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A legal update from Dechert's Labor and Employment Group

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U.S. Court of Appeals for the Third Circuit Recognizes Claim for Retaliatory Harassment

In *Jensen v. Potter*, 435 F. 3d 444 (2006), the U.S. Court of Appeals for the Third Circuit recognized for the first time that employees can state a claim for retaliatory hostile work environment under the anti-retaliation provision of Title VII of the Civil Rights Act of 1964. The Third Circuit joins the First, Second, Fourth, Sixth, Seventh, Ninth, and Tenth Circuits in recognizing that a hostile work environment can support a retaliation claim. The Fifth and Eighth Circuits, by contrast, limit the reach of Title VII's anti-retaliation provision to "ultimate employment actions" such as discharge.

In *Jensen*, the plaintiff was sexually propositioned by a supervisor in September 2001. Jensen reported the incident. The supervisor was transferred and, following an investigation, fired in early 2002. Jensen's workstation was moved, however, and she was immediately subjected to insults by another employee. The insults included references to her complaints concerning the supervisor. In addition, several employees would no longer speak to Jensen, and she was physically threatened and her property vandalized.

Jensen complained about the harassment to her supervisors. Nineteen months after the incident with the supervisor, a new supervisor intervened, and the harassment finally stopped. Jensen then sued for sex discrimination and retaliatory harassment. The district court granted the employer's motion for summary judgment.

The Third Circuit reversed and held that an employee can state a claim for retaliatory harassment if she can show that:

- She suffered intentional discrimination because of her complaint
- The discrimination was severe or pervasive
- The discrimination adversely affected her
- A reasonable person would have been adversely affected in the same circumstances
- The employer is liable for the actions of the harasser

Four aspects of the court's decision are significant:

- *Only Severe or Pervasive Conduct Required*. The Third Circuit's pre-*Jensen* standard required the plaintiff to demonstrate that the harassment was "pervasive *and* regular." *Jensen* substitutes a "severe *or* pervasive" standard. Employees may now find it easier to state a hostile work environment claim based on either a single isolated severe incident of harassment or repeated subtle incidents of behavior.
- *Severity and Nature of Conduct*. The Third Circuit made clear that some behavior, although hurtful, is not harassment. For instance, Jensen complained about coworkers giving her the "cold shoulder," but the court refused to consider that as evidence of harassment. Similarly, the court rejected Jensen's claim that coworkers vocalizing their support for the supervisor whom Jensen had accused should be considered when determining whether there was severe or pervasive harassment. Employees may express their support for the accused.

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- *Employer Liability for Coworker Conduct.* The Third Circuit held that, to hold the employer liable for coworker harassment, the plaintiff must demonstrate that the employer knew or should have known about the harassment but did not act promptly to stop it. The court found that the employer did not act promptly enough to stop the retaliatory co-worker harassment directed at Jensen after the employer knew (or should have known) about it. Had a supervisor participated in the harassment, the employer would have been strictly liable for the supervisor's conduct, subject (perhaps) to an affirmative defense.
- *Sex Discrimination Versus Harassment*. The Third Circuit addressed whether retaliatory harassment can also qualify as sex discrimination. The court found that although it is possible that the retaliatory harassment in *Jensen* would have occurred regardless of the accuser's sex, the circumstances "will almost always present a question that must be presented to the trier of fact." In other words, employers are unlikely to get summary judgment on a sex discrimination claim arising from a retaliation allegation if there is evidence sufficient to defeat summary judgment on the retaliation claim.

Employers should be aware of the additional exposure that *Jensen* may create. They should be sensitive to claims of additional harassment made by an employee who previously complained of harassment even when the additional harassment does not involve sex-based conduct. An employer should respond to all allegations of harassment in an effective and prompt manner and, of course, adequately document its response. ■

Employers Can Be Liable for Employee's Unauthorized Computer Use

An employer on notice that one of its employees is using a workplace computer unlawfully may have a duty to investigate and take prompt, effective action to stop such activity. An employer that fails to do so, resulting in harm to a third party, can be liable in negligence to the third party, the New Jersey Appellate Division has ruled in a recent decision. *See Doe v. XYC Corp.*, 887 A.2d 1156 (N.J. Super. Ct. App. Div. 2005).

In *Doe*, an employee used his workplace computer to regularly access pornographic websites. He sent nude and semi-nude pictures of his ten-year-old stepdaughter, which he had unlawfully taken at home, via his computer at work. The employee's wife sued the employer on behalf of her daughter, alleging (among other things) that the employer negligently allowed the employee to post the pictures from his workplace computer. The Superior Court held that, subject to adequate proof of causation and damages, the employer could be held liable in negligence for failing to prevent the employee from posting the pictures.

Although the employer had a policy prohibiting monitoring of an employee's computer activities "just for the sake of monitoring," it also notified employees that computer use should be restricted to business activities, that failure to do so could result in disciplinary action, and that employees should notify personnel of any violations of this policy. The court found that the employer had the capability to monitor the employee's computer activities and, most importantly, was on notice of numerous instances in which the employee used his workplace computer to access pornography in his open cubicle. Under these circumstances, the court ruled, the employer's duty to investigate and stop such unauthorized use of workplace computers trumped any privacy interest that the employee might have in his computer activities.

