

The Legal Intelligencer

Leaving the Door Open to Departing Employees

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Broken Employer Promises

The employer in *Gonzalez* laid off more than 100 workers in December 2008 because of poor economic conditions. At that time, the plant manager indicated to the plaintiffs that they would likely be called back to work in early 2009, according to the opinion. However, in April 2009, the vice president of finance formally terminated the affected workers, noting in letters to the workers that no recovery to the company's former workload was likely in the near future. Significantly, the VP further advised the laid-off employees in those same letters that "it does not mean that you will never be rehired by [the company]." The VP did not stop there. He further stated: "If and when [the company is] in a position to offer your job back to you, [the company] will contact you to see if you are available."

The three plaintiffs in *Gonzalez* were Hispanic, and had been laid off from their positions as floor managers in December 2008. The company later hired five new, white floor managers between August 2009 and May 2010, none of whom had ever been employed by the company. No one contacted the plaintiffs about these openings, despite the employer's promise to do so. While the company finally reached out to the plaintiffs in August 2010 when additional positions became available, they were not interested because they had found employment elsewhere.

The three plaintiffs asserted failure-to-rehire claims based on race pursuant to 42 U.S.C. §1981, Title VII of

the Civil Rights Act of 1964 and the Pennsylvania Human Relations Act. The court denied the employer's motion for summary judgment on the failure-to-rehire claims, stating that the plaintiffs presented sufficient evidence of alleged discrimination to proceed to trial. The court also allowed claims against the company's president and plant manager for individual liability under Section 1981 and the PHRA to proceed to trial, finding that both were decision-makers and supervisory employees. The court did grant the employer's motion for summary judgment on punitive damages, stating that there was no evidence that the company acted in face of a perceived risk that its actions would violate the law.

Lessons to Be Learned

The employer in *Gonzalez* made mistakes and miscalculations that led to the court's decision. For instance, the employer made a written, affirmative promise to contact the plaintiffs if jobs were to become available. The employer undeniably broke that promise. While the broken promise is not grounds to assume the employer had a discriminatory motive, it is not a helpful fact.

The employer made other mistakes, too. One of the employer's stated reasons for not rehiring the plaintiffs was their poor performance. While the employer had some emails from the plant manager suggesting poor performance, the plaintiffs had never been disciplined for poor performance. The plant manager also advised two of the plaintiffs that they would be called back to work in early 2009. The VP further indicated that the plaintiffs' terminations were not a reflection of their value as employees and reserved the possibility that they may be rehired. Moreover, the company president testified that he would have brought everyone back in early 2009 if the economy had improved. This loose talk and testimony played a role in the court's decision to deny summary judgment.

There was also another piece of evidence that weighed against the employer on summary judgment. In its position statement to the Equal Employment Opportunity Commission, the employer expressly stated that one of the plaintiffs "was not laid off because of any shortcoming in his performance, [and] he has always been an excellent and valuable employee." Notably, the court denied the employer's motion in limine to preclude admission of this evidence. The court pointed out that the employer's position statement was not made in the course of an informal conciliation process but was in response to, and a denial of, the plaintiffs' charges of discrimination.

The employer did not fare any better on another legitimate, nondiscriminatory reason it offered for its actions. The employer stated that it hired new floor managers at lower salaries than what the plaintiffs had been paid. While acknowledging that salary may serve as a legitimate, nondiscriminatory reason for an adverse employment action, the court found no evidence that the employer considered salaries in its decision not to rehire the plaintiffs.

Finally, none of the three plaintiffs applied for any of the job openings at issue, yet they were permitted to proceed with their failure-to-rehire claims. In the U.S. Court of Appeals for the Third Circuit, a former employee can assert a failure-to-rehire claim without applying for the job if the employee made every reasonable effort to convey his or her interest in the job to the employer and did not apply for one of two reasons: (1) the employee was deterred from applying by the employer's discriminatory practices and would have otherwise applied; or (2) the employee had a real and genuine interest in the job but reasonably believed that completing a formal application would be futile. Another avenue available to circumvent the application issue is for the employee to show that the employer had a reason or duty to consider the employee for the open position. Given the employer's promise to contact the plaintiffs if there were openings, the court found that the employer had an obligation to consider the plaintiffs for those openings. Moreover, the court noted that the employer did consider two of the plaintiffs for openings and rejected them.

What actions can employers take to reduce the risk of failure-to-rehire claims? First, employers should not promise to take any affirmative action with respect to departing employees that they are not otherwise required to take by law. Doing so creates a high compliance risk. Second, if an employee is a poor performer, document it and take action during the employee's employment. After employment is terminated, don't paint a rosier picture of the employee's skills and accomplishments than the documentation reflects.

Third, if employees are selected for lower salary requirements or other legitimate, nondiscriminatory reasons, document the reasons. Lastly, determine if there is an obligation to consider terminated employees for job openings. Failure to engage in these and other best practices for hiring opens the door to potential claims.

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