

# The Legal Intelligencer

THE OLDEST LAW JOURNAL IN THE UNITED STATES 1843-2016

PHILADELPHIA, WEDNESDAY, NOVEMBER 9, 2016

VOL 254 • NO. 92

An **ALM** Publication

## EMPLOYMENT LAW

# Disputed Evidence of Chicken Wings Leads to Denial of Summary Judgment

BY SID STEINBERG

*Special to the Legal*

Faulty investigations are a consistent theme in findings of pretext. While there certainly is an element of 20-20 hindsight in deconstructing an investigation into a workplace incident resulting in termination, it often seems, when viewed in that light, as though obvious steps have been missed. Such is the case in the recent decision of *Connearney v. Main Line Hospitals*, 2016 U.S. Dist. LEXIS 149559 (E.D. Pa. Oct. 28, 2016).

### DETERIORATING RELATIONSHIP WITH MANAGER

Christina Connearney was an experienced nurse, who worked for Lankenau Medical Center from 2001 to January 2015, when she was fired for allegedly falsifying medical records. For the last five years of her employment, Connearney was supervised by nurse manager Kathleen Hogan. In January



**SID STEINBERG** is a principal and chair of Post & Schell's employment and employee relations and labor practice groups. Steinberg's practice involves virtually all aspects of employee

relations, including litigation experience defending employers against employment discrimination in federal and state courts. He also represents employers before federal, state and local administrative agencies, and regularly advises employers in matters including employee discipline, labor relations, and the creation or revision of employee handbooks. He can be reached at [ssteinberg@postschell.com](mailto:ssteinberg@postschell.com).

2013, Connearney was promoted to a full-time clinical coordinator position and shortly thereafter, Hogan told her that she "should have fired her." Understandably, the relationship between the two deteriorated over the next few years. Most importantly, Connearney and several of her coworkers began to feel that Hogan was unfairly targeting the older nurses in the department. Connearney, at the time, was 45 years old.

In August 2014, Connearney complained to Lankenau's director of human resources that Hogan was bullying and harassing her which was causing her chest pains. Connearney asked to be transferred but there were no coordinator positions available. As such, she agreed to return to the position of staff nurse in a role that did not report to Hogan.

### CHARTING OF CHICKEN WINGS

The incident that led to Connearney's termination began on Nov. 20, 2014, when a quadriplegic patient was admitted under Connearney's care. The patient was hungry and asked to order buffalo chicken wings from Dominos. Although Connearney did not need a physician's order to order the food, she did need an order allowing the patient to actually eat them. There was a significant dispute as to whether the attending physician, Dr. Melissa Barenbaum, authorized the patient

to eat the chicken wings and, if so, in what sequence she did so. Barenbaum testified that she does not remember whether she allowed the patient to eat the wings.

Connearney wrote in the patient's chart that the patient had "ordered buffalo wings from Dominos" and timed the entry at 12:20 a.m. She subsequently wrote in the chart that Barenbaum had given a verbal order that the patient could eat. The hospital believed, however, that Connearney had altered the medical chart prior to getting Barenbaum's approval. Connearney's supervisor questioned the sequence of events and sent an email to Hogan regarding his concerns later that morning.

## **DISPUTE OVER SEQUENCE OF PHYSICIAN'S ORDERS**

Hogan subsequently spoke to Barenbaum although again, the details of this conversation were disputed. Hogan said that she spoke to Barenbaum for approximately 10 minutes, while Barenbaum said that it was a very brief conversation and that "Hogan's focus was really on Connearney's ordering of the wings, not how the event was recorded." Based upon the concerns over the incident and the possibility that Connearney had falsified an entry in the patient's chart, the human resources department instructed Hogan to tell Connearney not to

report to work "pending a fuller investigation into the events."

