

CRITICIZING THE SEXUAL ORIENTATION OF A SUBORDINATE FOR RELIGIOUS REASONS CONSTITUTES LAWFUL GROUNDS FOR

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In *Bodett v. CoxCom, Inc.*, 366 F.3d 736 (9th Cir. 2004), the plaintiff appealed the district court's ruling granting summary judgment in favor of the defendant employer. Bodett, an evangelical Christian, worked for 18 years as a quality assurance manager for defendant CoxCom and its predecessor. She was responsible for supervising 13 employees including Carson, an openly gay woman. Bodett told Carson when they began to work together that homosexuality is against her Christian beliefs. In addition, when Carson told Bodett about personal problems in a regular "coaching" session, Bodett replied that the homosexual relationship she was in at that time was probably the cause of turmoil in her life, that God designed relationships for man and woman and that homosexuality is wrong and considered by God to be a sin. After the conversation they prayed together at Carson's suggestion. Shortly thereafter, they attended church on at least one occasion and Bodett urged Carson to attend a "Woman of Faith Conference" and purchased a ticket for her.

At the time of these events, CoxCom had a General Harassment Policy which stated that no employee should harass another employee on the basis of race, color, religion, sexual orientation, national origin, age, disability or veteran status. CoxCom also had a Corrective Action policy which stated that verbally or physically harassing, coercing, intimidating or threatening a co-worker, supervisor or customer may be cause for immediate discharge.

A few months later Carson was promoted and transferred to CoxCom's Omaha office. Just prior to her departure, Carson complained about Bodett to a co-worker. The vice president of customer care heard rumors about Carson's complaint and commenced an investigation. Carson told the vice president that she was uncomfortable with the treatment given to her by Bodett and cited as an example a recent performance review during which Bodett mentioned that she would be disappointed if Carson dated another woman, but would be happy if she dated a man. Carson stated that she did not

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complain because Bodett was her boss and she couldn't afford to lose her job. After the conversation with Carson, CoxCom management decided that termination would be appropriate if Bodett admitted the alleged statements. After Bodett acknowledged the statements she was terminated for a "gross violation" of CoxCom's policy.

Bodett subsequently filed a complaint with the EEOC and received a right to sue on her discrimination claim. Bodett then filed a lawsuit in federal court asserting various causes of action against CoxCom, including claims of religious discrimination under Title VII of the Civil Rights Act of 1964, the Arizona Civil Rights Act and the Arizona Employment Protection Act. The district court granted summary judgment in favor of CoxCom, and the judgment was affirmed by the Court of Appeals.

The Court of Appeals held that Bodett did not demonstrate other circumstances surrounding her termination that show a bias or animus against her religion that give rise to an inference of discrimination. Nor could Bodett show that any similarly situated individual outside her protected category was treated more favorably. Moreover, even if Bodett had met these requirements, CoxCom produced evidence demonstrating a legitimate, nondiscriminatory reason for her termination. From either an objective or subjective viewpoint, Bodett's actions fell within the scope of harassment as defined by CoxCom's policy, particularly since Bodett was in a position of authority over Carson.

Further, to overcome the evidence of the legitimate, nondiscriminatory reason offered by CoxCom, Bodett would have the burden to show pretext and come forward with any evidence that religious discrimination was the more likely motivation for CoxCom to terminate her employment. The *Bodett* court held that Bodett's contentions that her behavior viewed in the light most favorable to Bodett did not constitute "harassment" under the company's policy and that CoxCom did not take the discretionary steps it typically followed prior to termination were not supported by sufficient evidence.

On the contrary, the court held that, under the plain terms of the company's harassment policy, Bodett's behavior could certainly constitute harassment. The evidence further demonstrated that Bodett knew the harassment policy expressly provided for the possibility of immediate dismissal. Since Bodett failed to offer evidence of animus towards her religious beliefs as the true motivation for her termination or that the proffered reason for termination was false, she failed to raise a genuine issue of material fact as to whether the reason CoxCom gave for her termination was a pretext for discrimination. Summary judgment in favor of CoxCom was therefore appropriate.

The *Bodett* decision serves to emphasize the importance of having a written policy against harassment. This prohibition should include an "open door" policy on complaints and provide that all complaints of harassment will be promptly investigated. More importantly, the employer should reserve the right to discipline misconduct as it deems appropriate, up to and including termination. Human Resources departments and supervisors should be trained on enforcing these policies, and selected management should be trained further on how to conduct a proper investigation. A well-written policy, coupled with periodic training of supervisory personnel,

offers employers the best protection against claims of wrongful termination based on discrimination and/or harassment.