

Brinkman vs. Allen and Summit Pharmaceuticals

Statement of Testimony

Summit Pharmaceuticals Inc. is a private generic drug company with 467 employees and approximately \$20 million in annual sales. For the last three years, Helen Brinkman has worked as a sales representative for the company. She has worked for John Allen, Summit's Chicago Sales Manager. Helen is part of a three person sales team that covers Chicago and its suburbs. The other members of the team are Bob Walters and Steve Moore. The accounts in the Chicago territory are evenly divided between Helen, Bob, and Steve. Although she has less experience than either Bob or Steve, Helen has worked very hard over the last three years. For the first three months of her employment, Helen achieved the highest percentage of new sales in the Chicago region and became the top producing sales representative in the Chicago office.

Since beginning to work at Summit Pharmaceuticals, Helen has enjoyed very good rapport with her boss, John Allen. John is responsible for training and mentoring Helen and the other members of the Chicago team. As part of this process, each week John meets individually with each member of his team to discuss their progress and their strategy for the week. On an annual basis, John reviews each employee and reevaluates the sales territories based on their ongoing potential. Helen currently makes a base salary of \$50,000 per year. Her bonus income, based on her sales performance, has grown from \$12,000 in her first year (2006) to almost \$25,000 in year three. Summit Pharmaceuticals rewards its top producing sales representatives by giving them better accounts. Sales territories are realigned each year in June to correspond with the company's fiscal year.

In Helen's weekly meeting with John in early April 2009, John praised Helen for her hard work and for achieving the top position in the territory. As a reward, and to celebrate, John told Helen he would treat her to lunch at a local restaurant where the team often met to discuss business. Both Helen and John were available on Thursday, and they made plans to meet at the restaurant at 12:30 p.m. Thursday morning, John called Helen at 11:30 on his cell phone. He was on a sales call with Bob and had to take a new client to lunch to close the deal. John apologized for having to cancel the lunch and reiterated how proud he was of her achievements. He suggested that they meet at the restaurant after work for dinner instead. Helen didn't think twice about the dinner invitation. In the past, she and the other members of the team had often met with John after work to discuss business issues.

Late that afternoon, John came into Helen's office to say that he would have to postpone dinner that evening. He had to work late to complete a proposal for the new client. John put his arm around Helen's shoulder and told her how badly he felt about having to postpone the celebration again. He also offered, by way of apology to take her to Chez Bernadette the following night, which was a Friday. Chez Bernadette was the hottest new restaurant in town and Helen had been wanting to go. John explained that the

friend he had planned to go to dinner with had canceled that morning and he really didn't want to give up the reservations.

Helen agreed to go, but she had mixed feelings about the offer. On one hand, she trusted and respected John as a supervisor and mentor. On the other hand, she felt a little uneasy that John had put his arm around her shoulder, and Friday night at a chic restaurant felt like more than a business dinner. Helen dismissed her uneasiness by telling herself that she and John were lucky to have a friendly relationship.

Despite her initial uneasiness, Helen had a good time at Chez Bernadette. John was charming and complimentary. The meal was wonderful. For the first time, she and John discussed their personal lives. After dinner, John walked Helen to her car, which was parked about eight blocks away. At the car, they spoke for another ten minutes. John looked at Helen and told her, "You are very beautiful. I've been attracted to you for a long time." Helen was deeply flattered and didn't know what to say. John leaned over and they shared a lingering, intimate kiss. Helen said she had to get home, but had a wonderful time. They kissed again and she got into her car.

The next morning, Helen was in turmoil. She had been attracted to John for quite some time, but had never admitted it to herself. She was interested, confused, excited and mortified by what had happened. She vacillated all weekend, first telling herself that what had happened was understandable. She and John were two single adults who were attracted to each other. She would then admonish herself for "getting involved" with the boss. She decided that her career at Summit Pharmaceuticals was too important to risk complicating it with a relationship with John. She would speak with John on Monday.

