

BIZARRE RETALIATION CLAIM ENDS UP DISASTER FOR PROFESSOR AT NON-PROFIT UNIVERSITY.

BY JOHN P. HAGAN, ESQ.

DR. ROXANA RECIO ALLEGED THAT HER EMPLOYER, THE NON-PROFIT CREIGHTON UNIVERSITY, RETALIATED AGAINST HER FOR FILING A CHARGE OF DISCRIMINATION WITH THE EEOC.



In 1994, Creighton University hired Dr. Recio as an Associate Professor of Spanish.

Dr. Recio is of Spanish origin. Creighton University also hired Dr. Recio's husband, Dr. Enrique Rodrigo, as a Spanish professor. In 1998, Dr. Recio was granted tenure as an Associate Professor.

A few years after obtaining tenure, Dr. Recio and the other professors interviewed Michelle Evers, a candidate for a Spanish professorship. Inexplicitly, Dr.

Inexplicitly, Dr. Recio engaged Ms. Evers in an email correspondence ...



Recio then engaged Ms. Evers in an email correspondence that Ms. Evers ended after four months.

Creighton University nevertheless hired Ms. Evers. ***Two-and-a-half years later, Dr. Recio made a written complaint about Ms. Evers' behavior at a faculty meeting.*** Ms. Evers responded that she had received "inappropriate and offensive" communications from

Dr. Recio. Some of what Ms. Evers complained about included the emails that Dr. Recio had sent her before she had been hired.

Ms. Evers then formally complained that Dr. Recio had sexually harassed her with "obsessive, stalker-like" emails and made "inappropriate advances . . . of a strong sexual nature"; that when Ms. Evers ended

... sexually harassed her with "obsessive, stalker-like" emails ...

email contact with Dr. Recio, Dr. Recio "repeatedly and relentlessly tried to re-initiate contact"; and finally, Ms. Evers believed that the portion of Dr. Recio's complaint was in retaliation for Ms. Evers's refusal to continue emailing with Dr. Recio.

Pursuant to the university's policies, a four-person Sexual Harassment Committee (the "Committee") heard evidence and issued a report to Creighton's president, Father Schlegel. ***The Committee recommended that Dr. Recio's employment be terminated.*** Although Father Schlegel concluded that the Committee's report had "substantial merit," he did not terminate Dr. Recio.

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Rather, than terminate Dr. Recio, Father Schlegel placed her on PROBATION, conditioning her continued employment on the adherence to certain conditions.

CONDITIONS OF PROBATION

1. **having no communication or contact** with Ms. Evers
2. **making no statements to others** about Ms. Evers
3. **completing a program of psychological counseling**, approved by the Dean and **at her own cost, for a period of one year**
4. **attending an educational program**, also approved by the Dean, **“dealing with issues of communication, appropriate interaction with others, teamwork, etc.”**
5. **submitting to close monitoring and documentation of her conduct in the classroom, attendance at classes, scheduling and maintaining of office hours for students, and her interactions with faculty throughout the year of probation.**

(Dr. Recio and her husband spent the next summer in Spain, as they had done so for the last 10 years.) During that summer in Spain, Dr. Recio filed a charge of discrimination against Creighton University, alleging that her probation was based on her Spanish national origin.

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After receiving notice of the charge, Father Schlegel wrote Dr. Recio to notify her that, because she could not commence the counseling program while in Spain, the one-year program would not begin until she returned.

That next school year, the Dean notified Dr. Recio that her annual employment contract would be delayed since she was still on probation. Later, the Dean sent her a new employment contract that required her agreement to the terms of the counseling program. The Dean also noted that, because Dr. Recio was again planning to spend the next summer in Spain, her one-year counseling requirement would not be completed until she returned from Spain.

Dr. Recio filed a second charge ... alleging ... retaliation against her for filing the first charge.

