How Vacation Policies Mirror A Firm's Culture

By Nancy Byerly Jones
Special to Lawyers Weekly USA

Sarah has worked for her law firm as a legal secretary for five years, she rarely uses any of her allotted sick days and her performance evaluations repeatedly reflect her high work ethic, positive attitude and quality work product.

In short, Sarah is a valued and model firm employee. She loves her work, but dreads the weeks before she leaves on vacation because of the guilt trips her supervising attorney tries to lay on her.

Managing Your Office & Staff
Nancy Byerly Jones

Below is a typical pre-vacation scenario for Sarah.

Two Months Before Sarah's Vacation

Sarah pre-schedules vacation time two months in advance with the firm's legal administrator.

Sarah receives her vacation approval via e-mail copied also to her supervising attorney.

Attorney: "Did you realize that your vacation is scheduled when the *Doe v. Doe* case might go to trial?"

Sarah: "Yes, but since we're a litigation firm, it's hard to find a week when we might not be in trial, or conducting depositions. or the like. I have asked the administrator to appoint someone as my backup during my vacation. That way, if you needed her assistance while I'm gone, my back-up will be prepared to help you. Also, I will get all my work done before I leave regarding the *Doe* case just like I've done in years past before leaving on vacation."

Attorney (walking off): "Yeah, and every time you're gone, it seems like all you-know-what breaks loose and here we go again."

Monday – Pre-Vacation Week

Sarah: "Since I'll be gone next week, could we sit down later today to double-check all I've done to prepare for my absence and to ensure there's nothing I've missed?"

Attorney (with big sigh): "Okay, how about 5:00 today?"

Sarah: "I have to be at my child's daycare by 5:30 so could we meet at 4:00 instead?"

Attorney (another disgruntled sigh): "If that's what it has to be, then okay."

4:00 p.m. – Attorney on phone.

4:15 p.m. – Attorney on different call.

4:30 p.m. – Attorney heads to one of his partner's offices and tells Sarah he'll be right back for their meeting.

5:00 p.m. – Attorney still not back.

5:15 p.m. – Sarah waits as long as she can for him, but finally has to rushes out to get to the daycare center in time

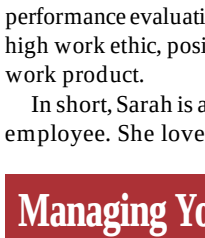
Thursday – Pre-Vacation Week

Sarah: "We really need to get together today about next week."

Attorney: "Just what is it you need to sit down and discuss?

Sarah: "I just want a few minutes to go over with you all I've done to prepare for my absence next week and to make sure there's nothing else you need me to do."

Attorney: "Okay, let's find some time this afternoon."



Attorney Nancy Byerly Jones heads up Nancy Byerly Jones & Associates, Inc., a legal management consulting & mediation firm providing on-site services or office retreats at their North Carolina mountainside conference center. For more information, visit www.nbj-consulting.com. To contact, call (828) 898-9600, or send an e-mail to nbj@nbjconsulting.com

4:15 p.m. – Attorney calls from opposing counsel's office where he's been taking depositions: "Sarah, since it's so late in the day, I'm just going to go straight home from here. See you tomorrow."

Friday – Pre-Vacation Week

Attorney has client meetings all morning; leaves for lunch at 12:30 and returns at 2:00.

Sarah: "Can we sit down for a few minutes to go over next week's agenda and so I can show what I've done on the *Doe* case and others?"

Attorney (sighs and does eye-roll, one of his perfected talents): "Okay, but still can't believe you're going to be gone next week of all weeks. Let me return some of these calls and then we will get together."

4:35 p.m. – Attorney storms out of his office looking for one of the files in the *Doe* case. Sarah explains she has them with the other materials she wants to go over with him in their meeting.

Attorney: "Well, get it and come into my office so we can go over everything. By the way, when are you planning to be back in the office?

Sarah: "Nothing has changed from the vacation approval you received two months ago; I will be back a week from this coming Monday."

