

Keep A Record

Details

Written by Edward Kaplan

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New Hampshire Employment Law Letter

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In a recent decision the First Circuit emphasized the importance of maintaining written notes concerning the behavior and performance of an employee. In this particular rule, the court used those notes and the references within the notes to affirm an individual's termination for behavior and performance rather than discriminatory reasons.

The Stage Is Set

Sean Holloway brought suit in the Federal District Court in Massachusetts alleging racial discrimination and retaliation. The district court ruled in favor of Holloway's employer, Thomas Island Outward Bound Education Center, Inc. (TIOB). Holloway appealed that decision to the First Circuit Court of Appeals, the appeals court controlling New Hampshire.

Holloway, who is black, worked in the kitchen staff at TIOB. He complained of racial discrimination and harassment by his supervisor and other employees who were white. In response to this complaint, TIOB placed Holloway on leave and negotiated a settlement with his counsel that involved transferring Holloway to the maintenance department, resolving any future disputes by arbitration and agreeing that Holloway would not be terminated except for just cause. In addition, TIOB agreed to pay Holloway's attorneys' fees. Subject to the terms of this agreement, Holloway returned to work.

Act One

Holloway's return to work was short-lived as he was terminated for insubordination, lateness, absenteeism and threatening behavior only two months after he returned. Holloway then commenced this litigation claiming that his termination was based upon his race and retaliation for the earlier complaints he had made. TIOB denied any discriminatory action whatsoever claiming that Holloway was consistently late; that he was absent without excuse on various occasions; that he refused to perform certain assigned tasks; that he was rude when his supervisors attempted to confront him concerning these issues; and that other employees had complained that he acted in a threatening manner toward them. Each of these behaviors was supported by affidavits submitted by Holloway's supervisors and a detailed record of their observations and interactions with him during the two months that he returned to work prior to his termination.

Act Two – The Discrimination Claim

In evaluating Holloway's claim that his termination was discriminatory, the Court looked at the record in the case to determine whether or not his termination was actually for insubordination or lateness or absenteeism or anything besides race or his previous complaints. If that was the finding, Holloway's claim would fail.

The court then reviewed the record and the numerous notes taken by Holloway's employers. It concluded that Holloway was often late, that he refused certain orders from his supervisors, and that he refused to speak with his supervisors concerning those actions claiming that doing so would unintentionally waive the rights he had to seek arbitration. When the court reviewed the record of notes taken by his supervisors, it was able to confirm each of the allegations that the supervisors had made about Holloway. In addition, the court determined that there was no evidence of direct discrimination against Holloway (for example, racial comments). Based on this record and supported by the documentation completed by the supervisors at TIOB, the court concluded that the actual evidence of discrimination was extremely weak and did not reinstate the case on this basis.

Act Three – The Retaliation

Although the court found that a possible retaliatory motive for Holloway's termination was somewhat stronger than his underlying discrimination claim, it ultimately dismissed that claim as well. The facts supporting Holloway's claim related, primarily, to the close relationship in time to his return and his termination. This interval of two months was short enough to raise certain suspicions. However, these suspicions could be dispelled if an employer had convincing evidence of legitimate reasons for the termination. TIOB provided those reasons primarily by producing their detailed record of observations and actions during Holloway's two months of employment. As an example, the court noted, that whereas Holloway would claim his arrival at TIOB was delayed because of transportation issues, the written record of the employer demonstrated that even when Holloway arrived late, he would not go directly to this work station but would bypass it. Moreover, the written record of the employer (or as the court called it, the "running file") had specific quotes of Holloway's comments to supervisors and co-employees reflecting his insubordination, rudeness, obscenities and refusal to discuss routine matters with supervisors. Taken together this record amply supported reasons other than retaliation for Holloway's termination. *Sean Holloway v. Thompson Island Outward Bound Education Center, Inc.*

Bottom Line

It is important to note that in refusing to reinstate Holloway's claim, the court specifically noted that, "TIOB has provided an extensive list of problems with Holloway's performance, backed up by record support." Indeed, in this particular matter, it was the careful recordkeeping by the employer which successfully supported the termination of Holloway and which led the court to conclude that that termination had nothing whatsoever to do with his race or with retaliation for earlier claims. This is an important message to employers. When dealing with employees, particularly employees who may

be subject to discipline or behavior issues, this case emphasizes again the need to keep detailed and accurate records.

[Edward Kaplan](#) is a member of the Sulloway & Hollis Labor and Employment practice group.