Fenwick Employment Brief

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Male Employee Allowed To Proceed With Sexual Harassment Claim Arising Out Of Female Co-Worker's Sexual Overtures

In *EEOC v. Prospect Airport Services, Inc.*, plaintiff Rudolpho Lamas was allowed to proceed with his case for sexual harassment by a co-worker after the federal Ninth Circuit Court of Appeals reversed a summary judgment in the employer's favor. Lamas was recently widowed when he started working for Prospect at the Las Vegas Airport. Soon after, a married co-worker, Sylvia Munoz, began a series of sexual overtures that Lamas rejected. When Munoz persisted, Lamas replied that he was just not interested and, despite repeated complaints to management, no action was taken to stop the harassment. Co-workers learned of Munoz's sexual advances and allegedly taunted Lamas that he must be a homosexual. Prospect later discharged plaintiff for unsatisfactory performance and the lawsuit followed.

In deposition testimony, plaintiff admitted that most men in his circumstances would have welcomed Munoz's advances. Based on this admission, the employer urged that Lamas must have welcomed Munoz's advances. The court rejected this assertion as a mere stereotype; indeed, Lamas had testified that he consistently rejected her advances and complained to management.

The employer also argued that Munoz's actions were not severe or pervasive as to create a hostile environment. To the contrary, the court ruled that Munoz's "relentless" pursuit of Lamas created a triable issue of the existence of a hostile work environment. Further, the court opined that Prospect's responses to plaintiff's complaints about Munoz's harassment were "ineffectual." In particular, the court pointed to a manager's response that plaintiff should sing to himself "I'm too sexy for my shirt."

The manager's response likely could have been avoided by training and requiring managers to take all complaints of harassment seriously, including those raised by male employees against female co-workers and supervisors. It is important to remember that an employer's liability for co-worker harassment may be avoided by immediately stopping the harassment, no matter what gender circumstances are involved.

Employee Discharged After Stroke Allowed To Pursue Disability And Age Discrimination Claims

In *Sandell v. Taylor-Lustig, Inc.*, Robert Sandell was hired as vice president of sales in 2004. Six months into his employment, he suffered a stroke. Upon returning to work, Sandell walked with a cane and his speech was noticeably slower. His performance evaluations for 2004 and 2005 rated Sandell as meeting or exceeding requirements in all areas. His 2006 review, however, rated him as needing to improve in several areas while meeting standard in others. In 2007, a few days after Sandell's 60th birthday, his employer terminated his employment for unsatisfactory performance, including poor sales. Sandell sued for disability and age discrimination.

The lower court dismissed the suit on the grounds that Sandell was not disabled and there was insufficient evidence of discrimination to warrant a trial. Reversing the summary judgment, the California court of appeal held that evidence of Sandell's need for a cane in order to walk and his impaired speech was "clearly sufficient" to establish that Sandell was disabled.

The court also ruled that there was evidence of discrimination sufficient to require a trial. For one, management's criticisms of his performance were mostly subjective and thus allowed an inference that the criticisms were motivated by discriminatory animus. The court further cited Sandell's testimony that his manager told him that if he "did not make a full recovery" then the company had the right to fire or demote him. On another occasion, the manager allegedly asked Sandell when he was "going to drop the cane" and "drop the dramatization."

The court opined that these alleged comments were "close to direct evidence" of disability discrimination. Other management comments supported the age discrimination claim, including several incidents where an executive said he would "rather fire old people and replace them with newer, younger people because it was cheaper."

This case powerfully reinforces two key points of HR practice: Good documentation of performance problems should focus as much as possible on objective, measurable criteria, and even the best documentation will be undercut by management comments of a discriminatory nature.

NEWS BITES

Employers Need Only Provide Meal Periods And Need Not Ensure Employees Actually Take Breaks

Since 2008, the California Supreme Court has been expected to answer the question, in *Brinker Restaurant v. Superior Court*, whether the California Labor Code requires employers to provide meal and rest periods by simply making them available to employees (even if employees do not take their breaks), or whether employers must ensure that employees actually take their breaks. Not willing to wait for the Supreme Court's decision, a California court of appeal held in *Hernandez v. Chipotle Mexican Grill, Inc.* that employers need only provide the breaks and not ensure that employees take their breaks. The court explained that to force employers to ensure breaks are taken would place an undue burden on employers and create "perverse incentives" to employees to violate company break policies in order to receive extra compensation for breaks not taken. The final word on this issue from the California Supreme Court remains pending.

