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EVIDENCE

Feeling wronged isn't the right reason to sue: a refresher course on Title VII claims

by Lauren E. Moak

The threat of litigation is a powerful stick in the hands of a disgruntled employee. Because defending a lawsuit can be expensive, you may be hesitant to terminate a problem employee, even when you have good cause to do so. But take heart! Two recent opinions from Delaware's federal court remind us that Title VII of the Civil Rights Act of 1964 requires employees to have real evidence of discrimination to file suit. Feeling "wronged" is an insufficient basis for a Title VII claim.

Facts

Majed Subh twice sued his employer. In doing so, he alleged a litany of discrimination theories, including gender discrimination, race discrimination, national origin discrimination, sexual harassment, hostile work environment, and retaliation, all in violation of Title VII. Every claim in both of his lawsuits was dismissed before trial.

Subh is a white male of Palestinian descent. He was hired by Wal-Mart as a photo center employee on December 20, 2005. While working in the photo center, he repeatedly butted heads with his coworkers, including several yelling matches in front of customers and other employees. He was repeatedly disciplined for altercations with coworkers and for his failure to follow policy. Nevertheless, when he submitted formal discrimination complaints, Wal-Mart investigated his allegations.

Based on Wal-Mart's disciplinary policy, Subh's multiple infractions were sufficient to warrant his termination. However, before he was discharged, he was allowed to transfer to another store of his choosing (on a date of his choosing) for a "fresh start."

Subh transferred from his home store in Delaware to a store in northeast Maryland on March 3, 2007. Approximately six weeks later, he returned to the Delaware store. While dressed in a security guard uniform and carrying a nightstick, he initiated an aggressive confrontation with the store's comanager and accused him of subjecting him to long-term discriminatory and retaliatory treatment. Subh was arrested and charged with several misdemeanors, and Wal-Mart subsequently fired him.

If the nightstick fits, you must dismiss

As a preliminary matter, it always bears repeating that an employee must file a charge of discrimination with the Equal Employment Opportunity Commission (EEOC) before filing a Title VII lawsuit in federal court. Otherwise, any Title VII claims filed in federal court may be dismissed for failure to exhaust administrative remedies. In Subh's two lawsuits, his claims of gender discrimination and sexual harassment were dismissed because he failed to raise either issue in his numerous filings with the EEOC.

Subh's remaining claims were dismissed because he didn't present sufficient evidence of discrimination. Wal-Mart had a legitimate nondiscriminatory reason for disciplining and ultimately terminating him: He was a problematic employee

who eventually threatened a manager. His problems were well-documented in his personnel file. To overcome Wal-Mart's apparently legitimate actions, Subh had to produce at least *some* evidence that the company's proffered reasons were pretext for discrimination.

The court's decision emphasized that "the ultimate burden of proving intentional discrimination *always* rests with the [employee]." The judge wrote that "Subh's own uncorroborated accounts that wrongdoing occurred, without any evidence in support of those claims, are not sufficient to" allow his case to go to trial. In other words, without some evidence of a discriminatory motive, Subh's voluminous allegations of discriminatory incidents were insufficient to prove discrimination under Title VII.

In the end, all of Subh's claims (included in two separate lawsuits) were dismissed before trial. *Subh v. Wal-Mart Stores, Inc.*, No. 07-410- SLR-LPS, 2009 U.S. Dist. LEXIS 108565 (D. Del., Nov. 19, 2009).

Bottom line

An employee's threats of litigation shouldn't dissuade you from terminating him for cause. As always, documentation is key. A paper trail ensures that employees with nothing more than a sense of being wronged will not ultimately succeed in the courtroom.

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