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The Year in Review: Significant Decisions on Sexual Harassment

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Federal courts have issued rulings in sexual harassment cases over the past year that are of interest to attorneys who practice in the field and human resource professionals. Listed below is a summary of several of the cases from 2004-2005 in the area of sexual harassment.

Requirements for Prima Facie Case for Hostile Work Environment Based on Sexual Harassment

- *Okruhlik v. University of Arkansas,* 395 F.3d 872, 881 (8th Cir. 2005). "To establish a prima facie case for a hostile work environment based on sexual harassment, Okruhlik must show (1) that she belongs to a protected group; (2) that she was subjected to unwelcome sexual harassment; (3) that the harassment was based on sex; and (4) that the harassment affected a term, condition or privilege of her employment."

For Purposes of Liability under Title VII, Who is a Supervisor?

- *Noviello v. City of Boston,* 398 F.3d 76, 96 (1st Cir. 2005). The court affirmed the grant of summary judgment to the Title VII defendant on plaintiff's claim of sexual harassment. The court held that plaintiff's harassers were merely second-rung "supervisors" who, despite their title, were not supervisors within the meaning of *Faragher* and *Ellerth.* "Having in mind both common law agency principles and the purposes of anti-discrimination and anti-retaliation laws, we agree with the Seventh Circuit that the 'essence of supervisory status is the authority to affect the terms and conditions of the victim's employment. . . This authority "primarily consists of the power to hire, fire, demote, promote, transfer, or discipline an employee." . . Without some modicum of this authority, a harasser cannot qualify as a supervisor for purposes of imputing vicarious liability to the employer in a Title VII, but, rather, should be regarded as an ordinary coworker."

- *Joens v. John Morrell & Co.*, 354 F.3d 938, 940-41 (8th Cir. 2004). The court affirmed the grant of summary judgment to the Title VII hostile-environment defendant, holding that the alleged harasser was not plaintiff's supervisor. The court canvassed the approaches of different Circuits, noting that the decisions of the few circuits to address the question are not entirely consistent. The majority of courts hold that, to be a supervisor, the alleged harasser must have had the power (not necessarily exercised) to take tangible employment action against the victim, such as the authority to hire, fire, promote, or reassign to significantly different duties. The Second Circuit, however, recently adopted a broader standard, concluding that an alleged harasser is a supervisor for these purposes if he possessed "authority to direct the employee's daily work activities", even if he otherwise lacked the power to take tangible employment action against the victim. The court did not resolve the question but held that the alleged harasser was a co-worker because he

was only the foreman of one of the production lines that depended on plaintiff to make their boxes. He was a customer without direct authority to control plaintiff's activities. He could demand that she allocate more of her production to him, but she had discretion and the allocation did not affect her total work effort. He could "write her up", but all foreman could do so and there was no evidence he had ever done so. The power to discipline plaintiff lay with the Human Resource Department.

- *Hill v. Lockheed Martin Logistics Management,* 354 F.3d 277 (4th Cir. 2004). The court affirmed the grant of summary judgment in favor of defendant. Plaintiff alleged that she was wrongfully terminated from her job due to discrimination because of her age and sex, and in retaliation for her complaints of such discrimination. Plaintiff argued that Lockheed had liability because although the individual who allegedly made discriminatory remarks did not actually make the decision to terminate Hill, he "substantially influenced" the employment decision made by the formal decisionmaker. The Fourth Circuit refused to adopt this expansive view of liability: "we decline to endorse a construction of the discrimination statutes that would allow a biased subordinate who had no supervisory or disciplinary authority and who does not make the final or formal decision to become a decisionmaker simply because he had a substantial influence on the ultimate decision or because he has played a role, even a significant one in the adverse employment decision". The court concluded that to survive summary judgment, an aggrieved employee who rests a discrimination claim under Title VII upon the discriminatory motivations of a subordinate employee must come forward with sufficient evidence that the subordinate employee possessed such authority as to be viewed as the one principally responsible for the decision or the actual decision-maker for the employer.

What Makes an Environment Hostile?

