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What's Inside

- Religious Employers**
Catholic hospital can't hide from liability behind MHRA religious exemption 3
- Workplace Trends**
Survey says most employers planning for modest raises next year 3
- Agency Action**
DOL issues guidance on same-sex marriage's impact on ERISA 4
- Tobacco Use**
It might not be smart to have a blanket policy of not hiring smokers 6
- Personnel Policies**
Can you treat e-cigarettes the same as tobacco cigarettes in the workplace? 7

What's Online

- Unions**
Learn about a backdoor approach to union organizing <http://bit.ly/17nr50h>
- HR Video**
10 sins of employee documentation <http://ow.ly/pIBaw>
- Infographic**
Should employers have a BYOD policy? <http://ow.ly/pIB5f>
- Find Attorneys**
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RETALIATORY DISCHARGE

Poor timing alone doesn't equal retaliation

by Chris LaRose

In a recent lawsuit under Title VII of the Civil Rights Act of 1964, the U.S. 8th Circuit Court of Appeals (whose rulings apply to all Missouri employers) upheld the trial court's decision that a hospital didn't discriminate against one of its African-American surgical technologists based on her race or retaliate against her for lodging a discrimination complaint.

Janice Wright claimed that the suspicious timing of her termination—just 48 minutes after she complained of race discrimination—was clear evidence of retaliation. That several other African Americans were fired over a two-year period, according to Wright, provided further evidence of discrimination. Finally, she argued that the hospital's performance expectations were impossible to meet and were different for white employees—the effect, she claimed, was that she was set up to fail.

After a two-day trial, the judge found Wright's evidence unpersuasive and determined that she was fired for poor performance and insubordination. Read further to see why the court ruled that her retaliation claim failed.

Background

The hospital hired Wright in November 2007 as a surgical technologist. A couple of months later, she began working a newly created night shift. A technologist's responsibilities include

preparing instruments and equipment and assisting the surgical team during surgeries.

Wright and another African-American woman, Nancy Bell, shared those duties during the night shift. A few months after Bell and Wright began working together, Bell was injured and was unable to return to work. The hospital didn't replace her, and Wright was expected to complete the duties she previously shared with Bell.

Wright's performance suffers

In September 2008, Wright was written up for the first time for failing to properly prep an operating room. She protested, claiming she didn't have sufficient time to complete the task because she had been in surgery for several hours the same night. In addition to a write-up, the hospital provided Wright with a corrective action plan that included a mandatory equipment checklist she was required to complete before every surgery.

Less than a week later, however, Wright received a second write-up for failing to complete the checklist. The hospital implemented a second corrective action plan in which she was given a prioritized written list of duties she was expected to perform during each shift. It also offered to remove the

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second write-up from her file if she had no further disciplinary issues during the next three months.

In December 2008—less than three months later—Wright was written up for two separate disciplinary incidents within a week. The first write-up came after she was caught sleeping on the job. The hospital issued the second write-up because she caused the delay of emergency care for a patient.

Finally, on July 9, 2009, Wright's supervisor, Cindy Sacker, received a report that Wright had delayed a surgery after she failed to inform the day shift that a doctor had asked to perform surgery the first thing that morning. Sacker also was informed that Wright hadn't been properly setting up the operating tables.

Sacker contacted Wright the same day by telephone. According to Sacker, Wright became belligerent and insubordinate and said, "Just fire me, go ahead and fire me."

Bad timing can create an inference of retaliation that you must overcome.

Immediately after that, Sacker called HR to report the incident and asked if she could fire Wright over the telephone. HR said she could fire Wright

by phone, but doing so wouldn't be ideal. Sacker then informed certain other employees that Wright would be terminated so they would be aware of it for scheduling purposes.

Wright lodges race discrimination complaint

Wright worked her shift the night of July 9 as scheduled. On July 10, she called the hospital's HR department at 10:30 a.m. and complained that she was being treated unfairly and harassed because of her race. Forty-eight minutes later, Sacker called Wright and terminated her. Wright then filed suit, claiming she was fired in retaliation for her discrimination complaint.

Court finds lack of evidence of retaliation

Wright argued that the short time between her discrimination complaint and her firing was "incredibly suspicious" and provided strong circumstantial evidence that she was fired in retaliation for complaining of race discrimination. The court agreed that the timing of her termination created an inference of retaliation that the hospital was required to overcome.

In response, the hospital offered evidence that it had decided to terminate Wright on July 9, the day before her discrimination complaint, for performance issues and insubordination. That evidence, according to the

8th Circuit, was sufficient to overcome the inference of retaliation.

Court finds lack of evidence of discrimination

Wright also argued that there was circumstantial evidence of race discrimination. According to her, that evidence included the fact that her supervisor had terminated three African-American employees but no white employees during the nine months the supervisor had been working at the hospital. Wright also offered evidence that eight of 12 employees fired by the hospital from 2008 to 2010 were African-American. The court disregarded those statistics because Wright provided no evidence of the racial makeup of the surgical department as a whole and didn't establish that the other fired employees held jobs similar to hers.

Finally, Wright argued that she was required to perform job duties that similarly situated white employees weren't required to do—namely, she was required to perform alone duties she previously had performed with Bell. The court, however, was persuaded by the hospital's explanation that profit motive and a desire for greater staff productivity were the reasons for giving her more responsibility. *Wright v. St. Vincent Health System*, U.S. Ct. Appeals 8th Cir. (Sept. 18, 2013) (Case No. 12-3162).

What can we take away from this case?

What can Missouri employers learn from this decision?

- While timing alone doesn't prove a retaliation claim, bad timing can create an inference of retaliation that you must overcome. If you choose to terminate an employee who recently complained of discrimination, make sure your reasons are justifiable and well documented in the employee's file.
- It's usually best to obtain advice from your attorney before terminating someone who has complained of discrimination, filed a workers' compensation claim, or complained that you have violated some law.
- When refuting statistical evidence, remember that you may offer evidence of the racial mix of the entire workforce or department. This provides context to the court when it determines how to view statistical evidence.
- Remember that Title VII prohibits you from subjecting a protected employee to different or more difficult work conditions than similarly situated employees outside the protected class.

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