

KRAMER RAYSON LLP
ATTORNEYS AT LAW

**NAVIGATING MINEFIELDS CREATED BY
DISGRUNTLED EMPLOYEES**

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Panelists: Edward G. Phillips, Betsy J. Beck, Brandon L. Morrow



GENERAL BACKGROUND

Henley Bridge Works (“HBW”), a bridge design and construction company with 55 employees, is up against the clock to meet a completion deadline. HBW contracted to renovate the Big Orange Bridge (“Bridge”) and have it reopened on or before October 24, 2014. In order to complete the project in time, HBW has engaged the services of several independent contractors. Unfortunately, pesky employment issues keep arising that could potentially delay the Bridge’s progress.

HYPOTHETICAL NO. 1

The Bridge is 100 years old and is in need of a serious facelift, so HBW engages the services of a sandblaster, **Cam Sanders**, and a painter, **Eduardo Phelps**. In the past, Sanders had been employed by HBW as a sander, but HBW recently eliminated this position. Phelps has worked with HBW on a couple of projects, but has never been an “employee.”

Per HBW instructions, Sanders is required to use a patented Micro-Abrasion technique that is allegedly more environmentally friendly than traditional sandblasting. HBW provides the Micro-Abrasion sander and the appropriate coarse particles to use with the machine. Sanders uses his own ropes, harnesses, and mask. He is paid hourly and works 12-hour days. HBW requires him to complete the sandblasting by March 1, 2014, so as to give Phelps plenty of time to paint. To ensure Sanders is finished in time, HBW conducts weekly progress reports on the sanding job.

Phelps is required to paint the Bridge orange (of course) and have it completed by October 21, 2014. He provides the paint, brushes, and sprayers. However, he uses HBW equipment to ensure his color is accurate. Phelps agrees to paint the bridge for \$19,980.00. After he contracts for the job, but before he purchases the paint, the price of orange paint skyrockets leaving him with a very slim profit margin.

Upon completion of the Bridge, HBW throws an employee appreciation party. Being friends with many HBW employees, and an integral part of the Bridge’s renovation, Sanders is invited. Phelps, however, is not.

Assume HBW has independent contractor agreements with both Sanders and Phelps outlining the terms set forth above.

HYPOTHETICAL NO. 2

Layne Kiphen, a HBW employee, turns in FMLA paperwork to care for his father, who has end-stage congestive heart failure. This comes at a critical stage of Bridge renovation. The physician certification states that Layne is responsible for feeding, bathing, and transporting his father to and from doctor's appointments, and helping him move around the home. A local Make-a-Wish foundation grants Layne's father a 6-day recreational trip to Las Vegas, which will include playing slots, dining at restaurants, and a Cher concert. Layne goes on the trip and reports the time to HBW as FMLA-covered absences.

Layne documents this trip heavily via Twitter, Facebook, and Instagram. **Fred Orgeron**, a Facebook friend of Layne's, reports the social media posts to HBW management: "I thought he was supposed to be caring for his sick father, not hitting the jackpot at the Bellagio!" HBW HR investigates Layne's FMLA leave. Pursuant to HBW policy, Layne and Orgeron are told to refrain from discussing the matter while HBW conducts the investigation.

HYPOTHETICAL NO. 3

Dolly Patron, an HBW employee and lead engineer, believes that she has been sexually harassed on the jobsite by **Fred Orgeron**, an HBW employee and maintenance worker. Ms. Patron files a hostile work environment charge with the EEOC. Only HBW's HR Director, **Will Klinten**, is aware of the EEOC charge. Based on prior interactions with Ms. Patron, Mr. Klinten believes that she may fabricate her story (and encourage others to do the same) to help her case. So, per HBW policy, she is told not to discuss her complaint or the investigation with anyone else.

Days later, Ms. Patron makes a series of miscalculations that significantly delay the Bridge's progress. Her supervisor, **Bob Browman**, decides to demote her to assistant engineer. Ms. Patron believes her demotion is related to her earlier EEOC charge – she files a second charge alleging unlawful retaliation.

HYPOTHETICAL NO. 4

Butch James, a HBW employee, is responsible for putting the brick . . . by brick . . . façade on the Bridge's railing. James reported directly to **Stephanie Spurrier**, a female HBW employee and masonry foreperson. Spurrier directed James' daily activities (*i.e.*, what portion of the Bridge to work on, when to break for lunch, and quality control). Masonry forepersons, like Spurrier, did not get paid enough to direct hiring, firing, and discipline issues, so those decisions were left to others.

James alleged sexual harassment by Spurrier. Spurrier frequently made comments that "men are terrible bricklayers" and this is a "woman's job." She criticized James' work, saying that his bricklaying abilities "lacked a woman's touch." She also locked him in a port-a-potty and put super glue on his tools. Even though James endured Spurrier's constant berating and pranks, his job as a bricklayer did not really change. Eventually HBW management heard about the harassment and reassigned Spurrier to a different department and counseled her about future behavior. James never complained about the harassment, even though HBW policy dictated that he notify the HR department if he felt harassed.

