MICHIGAN LAWYERS WEEKLY

March 06, 2006

News Story

Employee wins $400K verdict in ELCRA sex harassment lawsuit

Key was defendant's failure to investigate, take remedial action

By Sheryl Vassallo

Can a woman who was fired after claiming her former husband was sexually harassing her at work sue her employer for violation of the Elliott-Larsen Civil Rights Act (ELCRA) even though the employer said she was terminated over a poor attendance record?

A $400,000 verdict in Saginaw County indicates the answer is "yes."

Saginaw attorney John H. van Benschoten, who represents the plaintiff, told Lawyers Weekly the key to winning was keeping the focus on what the law requires of the defendant, regardless of the employee's previous track record.

"She had attendance problems and I never claimed she was perfect," van Benschoten said of his client, adding that one point he needed to get across to the jury was that the law doesn't just protect perfect employees, but rather all employees.

"I think the jury saw that," he said. "She asked for [her employer's] help and I don't think that they adequately responded."

van Benschoten said he also had to address questions of whether the defendant was properly put on notice and whether it had conducted an adequate investigation followed by proper remedial action.

"In Michigan, of course, that is what you have to show if you're the plaintiff — that you put the defendant on notice, that they knew about it and that they failed to adequately investigate it and failed to take appropriate remedial action," the plaintiff's attorney explained. "In a nutshell, that's what we had to prove."

Meanwhile, the woman's former employer insisted that any complaints given by the plaintiff were properly and appropriately handled.

According to a statement issued by the employer's attorney, John A. Decker of Saginaw, "The non-unanimous jury rejected the plaintiff's claim that the absences that led to her discharge were because of harassment at work, but found that the company was responsible for sexual harassment of the plaintiff by her ex-spouse for several months prior to her termination and awarded non-economic damages."

Additionally, the statement characterized the verdict by the majority of the jury as "inconsistent" and explained the employer had taken the appropriate steps to address the situation, given the absence of third-party witnesses.

According to van Benschoten, attorneys can win similar cases if they:

- keep the focus on the defendant and the law;
- use the defendant's witnesses to support their case;
- don't get emotionally ahead of the jury;
- remember to prove mental anguish and emotional suffering;

- have copies of all their client's personnel files;
- use exhibits, organizational charts and timelines to help the jury remember important facts, names and job titles; and
- choose good experts to help the jury comprehend the effects of the client's emotional suffering.

A Verdicts & Settlements Report of the case, *Heusted v. Means Industries, Inc.*, can be found on our website, www.milawyersweekly.com.

He said, she said

Plaintiff Suzanne Heusted and her ex-husband Dennis Martin were employed by defendant Means Industries, Inc. The plaintiff claimed her ex-husband, over a period of two years, was verbally harassing her at work by making vulgar gestures and remarks and calling her names that carried sexual connotations.

The plaintiff claimed she began missing work due to the stress brought on by the harassment and the physical ailments she felt as a result of the stress, including depression, for which she was being treated.

In October 1998, she attempted suicide. After nearly a month of recovery, the plaintiff returned to work and claimed the harassment immediately resurfaced.

After an accumulation of unexcused work absences, the plaintiff was terminated by the defendant on the basis of chronic attendance problems, which, the defendant claimed, had a long-standing history from the outset of her employment. The defendant claimed the termination was not related to the relatively recent claim of harassment.

Meanwhile, the plaintiff maintained she complained to her employer about the harassment enough times to where something should have been done.

The defense claimed that, under the union contract, it could not properly discipline an employee based solely on the claims of a coworker, especially when the employer was faced with a "he said, she said" situation.

It was also the defendant's claim that it did take prompt and appropriate remedial action through holding meetings during which the employees were instructed to "leave each other alone" and "stay away from each other" in the workplace.

Under the cross examination of several union representatives, it was established that the defendant actually had the ability to fire an employee for doing things the plaintiff alleged her former husband was doing.

