

COLORADO EMPLOYMENT LAW LETTER

A monthly survey
of employment
law developments

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Sample Issue

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Colorado Jury Returns \$2.3 Million Discrimination Verdict

A seven-member federal jury awarded two plaintiffs a \$2.345 million verdict in September 1992, setting a record in a race discrimination case. The case was brought by Laurie Fitzgerald and Aaron Hazard against U S West Communications, Inc. (U S WEST), after Fitzgerald and Hazard had participated in a pluralism training workshop.

Fitzgerald, a white woman, and Hazard, a black man, were independent consultants who were invited in May 1989 to participate in a U S WEST training program designed to identify individuals who could serve as facilitators for company-sponsored diversity training workshops nationwide.

On the first day of the workshop, participants were encouraged to talk about their personal experiences and how their backgrounds affected how they perceived diversity issues in the workplace. Participants were assured of confidentiality, and many of the stories shared with the group were quite personal and emotional.

Fitzgerald talked about her experience in a long-term romantic relationship with a black man, explaining that many people in the black community had isolated her and her partner because of their mixed racial relationship. While speaking, she became emotional and cried. Hazard hugged her for moral support.

Fitzgerald and Hazard claimed that, from that point forward, Debra Sapp, a black woman directing the workshop, became hostile towards them and made racially disparaging remarks to Fitzgerald, calling her at one point a "white bitch." Sapp also purportedly told Hazard that she would give him contracts for work only if he disassociated himself from Fitzgerald. At the end of the workshop, Fitzgerald was terminated from the program. Hazard, although he was not terminated, was never offered any diversity training work.

After the training session, Fitzgerald and Hazard wrote letters to U S WEST asking the company to investigate. Although the company later sent them a letter stating it had found no reason to believe discrimination had occurred, Fitzgerald and Hazard claimed that the investigation was done in a perfunctory way. For instance, they claimed that the manager in charge never checked with Sapp to see whether she had made any discriminatory comments to Fitzgerald. In addition, the company never contacted either Fitzgerald or Hazard during the investigation.

Fitzgerald and Hazard sued, claiming that U S WEST had refused to do business with them on the basis of race in violation of 42 U.S.C. § 1981, a

post-Civil War law that prohibits racial discrimination in the making of contracts. They also claimed that the company had failed to investigate adequately Sapp's conduct.

U S WEST denied that it had discriminated on the basis of race, but rather, had legitimate, nondiscriminatory reasons for the decisions not to use Fitzgerald or Hazard for diversity training after the workshop. It also denied that Sapp had made the alleged discriminatory remarks.

The jury decided discrimination had occurred. Counsel trying the case believed that the testimony of Jan Fincher, a pluralism training manager for U S WEST and the person responsible for the investigation, was critical. Fincher testified that Hazard had not been given any contracts, because he had supported Fitzgerald in her discrimination claim. Fincher explained that it made no sense to hire someone who was a friend of someone bringing discrimination charges against the company. Fincher also admitted that she had never asked Sapp whether she had made racial remarks to Fitzgerald during the training class. She further testified that she felt it was appropriate to allow Sapp herself to conduct the investigation into Fitzgerald's allegations, and she saw no reason to question the credibility of the investigation results.

Attorneys for Fitzgerald and Hazard, Kathryn E. Miller of the law firm Miller & Steiert P.C. and Robert J. Truhlar of the law firm Truhlar & Truhlar, called a psychologist at trial to explain how Sapp's actions were consistent with a social phenomenon in which African-American women become angry at Caucasian women who have romantic relationships with African-American men.

The jury awarded \$2.35 million. Of that, Fitzgerald received approximately \$1.29 million, including \$535,000 for economic damages, \$250,000 in emotional distress damages, and \$500,000 in punitive damages. Hazard received \$1.06 million, including \$310,000 for economic damages, \$250,000 in emotional distress damages, and \$500,000 in punitive damages.

Colorado employers can learn several important lessons about conducting investigations from this case. When a complaint of discrimination is made, an employer should investigate as promptly and as thoroughly as possible. The alleged perpetrator should be contacted directly and objectively interviewed by an independent investigator. Other potential witnesses should be contacted; for instance, in this case, other participants at the diversity training workshop could have been interviewed. Those complaining of discrimination

should be interviewed. Finally, after a thorough investigation, the persons who complained should be notified of the results of the investigation by a senior person directly responsible for the investigation. If not, a jury may conclude the investigation was done in a perfunctory way, assume the employer had no good reason for its conduct, and punish the employer accordingly.

Fitzgerald v. Mountain States Tel. Co., Civ. Ac. No. 90-Z-236 (D. Colo. Sept. 23, 1992).

Colorado Employer Wins Again in AIDS Case

In a recent decision, the Tenth Circuit Court of Appeals, which hears appeals from Colorado district courts, upheld the trial court's 1991 ruling that a former vice president had *not* been fired because he had AIDS or was HIV-positive. Holland & Hart successfully represented the employer, Field Real Estate Company, and other defendants in the case, one of the first employment-related AIDS discrimination cases to be tried in this area.

The case was filed originally in November 1989. The former employee, Phelps, alleged four claims against the defendants, which included his employer, Field Real Estate Company; Western Capital Investment Corporation, the parent of Field; Bank Western, a sister company; and two executives of Field. Damages in excess of \$1 million were sought. Phelps's emotional distress and wrongful act claims were dismissed on a motion for summary judgment three weeks before trial; the remaining two claims, for Employee Retirement Income Security Act (ERISA) discrimination and handicap discrimination under Colorado law, were tried to the court.

In his December 31, 1991, decision, Judge Richard P. Matsch of the U.S. District Court for the District of Colorado ruled in favor of the defendants and against Phelps on both of his remaining claims. Judge Matsch found: (1) that the evidence strongly supported a finding that the performance of the division headed by Phelps failed to meet the expectations of Field's management and board of directors; (2) that it was significant that Phelps's termination did not occur until over 14 months after his medical condition was first disclosed; (3) that Phelps had been "manipulative and secretive," that he had not functioned as one would expect a member of the management team to function, and that he had misled Field regarding the true nature of his medical condition; and (4) that Phelps had *not* been discharged or discriminated against because he had AIDS or was HIV-positive.