HYPOTHETICAL NO. 5

Anthony (Tonya) Winner is a pre-operative male-to-female transsexual. Winner lived off-the-job as a woman, had a French manicure, had arched eyebrows and came to work with makeup or lipstick on his face on some occasions. Instead of wearing regular blue jeans like the rest of the HBW crew, he fashioned his denim into shorts with a minute inseam; he also glued sequins and jewels onto his hard hat and work boots. While certainly different, this style of dress was not against any HBW policy.

In July 2013, Winner was promoted to HBW safety inspector. Safety is very important to HBW, so as part of his promotion, Winner had to pass a 90-day probationary period consisting of written tests and performance evaluations. One of the criteria evaluated during this probationary period was "Leadership Capabilities." HBW believes that those employees responsible for enforcing safety rules and regulations should be respected, direct, and forceful leaders to encourage safe practices.

Throughout his probationary period, Winner consistently ranked low in the "Leadership Capabilities" category. Some of Winner's supervisors told him that if he dressed like the rest of the crews, he would have greater "command presence" and workers would respect him more. Because Winner was not improving, he began to get evaluated every day (no other probationary employee was evaluated as frequently). Winner claimed that many of problems during probation were related to his elevated stress level, which would not have occurred but for his superiors singling him out in the manner they did.

Ultimately, Winner did not make it through the probationary period. He was demoted to traffic cone attendant. Winner is the only HBW employee to never pass safety inspector probation. Winner challenged his demotion under Title VII alleging gender discrimination.

HYPOTHETICAL NO. 6

The Bridge job was not as profitable for HBW as initially projected. As a result, the President directed the Human Resources Manager to prepare for a Reduction-In-Force ("RIF") to be implemented in approximately 30 days. The RIF, according to the President, should include employees from each of the company's four departments and total approximately 25 employees.

Three months before the RIF, **Daarik Dudley** was about to be fired for continually violating Company rules, but was given a last chance agreement (LCA) instead, stating "One more rule violation and you will be terminated." Mr. Dudley immediately filed an age discrimination charge with the EEOC. During the LCA period, management subjected him to "increased scrutiny," as was its practice during such periods. He was selected for the RIF largely because of his failure to follow the rules prior to the implementation of the LCA.

HYPOTHETICAL NO. 7

Assume that Mr. Dudley was terminated (no RIF), but that he maintains his age discrimination claim. He bases his age claim on comments made by two separate individuals.

First, he alleges that a co-worker, **Zach Buggin**, made the following comments over the last few years:

- "Dudley, you old silver fox, you're too old to be out here on this bridge."
- "There's Grandpa Dudley!"
- "You're just not as sharp as you once were, old man."

Second, he alleges that his supervisor, **Jon Summers**, said the following:

- "Daarik Dudley's leaving here at 62 – like it or not – and I'll see to it."
- "The old man has been here too long – it's time for Social Security to kick in."

HYPOTHETICAL NO. 1

- Which worker more closely resembles an employee? Why?
- If Sanders is considered an employee, has HBW paid him correctly? What are the potential damages?
- Assume Sanders harasses Phelps on March 1, 2014 while they are both at the jobsite. Phelps sues Sanders and HBW for a hostile work environment. This is HBW's first notice of the alleged harassment. Analyze HBW's defenses.

HYPOTHETICAL NO. 2

- Should the time be counted as FMLA or should the Company consider the trip an abuse of FMLA and an unexcused absence?
- Does it change anything if Layne's FMLA paperwork indicated that he needed FMLA leave only to transport and attend his father's medical appointments?
- Would the directive to Layne and Orgeron not to discuss the investigation violate either employee's rights under any statute?

HYPOTHETICAL NO. 3

- Does Ms. Patron have a claim for retaliation?
- In regard to her retaliation claim, what are HBW's best defenses?
- Assume that Browman was handed the evidence of the performance problems by Klinten, who embellished the negative impact on the Company. Browman, however, still does not know about the original EEOC charge and is the sole decisionmaker for the demotion. Does that change anything?
- Would the directive to Ms. Patron not to discuss her charge and/or investigation violate her NLRA Section 7 rights?

HYPOTHETICAL NO. 4

- Is Spurrier considered a coworker or supervisor for purposes of the harassment claim?
- Now assume Spurrier is a supervisor (*i.e.*, had the ability to hire/fire). Did Spurrier's conduct result in a tangible employment action against James?
- Does HBW have an affirmative defense to James' harassment claim? If so, explain.

HYPOTHETICAL NO. 5

- Under Title VII, can Winner establish that he was a member of protected class?
- Would it change your analysis if the observing and critical supervisor was a female?
- What could the Company do about its concerns related to Winner's clothing and/or uniform choices?

HYPOTHETICAL NO. 6

- Could the increased scrutiny after he files his charge be considered evidence of retaliation?
- If he violates the last chance agreement right before the RIF, is the Company better off to terminate him for violation of the last chance agreement or include him in the RIF?

HYPOTHETICAL NO. 7

- Are Mr. Buggin's statements direct evidence of discrimination?
- Are Mr. Summers' statements direct evidence of discrimination?
- How does the presence of direct evidence (as opposed to indirect evidence) impact HBW's ability to defend this claim?