- *Ezell v. Potter,* __ F.3d ___, 2005 WL 02958 (7th Cir. Mar. 16, 2005), affirmed the grant of summary judgment to the race, sex, and age discrimination defendant on plaintiff's harassment claim. Plaintiff showed that his supervisor made anti-white, anti-male and anti-older worker comments sufficiently strong that they constituted direct evidence of discrimination on his disparate-treatment claims, but that he had not shown the comments were pervasive or severe. As to severity, the court held that they simply reflected ignorant stereotypes. As to pervasiveness, the court stated: "Ezell testified by affidavit that Wright made these kinds of remarks on a regular basis. Of course, a regular basis could be daily, weekly, monthly or even yearly; Ezell provides no detail on the regularity and so we cannot consider the few comments detailed in the briefs to be pervasive."

- *McPherson v. City of Waukegan,* 379 F.3d 430, 439 (7th Cir. 2004). The court affirmed the grant of summary judgment to the Title VII sexual harassment defendant. The court distinguished between the physical assaults on plaintiff by her supervisor and the verbal comments prior to the assaults. "While Copenharve's inquiries about what color bra McPherson was wearing, his suggestive tone of voice when asking her whether he could 'make a house call' when she called in sick and the one occasion when he pulled back her tank top with his fingers were lamentably inappropriate, we agree with the district court that, due to the limited nature and frequency of the objectionable conduct, a hostile work environment did not exist until the March 21, 2001

assault." The court also held that plaintiff had not shown she subjectively found these "questions and remarks" offensive.

- *LeGrant v. Area Resources for Community and Health Services*, 394 F.3d 1098 (8th Cir. 2005). The court affirmed the grant of summary judgment to the Title VII same-sex sexual harassment defendant. The court of appeals held that repeated sexual advances on the male plaintiff by a priest on defendant's board of directors were not actionable despite the priests admission of his demands that plaintiff watch pornographic movies with him, hugging the plaintiff, kissing the plaintiff on the mouth, touching his crotch, and making explicit sexual suggestions, all of which occurred after plaintiff had followed defendant's procedures and complained following the priest's first sexual overtures. The court sought to explain its ruling: "'Sexual harassment standards are demanding—to be actionable, conduct must be extreme and not merely rude or unpleasant.'" *Id.* at 1101. It also noted: "Compared to other cases in which the Supreme Court and our circuit have found the harassing conduct did not constitute sexual harassment, we believe the harassment alleged in this case did not create an actionable hostile work environment." *Id.* at 1102. The court found that none of the incidents was physically violent or overtly threatening and while the priest's actions were "manifestly inappropriate", the three isolated incidents occurring over a nine-month period were "not so severe or pervasive as to poison LeGrand's work environment".

- *Hesse v. Avis Rent A Car System, Inc.*, 394 F.3d 624, 630 (8th Cir. 2005). The court affirmed the grant of summary judgment to the Title VII sexual harassment defendant, holding that the loud noises and bumptious conduct of the alleged harasser were directed equally to male and female employees under his supervision and there was no basis to say it was because of sex. The court stated: "In determining whether a hostile work environment existed, evidence concerning all circumstances of the complainant's employment must be considered, including the frequency of the offending conduct, its severity, whether it was physically threatening or humiliating, and whether it unreasonably interfered with work performance."

- *Baker v. John Morrell & Co.*, 382 F.3d 816 (8th Cir. 2004). The court affirmed the judgment on a jury verdict for the Title VII and Iowa Human Rights Act sexual harassment plaintiff, including awards of $839,470 in compensatory damages, $33,314 in back pay, $38,921 in front pay, $650,000 in punitive damages (remitted to $300,000), and $174,927 in attorneys' fees and costs, a total of $1,386,632. Plaintiff and other women had unsuccessfully complained for years about severe and pervasive harassment and degradation interfering with their work and their ability to work. The harassment included a daily barrage of degrading remarks, interference with plaintiff's work, physical assaults in the form of throwing 40-pound meat boxes at plaintiff and hitting her, male employees' grinding their groins into plaintiff's rear as they passed her, threatening her by driving at her in the parking lot, preventing or delaying plaintiff in going to the bathroom even where it was medically necessary, and driving plaintiff to emotional breakdowns and suicide attempts. The court found there was an actionable environment and rejected the company's claim that it was unaware of the sexual nature of the harassment. The court also upheld plaintiff's constructive discharge claim stating that the constant barrage of harassment was objectively intolerable, and she had little choice but to leave the position and seek employment elsewhere.

