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HEADLINE: Legal advice: No shield for punitives

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BODY:

Is following the advice of counsel enough to shield employers from punitive damages when they fire someone?

Is listening to a lawyer enough to show good faith?

Not necessarily, a state appeals court has ruled.

In Kluczyk v. Tropicana Products, Inc. -- a decision that also affirmed counsel fees of more than \$ 300,000 for the employee's lawyer -- Judge Edwin H. Stern flatly rejected the contention that punitive damages never can be awarded when firing a worker based on a lawyer's advice.

"The advice of counsel is only one factor, not a per se basis, for assessing or deciding whether the termination was in good faith," Stern wrote.

Besides, he said, the case before the court also presented a factual question of whether the employer's action truly was based on counsel's advice or was instead an independent decision to retaliate against the worker.

Stern added that when there is a claim that an employer was merely acting on a lawyer's recommendation, "evidence relating to the advice of counsel may be admissible and considered by the jury in reaching its verdict of punitive damages."

Andrew W. Dwyer of Newark, who represented the employee, said if the court had accepted the idea that there could be no punitive damages under the circumstances, it would mean conduct would be immunized whenever you "run it by the legal department."

He also noted a lawyer could give advice "not to comply with the law" but to circumvent it and there still would be no punitive damages.

The worker, Tadeusz Kluczyk, alleged his employer, Tropicana Products,

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maintained "a sexually hostile work environment on the basis of gender" in violation of the Law Against Discrimination (LAD).

He maintained he was subjected to words and gestures suggesting he was a homosexual and the company did nothing to stop it.

During depositions, it became apparent he had misrepresented his background in his job application.

After the deposition, the company's human-resources counsel spoke to the manager for human resources. The worker was fired for the misrepresentations.

Kluczyk amended his complaint to include a claim of wrongful termination.

There was a dispute over whether the attorney recommended the firing or whether the human-resources manager simply received input from the lawyer in a move the worker claimed was retaliatory.

On appeal, the court affirmed a jury award of about \$ 210,000 for past and future lost wages, \$ 20,000 for emotional distress and \$ 225,000 in punitive damages.

It also affirmed counsel fees of \$ 316,000, which the employer had challenged on the grounds the worker did not prevail under the LAD claim, which allows fee-shifting, but only on the wrongful-termination claim, which was not based on LAD.

Stern said, "The evidence overlapped and proof of the harassment claim was necessary to show why defendants retaliated."

Carmine A. Iannaccone of Newark argued for the employer, its human-resource manager and another company executive.

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