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REPORT FROM COUNSEL

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MINDING YOUR MANNERS IN THE WORKPLACE

By Samuel J. Pasquarelli, Esq.

Much has been written and more has been said about the need for decorum, professional behavior, and common sense dealing in the workplace. The purpose of this article is to point out how seemingly "correct" workplace behavior can become a workplace problem when a manager's unbending demands can lead to misunderstanding of his or the employer's motives. The facts set forth in this article are taken from a case that the author was recently involved in.

Ms. X, a 57-year-old clerical employee of ABC Company, began her employment with the company, an international manufacturing concern with plants and offices in American and foreign cities, about 8 years ago as a temporary clerk in the manufacturing division. Within a few months, since executives were impressed with her work, she was offered a full time, permanent position, working for a manager in one of the company's administrative divisions. She remained in that position for about a year and was then promoted to the position of executive secretary for the Chief Executive Officer of the company's Western Pennsylvania facility. During her tenure with the company as an executive secretary, she served under three Chief Executive Officers.

Her service with the first two of these individuals comprised a period of about two years with the first of them and a period of about five years with the second one. During her

tenure with these two individuals, she was evaluated a total of two times, although company policy required annual evaluations for all employees in her category. She received annual merit raises that were, in each year, at the upper limit of the company's raise structure. Her first evaluation was done by the first Chief Executive Officer, and it was a positive and glowing evaluation. This individual approved Ms. X for the highest permissible raise. The second evaluation, done by the second Chief Executive Officer that she worked for, was equally as positive and also recommended the highest permissible raise, although the evaluation did state that she should improve certain aspects of her computer skills. Since the person who made these comments had a well known reputation as a "computer illiterate", neither Ms. X nor anyone else in the Human Resources Department placed much stock in the criticism.

In late 1998, Ms. X's supervisor retired and the company replaced him with an individual who was theretofore the Vice President in charge of one of the company's largest American facilities. The company made a managerial determination to expand this person's authority by placing both the Western Pennsylvania facility and the facility that he previously managed under his control. Additionally, this person was also required to travel frequently to Europe and thus was only expected to be present in the Western Pennsylvania facility for 10% to 50% of his entire working time. As a result, the new supervisor, who was very "computer literate" and who was extremely familiar with the most advanced methods of electronic communication, relied heavily on e-mail and other computer, internet and technical developments to remain in constant communication with the various facilities under his control.

The new supervisor ("Mr. Z"), was in his mid to late 40's, he had an engineering degree, and he was an extremely demanding taskmaster. His appointment to the position wherein Ms. X would work for him took place in late December of 1998, and he arrived in Western Pennsylvania and met Ms. X for the first time on the first work day in January of 1999, but because he was so busy orienting himself with the duties and requirements of his new position, he had very little time to spend meeting with Ms. X to verbalize his expectations of her and her work. Basically, from January 1, 1999 to the end of February, 1999, he was present at the Western Pennsylvania office for about six work days. His face to face encounters with Ms. X were few and far between and as a result, much of his communication with her was either electronic or it consisted of leaving written notes for her.

As one might expect, the absence of direct communication led to a number of communication failures between them, with the result that Mr. Z quickly became frustrated and disillusioned with Ms. X and her job performance. This led him to present her with a list of ten questions near the end of March, 1999, in which he asked her to evaluate her present position and to describe how she saw herself and her job with the company. He asked that this questionnaire be completed in a few hours so that he could review it before leaving on an overseas trip in the next few days. Ms. X completed the questionnaire by typing the answers on the sheet that he gave her. Her answers contained one or two minor typing errors, and these errors and the fact that she typed her answers

instead of e-mailing them to him, and the fact that her view of her job was not "what [he was] looking for", led to his being seriously disenchanted with her.

In early April, 1999, two days after returning from an overseas business trip, Mr. Z decided to terminate Ms. X's employment, because he did not feel that he could work with her. Instead of telling her that he was severing her employment because he was dissatisfied with her work, he told her that "although [her] work was satisfactory, it did not meet the needs of the company." When Ms. X asked what this meant, he told her that he had extremely high expectations for his executive secretary, and that in his view, her skills were "outdated" and that there were "some things that [she] could never learn." Rather than offering her another job or placing her in a different position, he told her that her service was being ended and that she would be given a severance package, if she would sign a release of all claims. She declined to sign the release and instead sued the company, alleging age discrimination.