- *Porter v. California Dept. of Corrections*, 383 F.3d 1018, 1027 (9th Cir. 2004). The court reversed the grant of summary judgment to the Title VII sexual harassment defendant. The court stated that a single instance of sexual harassment may create an actionable hostile environment "if the harassing conduct is sufficiently severe." The court added: "With the exception of sexual assault, few types of harassing conduct are more extreme than thrusting explicit sexual propositions toward an employee and then executing reprisals against her for resisting the advances."

- *Chavez v. State of New Mexico*, 397 F.3d 826 (10th Cir. 2005). The court affirmed reversed the grant of summary judgment on the sexual harassment claim. The court held that plaintiffs' showings of persistent demands for sexual favors, and persistent gender-based abuse, coupled with threatening and physically hostile behavior and interference with plaintiffs' work, were enough to raise material questions of fact.

- *Sandoval v. City of Boulder*, 388 F.3d 1312 (10th Cir. 2004). The court affirmed the grant of summary judgment to the Title VII sexual harassment defendant, holding that two sexist comments did not constitute actionable harassment.

- *Cerros v. Steel Technologies, Inc.*, 398 F.3d 944, 950 (7th Cir. 2005). The court reversed the judgment after a bench trial for the Title VII defendant, and ordered that the case be assigned to a different judge on remand, pursuant to Circuit Rule 36. The court held that the lower court erred by apparently requiring that the harassment be both severe and pervasive, when either would do.

- *Dick v. Phone Directories Co., Inc.*, 397 F.3d 1256, 1265-66 (10th Cir. 2005). The court reversed the grant of summary judgment to the Title VII defendant, holding that a plaintiff complaining of same-sex harassment need show only that the harassment was motivated by sexual desire. The court held that there was substantial evidence that the harassment of the female plaintiff was motivated by dislike on the part of her female supervisor and female co-workers, in part because plaintiff was a top producer. However, there were also substantial indications that part of the conduct, including attempts to touch plaintiff intimately, was motivated by sexual desire. The court also relied on the extensive same-sex sexual activity in which the supervisor and other employees openly engaged.

- *Petrosino v. Bell Atlantic*, 385 F.3d 210, 221-22 (2d Cir. 2004). The court reversed the grant of summary judgment to the Title VII defendant on plaintiff's sexual harassment claim. The court found the lower court's incorrect approach. The district court concluded that no jury could reasonably find Petrosino's work environment objectively hostile to women. In so ruling, it decided, first, that evidence of incessant sexually offensive exchanges at the daily assignment meeting and omnipresent sexual graffiti in the terminal boxes could not support Petrosino's claim, because this conduct, while "boorish and offensive" was not motivated by hostility toward Petrosino because of her sex. The court of appeals disagreed, explaining: "In short, the insults were directed at certain men, not men as a group. By contrast, the depiction of women in the offensive jokes and graphics was uniformly sexually demeaning and communicated the message that women as a group were available for sexual exploitation by men. Such workplace disparagement of women, repeated day after day over the course of several years without supervisory intervention, stands as a serious impediment to any woman's efforts to deal

professionally with her male colleagues." The court held that the fact that much of the offensive material was not directed at plaintiff did not preclude a finding of a hostile work environment.

Tangible Employment Actions

- *Pennsylvania State Police v. Suders*, 542 U.S. 129 (2004). The district court granted summary judgment in favor of the employer, concluding that Suders' failure to utilize the available internal complaint procedures was fatal to her claim. On appeal, the U.S. Court of Appeals for the Third Circuit reversed and remanded, holding that a constructive discharge, when proven, is a tangible employment action which precludes availability of the affirmative defense and renders the employer strictly liable for unlawful harassment. The U.S. Supreme Court reversed the Third Circuit's decision, holding that constructive discharge does not constitute a tangible employment action unless an employee's resignation is precipitated by an employer-sanctioned adverse action which officially changes the employee's status. Examples include a humiliating demotion, extreme cut in pay, or transfer to a position in which she would face unbearable working conditions.

