



Retaliation Claims – the Ticket to Trial

By Jeff James

A recent case by the Court of Appeals, Division III, highlights the danger we reported on in our November 2002 Employment Law Note: retaliation claims are a plaintiff's ticket to trial. In *Barker v. Advanced Silicon Materials, LLC (ASIMI)*, the plaintiff brought claims for sex discrimination and retaliatory discharge. The sex discrimination claim was dismissed on summary judgment; the retaliatory discharge claim made it to trial. Along the way, the employer made a series of mistakes that might have proved fatal but for its sincere and good faith belief that it was doing the right thing.

Facts. Laurie Barker worked for ASIMI as a technician. She was promoted to lead technician and then to supervisor of one of ASIMI's two labs. The other lab was supervised by a male employee, Mr. Champion. In 2001, ASIMI decided to eliminate the lab supervisor positions. It put Mr. Champion in charge of both labs as the new "lab manager" and demoted Ms. Barker back to lab technician. After being demoted, Ms. Barker sued, claiming sex discrimination.

Within days of being served with the lawsuit, ASMI began an investigation into a breach of its voicemail security. When the system was originally set up, default passwords identical to the phone's extension number were created. It was common knowledge that many employees had never taken the trouble to change their original password, making it easy for someone to surreptitiously access another's voicemail. The phone system kept a record of when someone was locked out of accessing voicemail. Ms. Barker's phone extension was determined to have been the source of 11 of 55 attempts to access another's voicemail; Ms. Barker's phone was also easily accessible by other employees.

The day after the investigation began, two attempts were made from Ms. Barker's extension to access human resources voicemail. A week later, someone calling from Ms. Barker's extension was locked out of accessing the CEO's voicemail. Within forty-five minutes, Ms. Barker's supervisor, Mr. Slanga, checked to see if she was at her desk – she was. She later claimed she had just arrived, but the company didn't buy it. They terminated her for misconduct. She then added a claim of retaliatory discharge to her lawsuit.

Summary Judgment vs. Trial. The sex discrimination claim hinged on why the company promoted Mr. Champion and demoted Ms. Barker. In a twist on a standard allegation, Ms. Barker claimed that Mr. Slanga was homosexual and promoted Mr. Champion over her because he was attracted to him. The company presented evidence that the decision was made by a group of persons (not just Mr. Slanga) and that Mr. Champion was selected because his qualifications exceeded Ms. Barker's. Moreover, because Mr. Slanga had promoted Ms. Barker to supervisor two years previously, it invoked the "same actor" inference to show he did not discriminate against her in selecting Mr. Champion. To avoid summary judgment, Ms. Barker had to present some evidence showing that the company's stated reasons for the decision were a pretext for discrimination. She failed to do so, and her sex discrimination claim was dismissed.

Her retaliation claim was a different story. At issue was whether retaliation was a substantial factor in deciding to terminate her. This is a question of fact that is almost always in dispute where retaliation is alleged. To get past summary judgment, the plaintiff must show only that (1) she engaged in protected activity (filing a lawsuit); (2) she suffered an adverse action (termination); and (3) there is a causal connection between the two (being fired shortly after filing a lawsuit generally satisfies this element). Ms. Barker easily met these requirements.

Good Faith Belief Proves Enough. Thus, ASIMI was forced to go to trial on the retaliatory discharge claim, a bench trial, as it turned out. The trial judge found that ASIMI's investigation was "incomplete" and "incompetent," and "did not logically support more than a suspicion of misconduct by Ms. Barker." Despite this, the trial judge found that the company's managers "sincerely – even if unjustifiably – believed" that Ms. Barker was the one responsible for the voicemail invasions. Because the central issue was the employer's motivation, the finding that it truly believed it was doing the right thing carried the day.

Lessons Learned. *Barker v. ASIMI* offers several lessons for employers:

- Decisions that are likely to be controversial are best made by a group. Not only does this help ensure that all angles of the issue are carefully considered, it provides cover against claims of individual decision-maker bias.
- The "same actor" inference is alive and well in Washington. This is an important defense for employers, and leads to a presumption against discrimination, where the same individual who hired or promoted the plaintiff is later involved in the adverse decision.
- Retaliation claims are easy to assert and hard to defeat on summary judgment. Any time an employee engages in protected activity, s/he takes on semi-protected status.
- Investigations into employee misconduct need to be complete, competent, and reasonably support any adverse action taken. Fortunately, even if the employer fails in some respect, its sincere belief in the propriety of its decision may be enough to avoid liability. Unfortunately, it will likely pay the price in the time and expense of a trial or out-of-court settlement.
- Because retaliation claims are so easy to make, and so hard to defeat on summary judgment, it is usually worth taking extra time and effort to create a sufficient record before taking adverse action. This may help the employer dissuade the employee from filing suit in the first place.

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