Employers should use the Superior Court's decision as an occasion to review their computer use policies and evaluate whether to monitor computer use for unlawful activity. ■

Paralegals Generally Not Exempt Under FLSA

In December 2005, the U.S. Department of Labor, Wage and Hour Division ("W&H"), issued the second of two recent opinions on the classification of paralegals as exempt employees under the agency's white collar regulations (29 C.F.R. Part 541). *See* 2005 WL 3638473; 2005 WL 330608.

In both letters, W&H confirmed its longstanding position that paralegals cannot qualify for the learned professional exemption unless they possess an advanced specialized degree in a professional field other than that of paralegal (*e.g.*, engineering), the advanced degree is a standard prerequisite for entry into the other field, and they employ the advanced degree in the performance of their paralegal duties. So, for example, a degreed engi-

neer hired as a paralegal to provide expert advice on product liability cases could qualify for the exemption.

Prior to W&H's most recent revision of its white collar exemption regulations, commentators urged W&H to reconsider its position, but no commentator provided any evidence that the key requirement of the learned professional exemption test could be satisfied by the performance of paralegal duties—that a particular four-year *specialized* degree is a standard prerequisite for entry into the paralegal occupation. W&H thus declined to extend the professional exemption to paralegals.

In its most recent opinion letter, W&H also considered whether paralegals might qualify as exempt under the administrative exemption. Reluctantly acknowledging that possibility, W&H advised that only a paralegal whose primary duty relates to the management or general business operations of the employer or its customers, *and* who exercises discretion and judgment with respect to matters of significance in performing that primary duty, may be exempt.

W&H cautioned employers, however, not to confuse the exercise of skill with that of independent judgment and discretion. Prohibitions in most jurisdictions on the practice of law by lay persons, along with the widely implemented ABA Code of Professional Responsibility requirement that a lawyer closely supervise a lay person's work, will often make it difficult for employers to establish that their paralegals exercise sufficient independent judgment and discretion to satisfy the administrative exemption.

Employers should consider reviewing whether they have misclassified paralegal as exempt and confer with counsel about the self-correction of any errors. ■

Complaints about Compensation by Non-Union Employees May Constitute "Protected Activity" Under the NLRA

A recent decision of the U.S. Court of Appeals for the D.C. Circuit offers a clear reminder that non-union employees enjoy rights under the National Labor Relations Act ("NLRA") and cannot be disciplined or discharged when they exercise those rights. In *Citizens Investment Services Corp. v. National Labor Relations Board*, 430 F.3d 1195 (D.C. Cir. 2005), the D.C. Circuit upheld the Board's finding that an employer violated the NLRA by discharging a financial consultant who complained about the employer's compensation system.

Section 7 of the NLRA protects "concerted" employee activities—both inside and outside the union setting—undertaken "for the purpose of . . . mutual aid or protection. . . ." The D.C. Circuit emphasized that this right is expansive in its scope. It encompasses both the circumstance in which an employee seeks to "initiate, induce or prepare for group action" (even if no other employees choose to involve themselves) or "who brings a group complaint to the attention of management" (without regard to whether the employee was "designated or authorized to be a spokesman for the group"). Concerted activity need not involve a union, a union organizing drive, or any other union-related conduct to be protected.

In *Citizens Investment*, the discharged financial consultant sent an email to management reporting "the general consensus" among his fellow analysts concerning issues with the payment of commissions. The employee jokingly signed the email as the consultants' "union president." The employee also invited a human resources representative to join him and some fellow consultants in a discussion about compensation. The D.C. Circuit upheld the Board's finding that the employee engaged in concerted activity for which he could not be discharged.

In considering whether to discipline or discharge an employee, both union and non-union employers should consider not only whether the employee may have a legal claim based on the usual protected characteristics (*e.g.*, race, sex, disability status, FMLA leave status, and so forth), but also whether the employee may have a claim as a result of NLRA-protected activity. Employers should also consider whether to seek a release of NLRA claims in separation agreements. ■

California Courts Split Over Compensation for Missed Meal Breaks

Appeals court panels in California have divided over the issue whether violations of California's meal and break regulations result in payments that are penalties or wages. The distinction is significant because it affects the types of damages to which plaintiffs are entitled and the statute of limitations period that applies.

Under California law, workers are entitled to a 30-minute meal break for every five hours worked and a ten-minute break for every four hours worked. Workers are entitled to receive one hour of pay for each missed meal break. If the extra pay for the missed break is a penalty, a restrictive one-year statute of limitations applies to any claim to recover the extra pay, rather than a more forgiving three

or four-year limitations period. The penalty characterization would also likely prohibit the award of punitive damages.

Appeals court panels in San Francisco and Los Angeles recently sided with employers, concluding that meal and break pay is a penalty, not a wage. The Los Angeles court recognized that the relevant statute does not explicitly refer to the damages as a penalty, but reasoned that the damages do not have the characteristics of a "wage" under California law. The court also found that the provision of the law requiring an employer who fails to provide mandated breaks to pay a fixed sum to the employee is more akin to a penalty than a wage. An appeals panel in San Diego, however, reached the opposite conclusion—that the meal break law provided for wages as damages. The San Diego court reasoned that the legislature "could have, but did not" call the damages a "penalty."

Because California appeals court decisions are binding authority throughout California, rather than in just the district in which they were decided, the California Supreme Court will probably address the issue. The California Supreme Court's resolution of the issue will have significant consequences for the parties involved in a number of cases, including *Savaglio v. Wal-Mart*, a much-publicized case in which a jury awarded Wal-Mart employees $172 million for unpaid breaks.

Employers with operations in California should review their employment practices to ensure that they comply with the break requirements and continue to monitor developments. ■

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