- *McPherson v. City of Waukegan*, 379 F.3d 430, 439-41 (7th Cir. 2004). The court affirmed the grant of summary judgment to the Title VII sexual harassment defendant. Plaintiff testified that she was sexually assaulted on three occasions by her second-level supervisor, who resigned immediately after defendant learned of the problem and ultimately pleaded guilty to attempted criminal sexual assault, which required him to be registered as a sex offender. The court held that there was no tangible employment action, and that defendant was entitled to assert the affirmative defense. It rejected plaintiff's argument that she had been constructively discharged, constituting a tangible action.

- *An v. Regents of California*, 2004 U.S. App. LEXIS 1509 (10th Cir. 2004). The Tenth Circuit affirmed the district court's grant of summary judgment to defendant. Plaintiff, who was a Graduate Research Assistant in the Life Sciences Division at Los Alamos, alleged that her supervisor, Robert Cary, engaged in inappropriate conversations with her regarding his sex life and, ultimately, raped her. The plaintiff reported the conversations to the Human Resources Department, but did not report the rape until a year after it happened. Subsequent to her reporting the rape to HR, her contract was extended and she was transferred into another division. One year later, her job was terminated. Plaintiff alleged that her "job insecurity" constituted a tangible employment action. The Tenth Circuit, found that job insecurity did not constitute a tangible employment action.

Employer's Duty to Cure Any Harassment That Occurs

- *McCombs v. Meijer, Inc.*, 395 F.3d 346 (6th Cir. 2005). The court affirmed the judgment on a jury verdict for the Title VII sexual harassment plaintiff. The court noted that it has found in the past that when the allegations of sexual harassment involve a coworker and the employer has fashioned a response, the employer will only be liable "if its response manifests indifference or unreasonableness in light of the facts the employer knew or should have known". The court found that the jury could reasonably have found such an indifference. Plaintiff complained orally several times both to her supervisor and to her internal department responsible for acting on harassment complaints. She also made three written complaints, the third of which described an

incident where the coworker walked over to the counter near plaintiff, holding a bloody knife in his hand, and stared at her while he wiped the knife. Defendant finally fired the coworker, and he was convicted on state criminal charges filed by plaintiff. The court rejected defendant's argument that no reasonable jury could have found it proceeded indifferently because it did investigate, suspend, and ultimately fire the coworker. He was transferred to McCombs's department *after* she informed her supervisor that he was spreading rumors of having an extramarital affair with her. Prior to filing her first written complaint, McCombs orally informed her supervisor and internal department on several occasions of the inappropriate conduct. Neither addressed her concerns, and the evidence is legally sufficient to establish that Meijer acted indifferently and unreasonably.

- *Loughman v. Malnati Organization, Inc.*, 395 F.3d 404 (7th Cir. 2005). The court reversed the grant of summary judgment to the Title VII sexual harassment defendant. The court stated: "An employer is liable for a co-employee's harassment only when it is negligent either in discovering or remedying the harassment. And when it comes to remedying a bad situation, greater vigor is necessary when the harassment is physically assaultive." The court found that the consistent stream of harassment at the restaurant suggests that Malnati's policy was not very effective. Gros testified that she talked to the kitchen workers between 10 and 20 times about how to treat female employees. A jury could determine that, at some point, the management at Malnati's needed to stop merely issuing warnings and start taking disciplinary action against the offending employees.

Other Duties of Employers

- *Baker v. Boeing Helicopters*, 2004 WL 1490358 (E.D. Pa. June 30, 2004). The court ruled for the employer where the plaintiff reported harassment by a coworker and the employer took immediate disciplinary action against the coworker and the harassing behavior stopped. The employer asked Baker to report any further harassing behavior and to take advantage of the complaint process outlined in the sexual harassment policies. Baker then resigned for personal reasons, and she filed a complaint against her employer for constructive discharge and hostile workplace environment. The court specifically relied on the employer's harassment policies and the fact that the employer disseminated the policies to all employees and posted the procedure for reporting harassment throughout the workplace. The employer ensured that all employees received an employee benefit manual, a handbook with written policies against sexual harassment and discrimination and explicit instructions that complaints be directed to Human Resources or the Equal Opportunity offices at the facility.