Her case went to trial and a verdict was rendered in her favor. The Court, in ruling in her favor, relied on a number of factors. The Court found it significant that Ms. X always received the highest raises for which she was eligible, that she was only reviewed two times in seven years, that a number of current and former employees spoke glowingly of her and that one of the company's Human Resource employees testified that nothing adverse appeared in her personnel file regarding work performance (or anything else), and that this Human Resource employee was "shocked" to learn that Ms. X had been terminated. The Court also found it significant that after Ms. X was terminated, the company could not find anyone acceptable to Mr. Z as a replacement and for a period of about three years, it used a succession of younger female temporary employees to perform Ms. X's work. A number of these individuals testified at trial and they all indicated that, from what they could see about the work they did for Mr. Z, they were not doing their jobs any better or differently than the way Ms. X did her job. They also testified about their computer skills and in no case were any of their skills any better than Ms. X's skills. Most telling, however, was the fact that Ms. X's first replacement was a very attractive young lady in her early 30's, who wore what can best be described as provocative clothing. A number of employees, both male and female, complained to the Human Resources Director (but not to Mr. Z), that this lady's dress was unprofessional and unbecoming. After receiving a significant number of complaints of this nature, the Human Resources Director told Mr. Z about them. Mr. Z then told the young lady to dress more conservatively. When she asked Mr. Z if her manner of dress offended him, he said that it did not, but others were complaining about it. He offered the opinion in Court that "No red blooded American male could be turned off when a young, good looking lady dressed that way." After hearing all of the evidence, the Court ruled that Ms. X's age was a substantial determining factor in Mr. Z's decision to terminate her, and a verdict in her favor for lost wages and attorney fees followed.

The law clearly forbids taking adverse job action against an individual if race, age, sex, religion or certain other factors comprise a substantial determining reason for the job action. However, the law *does not* prohibit adverse job action because an employer has strict or even unreasonable expectations for an employee, so long as age, race, sex or the

like are not substantial elements in the final decision. Since it is extremely rare for an employee to muster direct proof of prohibited discrimination as the reason for job action, the law sets forth a three step procedure that may be used by an employee to try to prove unlawful discrimination. If an employee in an age discrimination case establishes that he/she is over 40 years of age (i.e., is in what the law calls "the protected class"), that she was qualified for the job that she held, that she lost that job, and that her replacement was younger than age 40, the employee has met the initial burden for being able to go forward with his/her case. The burden then shifts to the employer to establish that the job action was taken for "legitimate business reasons", and not for some prohibited discriminatory reason, such as the employee's age. If the employer can establish such a reason, the employee can only prevail by offering evidence that the so called "legitimate business reason" is a mere pretext and that it is more likely than not that the "legitimate business reason" was not the real reason for the discharge, but rather the employee's age was a substantial motivating factor for the job action. It is also extremely well settled that a supervisor may have extremely high, strict or even unreasonable expectations relating to an employee's job performance and so long as age, race, sex or the like do not play a part in the decision to take the job action, the employer is lawfully permitted to take the job action. One is then led to ask that went wrong in this case.

The most direct answer is that although an employer can take job action for any reason, even an unreasonable one, so long as prohibited discriminatory factors are not present, the more outlandish the reason for the job action, the more unlikely a fact finder (usually a judge or jury) is to believe it to be the real reason. We must still remember that once the employer establishes a non discriminatory although "far out" reason, for job action, the employee cannot simply rely on the possibility that the court will simply conclude that the reason is ridiculous and that age had to be a substantial motivating factor in the job action.

It is at this point that the supervisor's manners come into play. In the instant case, the supervisor told Ms. X that she was "outdated" and that she could "never learn". Although his comment about the dress of a younger employee was made after Ms. X's termination, the employee commented upon was the individual who directly followed Ms. X in her job, and the age related and sexist comments made by him clearly "opened the door" to a finding that those comments, coupled with the use of the term "outdated" and a reference to being unable to learn things, showed that age and age related issues played a significant role in Mr. Z's decision to terminate Ms. X.

The unfortunate aspect to this case for the company is that it is quite possible that Mr. Z's reason for desiring to sever Ms. X's employment was that his desires and expectations were unreasonably high. However, he failed to remember, as do most employers who become involved in discrimination litigation, that an employee who loses his/her job is not likely to accept an employer's reason for the termination at face value-rather, the employee will naturally begin to impute some sinister motive into the decision, and that is the point at which the court system becomes implicated in the process. When that occurs, the employer's decision will be subject to "second guessing" by a judge or jury. At that point, the judge or jury will be asked to determine what the most logical reason

for the job action may be, and at that point, the judge or jury will have to decide which story is more credible or believable. It is extremely difficult to convince third parties that an unreasonable or overly strict or extremely harsh assessment of employee performance is the real reason for a job action, especially where the employee formerly enjoyed good reviews and almost universal acceptance by co-workers and former supervisors, because most people are of the opinion that well run businesses are well run because decisions are made reasonably and rationally.

