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Supervisor's harsh words undermine employer's motion for summary judgment

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A nurse sued the Regents of the University of California, claiming he was retaliated against, harassed, and ultimately terminated because of his age and disability. The trial court dismissed some of the claims on summary judgment (i.e., without a trial). In an unpublished opinion, the court of appeal reversed the lower court's ruling in part, identifying questions of fact about whether the nurse's past medical leave was a motivating factor behind his termination.

Terminated psychiatric nurse sues UCI

In 2000, the University of California, Irvine Medical Center (UCI) hired Peter Albrecht as a psychiatric nurse. In 2007, Albrecht was seriously injured on the job when he attempted to restrain a patient. He returned to work in 2010 after an approved medical leave. Upon his return, he began to accrue unexcused absences, drawing written warnings from UCI.

In April 2012, at age 63, Albrecht transferred to UCI's Adolescent Partial Hospitalization Program. He alleges that during staff meetings, he endured harassing, degrading, and discriminatory comments about his age and disability, and the program's director, Paula Martin, did nothing to remedy the bad behavior. To the contrary, she allegedly asked employees to monitor him and help her build a case for firing him. He continued to receive warning letters about his substandard attendance.

In August 2012, Albrecht applied for and was granted qualified intermittent medical leave, which entitled him to take up to two days of leave twice a month. Martin expressed concern about his medical leave history and asked him when he planned to retire. In February 2013, she accused him of improperly taking his leave around holidays and demanded that going forward, any leave he requested close to holidays would require a doctor's note "to indicate that flare-ups are more likely to occur on or around the holiday." Despite Martin's complaints, Albrecht's 2012 annual performance evaluation scored him as "exceeding expectations" on average.

In March 2013, UCI dismissed Albrecht for absenteeism. As the dismissal meeting was ending, Martin allegedly commented that he really "needed to retire," referring to how "disabled" he looked. Albrecht complained to an HR representative and UCI's Office of Equal Opportunity and Diversity. UCI deemed the dismissal warranted but offered Albrecht a different nursing position in lieu of termination "given [his] tenure with the Medical Center."

Albrecht rejected the alternative position and sued the Regents of the University of California, Martin, and a colleague, alleging multiple claims of retaliation, harassment, and discrimination based on his age and disability. The trial court dismissed Albrecht's retaliation and discrimination claims on summary judgment but allowed his harassment claims to go to trial. The jury returned a verdict in favor of UCI, and Albrecht appealed. The court of appeal reversed the trial court's decision in part.

Triable issues on CFRA retaliation claim

On summary judgment, an employer, as the party making the request for dismissal, has the initial burden of proving either that the employee's *prima facie* (basic) retaliation case is lacking or that the adverse employment action in question was rooted in legitimate nondiscriminatory business reasons. If the employer meets that initial burden, the employee must produce substantial evidence that the employer's stated reasons were pretextual (untrue) or that the employer was motivated by discrimination.

UCI offered a legitimate reason for Albrecht's dismissal: his unexcused absences. The question then became whether his substandard attendance was an illegitimate pretext for firing him. Albrecht claimed that UCI had retaliated against him in violation of the California Family Rights Act (CFRA) and the Family and Medical Leave Act (FMLA). To establish a claim for retaliation in violation of the CFRA, he needed to show that:

- (1) UCI is covered by the CFRA.
- (2) He was eligible for and exercised his right to take leave for a qualifying CFRA purpose.
- (3) His CFRA leave was a substantial motivating factor behind his termination.

Albrecht pointed out that Martin had unfairly accused him of using his leave around the holidays, had suggested his medical leave was disruptive to the department, and told him that he looked "disabled" and should consider retirement. That collection of evidence suggested the possibility of an improper motive for his firing. And while UCI's offer of an alternative position cut against his retaliation claim, it is a jury's job to weigh the evidence. As a result, the court reversed the order of summary judgment on Albrecht's retaliation claim.

Similarly, there are questions of fact about discrimination

To establish a *prima facie* case of discrimination, an employee must present evidence that demonstrates, even circumstantially or by inference, that he:

- (1) Suffers from a disability or was regarded as suffering from a disability;
- (2) Can perform the essential duties of his job with or without reasonable accommodations; and
- (3) Was subjected to an adverse employment action because of his disability or perceived disability.

Albrecht presented sufficient evidence to create a dispute of material fact about whether UCI fired him for exercising his right to take medical leave, meaning a jury could find that UCI fired him because of his disability. And because he had alleged age and disability discrimination together in one claim, the survival of his disability discrimination claim necessitated the survival of his age discrimination claim.

Termination is irrelevant to harassment claim

Finally, Albrecht contended that the lower court erred in refusing to admit evidence at his harassment trial that UCI fired him. Not so, said the court of appeal. Harassment is conduct that falls outside the scope of necessary job performance and is engaged in for individual gratification, because of meanness or bigotry, or for other personal motives. Personnel management

actions, such as hiring and firing, generally do not constitute harassment. Thus, Albrecht's firing was not relevant to his harassment claim.

Albrecht argued that certain official employment actions taken by a supervisor can have the secondary effect of communicating a hostile message. While the court of appeal acknowledged that personnel decisions like firings can be relevant to a harassment claim if they contributed to a harassing message or a hostile work environment, there was no evidence that Albrecht's firing fit into that pattern or was conducted in an abusive manner. *Albrecht v. Regents of the University of California* (California Court of Appeal, 4th Appellate District, 8/23/18, unpublished).

Bottom line

Words uttered in the workplace matter. In this case, UCI had a well-documented business reason for terminating Albrecht, yet his supervisor's unprofessional and potentially unlawful comments prevented it from extracting itself from a lawsuit on summary judgment. You must educate and train your supervisors how to avoid problematic behavior in the workplace or be prepared to face significant legal and monetary consequences.

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