



The Personnel File

NEWS AND DEVELOPMENTS IN EMPLOYMENT LAW FOR CALIFORNIA'S EMPLOYERS

Another Court Decision Shows The Importance Of Documenting Employee Performance

Just as the most important thing in real estate is “location, location, location,” the most important thing in successful management and defeating employment litigation is “documentation, documentation, documentation.” This rule of thumb was highlighted once again in the Court of Appeal decision in *Haberman v. Cengage Learning, Inc.* (4th Appellate District, Division Three (Santa Ana) December 10, 2009.)

Alicia Haberman had worked for Cengage, a text book publishing company, since 2004 when she was hired as a sales representative. Haberman alleged that, beginning in 2005, she was sexually harassed by various male supervisors based upon comments they made. These comments included “Wow. You look so pretty.” A school administrator was “pretty hot for being an older woman.” A supervisor’s father, whose name was Richard, was referred to as “big Dick.” A statement that Haberman was “drop dead gorgeous.” Telling her that, when the male supervisor drove his car into a parking lot behind hers, that he was “coming up right behind her and that it felt pretty good.” Telling her that one of the text book authors had “the hots” for her. That he was not ready for a relationship with a woman but wanted to know whether Haberman knew someone who’s good in bed and just wanted to have sex. A statement that “We don’t get pretty girls like you coming around here very often.”

Haberman alleged that these statements were first made beginning in 2005 and continued throughout her employment. However, she first complained of harassment in September 2007, and initially she did not provide any details or examples. Three days later she was told that she would be placed on a Performance Improvement Plan (PIP) if she did not increase her sales to a stated percentage of her annual goal. After being told about the PIP she contacted the Human Resources Department and stated that she had “had enough” and was being harassed. The Human Resources representative told Haberman she would investigate the allegation. Nine months later Haberman took a medical leave of absence and never returned to work at Cengage. Her employment was terminated at the end of August 2008.

Haberman instituted her lawsuit in November 2007 alleging violations of the California Fair Employment and Housing Act (FEHA) including sexual harassment and retaliation as well as claims for breach of contract and intentional infliction of emotional distress. Cengage filed a motion for summary judgment which the Court granted. The trial court found that the acts complained of by Haberman did not as a matter of law constitute sexual harassment. Some of the specifics cited by Haberman were not sexual in nature and others were neither severe nor pervasive enough to create a hostile work environment. Her claim of retaliation was dismissed because there was no evidence to establish a causal connection between her complaint of sexual

harassment and the company's decision to place her on the PIP. In any case, the evidence demonstrated that the decision to place her on the PIP was made by the company before she complained about sexual harassment and there was no evidence to establish that any of the individuals involved in the decision to place her on the PIP were aware of any alleged earlier complaints of harassment. Further, there was no evidence to establish that the company's legitimate decision to place her on the PIP was a pretext to mask an act of discrimination. The Court similarly disposed of the breach of contract and intentional infliction claims.

Generally, California trial courts are reluctant to grant summary judgment for defendants in employment discrimination cases because of the general philosophy that questions of fact should be decided by a jury after hearing the evidence rather than by a judge based solely on cold paperwork. In order to obtain a summary judgment ruling, a defendant employer must be able to demonstrate that the key facts are undisputed and irrefutable and that there are no material issues of fact requiring a trial. If there is a conflict in the evidence the court will deny the summary judgment since it cannot resolve a question of fact and an issue of credibility in the summary judgment process.

However, in this case, the Court of Appeal carefully evaluated the evidence and concluded that the trial court had correctly decided the motion and affirmed the trial court's decision granting summary judgment. Even though Haberman had claimed acts of harassment covering a period from 2005 through 2007, the Court found that the alleged acts of harassment were occasional, isolated, sporadic and trivial and were neither severe enough nor sufficiently pervasive to alter the conditions of Haberman's employment and create a work environment that qualified as hostile or abusive to employees because of her sex. The Court found that the acts of harassment alleged by Haberman fell far short of establishing a pattern of continuous, pervasive harassment necessary to show a hostile work environment under FEHA.

Further, no instance of any alleged sexual harassment involved any physical conduct. None of the supervisors ever propositioned her or even asked her out for a date. She was not threatened or subjected to explicit language. While there was an occasional joke, such as the one supervisor's reference to his father, named Richard, as "big Dick", the Court noted that the FEHA is not a "civility code" and was not designed to rid the workplace of vulgarity.

In summary, the Court concluded that, considering the totality of the circumstances, "Haberman's allegations of harassing conduct did not establish conduct sufficiently severe or pervasive as to alter her conditions of employment and create a work environment that qualifies as hostile or abusive to Haberman based on sex. The trial court therefore did not err by granting summary judgment as to Haberman's sexual harassment claims as to Cengage and the two individual defendant supervisors.

The Court then turned to Haberman's retaliation claim. She alleged that she was retaliated against for complaining about sexual harassment when she was placed on the PIP. The company prevailed on this claim because the undisputed evidence established that the decision to place her on the PIP was made because she had failed to meet her annual sales goals in both 2005 and 2006 and because she had not reached the predetermined requirement of a stated percentage of her 2007 annual sales goal by the end of August 2007. Further, she was given an

additional chance to show significant improvement by September 30. When this failed she was then placed on the PIP in early October. The key factor was that the company established the decision concerning the PIP was made in August, prior to the time that Haberman first made a claim of sexual harassment to Human Resources. Haberman contended that she had complained earlier, in 2005 and 2006, but the evidence was undisputed that the complaint went to an employee who did not pass it on to anyone else and the individuals who made the determination about the PIP were unaware of any such complaint.

Cengage's documentation of these factual matters, and Haberman's inability to refute them, led the Court to conclude that this evidence was undisputed and allowed the Court to affirm the summary judgment grant.

CONCLUSION

Cengage was able to prevail because its documentation, coupled with Haberman's lack of contrary evidence, required the conclusion that Haberman had not been subjected to severe or pervasive conduct of a sexual nature or that she was retaliated against for complaining about harassment. Indeed, the company was able to establish irrefutably that the decision to place her on the PIP was made before she complained. As a result, Cengage obtained summary judgment and was able to avoid a dangerous jury trial.

California employers who wish to protect themselves from otherwise meritless claims of discrimination, harassment, or retaliation, would do well to consistently document employee performance. If an employer is able to establish through reliable documentation that the decision to terminate or discipline an employee was for legitimate nondiscriminatory reasons, this may defend against accusations that the employer's decision was for illegal purposes. Employers are advised to devise and implement consistent employee performance documentation practices.

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