

# Louisiana Employment Law Letter

H. Mark Adams, Editor; Alan F. Kansas and Jennifer L. Anderson, Associate Editors

November 2003

Vol. 12, No. 8

## Highlights

- Cashier claims shortchanged by employer
- Letter to new hire confirms more than employer intended
- The doctor, the nurse, and the license that lapsed
- Executives' careless remarks cost company big bucks
- Over-the-counter drugs now reimbursable under flexible spending plans
- Allegations of bias against Muslims soar
- HR Trends

## DOCUMENTATION

### Cashier claims shortchanged by employer

*We've said it before, and we'll say it again — Document! Document! Document! When an employee is discharged for legitimate reasons, the company's failure to thoroughly and accurately document those reasons and counsel the employee can come back to haunt it in the event the employee files a lawsuit. Proper and consistent documentation and counseling on poor performance or other discipline problems can go a long way not only to encourage improved performance but also to prove your legitimate business decision if the employee alleges that it was motivated by unlawful bias.*

*A recent case out of the federal district court in New Orleans proves our point and highlights the importance of employee counseling and proper documentation.*

#### ***Disgruntled cashier sees dollar signs***

A cashier at a New Orleans diner claimed that she had been sexually harassed by her manager for over three years and fired in retaliation for making complaints about the harassment. She said that her manager verbally harassed her and physically touched her at work. She also alleged that her manager called her at home and on her cell phone. The cashier claimed that the harassment occurred both in a back office at the diner as well as in public view at the cashier's station.

The cashier alleged that she reported the harassment on two occasions but that nothing was done about it and the harassment continued — that is, nothing was done to the alleged harasser, according to the cashier. On the other hand, she was fired within 10 days of making one of her alleged complaints about the manager. The cashier naturally alleged that she was fired because she complained about the purported harassment.

According to the diner, the cashier was fired for a very different reason. Her boyfriend had also worked for the diner. He was eventually fired, however, and according to the diner, the cashier made it clear through her actions at work that she didn't agree with its decision. The diner maintained that it fired the cashier for her poor attitude and insubordination at work following her boyfriend's departure.

The cashier sued the diner in federal district court in New Orleans, alleging sexual harassment and retaliation. The employer asked the court to dismiss both claims.

### ***Cashier serves up enough evidence of alleged harassment to get to trial***

The court first discussed the cashier's sexual harassment claim. To establish a case of sexual harassment, an employee must show that she belongs to a protected class, she was subjected to unwelcome sexual harassment, the harassment was based on her sex, and it was sufficiently severe or pervasive to affect a term, condition, or privilege of her employment.

If the alleged harassment occurs at the hands of the employee's supervisor or manager and doesn't result in an adverse employment action, such as termination, the employer may have a defense to the claim. The employer may escape liability if it can show that it exercised reasonable care to prevent and promptly correct the harassment and that the complaining employee failed to take advantage of those preventive and corrective measures or otherwise failed to avoid harm.

The court found that the cashier's allegations of harassment were sufficient to meet her initial burden of proof. The diner couldn't use the defense because a manager engaged in the alleged harassment and the cashier suffered an adverse employment action when she was fired. The court concluded that any credibility questions about the alleged harassment and whether it culminated in her discharge would have to be resolved at trial. For those reasons, the court refused to dismiss the cashier's sexual harassment claim before trial.

### ***Retaliation claim thrown into the mix***

The court next reviewed the cashier's retaliation claim and decided that credibility disputes and other fact issues also prohibited dismissal of that claim before trial. For instance, the cashier had been promoted consistently throughout her employment and had an excellent employment record. Nevertheless, 10 days after she purportedly complained of harassment, she was fired. Despite the diner's claim that she was fired for insubordination and a poor attitude, it had no documentation or other evidence to support its claim. Without proper documentation of its reasons for the discharge, the court refused to dismiss the cashier's retaliation claim. *Flowers v. Camelia Grill*, 2003 U.S. Dist. LEXIS 15391, E. D. La (8/19/03).

### ***Put training, counseling, and documentation on the menu***

You have many tools at your disposal for avoiding employee disputes and putting yourself in a solid defensive position in the event one arises. You should make sure all employees, including managers, are aware of your policies prohibiting sexual harassment and other unlawful employment practices. Employees need to be trained on their responsibility to report any alleged harassment or unlawful practices they experience or witness. In turn, a company's designated person or department responsible for investigating and documenting such claims must be trained on what to do and how to respond when someone complains. Often we hear that a complaint was made "off the record" and wasn't investigated. There are *no* off-the-record complaints. If you hear about it, investigate it and take appropriate action if a violation has occurred — whether you're asked to or not. In the event you're called on to prove what steps you took to correct or prevent the harassment, training and a prompt response to complaints will provide the proper foundation.

In addition, it's crucial that supervisors and managers properly document and counsel employees on performance and disciplinary matters. Consistently handling disciplinary matters with your

employees will help you defend against retaliation claims. Your best defense to any claim of improper motive is thorough, accurate, contemporaneous, and fair documentation that the employee has seen and acknowledged in writing. And, most of all, remember to communicate with your employees and counsel them when conduct and performance issues arise. Many employees who deviate from your rules or standards just need a little encouragement to get on the right track. Treating employees fairly and giving them an opportunity to correct their missteps are the best ways to steer clear of legal run-ins with them.

*You can find out more about documentation in the subscribers' area of HRhero.com, which is the website for Louisiana Employment Law Letter. You have access to an in-depth HR Special Report on the subject: "How to Discipline and Document Employee Behavior." Simply log in and scroll down to the link for all the Special Report titles. If you need help or have lost your password, call customer service at (800) 274-6774.*

**Copyright 2003 M. Lee Smith Publishers LLC**

**LOUISIANA EMPLOYMENT LAW LETTER does not attempt to offer solutions to individual problems but rather to provide information about current developments in Louisiana employment law. Questions about individual problems should be addressed to the employment law attorney of your choice. The State Bar of Louisiana does not designate attorneys as board certified in labor law.**