Attorney: "How can I reach you next week?"

Sarah: "Well, I can give you our hotel number, but since we will be on the go a lot, there may be delays before I would get any messages. I hope Pam, my appointed back-up, can take care of things since I have everything pretty much done for the *Doe* case and our other high priority matters."

Attorney: "Pam's going to be busy with her normal workload and that means my stuff will be a low priority for her. Have you checked into hiring a temp?"

Sarah: "Yes sir, but the administrator said that was not necessary as Pam would be available to help you if needed."

Attorney: "That's *just* great … did anyone think to ask me about who the backup should be?"

Sarah: "The administrator sent us both an email about Pam being your backup about two months ago, the same week she approved my vacation request."

Attorney: "Well, I don't remember that and I wish it were anybody but Pam. Oh well, if that's how its set up, I'll just have to make do, won't I?"

4:51 p.m. – Attorney's phone rings and he chats with one of his partners about the location options for the upcoming partners' annual retreat. He motions for Sarah to stay seated when she starts to leave his office.

5:00 p.m. – Attorney hangs up phone and Sarah says: "I have to leave in ten minutes to get to the daycare center on time. Since we don't have much time left, are there any specific questions or concerns you have about next week?"

Attorney: "Can't you stay later so we can finish going through everything? Otherwise, you'll really be leaving me in a fix for next week."

Sarah: "I wish I could, but I'm the only one who can pick up our baby today so I can't stay late today like I did yesterday and the day before.

Attorney (look of fear and frustration in his eyes): "Looks like I'll just have to make do best I can then, but sure wish you would have gotten with me sooner about all this."

Vacations can either be a source of perpetual tension and morale-crippling headaches for a law office or one of the best practice management tools ever created. Choose your course wisely, for the ripple effect is truly far-reaching and long lasting.

Monday Morning – Post-Vacation Week

Attorney: "Good morning. Please get right on these dictation tapes before things pile up even more."

Sarah: "Good morning. Hope you had a good weekend."

Attorney (puts on a smirky smile): "If you had been here last week, you would know that a fun weekend was out of the question for me."

Sarah: "I'll get right on those tapes."

Sarah (now rolling *her* eyes and saying under her breath): "We had a great vacation. Thanks for asking."

8:20 p.m. – Sarah, just getting home from work, says to her husband: "You know, I think it's time I considered changing jobs."

One Month After Sarah's Vacation

Sarah to attorney: "It's been a difficult decision for me, but here is my letter of resignation. I'm willing to stay on for another month before I start my new job as a legal assistant with another firm."

Attorney: "What? Why in the world would you do this?"

Sarah: "Well, I tried to …"

Attorney: "You sure picked a great time to do this considering all the work we have on our plates right now?"

Sarah thinks to herself: "Boy, did I ever make the right decision!"

Sound Familiar?

Does any of this sound familiar?

Like time off for holidays, there is no law that mandates employers must offer employees vacation time. Most law firms, however, do have some kind of vacation policy.

The key question is whether a firm offers vacations merely to be competitive in the marketplace or because it believes vacations are a valuable and necessary benefit for all employees.

If it's because the law firm feels it *has* to have a vacation policy, then it may be a firm where having a root canal may be more pleasant than asking for time off.

If it's an office that believes vacations are healthy and wise to take, then the attorneys no doubt highly encourage their employees to use their vacation time and are supportive when they do.

Instead of recognizing the value of vacation time, many lawyers ridicule those who dare even think of taking one, much less do it. They wonder: "How could anyone be a real lawyer if the person takes a vacation or worse, takes any time off without being connected 24/7 to the firm via pagers, cellphones and handheld computers?"

This "shoot-yourself-in-both-feet" type of attitude unfortunately filters down to the staff, whose vacations are viewed as intrusions instead of the morale boosters that they are and should be.

A Few Basics

The type of vacation policy, if any, is up to the employer, but if vacations are a firm benefit then they must be offered to all employees.