Employee Who Received Benefit Of Class Settlement Not Allowed To Bring Later Claim For Wage Penalties

In *Villacres v. ABM Industries, Inc.*, a security guard had accepted a settlement payment as part of the resolution of an earlier class action lawsuit against his employer for unpaid overtime and penalties. In the earlier action, the employer paid up to $2.5 million (including $730,000 in penalties) to the class, including Villacres, in return for a release. Two days after dismissal of the class action lawsuit, Villacres filed his individual lawsuit seeking penalties for the employer's alleged failure to timely pay overtime, furnish complete wage statements, provide meal and rest breaks, and reimburse business expenses (claims that were not expressly pled in the class action lawsuit). Rejecting the new claims, the court held that the earlier release prevented Villacres from litigating not only those claims that were actually raised in the class action lawsuit, but also claims *that could have been raised* in the prior lawsuit. The court explained that a class member may not bring a second action solely to recover greater or different penalties. As the court pointed out, not only did Villacres accept the settlement payment, he neither objected to the settlement nor did he opt out of the class action in order to preserve his ability to pursue his individual claims.

Court Refuses To Enforce Unconscionable Arbitration Agreement

In an example of an arbitration agreement that failed to pass legal muster, the California court of appeal refused to compel arbitration in *Trivedi v. Curexo Technology Corporation*. Plaintiff had sued for discrimination in court and sought to avoid the arbitration remedy required by his employment agreement. The court held that the agreement was "unconscionable" for several reasons. First, the agreement incorporated by reference the arbitration rules of the American Arbitration Association but failed to attach the rules for the employee's review. Next, the agreement mandated an award of attorney's fees to the prevailing party; the court ruled that a mandatory fee award violated public policy because fees may be awarded against an employee alleging discrimination only where the claim is "frivolous, unreasonable, without foundation, or brought in bad faith." In addition, the court disapproved of a provision that allowed either party to seek injunctive relief in court, observing that such a provision unfairly favored the employer as the party that would be much more likely to seek injunctive relief. Employers may attempt to avoid this result by providing employees with a hardcopy or softcopy of the arbitration rules and not including a mandatory fee award to the

prevailing party in arbitration provisions. A more thoughtful decision must be made whether to include a carve-out from arbitration of court claims for injunctive relief, since preserving the right to seek injunctive relief in court (for instance in trade secret matters) may entirely outweigh the desirability of arbitration.

Workers' Compensation Appeals Board Approval Required To Settle Both Workers' Compensation And Disability Claims

In a familiar scenario, Wendy Steller filed a workers' compensation claim arising out of an alleged work-related back injury as well as a civil lawsuit for disability discrimination against her employer. At a court-ordered settlement conference, Steller settled both her workers' compensation and civil disability claims for $95,000. Buyer's remorse set in, and Steller subsequently sought to set aside the entire settlement on the ground that settlement of the workers' compensation claim required administrative approval by the Workers' Compensation Appeals Board ("WCAB"). In *Steller v. Sears, Roebuck and Company*, the California court of appeal held that the settlement was enforceable albeit subject to approval by the WCAB. The court explained that if the WCAB does not approve the settlement, then the settlement would be set aside.

Class Action Against Oracle Approved For Alleged Overtime Violations

In *Oracle Wage and Hour Cases*, involving four lawsuits in a coordinated proceeding against Oracle, the Superior Court for the County of Alameda certified a class of about 3,000 Oracle employees who allege they were misclassified as exempt from overtime and owed unpaid overtime pay. The classes include technical and service analysts, project managers, and quality assurance analysts and developers. The plaintiffs also allege they were deprived of breaks, and owed penalties for unpaid wages, untimely payment of wages, and inaccurate wage statements. Class certification does not decide the merits of the case, and Oracle will still have an opportunity to establish the claimed exemptions.

