

Kansas court corrals Cowntown

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The Kansas Court of Appeals recently ruled that the former executive director of Old Cowntown Museum can go forward with her claim for breach of employment contract. In reaching its decision, the court took the Cowntown Board of Trustees to task for its employment practices.

Once upon a time in the West

Jan McKay began her employment as executive director of the Old Cowntown Museum in Wichita in 2001 and entered into a written employment agreement in August that same year. The contract was signed by McKay and the then-president of the Cowntown Board of Trustees.

McKay entered into an amended employment agreement in 2004. That contract was signed by her and the president of the Cowntown board at the time. The amended contract increased McKay's salary and provided for an initial one-year term that automatically renewed unless terminated 60 days before the automatic renewal date. Once renewed, McKay could be terminated only for "just cause," defined as an "ongoing refusal . . . to perform the job duties" or "illegal or unethical conduct."

In 2005, the Cowntown board received an anonymous e-mail complaint about McKay. In response to the complaint, the board formed a committee, which performed a nine-month investigation into the matter. At the end of the investigation, the board asked McKay to resign. She refused, pointing to the "just cause" provision in her 2004 contract.

Board members were surprised to learn of the 2004 contract. Unsure of its implications, the board placed McKay on administrative leave and sought legal counsel. It ultimately terminated her employment in October 2006.

A fistful of dollars?

McKay sued the Cowntown board, claiming it violated the 2004 employment contract and breached its duty of good faith and fair dealing by:

1. failing to provide her with required performance evaluations;
2. placing her on administrative leave;
3. terminating her employment without just cause; and
4. refusing to pay her salary and provide her benefits through September 20, 2007.

The board asked the court to throw the case out, arguing that the 2004 board president didn't have the authority to enter into the 2004 contract. The district court judge granted the request, and McKay appealed.

The good, the bad, and the ugly

The Kansas Court of Appeals reversed and sent the case back to the trial court for further proceedings. In reaching its decision, the appellate court focused on the Cowtown board's history of allowing its presidents to act alone, concluding that McKay could have reasonably believed the president was authorized to execute the 2004 employment agreement.

The court seemed to go out of its way to criticize the board's employment practices. In fact, the court's opinion begins by stating, "The facts of this case do not form a model for the governance of a nonprofit corporation." The court then went on to point out a number of missteps, which it referred to as a "pattern and practice of benign neglect." (It should be noted that the court, following procedural rules, assumed McKay's version of events as true for purposes of deciding the case, and the Cowtown board has the right to contest any disputed allegations at trial.)

As stated earlier, the board's missteps were numerous. First, it didn't follow its bylaws, which require full board approval to authorize contracts. Instead, according to the court, it had a history of letting presidents act alone. Second, it didn't perform biannual reviews of McKay's performance, as required by both the 2001 and 2004 contracts. She received her only performance review in 2002.

Third, the court faulted the board's investigation of McKay in several respects. The investigation committee lost the e-mail complaint that triggered the investigation, and it couldn't recall the identity of the sender or the contents of the e-mail. The committee could recall only three of the four persons it interviewed during its nine-month investigation. Additionally, the board couldn't produce any notes, statements, records, or other documentary evidence relating to the investigation. And the committee never gave McKay an opportunity to respond to the complaints against her. In fact, it didn't even tell her about the investigation.

Finally, McKay claims she learned she was fired through the media, not directly from the board. *Wrzesinski v. Old Cowtown Museum Board of Trustees*, Case No. 100,168 (Kan. Ct. App., May 15, 2009).

Roundup

The court's criticisms of the Cowtown board offer several lessons to employers.

Follow your policies. Inform supervisors and HR about your policies, and regularly provide instruction on compliance.

Don't enter into an employment contract with an employee without running it by your lawyer. If you have a contract with an employee, know what it says, and dutifully follow its terms and conditions.

If you get a complaint about an employee that warrants investigation, conduct a prompt and thorough investigation, and properly document it. Always interview the alleged wrongdoer, and give her a chance to respond to the charges. Courts find time and time again that failing to interview an employee accused of misconduct, as part of your investigation, can bring into question an adverse employment action taken against the employee. Before taking an adverse action, make sure you have all the facts straight, and talk to an employment lawyer if you have questions about the legal implications.