



Consultant can sue over Job Evaluation

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A business consultant who was fired after a negative performance evaluation could sue her employer for gender discrimination based on evidence that a manager who had taken part in the evaluation process had previously engaged in allegedly sexist behavior toward her, the Appeals Court has decided in an unpublished Rule 1:28 decision.

While a number of people participated in the evaluation and decision to terminate, the manager in question — who had a contentious relationship with the plaintiff consultant when they worked on a project together — apparently played a key role in the process.

According to the plaintiff, evidence of a sexist remark by the manager, combined with other belittling comments, suggested that the review process was “infected” by his alleged bias. Such a showing was sufficient to rebut the company’s assertion that it fired her for declining performance and a negative attitude, the plaintiff contended.

The Appeals Court agreed, reversing a Superior Court judge’s summary judgment for the company.

Although the company arrived at the termination decision by consensus, a jury readily could have found that the manager played a major role in driving the discussions that resulted in that consensus, the court wrote in a per curiam decision.

“This is not a case where it could be said that the employee’s case was reviewed with sufficient independence from the alleged bias as to break the chain of causation as a matter of law,” the panel said. “It was up to [a] jury to resolve the extent to which [the manager’s] comments and behavior revealed gender biased attitudes that could have infected [the plaintiff’s] evaluation.”

The 19-page decision is *Rochat v. L.E.K. Consulting, LLC, et al.*, Lawyers Weekly No. 81-089-13. [The full text of the ruling can be ordered by clicking here.](#)

‘Implicit’ bias

Plaintiff’s counsel Rebecca Pontikes of Boston said the ruling is especially important because the court, without using the exact phrase, acknowledged the validity of “implicit bias” as the basis for a discrimination claim.

“In this case, there was evidence that the member of a [decision-making] group was sexist, that he dominated the discussion, and that his decision carried the day,” she said. “The appellate court recognized that the evidence of discriminatory animus from him could be a basis for a jury to find that the entire decision was discriminatory.”

In light of the ruling, Pontikes said, it is important for plaintiffs’ attorneys, when dealing with a discrimination claim in a non-hierarchical, consensus-based environment, to carefully develop the

record to show where there might be animus and to sufficiently show that such animus may have played a determinative role in the decision.

“And if you’re an employer, you can’t just assume that a consensus decision will insulate you from liability, particularly where there was evidence of sexist comments,” she added.

Michael K. Clarkson, a management-side employment lawyer at Ogletree, Deakins, Nash, Smoak & Stewart in Boston, called the case “a good reminder” for employers to investigate the legitimacy of the decision-making of each member of a consensus-based team conducting an employee performance evaluation. The case shows that the potential bias of one member of the team can be enough to get a case to the jury, he noted.

Shannon M. Lynch of Beck, Reed, Riden in Boston, who also represents employers, said the ruling highlights the potential legal significance of stray comments when considered alongside other allegedly sexist behavior.

The manager in Rochat allegedly remarked of the plaintiff: “That’s a typical female thing to do.”

“An employer can address [stray remarks] in a lot of ways, including retraining,” Lynch said. “From a management perspective, it’s important to make sure that executives in particular are trained properly, because as this case shows, an inappropriate or insensitive remark can really leave you open to exposure.”

Christopher P. Litterio of Ruberto, Israel & Weiner in Boston represented the employer. He could not be reached for comment prior to deadline.

Poor review

In 2004, plaintiff Rachel Rochat began working as a consultant in the Boston office of defendant L.E.K. Consulting.

During her stint at the company, Rochat had full-time responsibility for one project at a time. For each project, she would manage a team of associates. Rochat typically answered to a different “manager” and two partners for each project.

Under company policy, Rochat received a written evaluation of her performance at the end of each project. The various managers and partners she worked with also participated in a consensus evaluation process that produced an overall evaluation of her work every six months.

Rochat described the company as having a decidedly male-dominated culture with only one female partner in the Boston office and no women at the manager level. The lack of gender diversity was allegedly pronounced enough to be parodied in a 2006 holiday skit.

During her first year, Rochat apparently received good project-specific evaluations and six-month reviews. She also received positive evaluations during the first few months of her second year before taking a leave of absence to play hockey for Switzerland in the 2006 Winter Olympics.