Employer Properly Discharged Employee For Failure To Give Timely Notice Of Need For Additional FMLA Leave

In *Brown v. Auto Components Holdings LLC*, the federal Seventh Circuit Court of Appeals (covering Midwestern states including Indiana) held that plaintiff failed to timely notify her employer of her need for additional FMLA leave. When Letecia Brown failed to timely return from FMLA leave, per the union contract, the employer mailed her notice giving her five days to return to work or to provide medical certification of the need for additional leave. The day after her scheduled return date, Brown called the plant nurse about her need for additional leave and was told that she needed to provide medical certification. The employer terminated Brown after she failed to provide the requested certification. After her termination, Brown provided certification and sued when her employer refused to reinstate her. In dismissing the suit, the court held that Brown's termination, after notice and opportunity to provide medical certification, was lawful.

Employee Failed To Establish Sufficient Evidence Of Race Discrimination

In *Smith v. Fairview Ridges Hospital*, the federal Eighth Circuit Court of Appeals (covering Midwestern states including Minnesota) held that a transportation aide employed at a hospital emergency room ("ER") failed to offer sufficient evidence of race discrimination to require a trial. Among other evidence, Shelia Smith (one of two African Americans in the ER room) offered evidence that a picture of "Buckwheat," a character from the Little Rascals show, was posted on the ER door along with other employees' childhood photographs with the caption: "Guess who this is?" On another occasion, a co-worker said Smith needed to "go back to the ghetto where she came from." In yet another incident, Smith brought fried chicken to a potluck. When a nurse asked who brought the fried chicken, a co-worker responded: "Who else?" In affirming summary judgment for the employer, the court held that the incidents, though racially tinged, were relatively infrequent (occurring over 12 months), involved co-workers and not managers, and were not severe or pervasive as to give rise to a hostile work environment.

Army Reservist Allowed To Pursue USERRA Claim

In *Vega-Colon v. Wyeth Pharmaceuticals*, an army reserve member claimed that his employer violated the Uniformed Services Reemployment Rights Act ("USERRA") by, among other things, failing to promote him, giving him a low performance rating, and extending his performance improvement plan ("PIP"). After dismissing nearly all of his claims for lack of evidence, the federal First Circuit Court of Appeals (covering eastern states and Puerto Rico) nonetheless allowed plaintiff to pursue his claim that extending the PIP violated USERRA. While the employer purportedly extended plaintiff's PIP for continued nonperformance, the employer's own documentation showed that plaintiff had successfully completed the PIP objectives. Further, plaintiff offered evidence that a supervisor stated Vega did not pass the PIP due to his military service.

Supervisor's Violation Of "Personal Space" Sufficed To Establish Hostile Environment Claim

In *Vera v. McHugh*, an administrative coordinator for the U.S. Army in Puerto Rico was required to share a small office space with her supervisor. For three months until Rosa Vera moved to another office, plaintiff alleged that her supervisor stared at her, came close to her that she could feel his breath, and moved his chair close to her that their legs touched. When plaintiff showed discomfort at the supervisor's proximity, he allegedly laughed, and blocked her escape from the office. On one occasion, the supervisor called plaintiff "Babe." On these facts, the federal First Circuit Court of Appeals reversed a summary judgment in the employer's favor and held that plaintiff offered sufficient evidence of a hostile work environment to require a trial. Although the court observed that some lack of privacy and personal space is inherent when employees must share office space, the evidence showed that the supervisor "went out of his way to violate Vera's privacy and the integrity of her personal space."

Jury Awards $8 Million For Sexual Harassment

On October 4, 2010, a federal jury in Michigan awarded plaintiff in *Waldo v. Consumers Energy Company* almost $8 million including $7.5 million in punitive damages (in addition to $400,000 in compensatory damages). Plaintiff, an apprentice, alleged that she was given "demeaning" job assignments on account of her sex, locked into a portable lavatory for 20 minutes in 90-degree weather, and called names. Her complaints to supervisors were allegedly ignored, and one allegedly said he did not want women in the department because they were "not strong enough."