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Dying Declaration

Although she died prior to trial, a computer company employee nevertheless prevailed in her lawsuit alleging cancer discrimination after her termination.

By Diane Taylor

In February 1991, Vivian Beck, then 42, was hired as an office manager/word processor at the West Los Angeles office of Sybase Inc., a computer software company based in Emeryville in Northern California. Vivian was born and raised in Sydney, Australia, where she earned her bachelor of business administration degree at the University of N.S.W. in 1970. Vivian's previous employment experiences included a brief stint with the UN in New York City as a public relations officer, office management work in Dublin, Ireland, and a training systems development position in Sydney, Australia. In September 1987, Vivian moved to the Los Angeles area with her American boyfriend, Justin Beck, whom she had met at a topless beach in Australia in the mid-1980s. Vivian and Justin, a self-employed network marketer, married soon after their move, but never had any children. Vivian obtained a job as an executive search consultant at Drake International, where she was promoted to branch manager prior to her retention by Sybase in 1991.

At Sybase, Vivian was quickly recognized as a top-performing employee. In her first two years, she received two special achievement plaques, recognizing her commitment and effort in the western region and beyond. In 1993, she was given yet another special recognition plaque for her outstanding performance in a special project and for her work outside her district. In 1995, Vivian was chosen as one of a select "pilot" group of managers across the country to participate in a leadership management seminar in San Francisco. The following year, she was presented with a clock for her exceptional administrative support to all of the company's districts and for her contribution to Sybase's success. Vivian's written evaluation that year indicated that her overall performance "far exceeded [the company's] requirements."

When Vivian commenced her employment with Sybase, the company was in its infancy in the Los Angeles area, and she was only responsible for a five-person office. By 1996, Sybase had gone public and the office had grown to over 50 employees. In order to accommodate the rapid expansion, Vivian had negotiated several times with various building owners for larger premises, put the new offices together and hired the additional personnel. By that time, Vivian was the senior district sales office manager in the El Segundo office of Sybase, where she provided direct administrative and personnel support to Larry Feinsmith, the director of the western region. However, in July 1996, after suffering some financial setbacks, Sybase was forced to implement a company-wide reduction in force. As a result, Sybase eliminated approximately 300 positions, including that of Feinsmith, and purportedly continued to get rid of hundreds of positions to reduce its workforce in the months to come.

On July 22, 1996, Vivian took a six-week sabbatical, which was paid for by Sybase. Vivian was entitled to the sabbatical under company policy because she had a good work record and had been employed there for over five years. Prior to taking the leave, Vivian had undergone an annual physical. In mid-August, Vivian discovered that she had lymphoma, a very severe and aggressive form of cancer. Vivian was referred to the UCLA oncology department, where the doctors prescribed a course of treatment involving six days of chemotherapy every three weeks

for a period of six months. Dr. Peter Rosen, a senior oncologist at UCLA, advised her that if she didn't receive this intense regime of chemotherapy and body radiation, she would not survive. Rosen further recommended that she culminate her treatment with a bone marrow stem cell transplant in approximately six months.

Vivian was devastated by the cancer diagnosis, but decided to immediately pursue the course of treatment advised by her doctors. In early September 1996, upon her return to work, Vivian commenced the chemotherapy and radiation program. Throughout this treatment, which continued through February 1997, Vivian continued to work at Sybase, attempting to schedule her appointments outside of working hours. However, during this time period, Vivian missed approximately 12 full work days due to the treatments and the resulting side-effects. Vivian testified at her deposition that her job at Sybase provided a great distraction from her cancer, for it gave her something to concentrate on that was good in her life and that she really enjoyed doing.

On March 1, 1997, Vivian was admitted into the hospital for the stem cell transplant. The procedure, which required a month-long hospital stay, involved slowly draining all of the liquids from Vivian's body and then transposing them back in. Vivian described the experience as "extremely unpleasant and fearful," especially due to the severe side-effects, which included nausea and a thinning of her throat and esophagus linings, making it very difficult to breathe or swallow. As a result of the hospital stay, which lasted throughout the entire month of March, Vivian exhausted all of her sick and vacation days at work.

On April 1, 1997, Vivian returned to work. Vivian stated in her deposition that going back to the office "felt like she was being released from prison." She said it gave her purpose, for it was a "signal that she was on the road to recovery" because she was "able to function in the real world with everyone else and could feel like a normal person." Upon her return, Vivian allegedly noticed that she was being treated differently by her direct supervisor, Mike Russell. In the next two weeks, Vivian repeatedly attempted to make an appointment with him to discuss the company's plans for the El Segundo office and her future job responsibilities, but he allegedly put her off by promising to talk about it later. Additionally, Russell purportedly failed to return her telephone messages and generally tried to evade her. Vivian said that she believed that Russell's behavior was a "marked rebuff."

