

In This Issue:

May 2011

The Tenth Circuit recently upheld the termination of an employee who claimed race discrimination and retaliation for protected activity, but who was himself the subject of a long litany of internal complaints.

Tenth Circuit Upholds Termination of Problem Employee

By Margaret Parnell Hogan and Oliver J. McKinstry

The U.S. Court of Appeals for the Tenth Circuit recently considered whether the termination of an employee who was the subject of 23 separate internal complaints (but who had also recently filed his own internal complaint) constituted discrimination or retaliation. In *Crowe v. ADT Security Services, Inc.*, 2011 U.S. App. LEXIS 8434 (10th Cir. Apr. 25, 2011), the court determined that the employee, despite having made his own internal complaint about a lack of advancement opportunities for African-Americans, could not show that his termination was either a pretext for discrimination or retaliation for engaging in protected activity.

Background

The plaintiff, an African-American technician at ADT Security Services, provided telephonic support to customers and retailers from 1997 until 2007. Although plaintiff received adequate performance evaluations, he was the subject of 23 reported complaints from other employees and his superiors, including five separate complaints of sexual harassment.

For example, on December 1, 2006, another ADT employee complained that plaintiff made her uncomfortable when she walked by because he obviously and inappropriately stared at her rear end. Plaintiff was disciplined as a result of the complaint. On January 3, 2007, plaintiff refused to comply with a supervisor's request that he remove his hat to comply with ADT's dress code. As a result of the two complaints, plaintiff received a final written warning on January 30, 2007. The final warning stated that plaintiff would be terminated upon another instance of harassment, unprofessional behavior, or insubordination. The problems, however, did not stop.

In early May 2007, one of the plaintiff's female supervisors complained to management that he refused to work with her, preferring instead to work only with male supervisors. In mid-May 2007, another ADT employee complained that plaintiff created a negative work environment by constantly criticizing his female supervisors and calling them racist. After these May 2007 incidents were reported, an ADT human resources representative performed a comprehensive investigation into plaintiff's conduct and personnel history.

At first glance, the investigator did not think there was enough documentation to terminate plaintiff for the May 2007 incidents. However, after completing her comprehensive review, which included interviews of plaintiff's coworkers and supervisors, however, the investigator wrote a report recommending termination. In her report, the investigator noted that plaintiff had been given many final warnings and questioned why plaintiff had not been terminated earlier. She also expressed grave concern that the company's failure to terminate plaintiff for his behavior was creating a risk of lawsuits brought by his coworkers. Based on the report, plaintiff was terminated on July 27, 2007.

Shortly thereafter, plaintiff filed suit against ADT claiming discrimination and retaliation. In his lawsuit, plaintiff claimed that he was discriminated against for being African-American and retaliated against for participating in a December 2006 discussion with three other employees and a manager regarding the lack of African-Americans in ADT management and the perception that African-Americans had been passed over for promotions.

The Tenth Circuit's Decision

On appeal to the Tenth Circuit, the court considered whether ADT's proffered rationale for termination was pretextual.¹ Plaintiff tried to use his long disciplinary history to his advantage, arguing that since ADT had tolerated his inappropriate behavior for so long – eight years – such behavior could not be the reason for his termination. Plaintiff argued that the fact that he had been the subject of so many complaints cut against ADT's rationale that inappropriate behavior motivated his termination, not discrimination or retaliation. Plaintiff reasoned that ADT's leniency only stopped after his participation in the discussion about a lack of African-American managers.

The court rejected that argument, however, finding instead that ADT's discipline of plaintiff's behavior had been coherent and consistent. The court determined there was no evidence that the rationale was pretext for discrimination, because there was no evidence that similarly situated employees were treated differently. The court also determined that there was no evidence that the rationale was pretext for retaliation because plaintiff's termination was based on his extensive history of inappropriate behavior. Indeed, as evidenced by the investigator's report, it was the long history of bad behavior and the fact that no remedial measures had proven effective that prompted ADT to terminate. Ultimately, the court decided that a reasonable jury could not conclude that firing plaintiff based on his history of inappropriate behavior was pretextual even when that termination occurred subsequent to his participation in a discussion regarding African-Americans in management.²

Recommendations for Employers

Most employers have had to deal with at least one employee like the plaintiff in this case and had to answer the question: "Which scares us more? This employee's lawsuit against the company or the potential destruction of the company's work environment if we continue to tolerate toxic (and, in this case, policy-violating) behavior." While this is not an easy question for employers to answer, the following recommendations may make such decisions less complicated:

- Have a coherent discipline policy that is applied consistently. Discipline should be administered for inappropriate behavior, but it must be administered for *all* inappropriate behavior and it must be well-documented.
- Enforce progressive discipline policies. If an employee is given a final warning, *enforce* the final warning, as a plaintiff may argue leniency stopped only because of a protected activity.
- Ensure that when a complaint is made about an employee, the employee's personnel file is examined to determine if the current complained-of behavior violates a final warning and/or is indicative of a pattern of bad behavior.
- Use objective evaluation criteria and honestly evaluate your employees. Subjective evaluation criteria are often seen as susceptible to discriminatory animus. Objective criteria make it easy to show termination was for legitimate, non-discriminatory reasons.
- Consider reviewing termination decisions with experienced employment counsel.

.....
Margaret Parnell Hogan is a Shareholder, and Oliver J. McKinstry is an Associate, in Littler Mendelson's Denver office. If you would like further information, please contact your Littler attorney at 1.888.Littler, info@littler.com, Ms. Hogan at mphogan@littler.com, or Mr. McKinstry at omckinstry@littler.com.

¹ Plaintiff also argued that the ADT human resources investigator was motivated by discriminatory racial animus and that because ADT made its termination decision based on her report, it was liable for discrimination under the “cat’s paw” theory of liability. The court rejected that argument, however, finding that the investigator’s report exhibited no discriminatory racial animus.

² The Tenth Circuit distinguished this case from those in which subjective evaluation criteria are the proffered rational for termination. The court noted that a shift from positive to negative performance reviews, where based on subjective evaluation criteria, could be considered pretextual.