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Gender-based claims advance after employer offers 'No Apologies'

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Hell hath no fury like a woman scorned. Just ask Alanis Morissette. Of course, her outlet is music. Without that outlet, sometimes the only way to redress the feeling of being wronged (real or perceived) is to tell it to the judge. One Arizona woman did just that, claiming gender discrimination, constructive discharge based on her age, violations of the Equal Pay Act (EPA), and unpaid wages after she was replaced by "A Man." Alanis Morissette got her fame and payday for venting her angst, but what happened to the Arizona woman's gender-based claims? Read on for your "Front Row" seat.

You Oughta Know

VF Jeanswear LP manufactures and sells apparel to Western specialty retail stores. Its sales representatives are called field sales representatives (FSRs) and account executives (AEs). FSRs and AEs generally engage in similar sales activities, but AEs typically work a larger volume of sales, have more responsibility, and manage major strategic accounts. Generally, AEs make more money than FSRs.

Lori Bell was hired in 1985 by a predecessor company. During most of her tenure, she was in a sales support role. In 2007, she was promoted to sales as AE for the Wrangler account and was responsible for selling Wrangler products to Boot Barn stores. The regional sales manager, her direct supervisor, generally characterized her performance as "strong," the second highest rating an employee can receive. She received positive accolades from others within the company as well.

Over time, Boot Barn stores experienced significant growth because of the company's acquisition of approximately 100 stores (all of which had existing accounts with Jeanswear). As a result, Jeanswear added Lory Merritt and Travis Barker, the AEs who had handled the acquired Boot Barn stores, to the Boot Barn account team. The regional sales manager and vice president of sales designated Merritt as lead on the Boot Barn account. As lead, Merritt had several additional responsibilities beyond those assigned to Bell.

On several occasions, Boot Barn expressed to management that Jeanswear needed to provide better sales analysis, suggesting the account needed an AE with more analytical skills. With Merritt and Barker anticipating retirement in 2014, Jeanswear took the opportunity to restructure the personnel devoted to several sales accounts, including Boot Barn. Management decided to move Bell to the Arizona territory FSR position, a change that was considered a demotion by everyone involved. Citing his superior analytical skills, Jeanswear replaced Bell on the Boot Barn account with a male AE who had been in the position since about 2010.

Bell was given time to consider the FSR position. She eventually resigned, claiming she felt "compelled" to do so because the company's "discriminatory and unfair acts" had created "an intolerable work environment." She then sued Jeanswear.

Uninvited

To establish disparate treatment on the basis of her gender, Bell had to show that she belonged to a protected class (female), she was qualified for her job, she was subjected to an adverse employment action, and similarly situated men were treated more favorably or her position was filled by a man. Jeanswear argued that she failed to satisfy the latter two requirements. The court disagreed, rejecting the argument that her movement from AE to FSR was a "simple transfer" and therefore didn't constitute an adverse employment action.

Noting that a demotion is an adverse employment action, the court pointed out that even management viewed the "simple transfer" as a demotion for Bell. The court also rejected the company's argument that Bell failed to show that it treated her less favorably than similarly situated men, pointing out that she was replaced by a man. Thus, she met her initial showing for a case of sex discrimination.

Next, the company asserted a legitimate nondiscriminatory reason for reassigning Bell: the customer requested a person with more analytical skills. To keep her claim alive, Bell had to show that Jeanswear's articulated reason was unworthy of credence. She did just that by presenting evidence that the vice president of sales had told Boot Barn's vice president of buying "that he felt a male would be better to service" Boot Barn at that time, suggesting there was bias in favor of a male employee. The court concluded that whether Bell was subjected to disparate treatment was a question for the jury.

Ironic

Jeanswear also asked the court to dismiss Bell's claim that she was constructively discharged because of her age. To advance her age claim, Bell needed to demonstrate that she was at least 40, she was performing her job satisfactorily, she was discharged, and she was either replaced by a substantially younger employee with equal or inferior qualifications or discharged under circumstances giving rise to an inference of age discrimination. Jeanswear argued that Bell wasn't discharged, and the court agreed, dismissing her age claim.

Constructive discharge occurs when the working conditions deteriorate to the point that they become sufficiently egregious to overcome the normal motivation of a competent, diligent, and reasonable employee to remain on the job. A single isolated incident is insufficient to establish constructive discharge. The court found that no reasonable jury could conclude that Bell's working conditions rose to the level of objective intolerability because after she learned of her change in position, she asked to stay on at Jeanswear as an AE with a different account. That fact alone undermined her assertion that her working conditions were intolerable.

All I Really Want

To save her EPA claim from dismissal, Bell needed to show that employees of the opposite sex in comparable jobs were paid different wages for "substantially equal" work and Jeanswear's defenses of the differential pay weren't enough to escape liability. Bell's base salary was $74,000, and her target compensation was $113,000, while a Boot Barn AE counterpart had a base salary of $87,000 and target compensation of $160,000.

Jeanswear argued that it used factors other than gender to determine salary, including, for the employees who were compensated more than Bell, longer sales experience (29, 33, and 12 years); level of responsibility and sales volume ($26 million jointly managed; $11 million to $13 million individually managed); and job performance ("exceptional"). By contrast, according to Jeanswear, Bell had only six years of sales experience, $18 million jointly managed, and a "strong" performance rating.

Bell asserted that she was in a sales role since 1985 and her experience was comparable to her male counterparts. She also argued that the jointly versus individually managed comparison wasn't credible because she individually managed Boot Barn for at least a year with comparable individual account levels. The evidence presented by both parties left sufficient room for uncertainty to render the question of discriminatory pay a factual determination for a jury.

Hand in My Pocket

Finally, Bell asserted an Arizona Wage Act claim, stating that Jeanswear owed her unpaid commissions for goods she took orders for while she was an AE that shipped after she resigned. Jeanswear urged the court to dismiss this claim, arguing Bell walked away from the unpaid commissions when she resigned. The claim rested on whether she had a reasonable expectation that she would receive commissions for sales that shipped after she resigned.

Jeanswear maintained that its policy is to pay commissions based on goods shipped during the time the account or territory is assigned to the AE, and it doesn't have a policy or practice of paying commissions to resigning employees. Bell asserted that because she fulfilled all of her responsibilities in securing the orders, she had a reasonable expectation that she would receive commissions on the sales despite her resignation.

The court found that the evidence supported Bell's position. The lack of a written policy to the contrary and the fact that other sales employees were unaware of the company's position that AEs wouldn't receive commissions upon resigning were sufficient to save the issue for a jury.

You Learn

Several missteps by the employer prevented this case from being resolved before trial and contributed to the more than $500,000 verdict awarded to the employee by a federal jury in Phoenix. So what can we learn from this case? First and foremost, you should maintain clear written policies outlining how compensation will be paid upon termination. A policy would have removed Bell's reasonable expectation of being paid commissions after her resignation.

Second, heightened interest in the gender pay gap has resulted in more wage claims, new pay equity laws, and new pay transparency rules. You should conduct an internal audit of your wage payment practices, evaluate whether a pay gap based on gender, race, or ethnicity exists, and eliminate any unlawful gap in pay. Even an unintentional wage gap could result in liability.

Finally, while overt genderor race-based comments are now the exception rather than the rule, you need to continue to educate your employees, especially managers, on your workplace antiharassment and antidiscrimination policies.

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