Upon learning of her suspension, but before meeting with human resources about the event, Connearney took Family and Medical Leave Act (FMLA) leave, claiming that she was suffering from "physical and mental breakdown." She returned on Jan. 14, met with the hospital on Jan. 16

---

*In deconstructing an investigation into a workplace incident resulting in termination, it often seems, when viewed in that light, as though obvious steps have been missed.*

---

and was terminated a few days later. She subsequently brought suit claiming that she was discriminated against on the basis of her age, disability, FMLA leave and that her termination had violated the Pennsylvania Whistleblower Law. She also claimed that Hogan had "assaulted" her by throwing papers at her earlier in her employment.

## **FIVE-YEAR AGE DIFFERENCE**

Initially, the court found that, in order to establish a prima facie case of disparate treatment under the ADEA, Connearney must show, in part, that "she was replaced by someone sufficiently younger to support an inference

of discriminatory animus." The court found that although there is "no particular age difference that must be shown" in order to satisfy this element, a five-year difference has been held to support this inference, while a one-year difference has not. Where more than one employee is hired in short order after a disputed termination, "the Third Circuit has also considered the average age of those workers who assume the plaintiff's job duties." In this matter, the court averaged the ages of the four hires immediately after Connearney's termination and found that they were, on average, five years younger than Connearney. As such, she successfully stated a prima facie case.

With respect to pretext, the court found that so long as an employer has an "honest belief" in its proffered nondiscriminatory reason ... the employee cannot establish that the reason proffered was "pretextual simply it is ultimately shown to be incorrect." However, the court cited the U.S. Court of Appeals for the Third Circuit decision of *Kowalski v. L&F Products*, 82 F.3d 1283, 1290 (3d Cir. 1996), in finding that "the less reliable the report [of the underlying investigation] may appear, the greater the likelihood that the employer's reliance on it to justify his actions was pretextual."

## FLAWED INVESTIGATION

In this matter, although the evidence was that the termination decision was made by the hospital's director of nursing, neither she nor anyone from human resources spoke with Barenbaum about the disputed sequence and whether Barenbaum had, in fact, authorized the patient to eat the chicken wings. Rather, the investigators relied upon Hogan's recollection of her conversation with Barenbaum, the details of which were disputed during discovery. As such, the court found the "investigation was flawed with inconsistencies and weaknesses and that the defendants could not have relied on it in good faith." The court noted that under a "Cat's Paw" theory, if a "supervisor [in this case Hogan] performs an act motivated by animus that is intended by the supervisor to cause an adverse employment action ... then the employer is liable." As such, based upon the quality of the investigation, and in particular the

failure of any investigator to speak with Barenbaum, the court found there to be a \_\_\_\_\_ issue of fact regarding whether Connearney's age motivated her termination.

The other findings in the case of particular note is the court's dismissal of Connearney's FMLA retaliation claim. With respect to this claim, Connearney asserted that because she was fired only one week after the end of her leave, the temporal proximity between the "protected activity and the adverse action" was unusually suggestive of retaliation. The court found, however, that because Connearney was terminated after she took FMLA leave "for events occurring before she took leave" and there was no evidence specifically connecting her leave to the termination, the timing alone was not unduly suggestive of causation.

The court granted summary judgment to all defendants with respect to all other claims brought, other than a finding that Hogan may have "aided and abetted" age

discrimination under the Pennsylvania Human Relations Act and may have engaged in assault against Connearney by throwing papers at her in a meeting.

The message of the case is clear. A faulty investigation, particularly when relying upon hearsay conversations related by the individual who is the focus of the employee's discontent, may jeopardize an otherwise good-faith, nondiscriminatory termination. In this case, the termination decision hinged on how Connearney documented Barenbaum's order. In hindsight, it seems self-evident that an investigator needed to speak to Barenbaum to, at a minimum, verify Hogan's recollection of their conversation.

Individuals investigating events that could lead to an employee's termination should take their time and speak to all of the individuals involved in a particular incident and/or review all of the documents in order to come to, and support, a termination decision. •