Additionally, prior to filing a lawsuit, the plaintiff wrote the company several letters asking for her job back, which the defendant denied. Moreover, plaintiff's counsel also wrote a letter to the company simply asking to allow the plaintiff to return to work on a different shift than her former husband, even for less pay. Again, the defendant refused.

Ultimately the jury returned a verdict of $400,000 for emotional damages only.

After the jury's verdict, the defendant moved unsuccessfully for remittitur. Subsequently, the case settled pursuant to a nondisclosure agreement.

Turning them around

van Benschoten said one of his most successful strategies at trial was using the defendant's witnesses to prove his case.

"I actually read parts of their depositions as part of my case, and then I also called their witnesses as adverse witnesses under the statute," van Benschoten asserted.

He said he took testimony from the plant manager, the director of human resources, the personnel administrator, and the operations manager as well as his client's shift supervisors.

Part of the human resource director's deposition, which he read to the jury, provided the evidence that proper notice of the harassment was given to the defendant.

"He said he did recall going to visit her in the hospital, and that she was having a problem with [her former husband] but couldn't remember exactly what she told him. He said he did know he wanted to make sure that they were separated

when she was able to come back to work," van Benschoten recalled. "That provided the notice because he was the top man in human resources. And then, of course, as far as the severity of the situation, it was severe enough that she attempted to commit suicide. So the question was, 'Was any action that they took appropriate given the totality of the circumstances?'"

Fading memories

van Benschoten said that because he chose to put the case on hold for a year and a half until he felt his client was strong enough to handle the trial, the defense made a point to suggest so much time had passed that their witnesses couldn't remember the details of the plaintiff's complaint.

He said, though, that none of the meetings the defense claimed they had regarding the complaint were documented.

"If you investigated, where are your notes? Nobody took any, or at least they didn't produce any," he declared.

van Benschoten stated that when the personnel administrator was on the stand she admitted taking notes at such a meeting would be one of her functions, yet there were no notes. She also admitted she was not aware of any investigation being conducted.

He added that the defendant's lack of credibility was also an issue. The human resource director said he remembered the defendant came to him with the complaint, but couldn't remember the details, only that she was upset. The jury couldn't accept that.

"How many people who work there have ever attempted to commit suicide before?" van Benschoten asked the defense witnesses. "You knew she attempted suicide and you can't remember why?"

He added, "Suicide is not an everyday event. You would think that might stick in [their minds] a little bit."

Emotional timing

van Benschoten next said he had to be careful not to get ahead of the jury emotionally.

"The jurors aren't familiar with the facts of the case, so although you know everything and you might be outraged, it doesn't mean that they are," he explained. "They're not psychologically prepared to be outraged yet.

van Benschoten noted that he saved emotions for final argument, after the jury heard the case and fully understood what it was about.

He said once he established liability to the jurors' satisfaction, he finally put his client on the stand and paid special attention to proving mental anguish and emotional suffering.

In addition to having an expert explain to the jurors the physical and emotional affects that severe depression can have on someone, he got his client talking about how it affected her life.

"In this particular case, I know it really affected her relationship with her daughter because she said 'My daughter thought I should have been stronger and I was weak.' Knowing how it affected her allowed me to bring that out in front of the jury," he stated. "In order to figure out what would be a fair amount, they have to understand the impact. When you get into that subject matter, as sensitive as it might be, then the true humanity comes out of what happened to her."

van Benschoten said the bottom line was the defendant's reliance on the union contract

"I told the jury that you can't use the union contract to hide behind," he recalled. "Once the employer is put on notice, the law says that the employer has to adequately investigate and has to take appropriate remedial action."

Though he admitted his client was not a perfect employee, he asserted she didn't have to be perfect to deserve equal treatment under the law.

If you would like to comment on this story, please contact Sheryl M. Vassallo at (248) 596-2700 ext. 17 or sheryl.vassallo@mi.lawyersweekly.com.