

Reduction in Force Sufficient to Overcome Pretext Argument in Retaliation Case

December 22, 2008

By [Maria Greco Danaher](#)

The 1st U.S. Circuit Court of Appeals has upheld summary judgment in favor of an employer who asserted that it had terminated the employment of a human resource manager because of his poor performance and a reduction-in-force, and not because of his prior testimony in a sexual harassment claim filed against the company.

The 1st U.S. Circuit Court of Appeals has upheld summary judgment in favor of an employer who asserted that it had terminated the employment of a human resource manager because of his poor performance and a reduction-in-force, and not because of his prior testimony in a sexual harassment claim filed against the company. *Dennis v. Osram Sylvania, Inc.*, No. 07-2670 (1st Cir. Dec. 10, 2008).

In order to set forth a case of retaliation under Title VII, an employee must show that he engaged in a statutorily protected activity, that he suffered an adverse employment action, and that the protected activity and the adverse action were causally connected. Once that *prima facie* case has been proven, the employer has the burden of offering a legitimate business reason for the adverse action. Once that legitimate reason has been asserted, the employee must prove that the proffered reason was simply a “pretext” for the alleged retaliation.

Richard Dennis was employed with Osram Sylvania from August 1995 until March 2004, when his employment was terminated. At the time of his discharge, Dennis held a position in Osram’s human resources department, representing the company at recruiting fairs and assisting with its internship program. On February 5, 2004, Dennis gave deposition testimony in a case in which a female employee filed a sexual harassment complaint against a co-worker at Osram. The following day, in an instance of unfortunate timing, an investigation was undertaken into a complaint against Dennis which had been received by the company on January 28. In that complaint, an unsuccessful applicant for employment at Osram (Molina) claimed that Dennis had subjected him to “inappropriate and unprofessional” conduct, including references to the applicant’s personal problems, and then sharing details of those problems with a company supervisor.

After a meeting between an Osram in-house counsel and Dennis' supervisors, it was decided that a written warning would be placed in Dennis' file. When Dennis was requested to sign a statement to that effect, he refused, and told his supervisor (Franz) that he viewed the Molina investigation as retaliation for his prior testimony in the sexual harassment case. Franz had no knowledge of that deposition at the time that he disciplined Dennis.

Dennis was terminated on March 24, 2004. Franz recommended the termination as part of a reduction-in-force (RIF), stating that Dennis' performance was "severely weakened" by the Molina investigation, and that the RIF required him to choose between Dennis and another employee, who Franz considered to be a "high achieving human resources manager." Dennis then filed a complaint under the New Hampshire state anti-discrimination law. The case ultimately was removed to federal court, where summary judgment was granted in favor of Osram. Dennis appealed that dismissal.

The First Circuit upheld the lower court's decision, stating that Dennis had not set forth the third prong of his *prima facie* case, since he was unable to connect his protected deposition testimony to his subsequent termination. The court based that conclusion on the fact that the individuals responsible for Dennis' termination "knew nothing about the [prior] deposition." The court alternatively concluded that even if Dennis had successfully established a *prima facie* case of retaliation, Osram had set forth legitimate reasons (prior poor performance and the RIF) for the termination, and that Dennis was unable to show that those reasons were simply pretext for retaliation.

Although this case was decided on the specific facts and testimony in the matter, the court's decision provides some direction in the analysis of a retaliation claim, and once again underscores the importance of full and objective documentation. The court found that much of Dennis' argument regarding the company's actions was based upon unsupported speculation and inference. Dennis offered no evidence that the individuals who were involved in the decision to terminate his employment consulted with anyone who attended the deposition which Dennis viewed as his "protected activity." Further, because the company was able to support Dennis' poor performance with documentation, it was able to support its decision in the RIF, and Dennis was unable to carry his burden to prove that the rationale for his termination was pretextual.

AUTHOR



Maria Greco Danaher
Shareholder, Pittsburgh

TOPICS

