

HOSPITALITY LAW

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EMPLOYEE'S TERMINATION BASED ON POOR PERFORMANCE, NOT RACE

Restaurant had non-discriminatory reason for firing former manager

By Gregg A. Gilman and Judith Kong

A restaurant chain's recent victory in a race and sex discrimination case underscores the importance of carefully and consistently documenting employee performance deficiencies.

In *Doxie v. Chipotle Mexican Grill, Inc.*, No. 1:13-cv-2611-WSD (N.D. Ga. 9/29/2015), the court granted summary judgment to Chipotle in a race and sex discrimination case brought by Shalett Doxie, a black woman who worked as an "apprentice." The apprentice position was akin to that of a general manager at the mall location where Doxie worked. In this role, Doxie was responsible for the day-to-day operations of the restaurant, including overseeing staff, food quality and cash handling. She was supervised by two white females, Area Manager Melanie Burrows and Team Director Leslie Ratelle.

In February 2010, Doxie notified Chipotle's Human Resources department that one of her employees had, in Spanish, made a racial slur toward a black customer. After consulting with and receiving approval from HR, Doxie terminated the employee. She also reported racial tensions between herself and her predominantly Hispanic staff, and was instructed by Ratelle to hold a meeting with the restaurant's employees to sort through the issues. Doxie held the meeting as directed; however, it did little to defuse the tensions in the restaurant.

One month later, it was noted in Doxie's "development journal" that she showed inconsistencies in running the restaurant and was not meeting expectations. In connection with these comments, Burrows provided examples of improvements Doxie could make in terms of completing required daily tasks. Regular cash audits of the restaurant also revealed multiple cash handling violations over the course of several months. Burrows communicated these performance issues to Ratelle and Devin DeHaven, another high-level management employee, and expressed a desire to terminate Doxie based on same.

Before any action towards termination could be taken, however, Burrows herself was terminated for failure to properly mentor her subordinates, including Doxie. Burrows was replaced by DeHaven, a white male, who was assigned to mentor and supervisor Doxie. When DeHaven took over, Ratelle discussed with him Doxie's ongoing leadership issues, including not coming into work, failure to schedule herself the requisite number of hours, and failure to hold herself and her crew to Chipotle's operational standards. The following month, in October 2010, Doxie's restaurant received two unsatisfactory cash audits and a failing operations grade, at which point Chipotle terminated Doxie's employment and promoted a Hispanic male to general manager of the location. During the termination meeting, DeHaven commented that Burrows had failed to support Doxie in her role and that "as a woman, she should have stepped up" to mentor Doxie.

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In her complaint, Doxie alleged that her termination from Chipotle constituted race and sex discrimination. Chipotle filed a motion for summary judgment, and a magistrate judge recommended that the motion be granted. Doxie objected, but a district court was unpersuaded by her arguments and adopted the magistrate judge's recommendation.

Doxie argued that DeHaven never discussed performance issues with her, had her sign reviews, or placed her on a performance improvement plan. She also said that the last of the two October audits was conducted after the decision to terminate was made, thereby undermining its relevance, and claimed that two Hispanic males who also received unsatisfactory scores during the October audits had not been terminated or disciplined. The district court found these assertions unavailing in the face of the "substantial evidence" of Doxie's poor performance, including her failed audit, development journal entries, documented cash handling issues, and assessment of her leadership abilities. The court noted that the fact that DeHaven allegedly never spoke to Doxie about her performance issues did not mean that such shortcomings had gone unnoticed by her supervisors; to the contrary, the documentation showed that Chipotle management had been well aware of her substandard performance. The purportedly unsigned performance reviews and lack of a PIP were also immaterial, as there was no evidence that DeHaven had not relied on Burrows' statements regarding Doxie's poor performance reviews and placement on a PIP in making his decision. Additionally, the court found it significant that the October audits were only one piece of the evidence establishing Doxie's documented history of poor performance — indeed, it stated that even without the October audits, Chipotle had demonstrated legitimate, non-discriminatory reasons for the termination.

The court also rejected Doxie's arguments that Chipotle's alleged exaggerations to the Equal Employment Opportunity Commission regarding the amount of counseling she had received prior to her termination constituted pretext. Similarly, the supposed "shift" in Chipotle's stated reasons for Doxie's termination after the EEOC issued a "reasonable cause" determination — which were still related to her performance — only served to corroborate the evidence of Doxie's shortcomings.

This case is a prime example of how diligent, contemporaneous documentation of an employee's performance deficiencies can be an important tool for minimizing liability and effectively defending discrimination claims. It serves as a reminder to hospitality employers of the importance of giving employees timely and regular feedback on performance and ensuring that any noted issues are recorded in the individual's file. Here, the substantial written evidence of Doxie's performance failures prompted the court to overlook alleged inconsistencies in Chipotle's case.

However, hospitality employers also need to be mindful of providing the feedback directly to employees in real time in addition to documenting the performance issues. Additionally, position statements should never overstate the employer's position in order to avoid shifting reasons, which may establish pretext.

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ABOUT THE AUTHORS



Gregg A. Gilman is co-chair of the Labor & Employment Practice Group. He may be reached at 212.468.4840 or ggilman@dglaw.com.



Judith Kong is an associate in the Labor & Employment Practice Group. She may be reached at 212.468.4851 or jkong@dglaw.com.

