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Spurned Lover's Heartache Becomes Employer's Headache… and Now Liability

By Dave Robinson on June 11, 2014

First Circuit finds that employer can be liable for jilted co-worker's actions to get employee fired.

On May 23, 2014, the First Circuit Court of Appeals, in *Velazquez-Perez v. Developers Diversified Realty Corp.*, found that an employer can be liable for the actions of a jilted co-worker that caused the plaintiff's termination. In this issue of first impression, the court overturned the lower court's grant of summary judgment for the employer dismissing the employee's sex discrimination claim, and remanded the case to the District Court for a trial on the merits.

In *Velazquez*, the plaintiff, Velazquez, worked as an operations manager. In his role, he frequently interacted with another employee, Rosa Martinez, who represented the employer's human resources department at plaintiff's location. During the first ten months of employment, the plaintiff and Martinez had a good relationship, which included flirting. When Martinez expressed her romantic interest more explicitly to Velazquez, the plaintiff gently rebuffed her.

Velazquez testified, however, that any flirtatious relationship with Martinez ended in April 2008, when Velazquez and Martinez were staying at the same hotel for a company meeting. At this event, Martinez allegedly followed Velazquez and two other women to his hotel room, attempted to force herself into the room, and lingered outside until Velazquez threatened to contact security. Martinez thereafter sent several emails to the plaintiff and attempted to call his room multiple times. In the days after the event, the plaintiff and Martinez exchanged several angry emails in which Velazquez firmly stated that he had no interest in a romantic relationship with Martinez. Martinez responded with statements intimating that she would have him fired for rejecting her.

Shortly after this exchange, Velazquez complained to his supervisor about Martinez's behavior. His supervisor advised Velazquez to send a conciliatory email to Martinez because she is "going to get you terminated." Additionally, Velazquez's supervisor and another employee jokingly suggested that Velazquez should have sex with Martinez. Later, Velazquez again complained about Martinez's behavior to his supervisors to no avail.

Meanwhile, Martinez began discussing Velazquez's job performance with Velazquez's supervisors, being critical of his work. Martinez suggested that Velazquez should be terminated. When Velazquez's supervisor placed Velazquez on a 30 day performance improvement plan, Martinez stated that she was obligated to refer the matter to the company's head of human resources. That same day, Martinez again stated to Velazquez her interest in a romantic relationship with him, which Velazquez rebuffed. Later than night, Martinez contacted the head of human resources recommending Velazquez's immediate termination. Four days later, the employer terminated Velazquez.

In overturning dismissal of Velazquez's sex discrimination claim, the First Circuit found that although Martinez was not Velazquez's supervisor, he could nevertheless prevail on his discriminatory termination

claim under "quid pro quo" theory. In general, quid pro quo harassment occurs when a supervisor conditions the granting of an economic or other job benefit upon the receipt of sexual favors from a subordinate, or punishes the subordinate for refusing to comply. Here, the First Circuit found that Martinez did not have sufficient authority over Velazquez for a reasonable jury to find that she was Velazquez's supervisor. Nonetheless, the court determined that Velazquez could have a viable quid pro quo claim based upon the employer's support of Martinez's discriminatory actions. In doing so, the First Circuit outlined the standard for liability on a co-worker quid pro quo claim: if the coworker acted, for discriminatory reasons, with the intent to cause the plaintiff's firing; the co-worker's actions were in fact the proximate cause of the termination; and the employer allowed the co-worker's acts to achieve their desired effect though it knew (or should have reasonably known) of the discriminatory motivation.

Based upon this test, the First Circuit found that plaintiff 's multiple complaints to his supervisors put the employer on notice of Martinez's discriminatory motivations. The court also determined that Martinez's acts to notify Velazquez's supervisors of his poor performance and recommendations to terminate Velazquez were the proximate cause of Velazquez's termination. Accordingly, based on Velazquez's version of events, the court concluded that a reasonable jury could find for Velazquez on his discrimination claim.

Velazquez aptly illustrates that it is vital that the employee discipline process remain free of any potential discriminatory bias. Where possible, having a neutral person investigate employee discipline decisions prior to execution will assist in creating a "wall" between any potential bias and the employment decision. Additionally, it is important for employers to promptly and effectively investigate and remediate all employee complaints regarding discrimination. Here, the failure to investigate the plaintiff's complaints largely contributed to the First Circuit's decision to let Velazquez's discrimination claim go to trial. Accordingly, in order to reduce exposure for discrimination claims, it is imperative for employers to have an effective (and unbiased) investigatory process that quickly resolves complaints of discrimination.

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