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South Dakota Employment Law Letter
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Retaliation

BARKING UP WRONG TREE: TANTRUM OVER DOG AT WORK LEADS TO FIRING

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Joyce Riggs was employed by Bennett County Hospital and Nursing Home as a technician but was terminated for insubordination after her request to bring a companion dog to work was denied. Does the employee's claim that she was terminated in retaliation for asking to bring her dog to work have any teeth?

New big dog CEO changes policy

Riggs worked for the hospital from March 2006 until her termination in March 2015. She was employed full-time as a central-supply technician and part-time as an emergency medical technician. She suffered from depression and posttraumatic stress disorder (PTSD) and had previously used a companion dog to help manage her symptoms. However, after Ethel Martin became the hospital's CEO in 2012, it adopted a more restrictive policy regarding pets or animals in the workplace.

Riggs informally requested that the hospital continue to allow her to bring her companion dog to work, but her request was denied. On January 13, 2015, she formally asked to bring her companion dog to work. This formal request contained a note from her psychiatrist indicating that Riggs suffered from depression and PTSD and that her symptoms had worsened since 2012.

On January 21, a committee met to consider Riggs' request for accommodation. It took into account the duties of her position, her current job performance, her two most recent performance evaluations, her attendance record over the preceding year, any previous complaints or concerns she had expressed to her supervisors regarding her difficulties, and her medical documentation.

The committee found there was no change in Riggs' duties, and there were actually improvements in her two most recent job performance evaluations. She also had excellent attendance, no complaints or concerns related to her ability to perform specific tasks, no decline in ability or extreme reactions when in stressful situations, no warnings of unsatisfactory job performance over the preceding year, and no substantial impairment of any major life activity or function. Based on those findings, the committee denied her request for an accommodation to bring her dog to work.

The collar tightens, choking relationships

Riggs' immediate supervisor, Katie Dillon, delivered a letter to her containing the committee's decision. The letter advised her that she had 30 days to appeal the decision. She reacted by throwing the letter in a drawer, slamming the drawer, cursing, and then walking away.

According to Martin, Riggs began refusing to respond or communicate with her. According to Dillon, on February 4, Riggs

came into her office upset that Martin had terminated another employee and stated that she hoped a family member of the terminated employee would beat Martin “so bad she can never do anything to anyone again.” Riggs also referred to the CEO as a “bitch.”

On February 26, Riggs interrupted a meeting of the board of directors and demanded a review of the denial of her request. The board president advised her that she hadn’t followed procedure to be placed on the agenda and instructed her to follow the hospital’s grievance procedure to be placed on the agenda for the meeting the following week. Riggs reacted by throwing another fit--stomping out of the room and slamming the door. She could be heard yelling as she walked away.

On March 2, Martin and Dillon approached Riggs to speak with her about her behavior. Riggs responded by covering her ears with her hands and repeating, “No.” She fled to the break room, and Martin and Dillon followed. Riggs called her husband and told him that it was an “emergency” and that they had her “cornered.”

At this point, Martin made the decision to terminate Riggs’ employment for insubordination and failure to follow hospital policy.

Later that same morning, Martin found a letter in her mailbox that appeared to be an appeal of the decision to deny Riggs’ request. On March 11, Riggs’ husband delivered a letter to the hospital from Riggs appealing the decision to terminate her employment.

Tail between legs, Riggs files for unemployment, charges discrimination

On March 12, Riggs applied for unemployment benefits from the South Dakota Department of Labor and Regulation (DLR), Division of Unemployment Insurance (DUI). DUI notified the hospital of the claim on March 13, and the hospital filed a response on March 16. On March 18, Martin provided DUI with documentation regarding Riggs’ termination. DUI concluded the hospital had terminated her for work-related misconduct and denied her request for unemployment benefits. She appealed that decision.

