

SIXTH CIRCUIT REITERATES THAT AN EMPLOYER'S INTERNAL INVESTIGATION, STANDING ALONE, DOES NOT CONSTITUTE "ADVERSE EMPLOYMENT ACTION" UNDER TITLE VII

The Sixth Circuit recently reiterated that an employer's internal investigation, standing alone, does not constitute "adverse employment action" under Title VII. *Kuhn v. Washtenaw County*, 296 F.3d 404 (6th Cir., March 11, 2013).

The County's Internal Investigation

Plaintiff Kuhn, a black male, was a sheriff employed by Defendant Washtenaw County. In October 2008, Kuhn attempted to pull over a suspect for a traffic violation. The suspect fled and was then apprehended. At the County jail, the suspect accused Kuhn of raping her.

Pursuant to the County's procedural manual, the County was required to conduct an investigation of the complaint. Almost immediately, the Sheriff's office concluded that the rape allegation was false -- a rape kit completed at a local hospital reflected no evidence that a rape had occurred. Nonetheless, Sheriff's office employees Lt. Anuszkiewicz and Sgt. Radzik proceeded with an internal investigation of the allegation.

In December 2008, Kuhn complained to Lt. Anuszkiewicz and the County's Commander of Police Services, Marilyn Hall-Beard, that he was concerned about the rape allegation. The Commander directed Lt. Anuszkiewicz and Sgt. Radzik to stop their investigation, but they did not immediately do so.

A new Commander was appointed on January 1, 2009. He promptly directed Lt. Anuszkiewicz and Sgt. Radzik to complete and stop their investigation without further delay, which Sgt. Radzik did later in January. However, the Commander did not inform Kuhn that the investigation had been closed until March 2009.

Later that March, Kuhn filed a complaint with the Sheriff's office against Lt. Anuszkiewicz, asserting that he had engaged in unprofessional behavior with respect to the investigation. The County conducted an internal investigation of Lt. Anuszkiewicz, which it did not complete until November 2009. The County concluded that Lt. Anuszkiewicz had not engaged in improper behavior in his conduct of the investigation, but did conclude that he had acted improperly in disobeying Commander Hall-Beard's original directive to promptly close the investigation.

Kuhn's Leaves of Absence and Termination

Kuhn began treatment for stress caused by the rape investigation in February 2009. In May 2009, two months after he was informed that the investigation had been closed, Kuhn asked for FMLA leave. Kuhn took FMLA leave until it expired in August 2009. He then requested and was granted discretionary leave on an unpaid basis until the investigation of his complaint against Lt. Anuszkiewicz was completed in November 2009.

In July 2009, Kuhn sent an email to his union president, expressing his frustration with a lack of information about the investigation into his complaint against Lt. Anuszkiewicz. In August 2009, Kuhn sent the same email to a County commissioner, and others, asking for a meeting to discuss his complaints. At the meeting in September 2009, Undersheriff Ptaszek explained that the Sheriff's office wanted Kuhn to return to work.

In November 2009, Undersheriff Ptaszek emailed Kuhn to inform him that the investigation of Lt. Anuszkiewicz was complete and to make arrangements for Kuhn to return to work. In response, Kuhn supplied the Sheriff's office with a doctor's note stating that Kuhn would not be able to return to work until January 3, 2010. Undersheriff Ptaszek extended Kuhn's unpaid discretionary leave to January 3, but warned Kuhn that "doing so is extraordinary. I do not envision extending it any further."

Despite that warning, on December 11, 2009, Kuhn requested a further extension of his discretionary leave. On December 30, 2009, Undersheriff Ptaszek emailed Kuhn, telling him that the Sheriff's office could "no longer continue a discretionary unpaid leave of absence;" the Sheriff's office was going to be short of deputies because it was being required to eliminate seven (7) deputy positions. Undersheriff Ptaszek then informed Kuhn that his "employment with the Washtenaw County Sheriff's Office will terminate effective Monday, January 4, 2010."

Kuhn did not return to work on January 4. On that date, Kuhn's attorney sent a letter to the Sheriff's office stating that "Kuhn will not return to duty."

Kuhn's Lawsuit

Kuhn sued the County and Lt. Anuszkiewicz in federal court for race discrimination in violation of 42 U.S.C. § 1981, race discrimination and harassment in violation of Title VII, retaliation in violation of Title VII, and other ancillary claims. The district court granted summary judgment in favor of both defendants on all claims.

The Sixth Circuit's Affirmance of Summary Judgment

The Sixth Circuit affirmed the district court's summary judgment that Kuhn had failed to establish a claim of race discrimination under either 28 U.S.C. § 1983 or Title VII because the County's internal investigation did not constitute "adverse employment action." Adverse employment action is a materially adverse change in the terms or conditions of employment, i.e., termination, a demotion accompanied by a decrease in wage or salary, a less distinguished title, significantly diminished material responsibilities, a material loss of benefits, or other indices unique to a particular situation.

Kuhn argued that an internal investigation done in "bad faith" may be an adverse employment action. The Sixth Circuit rejected that argument:

* * * Kuhn does not cite, and we cannot locate, any cases that impose a good-faith requirement on the employer regarding internal investigations. Such an inquiry into the employer's subjective motive would be contrary to the objective analysis of whether an employment action is adverse. * * *

The appellate court also noted that the suspension of an employee, with pay, pending the outcome of an internal investigation would not constitute adverse employment action under Title VII.

Lessons to Learned

Employers must be scrupulously fair with respect to any internal investigation they conduct. Employees who are targets of employer investigations often bring charges against their employer relating to the investigation -- especially if the employer takes disciplinary action as a result of the investigation. The investigation cannot be a witch hunt. The target of the investigation should be notified of the transgressions for which he is being investigated and given a chance to respond to the preliminary findings of the investigation. To do otherwise is to invite litigation.

The Kuhn opinion can be found at:

<http://www.ca6.uscourts.gov/opinions.pdf/13a0062p-06.pdf>.

