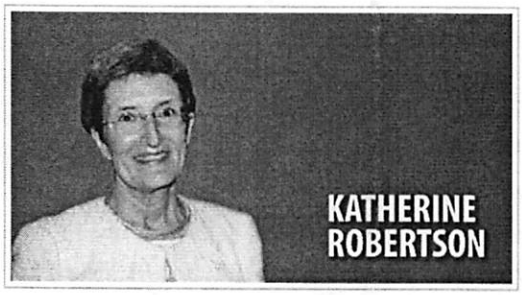
Teacher can depose school personnel over adverse actions vs. other employees

'Comparator' evidence potentially relevant in constructive discharge case

By: Eric T. Berkman March 7, 2018



A teacher who brought a constructive discharge claim against his former employer and the superintendent could depose school personnel over adverse employment actions taken against other workers, a U.S. magistrate judge has ruled.

The plaintiff, who taught in the automotive department at a vocational school in Northampton, resigned after first being accused of bias against female students and later being accused of stealing two cars from the school.

The latter allegation brought larceny charges of which the plaintiff was later acquitted. The plaintiff claimed his departure constituted a constructive discharge because he could not work for an employer that brought unfounded criminal charges against him.

In seeking to block depositions of school personnel who, by virtue of their positions, had information about suspensions and discharges of employees other than the plaintiff, the defendant city of Northampton argued that such information was not relevant to the plaintiff's case and that those employees' privacy interests outweighed the plaintiff's need for such information.

But Judge Katherine A. Robertson disagreed.

"Courts generally have permitted a plaintiff some discovery about adverse employment actions taken against other employees by a supervisor who is alleged to have acted improperly vis-à-vis the plaintiff," Robertson wrote.

"In seeking limited information about other employees who were allegedly subjected to adverse employment actions in which [the superintendent] had a role, Plaintiff is seeking information about employees who can be characterized as similarly situated to himself at least in the respect that the same decisionmaker had some involvement in the adverse employment action about which Plaintiff seeks information," Robertson said.

She did, however, limit the number of depositions, eliminating those people for whom the plaintiff had not adequately demonstrated a need to depose.

The 14-page decision is *Yourga v. City of Northampton, et al.*, Lawyers Weekly No. 02-095-18. The full text of the ruling can be found here.

'Long-settled principles'

Patricia M. Rapinchuk of Springfield, who was part of the defense team, said employers are often placed in a difficult position in employment litigation when confidential information about employees and former employees is sought during discovery. She declined to comment further.

Plaintiff's counsel Thomas T. Merrigan of Greenfield also declined to comment, but Boston attorney Dahlia C. Rudavsky, who represents employees in workplace disputes, said the judge applied "long-settled principles" to an unusual set of allegations, correctly ruling that other employees' privacy interests must yield to discovery of potentially relevant evidence.

"The case illustrates a conundrum typical of employment cases, where most of the information needed is possessed by the employer, and the plaintiff employee has no realistic way to secure that information outside the discovery process," she said.

Rudavsky also said that, to the extent employee privacy is a concern, there are many ways to protect those interests at trial should discovery lead to admissible evidence.

Matthew J. Fogelman of Newton said it is important for plaintiffs to be able to conduct discovery about "similarly situated" employees, especially with allegations that individual defendants acted in bad faith.

"It is not surprising that the defendants [here] tried to hinder the plaintiff from obtaining comparator evidence, Fogelman said, lauding the judge for denying "these efforts to stymie."

Boston attorney Brian J. MacDonough said he thought there might have been gamesmanship involved in the case, given the plaintiff was seeking to depose 28 employees. That suggested that the defendants may not have been cooperating with document production requests, MacDonough said.

"You can see the plaintiff saying, 'OK, fine. You won't respond to document requests? I'll take a million depositions,'" he said. "The reality is that if these are otherwise favorable witnesses, you don't necessarily have to depose them; you can interview them and get affidavits. So this had the feel of a pretty contentious litigation."

Nathan L. Kaitz, a management-side employment lawyer in Boston, had a similar take.