On the morning of April 15, 1997, one of the managers summoned her to the conference room, informing her that Russell wished to speak with her on the phone. In the conference room, Russell advised her that he was calling from Bethesda, Md., along with Laura Carmack, a human resources specialist. Russell allegedly told Vivian that due to the company's business needs, they had to make a reduction in company personnel, and that as a result, her position had been eliminated. Vivian was at first too shocked to speak, but then allegedly inquired as to why it had to be her position, since it would make more sense to eradicate a more junior person's position. Russell allegedly explained that there was no one else in the administration department. However, Vivian pointed out that Sharon Siegman, an administrative employee whom she had hired and trained, occupied a more junior position and had much less experience. Russell allegedly responded, "Oh, I hadn't thought of that," but then Carmack purportedly changed the subject, emphasizing that the decision was final. Carmack then offered Vivian a severance package involving ten weeks of severance pay and company paid COBRA coverage for 18 months. Vivian refused and never signed the severance agreement, causing her termination to become effective as of May 15, 1997.

According to Sybase, in the fall of 1996, numerous changes were flowing from the reduction in

force that began in July 1996. During 1996 and 1997, Sybase's domestic sales allegedly failed to meet the quotas and projected estimates. As a result, Sybase's revenues declined, resulting in major cut-backs of their sales and administrative staff across the country. At trial, witnesses described how in April 1997, the El Segundo office was only a fraction of its former size. As part of Sybase's effort to reduce its workforce and cut costs, it allegedly shifted some administrative duties to its existing district managers in each of its sales offices, including those relating to office and facilities management previously handled by Vivian. Additionally, the company purportedly re-assigned Vivian's expense account responsibilities to the corporate controller in her sales region. At that time, Russell allegedly became Vivian's supervisor by default, since her previous supervisor, Feinsmith, had been terminated. However, Russell purportedly had no need for Vivian's administrative support services, since he had other administrative personnel in the Irvine office to handle them.

As a result, by the fall of 1996, Vivian purportedly had virtually no responsibilities and Russell was allegedly criticized for having an oversized administrative staff for the level of revenue and employment for which his district was responsible. Several Sybase employees who had worked with Vivian testified that when Feinsmith's position was eliminated, Vivian's workload was significantly diminished, especially because the El Segundo office was going through a down-sizing mode. The existing junior employees were allegedly adequately handling all of the administrative needs of the El Segundo office.

At that time, Russell had just been given responsibility for the El Segundo office, was unfamiliar with the administrative staffing needs and resources and had brought in an office manager from another Sybase office to temporarily cover Vivian's duties during her sabbatical. Shortly after being retained, the temporary office manager allegedly reported to Russell that all of the administrative work was being sufficiently covered by the existing junior staff and there was essentially nothing for her to do. Consequently, Russell was purportedly directed to reduce the number of administrative personnel in his district. Russell then allegedly reviewed all of the administrative positions in his district and determined that Vivian's office manager position was no longer needed. Russell purportedly discussed the potential elimination of Vivian's position with Sybase's management, who considered whether there were other positions available for Vivian. However, since they could not identify any other suitable vacant positions, they decided to proceed with the formal elimination of her position in April of 1997.

Sybase alleged that other office manager positions in other Sybase offices across the country were similarly eliminated. Russell's former supervisor, Clint Regehr, testified that the office manager in Sybase's Houston office was in a position very similar to Vivian's, with a comparably sized office staff and shrinking workforce, and that her position was eliminated in December 1996. Regehr further testified that Vivian's position would also have been eliminated at that time, but that Russell wanted Vivian to stay on the payroll because of her planned stem cell treatment in March 1997. Sybase alleged that this was the reason that Vivian was retained until April 1997, when her last scheduled treatment was completed and she had returned to work, apparently able to continue full time.

