



An Employer's Horror Story For Friday The 13th: Retaliation Claim Survives 13-Year Gap

Insights

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January 2017 is one of those rare months including a Friday the 13th, which might bring to mind a horror movie where a seemingly vanquished killer somehow rises to his feet – once again! – to wreak havoc on his stunned victims. Just like an undead specter rising from the grave long after you think it's been killed off, an employer recently faced a retaliation claim despite the fact that a 13-year gap existed between the alleged protected activity and the adverse action.

Here are 13 quick bullet points to help you digest this employment-law-version of the classic horror story. (*Note: this story is generally comprised of allegations lodged by the former employee, many of which were disputed by the employer and company management.*)

1. Horror Story Begins Innocently Enough

Just like with most horror stories, this one begins in a fairly benign manner. Robert Pace began work for Alfa Mutual Insurance Company in Hattiesburg, Mississippi in 1986. By 1990 he was promoted to the Senior Vice President of Marketing position, a job he ended up holding for 24 years.

2. Pace Gets Along With Supervisor – At First

During a four-year span between 1997 and 2000, Pace was supervised by Executive Vice Marketing Alvin Dees. Things seemed to be going fine between the two of them...until a sexual harassment case arose and caused a rift in their relationship.

3. Sexual Harassment Case Drives Wedge Between Employee And Supervisor

In September 2000, an employee named Tracy Wilson filed a sexual harassment lawsuit against Alfa Mutual and Dees, accusing Dees of improper conduct. Dees denied any wrongdoing and claimed that his behavior was above reproach. But he was curious about how his coworkers viewed his behavior, so he asked Pace for his view of the matter.

Management had just interviewed Pace as part of its investigation into the sexual harassment allegations, and Dees wanted to know what Pace told them. Pace told Dees that he was “uncomfortable” being put in this situation but that he had shared information about “many damaging things” involving Dees and his conduct. It included the fact that Dees invited Wilson to join him on business trips and shared a hotel room with her. despite the fact that there was no

jointly on business trips and shared a hotel room together, despite the fact that there was no business purpose for Wilson's presence.

4. **Dees Forced Out The Door Due To Allegations**

As you could imagine, Dees was not happy to have been described in this way by Pace, as Pace's information helped inform management that the allegations against Dees may very well have been true – and exposed the company to liability. The president of the insurance company told Dees that he could no longer be trusted and could no longer work for Alfa Mutual. Dees ended up taking an early retirement in October 2000 to avoid getting terminated.

5. **13 Years Of Peace Followed...**

The following 13 years were relatively peaceful from Pace's perspective. He continued in his role as Senior Vice President, and his department outperformed all other districts in the company. He claimed that his production rose by – wait for it – 13 percent (there's that number again). Just like that point in the horror story where everything is going fine and the main character can relax, that's when the terror began anew.

6. **...And Then Pace's Nightmare Began Once Again**

In 2013, Alfa Mutual brought Dees back to resume his role as Executive Vice President. There had been a change in leadership at the company, and whether management didn't believe, didn't know, or didn't care about the earlier allegations against him, he was once again installed in his former role after a 13-year absence – and was again Pace's supervisor.

7. **Pace Sought – And Received Assurances – That His Job Was Safe**

Understandably worried about having to once again report to a man whose career he may have derailed by cooperating with the sexual harassment investigation 13 years prior, Pace went to the company president and asked him about his job status. According to Pace, the president assured him that he was a "bright spot in the organization" and that he had "nothing to be concerned about." After all, he was performing at a high level and his department was the most productive at the company. Because of these assurances, Pace declined other job opportunities that presented themselves at that time. He would soon regret that decision.

8. **Dees Lets Pace Know That He Has A Long Memory**

Pace claims that immediately after Dees returned to the company, he began to terrorize him. In fact, the campaign began with a phone call that immediately preceded Dees' first day back, with Dees telling Pace, "I bet you thought you'd never have to mess with me again!" Once back in his old job, Dees immediately stole Pace's long-term administrative assistant without warning, placing her as his own assistant. Pace then learned from other management personnel that Dees had Pace on his "hit list" and that it was probably for the best if he looked for another job.

9. **Dees Drops The Hammer On Pace**

In just a few short months, Dees dropped the hammer on Pace. He demoted him to a district manager position in another part of the state – a two-step demotion that also involved a location transfer. According to Pace’s version of events, he confronted Dees and demanded to know why he was being demoted and transferred despite his high-level performance, and Dees “stuttered and stammered” and said, “well, it’s hard to explain.”

10. **Pace Quits Alfa To Escape Further Terror**

Pace would not stand for the demotion and quit his job. Instead he filed a federal retaliation lawsuit against Alfa Mutual under Title VII of the Civil Rights Act, seeking compensation for his losses and his emotional suffering at the hands of Dees. The employer must have felt like another horror movie victim when it received the federal complaint and saw that what it must have considered a long-dead situation was now front-and-center in a current lawsuit.

11. **Employer Argues That The 13-Year Gap Could Not Support A Retaliation Claim**

Alfa Mutual sought to have the case dismissed from federal court, arguing that the long gap in time between Pace’s alleged protected activity (assisting with the sexual harassment investigation in 2000) and the alleged adverse action (the demotion in 2013) could not support the retaliation charge. The employer argued that it was “implausible” that a 13-year span could come anywhere close to meeting the necessary retaliation standard, especially given the fact that federal courts routinely dismissed cases if a mere three or four months passed between cause and event.

12. **Court Rejects Defense Motion, Allows Retaliation Claim To Proceed**

The court rejected the employer’s argument, pointing out that Dees used the first chance he got to carry out his campaign of retaliation against Pace. Despite the fact that 13 years passed between the activity and the adverse action, the court pointed out that this was actually “immediate” given the fact that Dees was not in any position to carry out the retaliation during the 13-year gap. Once you eliminate the time he spent away from the company, the court said that Dees carried out what could be considered retaliatory conduct in a very close temporal proximity to Pace’s protected activity.

The court noted that it would routinely dismiss retaliation claims involving a three- or four-month gap if those cases are “unsupported” by other circumstantial evidence suggesting retaliation. However, in this case, Dees’ comments demonstrated he had not forgotten about the protected activity from 13 years previous, which sufficed to satisfy Title VII’s retaliation standard. This allowed the retaliation claim to survive and be scheduled for a jury trial.

In November 2016, before a trial could take place, the parties reported an undisclosed settlement and the case was dismissed.

13. **What Can You Learn From This Case?**

The key to avoiding retaliation claims is a consistent application of your disciplinary policies and a thorough documentation of critical company decisions. You will be in the best position to defend yourself against a similar claim if you ensure all of your management personnel are well-trained to follow your professional conduct standards, hold all of your employees to the same misconduct rules, take all allegations of retaliation seriously, and well document all demotions, transfers, and reorganization decisions (including supporting data).

Retaliation claims are like undead zombies, just waiting to rise from the grave and haunt you when you least suspect them. You can avoid a horror-movie ending at your own organization if you use this case as a learning tool and minimize the chances of a retaliation claim coming back to life.

If you have any questions about this case or how it may affect your business, please visit our website at www.fisherphillips.com or contact your Fisher Phillips attorney.

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