

***Yanez v. Plummer* (2013) 221 Cal. App. 4th 180**

A terminated employee presented enough evidence to raise a triable issue of material fact that his former employer's in house counsel's malpractice, breach of fiduciary duty, and fraud caused his termination.

FACTS AND PROCEDURAL POSTURE

Plaintiff Michael Yanez was employed by Union Pacific Railroad. On Sept. 6, 2008 a coworker slipped and fell while on working with Yanez. The coworker filed a FELA action against Union Pacific. Union Pacific requested a written statement from Yanez. Yanez provided a statement giving the basic facts of the accident. Union Pacific then requested a more specific statement, which Yanez provided, this time with the words "I saw Bobby slip & fall down..."

Union Pacific assigned its in-house counsel, Brian Plummer, to defend the FELA action. Plummer met with Yanez and confirmed that Yanez did not actually "see" the accident occur. Before Yanez's deposition, Yanez expressed concern to Plummer about his job, since his testimony might be unfavorable to Union Pacific. Plummer responded that he was Yanez's attorney, and that as long as Yanez told the truth, his job would be safe. Plummer did not prepare Yanez for the deposition.

At the deposition Yanez testified about various unsafe working conditions at Union Pacific. Yanez then confirmed that he did not actually see the accident. Plummer confirmed this testimony, and then asked Yanez about the second written statement in which Yanez claimed he *did* see the accident. Plummer did not ask Yanez for an explanation, but Yanez offered that he had worded the second statement incorrectly.

After the deposition Union Pacific conducted a disciplinary hearing against Yanez, charging him with violating a company policy against dishonesty. At the hearing Yanez again reiterated that he simply misworded the written statement, and that he did not actually see the accident occur. Union Pacific terminated Yanez. Yanez then filed an action against Union Pacific for wrongful discharge, and against Plummer for legal malpractice, breach of fiduciary duty, and fraud. Plummer successfully moved for summary judgment claiming that Yanez could not meet the causation element of the three causes of action. Yanez appealed.

DISCUSSION

The court explained that Yanez and Union Pacific occupied adverse positions in the coworker's lawsuit. Thus Plummer could only represent Yanez if both Yanez and Union Pacific provided informed written consent. Violation of a state bar rule prohibiting concurrent representation of conflicting interests constitutes evidence of malpractice and breach of fiduciary duty, although it is not proof in and of itself. Yanez provided additional evidence for his claims: Plummer told Yanez that he was Yanez's attorney; Plummer elicited Yanez's admission that his written statement conflicted with his subsequent testimony; Plummer never gave Yanez a chance to explain this discrepancy; and Plummer did not present Yanez's first statement at the deposition. A Union Pacific representative admitted that the disciplinary action against Yanez was based on the deposition. The court found that all of this evidence was sufficient to present a triable issue of material fact as to whether Plummer caused Yanez's termination.

Held: Reversed.