However, as was said above, if the inquiry stopped after the employer proffered the irrational or strict decision, the employer could probably still prevail. It is when the employer "leaves the door open" by injecting something into the situation that could be construed to implicate age (in this case) that the employer's case begins to unravel. After the employer gives its "business reason", the employee must come forward with evidence indicating that the proffered reason is a sham. A number of references to age, or to situations that implicate age, such as "outdated", or "things you cannot learn", or "young lady" can easily provide that entree. When remarks such as those appear, the judge or jury which cannot speculate on motive absent some affirmative reason to do so, is provided with that reason.

The lesson to be learned in such a case is that an employer should spend some quality time deciding why a particular job action should be taken. The employer should not shy away from taking action because it has high, strict or even unreasonable expectations. It should, however, spend some time developing proof that those expectations are not being met, and to the extent that the expectations are abnormal, it is worthwhile to spend some time acclimating the employee to the expectations to see if he/she can meet them. Above all, the employer should refrain from assuming that age prevents developing a skill set—rather, if a skill set that is needed does not exist in a particular employee, the employer is best advised to either attempt to develop the skills in the employee, or simply take the job action because the skill set does not exist, without commenting about the employee's ability to acquire the skills. The only pitfall in taking the latter course arises when another (in this case, younger) employee, is hired with the same lack of skills as the employee who was recently furloughed.

As fraught as many employers see this entire situation, there are really only two issues to be aware of. First, give some thought not only to what is to be done and why, but also to how a detached outsider would review the scenario and if an outsider would be puzzled by it, consider modifying the action to meet those concerns. Secondly, mind your manners and speak and act professionally in all dealings on personnel and performance issues.

About the Author

Samuel J. Pasquarelli is a shareholder of Sherrard, German & Kelly, P.C. Mr. Pasquarelli practices in the areas of labor law, workers' compensation, personal injury and credit union law. He received his undergraduate degree from the University of Pittsburgh in 1964 and his law degree from Duquesne University in 1967.

WHEN NONCOMPETITION AGREEMENTS CROSS STATE LINES

It is a common practice for an employer to require an employee to sign an agreement preventing the employee from competing with the employer for a certain period of time and in a designated geographic area. For many years, interpretation and enforcement of these noncompetition agreements or covenants not to compete, as they sometimes are called, have led to lawsuits. When an ex-employer attempts to enforce an agreement in another state, which happens more often in today's economy, special issues arise because of the variations in how receptive or hostile the different states are to the anticompetitive effects of these agreements.

Dueling Lawsuits

When Mark was hired in Minnesota to work for a manufacturer of medical devices, he signed an agreement not to compete with the employer, for two years after leaving, and in any area where the employer marketed its products. In a typical "choice-of-law" clause, the agreement also said that it was governed by the laws of the state where the employee last worked for the employer.

After five years, Mark resigned and moved to California to take a job with a company that was competing head-to-head with his ex-employer. Correctly anticipating a fight, and wanting to reach the courthouse first, Mark and his new employer sued his former employer in a California court on the same day he started his new job. Except in limited circumstances, California law prohibits anticompetition agreements, so Mark asked for a declaration that the agreement he had signed was void and unenforceable against him in California. More than that, he also asked the court to prohibit the ex-employer from taking any action outside of the California court to enforce the agreement. At about the same time, the former employer did, in fact, sue in a Minnesota court, which issued a preliminary order to enforce the terms of the agreement.

A stalemate ensued, with each side having obtained a ruling in its favor, and purporting to prevent pursuit of the litigation in the other state. When the California case was appealed to that state's highest court, it ruled against any interference with the pending litigation in Minnesota. At the same time, the court recognized California's aversion to noncompetition agreements and allowed Mark's California case to proceed unless and until any Minnesota judgment became binding on the parties. In short, the race to a favorable judgment continued.

Georgia on His Mind

In another similar case, James signed a noncompetition agreement with a company in Ohio that gave computer support services to providers of wireless communications.

Later, he left and relocated to Georgia, which does not prohibit noncompetition clauses outright but does subject them to close scrutiny. The agreement had provided that Ohio law was controlling.

Like Mark in the California case, James went to work for a competitor in his new state and sued there to invalidate the covenant not to compete. Unlike the California case, however, there were no dueling lawsuits in different states because James had misrepresented to his first employer that he was leaving to become a stockbroker.

James's lawsuit in Georgia to rid himself of the agreement was partially successful. The agreement was too broad and restrictive to pass muster under Georgia law, so it could not be enforced there, even though the agreement itself referred to Ohio law. James was relieved of the agreement, but only while working in Georgia, because, as the court put it, "the public policy of Georgia is not that way everywhere."