"Most of the time, if I'm asked to produce comparator evidence, I'm going to ask for a confidentiality agreement so that the evidence is only used for purposes of the case and so that there are limits on who can review it. Most of the time, an experienced plaintiffs' attorney will agree," he said. "And most of the time, the evidence is produced in a production request without the need for court intervention."

Now it appears that defendants will be subjected to such discovery without the protection of confidentiality agreements, he continued.

"The message from this would be to try and work things out in a reasonable fashion with plaintiffs' counsel," Kaitz said. "The litigators on both sides are experienced, so I wouldn't begin to question any of their litigation decisions. But it seems like there's a lot here that's outside the norm."

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>
> *— Dahlia C. Rudavsky, Boston*

Constructively discharged?

Plaintiff Jonathan Yourga started working at Smith Vocational and Agricultural High School as a full-time automotive instructor in 1993.

Under a collective bargaining agreement, he was ensured employment for a three-year term and could not be disciplined, suspended or terminated without just cause.

In spring 2014, a student complained that the plaintiff was biased against female students in his department. He was placed on paid administrative leave pending investigation.

The school's director of security at the time, defendant Kevin Brown, conducted the investigation. During the investigation, Brown reported to police that the plaintiff had stolen two of the school's cars.

Police searched the plaintiff's home on May 21, 2014, and, at the apparent instigation of Brown and then-superintendent Jeffrey Peterson, the plaintiff was charged with two counts of larceny.

Later that month, the plaintiff was suspended without pay, and a grievance hearing was scheduled for June 3.

Fearing that his retirement benefits were at risk because of statements Peterson allegedly made, the plaintiff resigned his employment a day before the hearing.

The plaintiff was ultimately tried and acquitted of the criminal charges and brought civil rights claims against the city, Peterson and Brown in U.S. District Court. He also alleged constructive discharge, asserting that he could not work for an employer who had brought unfounded criminal charges against him.

After filing the case, the plaintiff filed a document production request seeking discovery of information concerning disciplinary actions, suspensions or discharges of other teachers while Peterson was superintendent.

The defendants objected on relevance and confidentiality grounds.

Rather than pressing further for production of personnel records, the plaintiff then sought to take depositions of 28 current and former school employees possessing such information by virtue of their positions, claiming it was intended to be a less intrusive means of obtaining relevant information. Again, the defendants objected.

Limited scope

Robertson rejected the defendants' argument that the comparator evidence the plaintiff was seeking was not relevant and that it would unreasonably violate the privacy of other employees.

"While the question is close, the court concludes that Plaintiff has shown that such information is relevant and may lead to the discovery of admissible evidence," the judge said.

Robertson noted that the U.S. District Court judge presiding over the case refused to dismiss the plaintiff's claims because he had alleged sufficient facts for the court to infer that Peterson and Brown had colluded to harm the plaintiff, including making misleading statements to the police and leveraging those statements to get the plaintiff to resign rather than grieving his suspension.

"While it is true that Plaintiff is not seeking true 'comparator' evidence, the reasons the presiding District Judge gave for denying Defendants' motion to dismiss a majority of Plaintiff's claims supports a finding that evidence that bears on the motives of the named individual defendants with respect to employees other than Plaintiff may be relevant as proof of their motives in his case," Robertson said.

She added that the privacy interests the defendants were invoking had to be weighed against the plaintiff's need for information that would help him prove the defendants did not act in good faith.

However, Robertson did go on to limit the number of depositions the plaintiff could take, finding that he had not demonstrated sufficient need to depose a number of the people he had sought to question.

Yourga v. City of Northampton, et al.

THE ISSUE: Could a teacher who brought a constructive discharge claim against his former employer and its superintendent depose school personnel regarding adverse employment actions taken against other workers?

DECISION: Yes (U.S. District Court)

LAWYERS: Thomas T. Merrigan of Sweeney Merrigan Law, Greenfield (plaintiff)

Hunter S. Kell, David S. Lawless and Patricia M. Rapinchuk, of Robinson Donovan, Springfield (defense)

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