Riggs filed her first charge of discrimination with the DLR’s Division of Human Rights (DHR) on March 16. In that charge, she alleged that the hospital had terminated her employment because she asked for permission to bring her companion dog to work. The hospital received notice of her complaint on March 18, the same day DUI contacted Martin about Riggs’ termination.

On April 20, an administrative law judge (ALJ) considered Riggs’ appeal of DUI’s denial of her request for unemployment benefits. On April 28, the ALJ affirmed DUI’s decision and found that Riggs was terminated because of employment misconduct--she “knowingly refused to follow [the hospital’s] grievance policy when she appeared at the Board meeting on February 26,” she “knowingly refused to speak to Martin and Dillon,” and she “deliberately slammed doors to show anger and disrespect toward her supervisors.”

On August 3, Riggs filed a second charge of discrimination, alleging that the hospital opposed her unemployment benefits in retaliation for engaging in protected activity. On December 1, DHR determined there wasn’t probable cause to believe the allegations in the second charge. She appealed the decision to the circuit court, which affirmed DHR’s decision on December 23, 2016.

South Dakota Supreme Court takes a bite out of DHR’s decision

The issue presented to the South Dakota Supreme Court was whether DHR erred in its determination that there was no probable cause to believe the hospital’s opposition to Riggs’ claim for unemployment benefits was retaliatory. Riggs contended that the hospital engaged in retaliation when it opposed her claim for unemployment benefits and her request for permission to bring her companion animal to work. According to her, the hospital violated the federal Americans with Disabilities Act (ADA) and the South Dakota Human Relations Act (SDHRA), both of which prohibit discrimination on the

basis of disability and prohibit an employer from retaliating against an employee who engages in protected activity under those laws (such as requesting an accommodation).

In making a determination of whether there is probable cause to believe that an entity engaged in unlawful discrimination or retaliation, DHR is to investigate and assess the likelihood that discrimination occurred, based on evidence that establishes a *prima facie* (minimally sufficient) case. If the entity has provided a viable and legitimate business reason for its actions, DHR then should determine whether there exists any evidence of pretext (a cover-up).

DHR concluded that Riggs failed to establish a *prima facie* case of retaliation. A retaliation claim under the ADA or SDHRA requires a “but-for” causal connection between the employee’s assertion of her rights and an adverse employment action by the employer.

DHR found no probable cause of retaliation based on its determination that there was no causal connection between Riggs’ January 13, 2015, request for accommodation and the hospital’s March 18 communication with DUI regarding unemployment benefits. DHR relied on cases holding that a time interval of two months or more between the protected activity and the adverse employment action is usually insufficient to support an inference of causation.

On appeal to the supreme court, Riggs contended that DHR failed to consider her March 2 letter appealing the denial of her request for an accommodation and her March 11 letter asking the hospital to reconsider her termination. The supreme court agreed and found nothing in DHR’s written decision or its summary of facts that indicated it had considered the two letters in its conclusion that Riggs had failed to establish a *prima facie* case of retaliation.

Further, the court found that while DHR’s decision indicated that the hospital articulated a legitimate reason for terminating Riggs (i.e., misconduct), its decision didn’t indicate whether it considered this a viable defense or whether there was evidence of pretext as required by the *McDonnell Douglas* burden-shifting framework and South Dakota statute § 20-13-1.1 (definition of “probable cause” of discrimination). The court reversed the circuit court on the grounds that DHR’s decision was incomplete and its affirmance was premature. The court sent the case back to the agency for further proceedings.

Bottom line

Dealing with an employee who exhibits bad behavior isn’t something that an employer should be required to tolerate. However, decisions to terminate employees should be done in a consistent fashion, and all documentation should be given proper review.

Keeping determinations about reasonable accommodations separate from decisions regarding discipline is an important practice. Although it appears that practice was properly followed in this case, it’s certainly foreseeable that an employer could be caught somewhere in between. Accurately created and kept records regarding employment decisions can be the difference between ultimately being safe and being bit.

Footnotes

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