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DISCRIMINATION

Furlough backlash: Sexual orientation not protected by Title VII

by Brinton Wilkins

Being furloughed is stressful. Being furloughed because you're the lowest performer is not only stressful but also embarrassing. Thus, it's not surprising that an employee who is furloughed for that reason might try to shift the blame. A former United Airlines employee recently tried to do just that, but thanks to past good management decisions and an admittedly fair evaluation process, the employer avoided any Title VII nightmares.

Objectionable letters and weak performance

Geoffrey Larson had worked for United Airlines since 1999. In 2008, the year United furloughed him, he was an operating manager in Denver. In December 2007, an anonymous letter appeared in the employees' break room. The letter expressed concerns about homosexuals in management positions and accused various managers of favoring employees who had been romantically involved with them. The letter specifically named Larson, who throughout his tenure at United identified himself as gay.

Larson complained to his manager, who conducted an investigation and issued a written response to all Denver employees stating that the anonymous letter was "malicious and inappropriate" and "wholly unacceptable" under the company's harassment and discrimination policy. Several weeks later, 65 United employees signed a letter complaining of Larson's management style. As a result of the letter, which was delivered to several of Larson's managers, United laterally transferred him to a different management position.

In April 2008, a second anonymous letter was circulated to United managers. The second letter never mentioned Larson but complained about dysfunctional relationships among agents and a perceived systemic lack of

mutual respect. The letter also stated that no one should care "what sexual preference you may have."

The letter intimidated Larson, who reported it to Todd Sprague, his manager. Sprague didn't conduct an investigation because he believed the letter wasn't derogatory and that Larson was overreacting. Larson admitted the letter's substance wasn't objectionable but stated that he didn't "like working in an environment" in which people continued to discuss sexual orientation.

Around the same time, United assigned Larson to conduct the bidding process for union employees' shifts. Although Sprague warned him to be careful and make sure the process went smoothly, Larson used an incorrect seniority list, which resulted in a week's delay.

In 2008, United faced financial pressures that required it to furlough 1,000 employees, including one Denver manager at Larson's level. The company conducted a performance review of its managers, taking into account experience in various areas, labor union relations, and work skills. Larson received the lowest score. He agreed that his review was accurate, and in August, he was furloughed.

Larson responded by hiring an attorney and suing United. Because Title VII of the Civil Rights Act of 1964 doesn't protect against sexual orientation discrimination, Larson claimed (among other things) retaliation and discrimination under Title VII based on his gender—i.e., his status as male.

Pure speculation

According to the U.S. 10th Circuit Court of Appeals, whose rulings apply to all Utah employers, for Larson's Title VII discrimination claim to survive, he had to show that the events surrounding his furlough could lead to "an inference of discrimination" based on his gender. In other words, he had to provide evidence showing that

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“but for his status as a man,” United wouldn’t have furloughed him. He failed to do so.

The fact that after the furlough, 10 of the 11 remaining managers were male cut against Larson’s argument. Additionally, he admitted that none of the managers involved in deciding who would be furloughed ever made disparaging remarks based on gender. Further, evidence that two females were promoted and not furloughed simply wasn’t enough to show that Larson was discriminated against because of his gender.

Larson testified that he had a conversation with a female manager who wasn’t furloughed about their performance reviews. According to him, the female manager told him that her score was lower than his. Nevertheless, United furloughed him. Unfortunately for Larson, he couldn’t rely on that evidence because it was hearsay. Also, United’s records revealed that the female employee’s score was actually higher than his. And although United’s final decision to furlough him was the result of an all-day meeting, there was no evidence that his performance review score was altered during the meeting.

Instead of presenting evidence that could, at the very least, raise an inference that United furloughed him because he was male, Larson presented only speculation. And because United had a legitimate nondiscriminatory reason for its decision (his low performance review score), there was no way he could establish the basic requirements of a Title VII discrimination case or show that the employer’s stated reason for its decision was simply a cover-up for illegal discrimination.

Title VII and sexual orientation retaliation

To succeed on his retaliation claim, Larson had to show that he was furloughed for engaging “in

protected opposition to discrimination” on the basis of gender, not his sexual orientation. He tried to do so by citing his objections to the two anonymous letters, but his efforts failed because neither of the letters referred to discrimination on the basis of his status as a male. Additionally, the second letter contained no complaints about favoritism or hostility based on sexual orientation or gender.

Further, although the first anonymous letter contained derogatory remarks on the basis of sexual orientation, United responded with a strongly worded letter. Thus, even if the letter could have been viewed as discrimination on the basis of gender (as opposed to sexual orientation), there was no evidence that United retaliated against Larson as a result of his complaint. Finally, although Larson complained to Sprague, who was involved in the furlough decision, Sprague had a non-discriminatory reason for his action (Larson’s low performance review).

In short, Larson presented no evidence that his complaints resulted in United retaliating against him. Accordingly, the 10th Circuit upheld the trial court’s decision to dismiss his claims without a trial. *Larson v. United Airlines*, 2012 WL 1959471 (10th Cir., 2012).

Lessons learned

In troubled economic times, unpleasant reductions in force have become more common. However, that doesn’t make them any less painful for the employees who are affected. Employers shouldn’t be shocked when affected employees try to fight back. Fortunately, as long as employers make employment decisions based on neutral, objective criteria and maintain good written records of their decisions, these fights clearly are ones they can win. ❖