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Jury finds retaliation in lifeguard bias case

Employment lawyers are hailing a trial victory for a former Virginia Beach lifeguard who claimed gender discrimination by squad leaders, even though her discrimination claim faltered and a jury awarded only \$17,500 in damages for retaliation.

A lawyer for the defendant lifeguard service says the trial outcome is no cause for celebration, considering the original demand for \$300,000 and claims that failed to survive.

The jury verdict in Norfolk federal court marks a break from the usual pattern for employment plaintiffs, lawyers agree. Savvy practitioners say it is rare for a plaintiff to even get to a jury trial, much less come back with a victory.

Still pending in the lifeguard's case is her lawyers' motion for fees and costs totaling nearly \$270,000 and expected post-trial motions and a possible appeal from the defense.

Robin Lang joined the Virginia Beach Lifeguarding Service in 2005, according to her complaint. Three years later, she was promoted to the position of Crew Chief.

She rose no higher. Despite aspiring to become a Sergeant with a higher pay rate, Lang said she was passed over four times for the post while male lifeguards equally or less qualified were promoted.

In March 2012, Lang filed a charge of discrimination with the Virginia Council on Human Rights and with the federal Equal Employment Opportunity Commission. Within weeks of filing the administrative charge, Lang said, she was cut off from internal communications at the VBLS.

Lang claims she was terminated a month later for reasons she characterized as mere pretexts.

Lang did not languish on the unemployment rolls. She quickly found work as a lifeguard in Corolla, N.C., at even better pay than the Virginia Beach job.

With almost no out-of-pocket financial damages, the case might have been passed over by many attorneys. But Norfolk lawyer Lisa A. Bertini saw the case as a chance to right a wrong.

"I took the case thinking it would go away early," Bertini said. "It really was, to me, about

the incredible flagrancy of VBLS."

Bertini contended the lifeguard service was dominated by men in the higher ranks. Although the squad was about 50 percent women, only one woman was among the 21 supervisors.

"To try to make it up the ranks, as Robin wanted to, it's a boy's club," Bertini said.

There was no wrong in VBLS' actions, the company replied. Deputy Chief Thomas Gill explained the company had to re-organize in 2012 because it had won a new city contract for lifeguard services with new requirements. Lang showed little interest in being part of the new regime, Gill said in an affidavit.

Since the VBLS was, in effect, starting anew, Lang's non-employment was not a termination but a decision not to hire, the company contended.

Senior U.S. District Judge Robert G. Doumar crafted his own jury instruction to address the dispute over the separation, using language from a deposition answer in which Gill said it was decided to "set her free."

Before reaching a jury trial, however, Lang had to swim the choppy seas of employment litigation. There were depositions, a motion for partial summary judgment and a contested motion in limine.

By the time of trial, the only issue was retaliation, since the discrimination claim was barred by a limitations period.

The trial was a battleground for three days, Bertini said. Lang had one witness besides herself. The VBLS had eight.

Even Doumar expressed skepticism about Lang's cause, outside the presence of the jury, Bertini said.

The result was no ringing victory, said Virginia Beach lawyer Samuel W. Meekins Jr., one of VBLS attorneys. He said Lang originally claimed violation of the Equal Pay Act, gender discrimination and retaliation. Lang's lawsuit demanded \$300,000 in compensatory and punitive damages.

When the trial finished, the Equal Pay Act and discrimination claims were gone, and the verdict was just \$17,500 for retaliation.

Meekins said VBLS has plans for motions to set aside the verdict and for a new trial, with plans for appeal if the outcome is unfavorable.

The case could have been resolved "several times" before it went to a jury trial, Meekins said. Bertini said the only offers came after many hours of legal work had been invested.

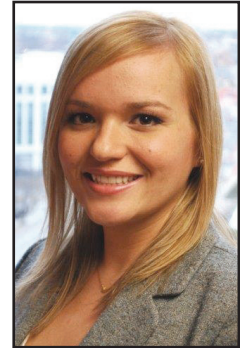
"There's no way they would have paid even a fraction of the attorney fees," Bertini said. "I said, 'This is a case we have to try.'"

Bertini has requested attorneys' fees and costs totaling \$269,217.70.

Charlottesville employment lawyer John E. Davison was enthusiastic about the trial win in what is viewed as a difficult forum. "There will be bigger verdicts, and there will be larger damages, but I don't believe I will ever see a



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ROBIN LANG, LIFEGUARD



more smashing victory," he wrote in a congratulatory email.

Most employment cases "never get close to a trial," Davison said. "They get picked off by summary judgment or they settle," he said.

A critical obstacle for disgruntled job seekers or former employees is proving the reason for their rejection by the company. The plaintiff has to show the employer had a bad motive.

"What's important isn't the 'what,' it's the 'why,'" Davidson said.

Bertini said Lang's case turned on credibility, and the jury rejected the company's explanations about Lang's alleged lack of interest.

"I am so proud of the jury for cutting through that stuff," she said.

— Peter Vieth