

Employment Law

MONTHLY

Attorney Advertising

January 2013

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The Importance of Conducting Prompt Internal Investigations By Frank A. Custode, Esq.

A recent decision rendered by the United States Court of Appeals for the Fifth Circuit illustrates why it is important for employers to conduct prompt internal investigations regarding claims of harassment, discrimination and/or retaliation. In *Babin v. National Vision, Inc.*, 2012 U.S. App. Lexis 25365 (December 12, 2012), the Fifth Circuit held that an employee's allegation of retaliatory discharge under Title VII of the Civil Rights Act of 1964 ("Title VII") failed as a matter of law because (1) she did not demonstrate that "but for" her complaint against the general manager, she would not have been fired; and (2) she was unable to rebut the company's non-retaliatory business reason for her termination. In attempting to rebut the company's non-retaliatory business reason for her termination, the employee contended that the company attempted to "protect" the general manager following her complaints about him. The Fifth Circuit, however, rejected this assertion because the company promptly dealt with the employee's complaints by launching an internal investigation, reprimanding the general manager and, ultimately, relocating the general manager.

Factual Background

In 1996, Pinky Sparks ("Sparks"), an African-American female, began working as a front desk clerk at an eyeglass retail outlet of National Vision, Inc., in Slidell, Louisiana. Throughout her employment, she reported to the outlet's General Manager. During her employment, the following three individuals served as the outlet's General Manager at various times: (1) Mike Nguyen (Asian-American); (2) Angela Miller (African-American); and (3) Ben Ramsey (Caucasian). During their respective tenures as General Manager, Mr. Nguyen, Ms. Miller and Mr. Ramsey each administered disciplinary "write-ups" to Sparks.

According to Sparks, when Ramsey became the General Manager, he immediately declared himself a "redneck" and said there was a "new sheriff in town," which made her feel uncomfortable. On March 17, 2008, Ramsey allegedly told Monica McKeivitt, a Caucasian employee at the outlet, "this is going to be an all white man's store," that there were "too many black people in [the store]" and that "these n***** need to get out of here." Upon learning about this discussion, Sparks called National Vision's District Manager Tina Wicker, and handed the phone to McKeivitt to speak with Wicker about McKeivitt's conversation with Ramsey.

Soon thereafter, Sparks filed a complaint against Ramsey with National Vision's Human Resources Department, which promptly commenced an investigation. The investigation confirmed that Ramsey referred to himself as a "redneck" and resulted in Ramsey's transfer to another store. Additionally, National Vision issued a written reprimand to Ramsey due to this misconduct. Following Mr. Ramsey's transfer, Ms. Miller returned to the outlet as the replacement General Manager.

Meanwhile, Sparks continued to receive disciplinary "write-ups." As a result, in May 2008, Sparks filed a Charge of Discrimination with the Equal Employment Opportunity Commission ("EEOC") alleging race discrimination and retaliation based on conduct directed toward her following her complaints about Ramsey. McKeivitt filed a similar Charge with the EEOC that same day.

Approximately three months later, National Vision terminated Sparks' employment due to her "perpetual failure" to carry out her job duties in a satisfactory manner. Nearly two years later, Sparks brought action under Title VII, alleging sex discrimination, race discrimination, and retaliation.^[1]

Fifth Circuit Upholds District Court's Decision To Dismiss Sparks' Title VII Claim

On appeal, the Fifth Circuit found that the district court properly granted summary judgment in favor of National Vision. Specifically, the Fifth Circuit held that, even if Sparks established a *prima facie* case of retaliation under Title VII, she was unable to demonstrate that "but for" her complaint against Ramsey, she would not have been fired since the record evidence showed that the disciplinary "write-ups" administered to Sparks began prior to Ramsey's tenure as General Manager and continued after Ramsey's transfer.

In an attempt to rebut National Vision's non-retaliatory business reason for her termination, Sparks asserted that the company was trying to "protect" Ramsey following her complaint about him. However, the Fifth Circuit rejected this assertion. Indeed, the Fifth Circuit stated that the record evidence supported a finding that National Vision promptly investigated Sparks' complaints about Ramsey's alleged offensive comments; National Vision sent out a memo to all area stores detailing the company's anti-harassment policy; and the company reprimanded Ramsey and relocated him to another outlet. As a result, the Fifth Circuit held that there was no evidence to rebut National Vision's non-retaliatory business reason for terminating Sparks' employment.

Practical Tips

This decision reiterates to employers the necessity of adhering to the following guidelines in handling complaints of discrimination and/or harassment:

- All employers should have anti-harassment/anti-discrimination policies in place that are widely distributed to employees and are consistently implemented. It is important for employees to understand a company's protocol and procedures for handling internal discrimination/harassment claims.
- Always document performance deficiencies with employees. Performance evaluations should accurately set forth all of an employee's performance-related issues and may serve as evidence of an employer's non-discriminatory/non-retaliatory business

justification for an adverse employment action in the event litigation ensues.

- Promptly investigate and document all internal claims of harassment/discrimination. Conducting a comprehensive investigation and preparing an investigation report puts an employer in the best position to defend a potential sexual harassment/discrimination lawsuit.

[1] Wilbur Babin, as Trustee of Sparks' Bankruptcy Estate, brought the action on behalf of Sparks.

The Porzio Employment Law Monthly is a summary of recent developments in employment law. It provides employers with an overview of the various legal issues confronting them as well as practical tips for ensuring compliance with the law and sound business practices. This newsletter, however, should not be relied upon for legal advice in any particular matter.