



DELAWARE

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LITIGATION

Know when to hold 'em, and know when to fold 'em

by Lauren Moak Russell

Discretion, as the saying goes, is the better part of valor. That turn of phrase is particularly apt in the litigation context, where employers are often faced with the choice of defending a costly lawsuit or walking away and fighting another day. Nowhere is the choice harder than when you're defending a case in which the law is on your side, but the facts aren't. In those situations, settlement is often a hard pill to swallow, but it's usually the right choice in the long run.

Equal opportunity harasser

The U.S. District Court for the District of Delaware recently addressed a case that illustrates the tug between fighting a case and settling it. Judith Perkins sued the state after she left her employment and went on long-term disability. She alleges that she was the victim of aggressive and sexually harassing behavior by her manager, Andrew Kloepfer. She says she complained to the state about his behavior on several occasions, and even requested a lateral transfer, but her concerns were never addressed.

In response, the state requested dismissal of the case, asserting that Perkins didn't allege facts sufficient to support her claims. More specifically, the state argued that even if everything she said was true, the alleged harassment was unrelated to her sex and wasn't severe or pervasive in nature. The court rejected the state's motion, and the case will continue on through the costly litigation process. The employer is now faced with the prospect of engaging in multiple rounds of document exchange as well as depositions of key personnel, who surely could be better occupied by performing their job duties.

Balancing act

Because the litigation is in its early stage, we don't have many facts about the relationship between Perkins and the state. What we do know is that her former manager, Kloepper, is alleged to be awful. His misconduct is said to include shouting, threatening behavior and statements, and inappropriate comments about women.

Those of you with management experience know that Perkins' allegations are almost certainly colored by her experiences, and there are two sides to every story. In addition, from a legal perspective, there are plenty of holes to be poked in her account. But chances are good that Kloepper engaged in at least *some* of the poor behavior he's accused of, even if it had nothing to do with Perkins' sex. So, assuming that he is nothing more than a big jerk—the proverbial equal opportunity harasser—the question then becomes whether the case should be fought and what considerations weigh in favor of fighting or settling.

On the one hand, employers frequently choose to fight cases on "principle." Employees shouldn't be able to lie and then make a dime from their manipulation. In addition, there's a common perception that settling cases encourages frivolous litigation. Finally, if you have a winning case under the law, aren't you entitled to fight it to the bitter end in hopes of vindicating yourself?

On the other hand, principles are very expensive—litigating an employment discrimination case through trial can cost hundreds of thousands of dollars. If your business has employment practices liability insurance (EPLI), your costs may be covered, but your insurance rates will likely rise. But more than the expense, you need to consider the practical implications of fighting a case in which a manager is alleged to have engaged in such egregious misconduct.

In pursuing its motion to dismiss, the state was placed in the position of having to argue that even if everything Perkins said was true, it was OK because Kloepper's misconduct wasn't that bad and it didn't implicate her sex. It's both bad press and bad for internal morale to argue that your employee was a real jerk, *but don't worry, he didn't engage in sexual harassment!* Even if you can win the case on the law, consider whether you want to put that argument out for public consumption. *Perkinsv. State of Delaware, Department of Health and Social Services.*

Bottom line

There's no easy answer in deciding when to hold 'em and when to fold 'em. When forced to choose between your principles, your pocketbook, and public perception, there's almost never a solution that leaves you happy on all fronts. However, there's something to be said for negotiating a reasonable settlement in a winning case when fighting the case puts you in the position of making undesirable arguments. And settlement decisions become substantially more palatable when you remember that settlement isn't an admission of defeat—it's a business decision based on a

variety of considerations.

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