Likewise, vacation polices should be put in writing clearly, spelling out the terms. This includes any time limits or rules regarding usage and caps on carry-over days from year to year.

Few firms enjoy writing personnel policies and procedures manuals, but delays in doing so can be costly. Vacation policies are no exception.

Once written, electronic and hard copies should be provided to all employees. Timely group or individual meetings should also be held to explain any updates to the firm's vacation policy (especially any changes that employees would probably not be too happy about, such as fewer paid holidays).

To minimize the gossip grapevine and concerns, it is highly recommended that a meeting be held to explain and discuss any unpopular changes before putting the updates on-line or passing out a memo with the newest version.

Like all firm policies and procedures, vacation policies should be followed. While employers are not required by law to offer vacations, it is critical that if they do that the vacation policy is fairly and consistently applied. Applying the policy strictly to some employees and being more lax with other employees

Continued on page 25

How Vacation Policies Mirror A Firm's Culture

Continued from page 16

is a discrimination time bomb for a firm.

Attorneys are notorious for ignoring the firm's policies and applying their own when it comes to their personal secretaries and legal assistants. When that happens, morale will sooner or later take a big hit – not to mention the increased risks for a successful discrimination claim.

Usually, the amount of vacation time is linked to the length of one's years with the firm, ranging from one week to four or more.

Most firms require at least a month's notice (if not more) from employees requesting vacation days off. If one or more co-workers request the same week off and this would cause a hardship on the firm, it is common for the conflict to be resolved by granting vacation approval only to the employee whose request came in first.

Some Vacation 'Twists'

- To encourage all employees to take some R&R time, a certain amount of vacation time each year is mandatory.
- Designating one week each year when all employees must take one of their weeks of vacation (for example, between Christmas and New Year's or whenever business is slowest).
- No per se vacation policy, but rather a personal leave policy that offers 120 or more hours per year that an employee can take off with pay and for any purpose (e.g. sick days, vacation, doctors appointments, etc.). The amount of advanced notice required is usually dependent upon whether the employee is asking for an hour off or several days. While all policies have their pros and cons, the personal hours off concept is fast gaining in popularity.
- Staff can buy or sell up to "x" number of vacation days each year.
- Staff members can give away some of their vacation days to a staff member who has used all allotted paid-leave days due to an extended illness, injury or other family emergency.
- No vacation days can be carried forward into a new year. Employees must use it or lose it each year.

At Sarah's New Firm - Two Months Prior to Her Vacation

Supervising attorney: "Sarah, I see you're planning a vacation in a couple of months. Good for you!"

Sarah: "Yes, we can't wait. I'll make sure I plan far enough ahead to make things flow smoothly for you while I'm gone."

Attorney: "I know you will and appreciate that. Let me know what I can to help you get ready as well."

Monday – Pre-Vacation Week

Sarah: "Since I'll be gone next week, could we sit down later today to double-check all I've done to prepare for my absence and to ensure there's nothing I've missed?"

Attorney: "Absolutely. How about in about an hour?"

One-hour later, the attorney and Sarah hold an in-depth and productive session.

Friday – Pre-Vacation Week

Sarah: "Do you have any other questions or concerns about any matters before I leave on vacation?"

Attorney: "No, I believe we covered it all when we met on Monday and thanks for all you've done to get things ready for your absence. My only concern now is that you forget about this place and go enjoy a great and relaxing vacation. You'll be missed, but things will be fine around here and we will all look forward to seeing your vacation photos when you return."

Monday Morning – Post-Vacation Week

Attorney: "Good morning and welcome back, Sarah! Hope you had a great vacation from start to finish!"

Sarah: "It was wonderful and so relaxing! How did everything go while I was gone?"

Attorney: "You were certainly missed, but you had prepared your back-up person well and that was a huge help. We were determined not to bother you on vacation and primarily because of the super job you did of planning ahead before you left, we did not have to call you."

Sarah: "Well, where should we start this morning; I have a feeling we have a busier than normal day ahead, right?"

