High Ranking Male Prevails in Reverse Discrimination Gender Bias Suit

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The tables have turned. It's not just women who have to put up with inappropriate remarks and a sexist atmosphere in the workplace anymore. And it's not just women who are fighting the status quo. Nowadays, men, albeit infrequently, are making claims of gender-based discrimination and, as illustrated in a recent decision by the U.S. Court of Appeals for the First Circuit, winning them.

In Carey v. Mt. Desert Island Hospital, No. 97-1661 (1st Cir. Aug. 18, 1998), the male vice president of finance at a Bar Harbor, Maine hospital who had always received good performance reviews had found himself on the outs when a female CEO came on board. Suddenly, the quality of his work was criticized, certain anti-male remarks by other senior employees were made, and the man found himself discharged and replaced by a female.

So Michael Carey brought suit for gender discrimination in violation of Title VII of the Civil Rights Act of 1964. The hospital asserted that Carey was terminated for cause, but the First Circuit has upheld a jury verdict in Carey's favor.

While the decision shows that men can prevail in a gender discrimination suit, very few men end up bringing legal actions for sex-based bias, says Sumner Lipman, Carey's attorney and a partner at Augusta, Maine's Lipman & Katz.

"The vast number of sex discrimination cases involve women being victims at the hands, typically, of men," agrees Joseph Sellers, head of the civil rights practice at Washington's, D.C.'s Cohen, Milstein, Hausfeld & Toll, a plantiff's firm. Of course, one of the reasons is that the "overwhelming majority of managers in the workplace is (still) men," adds Rodney Satterwhite, senior associate at Richmond, Va.'s McGuire, Woods, Battle & Boothe.

In the Carey case, however, the decision in the plaintiff's favor serves as a reminder to high-ranking women that they too might need to be a little cautious about casual workplace conversation. People in cases such as these often "don't realize they're being sexist," observes K. Tia Burke, a senior associate in the employment department of Philadelphia's Christie, Pabarue, Mortensen and Young. "They think they're just reacting to a sexist environment."

Some of the comments about which Carey complained seem to be the sort that people often make at the water cooler. For instance, Carey filed a complaint with the hospital's personnel director after the hospital's fundraising and public relations director, a woman, casually discussed a television program on child abuse at day care centers with Carey and another employee.

As the appeals court observed, the woman "concluded the discussion with, 'we live in a patriarchal society, and men skirt their duties toward child raising. And because men have money, power and position, because they have penises, then this is the type of thing that happens as a result.' "

"These were not nurses making comments to each other, or janitors speaking," says Burke. "These were high-ranking people close to the decision-making structure."

A jury, and later the appeals court, sided with Carey even though his employer has seemed to create a paper trail justifying the decision to terminate. "In this case, there was some documentation of the plaintiff's poor performance," observes Satterwhite. But, he explains, "the plaintiff got the opportunity to show (it) was a set-up." Ultimately, the jury decided that this was a case "of a company just nitpicking the plaintiff's performance."

The hospital contended that Carey mismanaged his financial responsibilities at the hospital. Yet Carey had been hired as comptroller in 1983 and was promoted to vice president of finance in 1991. The CEO who has originally hired Carey was himself discharged in January 1993.

Carey had gotten good performance appraisals under the old regime. He was passed over for CEO, however, and presented evidence that his application for the position was given short shrift. Moreover, in April 1993, new outside auditors prepared a management letter mentioning certain problems that would need to be addressed by the finance department. The auditors discussed these issues with the hospital's new female CEO in a September 1993 meeting to which Carey was not invited. He was fired less than a year later.

The reasons cited were uncorrected deficiencies in the auditors' management letter, the lack of a budget - the CEO and the hospital's finance committee had sent an earlier one back down to Carey for reworking when they disapproved certain high expenses - and a lack of confidence in Carey.

The auditors' management letter may have been much ado about nothing, according to the appeals court: "What sound like a massive indictment could have been read by a skeptical jury as a list of technical accounting recommendations to be expected from a firm making its first impression on a client."

Another fundamental message here for employers is that "they ought not to give employees good evaluations and then terminate them," says Lipman. Even if an employer is going to document performance problems, observes Burke, management should discipline consistently without penalizing some people differently than others. In this case, some women who have received poor reviews were disciplined through progressive measures, but Carey was shown the door.

Workers, for their part, should pay close attention before a crisis developments. "What happens fairly often is that an employee disregards the first couple of incidents and writes them off. Then, when a pattern emerges, they regret not paying attention to the earlier problems," says Sellers. Employees may want to start some sort of personal file after an initial incident even if they're not necessarily expecting to take legal action, Sellers suggests.