On Monday morning, Helen arrived at the office with tremendous trepidation. She had an extremely busy morning and was able to avoid thinking about John. That afternoon was their weekly meeting. It took all of Helen's courage to tell John that although Friday evening was lovely and they obviously had an attraction for each other, she felt the kissing was a mistake and she regretted it had happened. She also said that she hoped their wonderful working relationship wouldn't be compromised. John said that he was relieved she had brought it up and that he was sorry that he had made her feel uncomfortable. He reached out and took her hand, assuring her that they would put the incident behind them and continue working as usual. Helen was relieved, but also a little disappointed. She still felt an attraction to John.

A couple of weeks went by without incident, although John did seem to be warmer and a little less perfunctory in his dealings with Helen. One afternoon, John sent a text message to the members of the Chicago team inviting them out for drinks after work to celebrate a very successful week of business. Helen left the office with Steve and met Bob and John at the usual pub where they celebrated their successes. It was a particularly cordial meeting and Helen remembers thinking how wonderful it was to work with such a good group. Both Bob and Steve got up to leave at about 6:30. John asked Helen whether she could stay a few extra minutes to discuss some business issues. She said yes.

John began by confessing his admiration. He complimented Helen on how quickly she had developed as a pharmaceuticals representative in three short years. He said that he was proud of her accomplishments since the beginning of the year and that he wanted to show his appreciation for her hard work and dedication. John told her that when he reevaluated and assigned territories in June, that he planned to make certain she got “the choice accounts.” Helen said he leaned closer to her and quietly said that she looked particularly alluring and would she please come to dinner with him that night. Helen felt a little uncomfortable, and told him she appreciated his professional support, but she did want to keep their relationship strictly professional. John placed his hand on her knee and asked her to reconsider. She firmly moved his hand and said she had to leave. John admits asking her to dinner to continue discussing the new territories, but denies telling her anything about her appearance or touching her.

The next Saturday, John sent a text message to Helen at 6:57 p.m. saying “Need 2 talk.” Helen responded “OK,” and a few minutes later her phone rang. It was John. According to Helen, it sounded as if he had been drinking. She testified John asked her to meet him for a drink. Helen further testified that she declined, saying she was busy and that John became insistent that she meet him for “just half an hour.” Helen testified further that when she continued to refuse that John raised his voice and told her that “she should do what he says” and that he “controls her fate at the company.” John testified that he sent the text message from the office and that he did call. He testified that the call concerned a legitimate issue with a client that needed completion before Monday morning. He further testified that he had not been drinking, that he had not raised his voice, and that he did not threaten Helen. He testified that it was Helen who asked him to meet her for a drink, that she “came on” to him and that he resisted her telephone advances.

Following the phone conversation, John began to find fault with much of Helen’s work. When the new territories were announced in June, four of Helen’s top accounts had been taken away and given to a fourth sales representative who had just been hired. John maintains that his sole motivation in reassigning the accounts was to give the new sales representative a few “sure fire” clients, an advantage that he says was also bestowed upon Helen when she first joined the company. Without the four accounts, however, Helen’s numbers dropped dramatically. Within a month, John told Helen she had to improve her numbers. If she couldn’t, she should think about finding another job. Two months later, John put Helen on a “performance improvement plan,” or work probation saying that she had one month to improve her numbers or she would have to leave.

After seeking confidential advice from several close friends, Helen followed the procedures in the Summit Employee Handbook and filed a complaint with Summit's Human Relations Department alleging that John violated the Summit Pharmaceuticals sexual harassment policy. When the Human Relations Department failed to achieve a satisfactory resolution of Helen's complaint, Helen resigned her position as sales representative.