Attorney: "There's plenty here to do as always. I know firsthand, however, how tough re-entry can be after a vacation so I'm going to try to avoid burying you too deeply in work on your first day back. That will give you a chance to more gently get back into the flow of our typical 90 mile-per-hour pace!"

Sarah: "Thanks, but I'm coming back with lots of rest under my belt and my batteries are re-charged so I'm ready for whatever we need to do. It was a great vacation week, but I am really happy to be able to come back to work with such a great group of folks."

The Lesson

Vacations can either be a source of perpetual tension and morale-crippling headaches for a law office or one of the best practice management tools ever created. Choose your course wisely for the ripple effect is truly far-reaching and long lasting.

LWUSA

Continued from page 24

230 F.3d 1357 (6th Cir. 2000)); the 7th Circuit (*see Gawley v. Indiana Univ.*, 276 F.3d 301 (7th Cir. 2001); *Dockery v. Dayton Hudson Corp.*, 2001 WL 693094 (7th Cir. 2001); *Shaw*, 180 F.3d 806); the 8th Circuit (*see Jackson v. Arkansas Department of Education, Vocational and Technical Educ. Div.*, 272 F.3d 1020 (8th Cir. 2001)); the 9th Circuit (*see Zelaya v. Eastern & Western Hotel Corp.*, 2001 WL 219897 (9th Cir. 2001); *Kohler*, 244 F.3d 1167); and the 11th Circuit (*see Madray*, 208 F.3d 1290).

Other Interesting Issues

1. Who is a supervisor?

If the alleged harasser is a co-worker rather than the plaintiff's supervisor, employers are liable for harassment only when they have been negligent either in discovering or remedying the harassment. *See, e.g., Swinton v. Potomac Corp.*, 270 F.3d 794, 803 (9th Cir. 2001).

In such cases, the employee has the burden to show that management knew or should have known of the harassment and failed to take reasonably prompt corrective action, and there is no need for employers to use the affirmative defense.

Courts have struggled to define the characteristics that distinguish a supervisor for purposes of determining the correct standard of liability.

The text of Title VII provides little guidance because it provides no definition of the term "supervisor." The EEOC defines a supervisor as someone who has authority to undertake or recommend tangible employment decisions affecting the employee or someone who has authority to direct the employee's daily work activities. *See Enforcement Guidance: Vicarious Employer Liability for Unlawful Harassment by Supervisors*, EEOC Notice No. 915.002 (June 18, 1999).

The 7th Circuit has ruled that a supervisor must possess authority and power "of a substantial magnitude." *See Parkins v. Civil Constructors of Illinois, Inc.*, 163 F.3d 1027, 1034 (7th Cir. 1998); see also *Swinton*, 270 F.3d at 804 (supervisor must have "substantial authority and discretion to make decisions concerning the terms of the harasser's or harassee's employment)."

A supervisor must have the authority to affect the terms and conditions of an employee's employment, meaning the power to hire, fire, demote, promote, transfer, or discipline an employee. *Id.* at 1033-34. A supervisory title does not in itself confer supervisory status. *Id.* at 1033.

In *Parkins*, the court concluded that working foremen were not supervisors, where they had modest responsibility for directing work at a job site, but lacked authority to hire, fire or otherwise alter the terms of the plaintiff's employment. Accordingly, the co-worker standard for employer liability would apply, and the employer did not need to avail itself of the affirmative defense.

It is clear that from a litigation standpoint at least, a written policy is the best evidence of an employer's efforts to eliminate harassment.

2. Is a constructive discharge a 'tangible employment action'?

A surprising number of cases have considered whether a constructive discharge is a tangible employment action.

When it created the affirmative defense, the Supreme Court stated: "A tangible employment action constitutes a significant change in employment status, such as hiring, firing, failing to promote, reassignment with significantly different responsibilities, or a decision causing a significant change in benefits. … Tangible employment actions are the means by which the supervisor brings the official power of the enterprise to bear on subordinates. A tangible employment decision requires an official act of the enterprise, a company act." *Ellerth*, 524 U.S. at 761-62.

