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DISCRIMINATION

Living on the edge

by Brinton Wilkins

A story was once told about an employer in the Wild West that was looking to hire a stagecoach driver. The employer gave the three applicants a driving test. They were to drive the coach as close as they safely could to the edge of a dangerous cliff. Two of the drivers drove the coach so close to the cliff that the coach's wheels hung over the edge. The third driver, however, said that the safest route was to stay as far from the edge as possible. The third driver got the job. Recently, several state employees drove themselves dangerously close to the edge of acceptable behavior. While a technicality ultimately saved them, their actions came close to dropping them off a precipitous legal ledge.

A little too close

In January 2004, Salt Lake County hired Soudabeh Darvish as a health inspector. She has a master's degree in occupational and industrial hygiene and had worked as an inspector for both Salt Lake County and the state of Utah for several years. Darvish is Muslim and was born in Iran. During the standard six-month probationary period for all new employees, she reportedly overheard coworker Jessie Morris say to a lead inspector, "These Persians cannot come here and tell us what to do."

Darvish complained about the insensitive comment to her supervisor, Eric Peterson, and asked to be moved to another team. Peterson refused to move her and took no disciplinary action against Morris. In March, he began taking disciplinary action against Darvish. For example, she received a written "verbal warning" stating she had improperly inspected several level-3 and level-4 food establishments because Peterson claims he instructed her to inspect only level-1 and level-2 restaurants. However, Peterson later admitted (1) his original instructions were unclear, (2) Darvish had inspected higher-level restaurants in her previous employment, and (3) the list of establishments given to her to inspect did include several level-3 and level-4 establishments.

After receiving the verbal warning, Darvish asked Peterson's supervisor, Bryce Larson, to transfer her. After consulting with Peterson, Larson denied her request. In April, based on the verbal warning, Peterson and Larson placed her on a corrective action program that required her to "effective immediately . . . follow directions given by your supervisor." Peterson later admitted that at the time of the action plan, Darvish no longer had problems following directions.

Because Darvish had requested to be transferred from her team, she received a low score on her evaluation in the "working effectively in team settings" category. Her corrective action plan required her to "understand and support the concept of team work." Peterson later acknowledged the impropriety of disciplining an employee for simply requesting a transfer.

After receiving the corrective action plan, Darvish accused Peterson of illegally retaliating against her for complaining about Morris' statement. Peterson provided an amended corrective action plan, but it changed only the plan's format, not its content.

Upon receiving the amended corrective action plan, Darvish again confronted Peterson, who ordered her "to file a written discrimination complaint against Jessie Morris by the end of the day." Darvish failed to do so, and in an e-mail to Larson, Peterson described her failure as an act of insubordination. Nevertheless, he never filed a report of her discrimination complaint as required by county policy.

In May, when Royal Delegge, the health department's director of regulatory enforcement, was out of town, Peterson obtained approval from Patty Pavey, the director of the Salt Lake County Health Department, to terminate Darvish. The only information that Pavey had regarding Darvish came from Peterson.

Larson and Peterson fired Darvish on May 24. They argued that their decision was based on her failure to

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follow directions and repeatedly asking for a transfer from her team as a result of Morris' insensitive statement.

Hanging off the edge

Darvish filed a discrimination claim against the county with the Utah Antidiscrimination and Labor Division (UALD) of the Utah Labor Commission. She claimed that the county discriminated against her on the basis of her race, color, sex, religion, and national origin. The thrust of her claim was that the county had retaliated against her for complaining of illegal discrimination.

The administrative law judge (ALJ) assigned to hear the complaint sided with Darvish, finding that Peterson and Larson's stated reasons for firing her were full of "incoherent reasoning." The evidence clearly showed that none of the reasons given was valid. Furthermore, the ALJ found that the second reason given for firing her — repeatedly asking for a transfer after complaining of discrimination — was "the smoking gun of retaliation in this case."

The county appealed the decision to the Appeals Board of the Labor Commission. The board initially upheld the ALJ's decision, but the county asked the commission to reconsider its decision. At that stage, Darvish lost. She appealed her loss to the Utah Court of Appeals, which upheld the commission's decision against her.

Good-faith, reasonable belief

Both Title VII of the Civil Rights Act of 1964 and the Utah Antidiscrimination Act make it illegal for an employer to retaliate against an employee for opposing illegal discrimination. But the discrimination must be based on the *employer's* illegal act and not merely a co-worker's stupidity. According to the Utah Court of Appeals, an employee who complains of discrimination in the workplace must have a "good faith, reasonable belief" that the discrimination she experienced came from the employer.

To determine whether an employee has a good-faith, reasonable belief, courts consider "all the circumstances, including the frequency of the discriminatory conduct; its severity, whether it is physically threatening or humiliating, or a mere offensive utterance; and whether it unreasonably interferes with an employee's work performance."

As explained by the court, neither Title VII nor the Utah Antidiscrimination Act are intended to be a code of civility; they are intended to prevent an employer from engaging in illegal discrimination. Although Morris' statement was insensitive, it was isolated, not severe, and not physically threatening or intimidating. It was an

offhand offensive utterance by a coworker that couldn't be imputed to the county. When Darvish complained, she wasn't complaining about employer discrimination. Therefore, the prohibitions against retaliation did not protect her.

In reaching its decision, the Utah Court of Appeals relied on an earlier Title VII decision from the U.S. Supreme Court. In *Clark County School District v. Breeden*, a female employee heard a male employee say, "I hear that making love to you is like making love to the Grand Canyon." Although the statement was tasteless, the U.S. Supreme Court said it was a single statement "that [couldn't] remotely be considered extremely serious, as our cases require." Similarly, Morris' insensitive comment was too isolated to be considered evidence of the county approving of, allowing, or engaging in illegal discrimination.

Further, Darvish couldn't claim that the actions taken against her after she complained were evidence of retaliation because the "relevant question . . . is whether [Darvish] could believe in good faith that the conduct *preceding* her complaint" constituted illegal discrimination.

Because the court found that she couldn't have reasonably had that belief, Peterson and Larson's unjustified actions didn't run afoul of applicable antidiscrimination laws. *Darvish v. Labor Commission Appeals Board*, 2012 WL 748566 (Utah Ct. App., 2012).

Lessons learned

Although the county ultimately escaped liability for Peterson and Larson's actions, that should constitute cold comfort. According to the court's recitation of the facts, it appears that Peterson and Larson had little, if any, justification for their decision to fire Darvish. Indeed, based on the court's decision, race, ethnic, religious, national origin, and sexual discrimination may have played a part in their decision. They arguably avoided liability, however, simply because they weren't involved in the first instance of insensitive behavior.

All employers, including Salt Lake County, would be wise to make sure that not even the appearance of illegal discrimination taints hiring, firing, and disciplinary decisions. Although the county may have successfully returned from a trip to the very edge of the cliff, it would have been better for everyone involved if it had remained as far away from the edge as possible.

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