After Rochat returned, however, she received a review stating that her performance had “trended downward.”

Over the next several months, Rochat worked on four projects, two of which did not go well.

In the first of the two projects, she worked with a manager, Jonathan Chou, who allegedly had a very demanding reputation. At the project’s conclusion, Chou apparently gave her a mark of “below expectations,” but he noted that she had worked hard to overcome “less-than-ideal circumstances” beyond her control while maintaining a generally good attitude throughout.

The other project required team members to spend time living in Indianapolis. Rochat apparently objected to working on the case because she needed to be in Boston to deal with a family member’s health crisis, but the company did not remove her from the project.

During the project, Rochat apparently had personality conflicts with her immediate supervisor on the case, manager Thilo Henkes, who allegedly subjected Rochat to belittling comments on a regular basis, including remarking on one occasion, “Oh, that’s a typical female thing to do.” Rochat apparently felt Henke was trying to provoke a reaction from her in front of male colleagues.

Henkes, on the other hand, maintained that Rochat had a negative attitude, which created morale problems on the project.

Chou, Rochat’s supervisor on the first project, was tasked with pulling together Rochat’s six-month review and allegedly consulted with Henkes and another person in preparing a set of slides to be presented at the meeting at which her performance would be evaluated.

All three participated in the meeting, along with other managers and partners. While Rochat’s work ethic and credibility in front of clients was acknowledged at the meeting, a prevailing view emerged that she was “underperforming” and had a poor attitude. Henkes actively participated in the discussion and allegedly did much of the talking.

The company decided to fire Rochat rather than put her on a 90-day performance-improvement plan, and on Oct. 9, 2006, informed her of the decision, asked her to leave the premises, and denied her outplacement services and an annual bonus. According to Rochat, that was different from the treatment received by similarly situated male employees.

The day after her termination, the company produced an extremely negative project review for the second project, reportedly authored by Henkes. Though some of the concerns noted in the review had been previously documented, the timing, according to the Appeals Court, suggested that the company could have “shaded” its severity in order to justify an employment decision that had already been made.

Rochat brought a gender-bias claim against the company in Superior Court. The firm successfully moved for summary judgment, arguing that she had not met her burden of showing that its proffered reason for the termination — her performance and attitude — was a pretext for gender discrimination.

The plaintiff appealed.

Jury questions

The Appeals Court acknowledged that the company's "detailed and comprehensive" evaluation process helped build a case that it had legitimate reasons to terminate Rochat.

Nonetheless, the panel said, "even if a company relied on its performance evaluation process, that process itself might be infected by the bias of those performing the evaluation."

The court said Rochat offered evidence that Henkes was a decision-maker who influenced other decision-makers while acting in a "belittling manner toward her" based on her gender.

Meanwhile, the panel said, the trial judge — while characterizing as "overtly sexist" Henkes' remark "that's a typical female thing to do" — wrongly discounted the significance of the remark in proving pretext or discriminatory intent.

"Even putting aside the fact that [the remark was offered] as but one example ... we believe the judge engaged in fact finding that should have been left to the jury," the court said. "Put differently, a jury could have concluded — based on the summary judgment record — that Henkes's comments and needling behavior revealed a gender biased attitude that negatively affected Rochat's evaluation... ."

The court said the allegedly male-dominated work culture at the company, while not dispositive given the possibility of valid explanations, was a factor the jury could also consider in weighing for bias.

The panel further emphasized that even though other key players at the company, such as Chou, formed a negative impression of Rochat separately from her work on Henkes' project, "reasonable jurors could have concluded on the current record that Henkes played an important role in evaluating Rochat and that he materially affected the opinion of others who were evaluating her."

Because rational jurors could have concluded based on the record that the discriminatory animus of at least one key actor was "a material and important ingredient in the discharge," the court concluded, the motion judge erred by granting summary judgment to the employer.

CASE: *Rochat v. L.E.K. Consulting, LLC, et al.*, Lawyers Weekly No. 81-089-13

COURT: Appeals Court

ISSUE: Could a business consultant who was fired after a negative performance evaluation sue her employer for gender discrimination based on evidence that a manager who had taken part in the evaluation process previously engaged in allegedly sexist behavior toward her?

DECISION: Yes, because the evidence suggested that the evaluation process could have been "infected" by the manager's alleged bias.