

## Courts' common sense means money back for victorious employer

In two recent decisions, our firm, Bond Schoeneck & King, was successful in recovering monetary relief for employers that had either been victimized by employee wrongdoing or unsuccessfully sued by employees.

We covered the first case last month in "Payback time: Employer wanted its money back—and got it!" (See New York Employment Law, *October 2009*, page 6.)

This month, we'll take a look at a case in which an employer recovered substantial court costs because a court applied plain-old common sense when it looked at existing rules. This time, the employer got a win in court—plus a nice "bonus" amounting to \$58,000.

### \$50,000 worth of transcripts

After an approximately one-month trial in November 2005, a jury in the Federal District Court for the Eastern District of New York returned a verdict in favor of the town of Huntington, which had been sued by William Perks for sexual harassment, discrimination, hostile work environment and retaliation. The town was our firm's client.

Susan Scarpati-Reilly, a town board member, had been separately named as a defendant.

During the trial, the defendants had ordered daily transcripts of the trial testimony from the court reporter. Those transcripts cost approximately \$50,000 for more than 3,000 pages of testimony produced over the course of a month.

After winning their case, the town and Scarpati-Reilly asked to be reimbursed for the costs incurred during the lawsuit.

Those included fees for photocopying, deposition transcripts and those daily court transcripts. The request was made pursuant to Federal Rule of Civil Procedure 54(d) and a

federal statute, 28 U.S.C. §1920.

Perks contested the jury's verdict, filing a motion to set it aside and claiming the verdict was inconsistent.

### Clerk versus judge

The District Court denied Perks' motion and he appealed to the 2nd Circuit. The defendants' request for reimbursement was stayed during the appeal. The 2nd Circuit denied Perks' appeal in May 2007. (*Perks v. Town of Huntington*, 234 Fed. Appx. 9, 2007 WL 1366335, 2nd Cir., 2007)

That's when the issue of recovering the defendants' costs came up for review. District Court clerks have the initial power to approve or disapprove costs. Clerks' decisions, however, are reviewable by the District Court that tried the case.

The clerk denied our request for the high cost of the daily transcripts, but the judge reviewed the clerk's decision and granted our request—including fees for daily trial transcripts.

### 'Confusing and muddled'

Such costs are not customarily awarded. The key to whether daily trial transcripts ordered are taxable to the losing party is if they are, according to 28 U.S.C. 1920, "necessarily obtained for use in the case." In our case, the District Court judge who presided over the initial case agreed that all relevant factors favored awarding the cost of daily transcripts.

In a 16-page decision, the judge cited the length of the case and its complicated nature.

Describing Perks' presentation as "confusing and muddled," and noting that his credibility was a crucial issue in the case, the judge determined that the defendants' attorneys had to rely on the daily transcripts to resolve confusion.

The court also noted that Perks

failed to make any affirmative showing that he was financially unable to bear the cost of the daily transcripts.

In some cases, the losing party's indigence may convince a District Court that a significant award of costs is not appropriate, but that was not the case here. (*Perks v. Town of Huntington*, Slip Op. 99-cv-4811, March 31, 2008)

### Reimbursement, vindication

Perks again appealed to the 2nd Circuit, this time challenging the District Court's award of costs as an abuse of discretion. Oral arguments were heard on May 22, 2009, and the 2nd Circuit issued a summary order affirming the District Court's decision on May 27, 2009. (*Perks v. Town of Huntington*, Slip Op. 08-cv-2123, May 27, 2009)

The 2nd Circuit found that there was no evidence the District Court judge abused her discretion in awarding costs.

The appeals court agreed that Perks had failed to meet his burden of showing he was unable to pay the costs incurred.

Overall, including other miscellaneous costs, the town of Huntington not only won its case but also was awarded more than \$58,000 in costs for the defense of the lawsuit.

Even four years after the original victorious jury trial, it provided further vindication, and a meaningful reimbursement to the town and its taxpayers.

### Lesson learned

Winning an employment law case is great, but a verdict in your favor need not be the end of your story.

If you have to spend substantial amounts of money successfully defending yourself—and that's usually the case—then don't hesitate to ask your attorney about your options for recovering those costs.