Sybase alleged that after Vivian had informed them that she had been diagnosed with cancer in September 1996, it repeatedly deferred the decision to eliminate her position. At trial, Russell, Regehr and Carmack testified that had it not been for Vivian's serious health condition, her position and employment with Sybase would have been eliminated months earlier. Sybase maintained that it waited until April 1997 in order to accommodate Vivian to the fullest extent possible during her treatment and to keep her employed for as long as was feasible in light of her

medical condition. Vivian was purportedly permitted to work from home and was provided with a laptop computer so that she could communicate with office personnel via e-mail and have access to Sybase's computer systems. Additionally, she was allowed to take medical leave, vacation days and sick days every time she made a request while undergoing treatment. Sybase further alleged that it attempted to have an in-person meeting with Vivian to fully explain the elimination of their position. To this effect, Carmack flew in from Bethesda to meet in-person with Vivian and Russell. However, when Vivian unexpectedly failed to come to work that day and could not be reached, Carmack had to return to Maryland because of other commitments. For this reason, and because Russell had a previously planned business trip that week, two other managers from the El Segundo office attended the April 15th meeting with Vivian in-person, while Russell and Carmack were on the conference telephone. On June 30, 1997, Vivian sued Sybase for medical condition discrimination under FEHA, wrongful retaliation in violation of public policy and breach of contract. After Vivian filed the lawsuit, her condition quickly deteriorated, causing her doctors to schedule a bone marrow transplant for late July. As a result, Vivian's attorneys filed a motion to accelerate the trial and an ex parte application to permit the early taking of her deposition. The motion and application were granted, and on July 23, 1997, Vivian's videotaped deposition was taken by her own attorneys. On the following day, Vivian went into the hospital for a bone marrow transplant. Despite the transplant, on August 14, 1997, Vivian succumbed to the cancer and passed away. Justin Beck continued with the litigation on Vivian's behalf as her successor-in-interest. During the trial, a one-hour excerpt of Vivian's deposition was played for the jury. Plaintiff's counsel indicated that the deposition provided pivotal demonstrative evidence in the trial, for it allowed the jury to connect to Vivian on a personal level, and to hear her first-hand account of the events upon which the lawsuit was based.

Contentions: Plaintiff contended that she was terminated not as part of a reduction in force, but as a result of her medical condition and the time off she had taken for her treatments. At trial, Dan Harrison, a special projects manager, testified that he overheard Russell saying that Vivian's medical condition would pose a burden for the company. Harrison further testified that in another meeting, Russell purportedly stated that Vivian's termination was classified as a reduction in force in order to avoid liability. Plaintiff argued that Vivian's termination was that of an individual, not a position, as she was the only one to be let go in April 1997. Plaintiff further maintained that defendant's written policy provided that if a reduction in force was implemented, junior employees would be the first to be terminated, while more senior, qualified people were to be retained for as long as possible. However, in this instance, plaintiff alleged that there were other, more junior employees in the administrative department that were not terminated in April 1997.

During trial, plaintiff produced a memorandum, dated Nov. 26, 1996, which contained a handwritten list of the administrative employees, with pluses or minuses next to their names denoting their skills and attitude, as well as comments regarding their status. During his deposition, Russell admitted that he had prepared the list, thereby allegedly nullifying his argument that he never compared Vivian's qualifications or job performance to anyone else's prior to his decision to eliminate her position. Vivian's name was followed by two minuses in the skills and attitude column and "health issue" was written in the status column. Plaintiff argued that this "smoking gun" memorandum evidenced that Russell did compare plaintiff to other administrative personnel, which included individuals in less senior positions, and that he made a

determination to terminate her based on this assessment. When Carmack was shown this memorandum during her cross-examination at trial, she allegedly said, "Had I known everything Mike Russell was doing, I wouldn't have approved it [the termination]."

The defendant contended that plaintiff was terminated as part of a company-wide reduction in force and not as a result of her medical condition or her month-long medical leave. Defendant further maintained that it had legitimate, nondiscriminatory reasons for the elimination of plaintiff's office manager position in the El Segundo office, and that these business reasons constituted good cause for her termination. Defendant alleged that Vivian's position was never re-established or refilled, thereby buttressing its argument that her termination was the result of a reduction in force. Defendant further contended that it did its utmost to accommodate Vivian's medical needs while she was employed there, including repeatedly deferring the elimination of her position, furnishing her with a laptop computer and allowing her extended periods of time off for her treatments and hospital stay.

Jury trial: Length, 4 weeks; Deliberation, five hours; Poll, 12-0 (wrongful termination), 12-0 (medical condition discrimination), 12-0 (amount of damages), 12-0 (malice).

Settlement discussions: Prior to trial, the defendant extended an offer of \$200,000 to settle the matter. After one week of trial, plaintiff demanded \$550,000, which was refused. After the plaintiff's verdict came in on March 17, both parties entered into heavy negotiations, resulting in a settlement of \$1,750,000 the following day. A judgment pursuant to stipulation was entered in that amount on March 18, in exchange for plaintiff's waiver of all post-trial motions and appeals.

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