Constructive discharge occurs when an employer imposes a substantial change in the employee's working conditions, such as a demotion or transfer, which has the effect of creating new working conditions that are so difficult or unpleasant that a reasonable person in the employee's shoes would feel compelled to resign. *See, e.g, Mosher v. Dollar Tree Stores, Inc.*, 240 F.3d 662 (7th Cir. 2001); *Ramos v. Davis & Geck, Inc.*, 167 F.3d 727, 731-33 (1st Cir. 1999); *Alicea-Rosado v. Garcia-Santiago*, 562 F.2d 114, 119 (1st Cir. 1977); *GTE Products Corp. v. Stewart*, 421 Mass. 22, 34-35 (1995).

If this type of forced resignation is a tangible employment action, the employer cannot advance the *Faragher/Ellerth* defense; if it is not, then the defense is available.

Courts have reached divergent conclusions on this question. *See Mosher*, 240 F.3d at 662 (recognizing issue but not resolving it in this decision). In 1999, the 2nd Circuit held that constructive discharge is not a tangible employment action. *See Caridad*, 191 F.3d at 294-95. The court reasoned that in *Faragher* and *Ellerth*, the Supreme Court found it appropriate to impose strict liability on employers for tangible employment actions because those actions require affirmative action by the employer, executed through the agency relationship.

In contrast, employers do not formally approve a constructive discharge. Indeed, the court noted that co-workers as well as supervisors can in theory bring about a constructive discharge. *See id.*, at 294-95.

The 3rd Circuit reached a different conclusion in *Durham Life Ins. Co. v. Evans*, 166 F.3d 139, 149 n.5 (3d Cir. 1999). In that case, the supervisors' actions caused the constructive discharge, and the court found that it constituted a tangible employment action leading to automatic liability on the part of the employer.

Similarly, the 8th Circuit has considered constructive discharge to be a tangible employment action. *Phillips v. Taco Bell Corp.*, 156 F.3d 884, 889 n.6 (8th Cir. 1998).

The U.S. District Court for the District of New Hampshire split the baby in its *Elmasry* decision, holding that a constructive discharge may be a tangible employment action depending on the facts. The court looked specifically at whether the incident bringing about the resignation was "an official company act tantamount to a tangible employment action." *Elmasry v. Veith*, 2000 WL 1466104, * 5 (D.N.H. 2000).

When the plaintiff in *Elmasry* had been absent for two days without notice, the company regarded this as her "voluntary resignation." The court ruled that the employer's application of its no-call, no-show policy did not constitute an official company action that could be regarded as tangible employment action. Because of this, the court did not consider whether the plaintiff had been constructively discharged because, even if she had been, the discharge did not rise to the level of a tangible employment action.

3. What if the tangible job action was non-discriminatory?

Two circuits have concluded that if a "tangible employment action" was not taken for discriminatory reasons, the affirmative defense may still be available to the employer. *See Lissau*, 159 F.3d at 182 ("Tangible employment actions, if not taken for discriminatory reasons, do not vitiate the affirmative defense."); *Frederick*, 246 F.3d at 1312 (affirmative defense available where a former employee failed to demonstrate any factual link between a failure to promote and the alleged harassment).

Conclusion

The *Faragher/Ellerth* defense provides employers with a powerful tool to control their exposure to sexual harassment claims.

All employers should adopt, disseminate and follow a well-crafted sexual harassment policy.

Ideally, by following these steps employers may actually reduce the amount of sexual and other forms of harassment at their workplace. In litigation, evidence of these steps may provide a basis for the employer to assert the *Faragher/Ellerth* defense in a civil action.

Because the affirmative defense is so fact-intensive, however, it will rarely support a successful summary judgment motion.

[EDITOR'S NOTE: A version of this article, with links to the decisions cited, can be found on Lawyers Weekly USA's website, www.lawyersweeklyusa.com, in the Special Features box.]