



DELAWARE

EMPLOYMENT LAW LETTER

Part of your Delaware Employment Law Service

William W. Bowser, Editor; Scott A. Holt and Adria B. Martinelli,
Associate Editor
Young, Conaway, Stargatt & Taylor

Vol. 15, No. 9
September 2010

RACE DISCRIMINATION

Employees need 'more than a feeling'

by Lauren E. Moak

A recent decision issued by Delaware's federal court underscores the importance of employer documentation. The court dismissed an employee's race discrimination lawsuit, relying in part on the employer's annual reviews and progressive disciplinary procedure to document fair and consistent treatment of the complaining employee.

Facts

Barry Sullivan, who is African American, began working with Nationwide Insurance Company in 1988. He was terminated on March 28, 2007. Over the course of his employment, he received acceptable performance evaluations, but his organization and communication skills were continually noted as lacking. Nevertheless, he didn't feel that he was discriminated against until 2006.

In December 2004, a new manager, Kenneth Olsen, took over Sullivan's department. The two got along well the first year. Olsen even gave Sullivan a positive evaluation. However, an incident in April 2006 changed Olsen's view of Sullivan. Around that time, a major computer system responsible for paying death benefit claims to policyholders failed and was offline for over a week. Sullivan was responsible for maintaining the system.

After the April 2006 incident, Olsen determined that Sullivan's slow response and inadequate communication during the incident required discipline. He began meeting with Sullivan on a weekly basis. By

August, he concluded that Sullivan's performance hadn't improved, so he implemented a formal coaching plan. Under the plan, the two men met for no less than one hour each week. The sessions were documented by Olsen in an e-mail sent to Sullivan after each meeting.

When Sullivan's performance didn't sufficiently improve, Olsen instituted an official performance improvement plan (PIP) in January 2007. In a meeting to discuss the PIP, Sullivan became irate, disputing the performance issues described in the PIP and accusing Olsen of discrimination.

Sullivan wasn't able to point to any openly discriminatory conduct (*e.g.*, name-calling). Instead, he asserted that he "couldn't find anything other than [his] race" to explain Olsen's heightened scrutiny and criticism of his performance. After investigating Sullivan's claims and interviewing individuals who sat near him, Nationwide was unable to uncover any evidence of discriminatory behavior by Olsen.

In the meantime, Sullivan's performance failed to improve under the PIP, and he was terminated on March 28. After his discharge, he sued Nationwide, alleging race discrimination.

Court's decision

The court found that Sullivan was unable to provide any evidence to rebut Nationwide's legitimate nondiscriminatory reasons, which were well documented in employee evaluations, for his termination. Nationwide had almost 20 years of employee evaluations demonstrating Sullivan's performance problems, including a history of communication problems that were noted by several different supervisors.

Additionally, Nationwide had successfully implemented its progressive discipline policy in addressing Sullivan's deficiencies. Not only did Olsen implement progressive discipline, but he also documented each step of the process. Particularly important were the follow-up e-mails he sent after each weekly meeting. They allowed Nationwide to rebut Sullivan's allegations that Olsen had exaggerated the frequency of their meetings and that his expectations were unreasonable.

In contrast to Nationwide's considerable documentation, Sullivan had only his own supposition that Olsen's criticism must be based on race. As the court noted, an employee "needs more than his subjective belief to survive [dismissal]." Thus, the case was dismissed. *Sullivan v. Nationwide Life Insurance Company of America*, No. 09-170-MPT (D. Del., July 6, 2010).

Bottom line

Employees need "more than a feeling" that they have been discriminated against to sustain a lawsuit. As employers and HR professionals, it is your job to ensure that they don't get it. As demonstrated in this case,

honest and fair documentation of an employee's performance issues is critical to a company's success in defending baseless lawsuits.

Copyright 2010 M. Lee Smith Publishers LLC

DELAWARE EMPLOYMENT LAW LETTER does not attempt to offer solutions to individual problems but rather to provide information about current developments in Delaware employment law. Questions about individual problems should be addressed to the employment law attorney of your choice.

[Back to Results](#)

[Back to Search](#)

[Exit Search](#)