

The Legal Intelligencer

THE OLDEST LAW JOURNAL IN THE UNITED STATES 1843-2016

PHILADELPHIA, WEDNESDAY, AUGUST 10, 2016

An **ALM** Publication

EMPLOYMENT LAW

Criticism of an Employee Is Not Necessarily 'Hostile'

BY SID STEINBERG

Special to the Legal

Employees will often complain that their workplace is “hostile” because their supervisor is critical of their work performance. But, of course, there is a difference between a “critical” work environment and a legally actionable “hostile” environment. This distinction was made clear in the recent decision of *Carter v. Vanguard Group*, No. 15-05370, 2016 U.S. Dist. LEXIS 97512 (E.D. Pa. July 26, 2016).

Cassandra Ballard-Carter was hired by Vanguard as a processing associate in 1996 and, in 2007, became a client relationship administrator (CRA). A CRA’s job is to be responsible for running a client’s retirement plan on a day-to-day basis. As a CRA, Ballard-Carter was responsible for working directly with the client and in tandem with a client relationship manager.



SID STEINBERG

is a principal and chair of Post & Schell’s employment and employee relations and labor practice groups. Steinberg’s practice involves virtually all aspects of employee relations,

including litigation experience defending employers against employment discrimination in federal and state courts. He also represents employers before federal, state and local administrative agencies, and regularly advises employers in matters including employee discipline, labor relations, and the creation or revision of employee handbooks. He can be reached at ssteinberg@postschell.com.

The CRM, however, is responsible for the overall client relationship. Both the CRM and CRA report to the client administration manager.

ISSUES NOTED WITH PERFORMANCE

In the fall of 2011, Ballard-Carter began reporting to Steve Bakey, a client administration

manager. After working with Ballard-Carter for a few months, Bakey observed that there were “issues” with her spelling and grammar and that “she would become defensive when he attempted to talk with her about it.” This observation was shared by others who worked with Ballard-Carter, such that in February 2013, Bakey met with Ballard-Carter to discuss improving her communication skills. Ballard-Carter stated that she felt as though she was working “in a hostile work environment because people were talking about her behind her back.”

Shortly after this meeting, Ballard-Carter contacted Bakey’s supervisor and human resources to state that “she couldn’t work here anymore because of the hostile work environment.” Specifically, Ballard-Carter complained of the way Bakey used profanity, her belief that people

were talking about her and specific comments from Bakey that “you’re the only one I go through this with” and “you pissed me off.”

Human Resources investigated Ballard-Carter’s concerns and advised her that although there were issues with Bakey’s “management style,” HR was unable to conclude that Bakey had created a hostile environment.

DIAGNOSIS OF HEARING LOSS

In April 2013, Ballard-Carter underwent a hearing examination at which she was diagnosed as having moderate hearing loss in her left ear and severe hearing loss in her right. She was never diagnosed, however, as being “deaf,” or even “partially deaf.” Nor was Ballard-Carter ever diagnosed as being dyslexic—although she testified that she believes herself to be dyslexic because she experiences difficulty with her “ability to think.”

Later in the spring of 2013, a particular client began to complain about Ballard-Carter’s performance, including complaints about the timeliness and accuracy of her communications. Bakey offered to again meet with Ballard-Carter and to review her written communications with the client before they were submitted. Although Ballard-Carter responded positively to this

overture, Bakey testified at his deposition, that he rarely received such communication.

COMPLAINT OF A ‘VERY VERY HOSTILE’ ENVIRONMENT

In September 2013, Ballard-Carter complained again to HR that her environment was “very, very hostile” and specifically alleged that Bakey had been unsympathetic to her being partially deaf” and that he had mentioned “my dyslexia.” HR requested a meeting with Ballard-Carter to further investigate, but she never responded to this request.

It is important for an employer to work with employees to improve their performance.

With client complaints mounting, Ballard-Carter’s annual performance evaluation, given in early 2014, was below expectations and identified, in part, “communication” as an area for improvement. Her review specifically stated that “her emails to both internal and external clients contained grammatical errors and typos” and noted that a particular client had requested that she be removed from their account. A few

months after receiving this review, Ballard-Carter began a medical leave for hip pain from which she apparently never returned.

Ballard-Carter brought suit against Vanguard claiming that she had been discriminated against, retaliated against, refused an accommodation and subjected to a hostile environment under both the Americans with Disabilities Act and the Pennsylvania Human Relations Act. Counsel withdrew most of his client’s claims during briefing or at oral argument, leaving only the claims for hostile work environment and failure to accommodate. Following discovery, Vanguard moved for summary judgment.

The court initially questioned whether Ballard-Carter’s hearing loss rose to the level of a “substantial limitation of a major life activity,” but found that it was unnecessary to make a determination of this issue because of her failure to state a viable hostile environment claim. Counsel withdrew Ballard-Carter’s claim that she was disabled due to dyslexia—thereby avoiding a determination as to whether a self-diagnosis could support a disability finding.

NO GUARANTEE OF A HAPPY WORKPLACE

In considering Ballard-Carter’s claim that her work

environment was “hostile,” the court cited the U.S. Court of Appeals for the Third Circuit’s finding that Title VII “prohibits severe or pervasive harassment; it does not mandate a happy workplace. Occasional insults, teasing or episodic instances of ridicule are not enough; they do not ‘permeate’ the workplace and change the very nature of the plaintiff’s employment.” With this as the standard—the court found that, at most, Bakey made potentially offensive comments to Ballard-Carter on a sporadic basis which, even if taken together, did not satisfy the “high” threshold the Third Circuit has set for “severe or pervasive” conduct.

Furthermore, the court found that “although Ballard-Carter may have perceived Bakey’s comments as offensive, they are in no way comparable to the severity of ... statements” that, on their face, are so severe that they constitute a hostile environment. The court noted that Bakey’s alleged comments were not “objectively hostile or abusive.”

The court also rejected Ballard-Carter’s claim that she had been denied a reasonable accommodation, finding that there was no evidence that any Vanguard employee had “refused to cooperate

with her on any of her requests.” Moreover, the court found that Vanguard in general and Bakey, in particular, had repeatedly attempted to assist Ballard-Carter in improving her communication skills. “Since the undisputed facts demonstrate that Vanguard consistently made good-faith efforts to assist Ballard-Carter [to] improve her communication skills” her failure to accommodate claim failed as a matter of law.

PRACTICAL POINTS

The case emphasizes that a number of practical points. First, it is important for an employer to manage its employees, which often includes critical feedback in order to improve the employee’s performance. While Ballard-Carter claims to have understood Bakey’s criticism of her “communication” as referring to her hearing—there was no evidence that this was objectively so. It should also be noted that Ballard-Carter testified that she took extensive contemporaneous notes of her conversations with Bakey, but her notes did not reflect the allegedly harassing comments about which she testified.

Secondly, it is perfectly acceptable for an investigation into an employee’s complaints result in a finding that the behavior

in question, while perhaps imperfect managerial conduct, is not “hostile” as a matter of law. It was important for Vanguard to investigate Ballard-Carter’s allegations, but the complaint did not mandate any particular finding.

Finally, it is important for an employer to work with employees to improve their performance. In this matter, there was extensive testimony that Vanguard tried to reach out to Ballard-Carter and that she refused the offers of assistance. It was also important for Vanguard to have documented its efforts so there could be no dispute if, and often when, difficult decisions needed to be made. •