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SEX DISCRIMINATION

Employer vs. employee perception in gender discrimination claims

by Brinton M. Wilkins

Philosophers argue endlessly about "Truth" with a capital "T," but most people will likely never comprehend that kind of "truth." Rather, we all view and interpret the world and our experiences through a complex set of lenses that we spend a lifetime creating, both consciously and subconsciously. As Oscar Wilde summed up, "The optimist sees the donut, the pessimist sees the hole." When it comes to discrimination claims, the law tries to account for differences in perception. Read on to see how employers can find a measure of protection in their honestly held perceptions.

'But I think I'm an excellent employee!'

Stephanie Salazar worked as the director of economic development for Commerce City, Colorado, from August 29, 2005, until her termination on July 16, 2008. Her direct supervisor, Tom Acre, outlined the reasons for her termination in a letter. According to Acre, the city fired Salazar for (1) unprofessional behavior, (2) a demonstrated inability to work on a team, (3) her failure to communicate effectively with her department, (4) a lack of good judgment in sharing information with city manager Gerald Flannery, (5) her submission of repetitive, meritless, and unsubstantiated complaints, and (6) her refusal to participate in the investigations of her complaints.

Salazar sued the city for gender and national origin discrimination under Title VII of the Civil Rights Act of 1964 as well as various civil rights claims. The trial court dismissed her claims, and she appealed to the U.S. 10th Circuit Court of Appeals (whose decisions apply to all Utah employers).

Through the doors of perception

To defeat a Title VII gender discrimination claim, an employer must show that legitimate nondiscriminatory

reasons supported its decision to take an adverse employment action against the employee. Then, the employee must provide evidence that the employer's stated reasons are a pretext (cover-up) for illegal discrimination. If the employee cannot provide that evidence, she will lose her lawsuit.

At the heart of Salazar's appeal was her contention that she provided sufficient evidence to prove that the stated reasons for her termination were a pretext for discrimination. The city pointed to the factors in Acre's letter as legitimate nondiscriminatory reasons for Salazar's firing. Salazar attempted to show that those reasons were pretextual.

First, Salazar argued that the city's belief that she was unprofessional and did not cooperate with other staff members was false. She pointed to her written responses to poor performance evaluations she had received and argued that any communication difficulties were the result of other employees' actions. Those arguments did not persuade the 10th Circuit. According to the court, "It is the manager's perception of the employee's performance that is relevant, not [the employee's] subjective evaluation of her own relative performance." Thus, because Salazar did not provide evidence that the city and her supervisors didn't honestly believe that she was a poor performer, her perception of her performance could not show that the city's stated reasons for firing her were pretextual.

Second, Salazar argued that similarly situated employees who engaged in comparable conduct were not fired. Unfortunately for Salazar, her evidence of disparate treatment involved an employee who had a different supervisor. Thus, she had no evidence of a similarly situated employee being treated differently.



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Third, Salazar argued that Flannery terminated or demoted all female directors in 2007 and 2008. However, she failed to provide evidence to support that broad assertion.

Fourth, Salazar claimed that Mayor Paul Natale made sexist remarks, including referring to a former city manager's female staff as a "harem." But the 10th Circuit explained that none of the remarks supported Salazar's pretext argument because they were not connected to the decision to terminate her in any way. Furthermore, the evidence showed that Natale was not involved in the decision to terminate Salazar.

Fifth, although Salazar presented evidence that tended to show that she had been intentionally excluded from various meetings, the evidence also established that her gender was not the cause of the exclusion.

Sixth, Salazar argued that the city systematically engaged in discrimination against women, but she presented no statistical evidence from which an inference of illegal discrimination could be drawn.

In short, the 10th Circuit decided that either Salazar presented no compelling evidence to support her argument that the stated reasons for terminating her were pretextual or the evidence she provided justified the city's perception of her poor work performance. Without evidence that the city's perception was held in bad faith, Salazar could not succeed on her gender discrimination claim.

First Amendment limits

In addition to her Title VII discrimination claim, Salazar alleged her termination violated her rights under the First Amendment to the U.S. Constitution. Specifically, she argued that the city fired her in retaliation for

criticizing it about its allegedly discriminatory treatment of her and other employees.

Although the government cannot usually take adverse action against a person for speaking her mind, the 10th Circuit clarified that this general rule has some caveats. One exception is for statements made by government employees while performing their role as employees. In other words, a government entity can discipline an employee who criticizes her employer in her capacity as a government employee.

The 10th Circuit looked carefully at every document in which Salazar criticized the city. Each document was prepared by Salazar in her capacity as the city's director of economic development. Thus, her civil rights claim failed. *Salazar v. City of Commerce City*, 2013 WL 5303257 (10th Cir.).

Lessons learned

An employer's perceptions can protect it from discrimination claims, but the perceptions must be honestly held. Title VII does not require employers to retain and coddle subpar employees. However, the law does require employers to act rationally and in good faith. Because the city did so, it was able to blunt Salazar's arguments against it. Learning to act honestly and in good faith is a lesson every employer would be well-served to commit to heart.

In addition, public employers should know that although they must be extra careful to protect employees' constitutional rights, they are not prevented from taking appropriate disciplinary action against difficult employees. If public employers have questions on whether discipline will violate employees' constitutional rights, they should retain competent legal counsel. ❖