Dr. Recio objected, and an agreement was reached in which her employment contract stated that she was on probation only until she left for Spain. Right before she left for Spain, Dr. Recio filed a second charge with the EEOC, alleging that Creighton had retaliated against her for filing the first charge.

Dr. Recio eventually completed her probation with no violations. The EEOC completed its investigation, found no evidence of discrimination and issued a Right to Sue letter. Dr. Recio filed suit, alleging Creighton of 21 acts of retaliation.

The court threw the lawsuit out on summary judgment. Here's why . . .

Of course, Title VII prohibits retaliation against employees who initiate or participate in an investigation that claims their employer violated Title VII. **To prove that their employer retaliated against them, these employees must demonstrate that a reasonable employee would have found the supposed retaliatory action materially adverse;** and the materially adverse

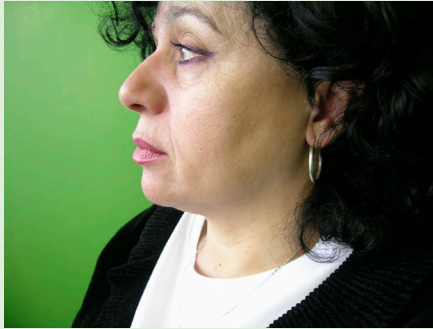
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action was causally linked to the protected conduct. The employee must *also prove that the adverse employment action was motivated by intentional retaliation.*

Here, Dr. Recio claimed that a reasonable employee would have found the following actions materially adverse:

1. **Denying her opportunities** to participate in a study program in Spain.
2. **Requiring** that she maintain a M-W-F teaching schedule.
3. **Shunning** by faculty.
4. **Failing to provide** her prior notification of a faculty vacancy.
5. Keeping her office **too cold.**
6. **Requiring** her to **acknowledge her probation** in her employment contract.
and
7. **Not allowing** her to teach advanced classes.



An employment action is materially adverse if it might have dissuaded a reasonable employee from making or supporting a charge of discrimination. The Court found that most of Dr. Recio's allegations — *the delayed notification of the faculty opening, keeping the temperature in her office too cold, requiring her to acknowledge her probation in her employment contract, and denying her the opportunity to participate in a study program in Spain* — were “akin to the sort of trivial harms that do not rise to the level of retaliation.”

The Court found that the allegations that came closest to being “materially adverse” were Dr. Recio's contentions that Creighton altered her teaching schedule, that she was shunned by faculty and that Creighton failed to assign her advanced classes to teach.

Dr. Recio contended that she suffered a materially adverse action when Creighton changed her Tuesday-Thursday teaching schedule to a M-W-F schedule. The Court disagreed. The mere fact that Creighton disallowed her from maintaining her preferred teaching schedule, without any indication that she suffered a material disadvantage as a result, did not meet the materially adverse standard. Minor changes in duties or working conditions, even unpalatable or unwelcome ones, which cause no materially significant disadvantage are not materially adverse employment actions.

Dr. Recio also alleged that she received “*the silent treatment*” from other faculty and was excluded (along with her husband) from a picture of the Spanish faculty posted on its' website. The Court found that these instances of ostracism were simply not materially adverse. Employees have to withstand colleagues that do not like them, are rude, and may be generally disagreeable people, because *a court will not dictate interpersonal skills or intervene in personality conflicts.*

For example, a supervisor's refusal to invite an employee to lunch is normally a trivial, non-actionable petty slight. However, to *retaliate by excluding an employee from a weekly training lunch that contributes significantly to the employee's professional advancement might well deter a reasonable employee from complaining about discrimination and therefore be materially adverse.*

The Court next noted that there may be some instances where *denying a professor the opportunity to teach advanced classes constitutes a materially adverse action.* However, Dr. Recio failed to prove retaliation because she failed to demonstrate any connection between her charge of discrimination and her course assignments. In fact, there could be no connection because Creighton denied her request to teach advance classes before she filed her charge of discrimination. ▼

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