Helen remained unemployed for three months, until she obtained a new job as a sales representative. Helen now works for a scientific textbook publishing company and sells science texts to colleges and universities in Illinois and Indiana. She had wanted to stay in pharmaceutical sales but was unable to find a position. Her new job pays \$40,000 per year. With bonuses and commission, Helen has a possibility of earning a maximum of \$45,000 in her first year of employment (in contrast to the approximately \$65,000 that she was earning at Summit). Unlike her position at Summit, Helen is also obligated to travel approximately 35% of her time. It has been estimated that it will take Helen four years to return to the earning capacity she had while working for Summit Pharmaceuticals.

Since her resignation, Helen has experienced difficulty sleeping and has occasional days when she feels angry, depressed or anxious for no apparent reason. She has resisted forming friendships at the new company and has kept her distance from her new supervisor.

Shortly after accepting her new position, Helen filed a sexual harassment lawsuit against John and Summit Pharmaceuticals alleging that they violated her rights under Title VII of the Civil Rights Act.

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Jury Instructions

MEMBERS OF THE JURY:

You as jurors are the sole judges of the facts in this case. You are duty bound to follow the law as stated in these instructions, and to apply the law to the facts as you find the facts. In doing so, you must consider all the evidence. If there are conflicts, it is your duty to reconcile the conflicts, if you can, on the theory that each witness has told the truth. If you cannot reconcile the facts, then it is up to you to determine whom you will believe and whom you will not believe. Your duty is to search for truth.

The law places upon a party the burden of proving her claim by a preponderance of the evidence. In this case, Plaintiff Helen Brinkman must prove sexual harassment by the preponderance of the evidence. Preponderance of the evidence means that when you consider all of the evidence, you believe it is more likely that the claim is true than not true. If the evidence does not lead you to believe it is more likely that the claim is true than not true, then the claim has not been proved by the preponderance of the evidence.

Sexual harassment is either unwelcome sexual advances or other unwelcome verbal or physical conduct of a sexual nature. In order to constitute harassment, the conduct must be unwelcome in the sense that the employee did not solicit or invite it and the employee regards the conduct as undesirable or offensive.

Defendants Summit Pharmaceuticals and John Allen, are liable in plaintiff's claim of sexual harassment if Plaintiff Helen Brinkman proves, by a preponderance of the evidence, that:

First: John Allen, Plaintiff's supervisor, made intentional sexual advances to the Plaintiff;

Second: The sexual advances were unwelcomed by Plaintiff Helen Brinkman;

Third: The acceptance or rejection of the sexual advances were an express or implied condition for the receipt of a job benefit or the imposition of a tangible job detriment;

Fourth: The plaintiff's reaction to the supervisor's advances, in fact, affected a tangible aspect of her employment.

On the subject of damages, the plaintiff must prove by a preponderance of the evidence that she suffered injury, damage or harm which was caused by the sexual harassment. The law defines a cause of injury, harm or damage as something that is a substantial factor in bringing about the injury, damage or harm. With respect to damages,

the idea of the law is simply this: One who suffered through the wrong or fault of the other is to be made whole. Such person is entitled to recover money that will fairly and adequately compensate that person for the amount which she is legitimately entitled, not more or less.

The law provides that an employer is liable for the actual injury, damage or harm which is caused by an employee who is also a supervisor. John Allen is an employee of Summit Pharmaceuticals and was Helen Brinkman's supervisor. Therefore, if you should find that plaintiff suffered actual injury, damage or harm caused by unlawful sexual harassment on the part of Mr. Allen, then your verdict must be against both Mr. Allen and Summit Pharmaceuticals for the amount of the damages caused thereby.

If you find by clear and convincing evidence that the acts of a defendant shows a reckless indifference towards the rights of the plaintiff, you have determined that the plaintiff is entitled to punitive damages. When I say clear and convincing evidence, I mean that the evidence must lead you to conclude that it is highly probable that the defendant acted with reckless indifference. The evidence must produce in your minds a firm belief that the defendant acted with deliberate disregard for the rights of the plaintiff. Punitive damages are warranted when a defendant knew or should have known, in light of the surrounding circumstances, that his conduct would probably result in injury and he continued such conduct in reckless disregard of the consequences.