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Supreme Court Update: Protecting Employers From Liability For Sexual Harassment Claims

By Ann S. Ginsberg

On June 26, 1998, the United States Supreme Court decided two cases that dramatically affect employers' potential liability for sexual harassment. In *Burlington Industries, Inc. v. Ellerth* and *Faragher v. City of Boca Raton*, the Court rejected various conflicting and often inconsistent theories of liability that were being applied by the lower federal courts and adopted, what it hopes will be, a bright-line test for employer liability for sexual harassment by a supervisor.

Under the Court's new rules, an employer will be liable for sexual harassment or requests for sexual favors by a supervisor if the supervisor takes "tangible employment action" — such as a denial of promotion or an adverse pay decision stemming from a subordinate's response to the harassment — which inflicts "direct economic harm" on the subordinate. An employer is *strictly liable* for such an action *whether or not it knew of the supervisor's harassing conduct*.

"Hostile environment" sexual harassment — for example, offensive touching or offensive sexual innuendo — which is not otherwise accompanied by a tangible employment action is subject to different standards. An employer *may* be found liable if an employee proves that a sexually hostile environment exists, but the employer can avoid liability for the harassment if it proves both elements of a two-part defense. First, the employer must prove that it "exercised reasonable care to prevent and correct promptly any sexually harassing behavior." Second, the employer must prove that the complaining employee "unreasonably failed to take advantage of any preventative or corrective opportunities provided by the employer or to avoid harm otherwise."

In creating this two-part defense, the Supreme Court noted that proof that an employee failed to complain will normally prove the second element of the defense, i.e., that the employee unreasonably failed to "take advantage or preventative or corrective opportunities." The Court also made clear that whether an employer adopted an effective "anti-harassment policy with complaint procedure" is a key factor in deciding whether the employer can establish the first element of the defense. The Court cited the Equal Employment Opportunity Commission's regulations as helpful guidance for determining the proper components of an employer's anti-harassment policy.

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ADA Update:

Supreme Court's Protection of HIV-Positive Individuals Will Provide Surge to ADA Litigagion

By Pablo Quiñones

Employers face an increased exposure to lawsuits for disability discrimination in light of the U.S. Supreme Court's ruling that asymptomatic HIV infection is a disability under the Americans With Disabilities Act ("ADA").

In *Bragdon v. Abbott*, 118 S. Ct. 2196 (1998), the Court held that an individual with the HIV infection can invoke the protection of the ADA despite having no symptoms. The *Bragdon* case involved an HIV-positive woman who sued her dentist for disability discrimination after he told her of his policy of not filling cavities of HIV-infected patients in his office, but offered to perform the procedure in a hospital.

The ADA defines a "disability" as a "physical or mental impairment that substantially limits one or more major life activities" of the individual. Proceeding in three steps, the Court considered (i) whether HIV infection is a physical impairment, (ii) whether the life activity identified by the plaintiff — reproduction — was a major life activity and (iii) whether the impairment substantially limited the major life activity.

The Court concluded that HIV, "in light of the immediacy with which the virus begins to damage the infected person's white blood cells and the severity of the disease," is a physical impairment "from the moment of infection" — symptomatic or not. The Court rejected the dentist's argument that reproduction was not a major life activity because Congress intended to restrict ADA coverage to life

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While a number of issues in sexual harassment law remain to be clarified, the following tips should help to protect an employer against liability.

- Draft a comprehensive anti-harassment policy, including a procedure for reporting complaints and a provision against retaliation for complaining employees.
- Disseminate the company policy and require that employees sign a statement affirming that they have read the policy and agree to abide by its terms.
- Post the policy on bulletin boards in kitchens, coffee rooms or other meeting locations.
- Conduct company-wide training sessions with mandatory yearly attendance by all employees. The goal of these sessions is to instruct employees on what constitutes harassment, background of laws, pertinent examples and procedures for reporting complaints.
- Hold an additional annual meeting to educate supervisors and managers on recognizing harassment and their role in enforcing the policy and the consequences to them and the company if they engage in any prohibited activities.
- After completing the training program, each employee should sign a statement, affirming that: he or she will not engage in harassing behavior at work; and he or she will report immediately any incident of harassment which is either witnessed or experienced.
- For larger companies, set up an employee hot-line, where employees can lodge complaints.
- Set up internal procedures for investigation:
  a. Investigations should be conducted by an objective, disinterested party;
  b. The person investigating the complaint should interview both parties and determine whether anyone else witnessed or has information regarding the alleged incident;
  c. Determine appropriate response (e.g., warning, transfer, demotion, dismissal). The company's response should be communicated to the complaining employee and the employee accused of harassment;
  d. If the complaint was justified, do whatever is necessary to make the complaining employee whole (e.g., reinstatement, pay for vacation time taken off due to the harassment, unfavorable evaluations resulting from harassment should be removed from file);
  e. Carefully document investigation, decision and supporting facts for later reference in case of litigation or subsequent complaints; and
  f. Make follow-up inquiries to ensure that the complaining employee does not suffer retaliation and that the harassing conduct does not continue.
- Consider purchasing employment practices liability insurance.

Practical Advice

It seems apparent that if an employer adopts, implements, publicizes, and frequently republicizes an anti-harassment policy that follows EEOC guidelines, and takes prompt action to investigate and, if necessary, remedy any complaints of harassment, the employer will, in many or most instances, avoid liability for sexual harassment by a supervisor. While a number of issues in sexual harassment law remain to be clarified Ñ many dangers for employers still lurk Ñ it has become evident that the creation and implementation of a comprehensive anti-harassment policy will be an employer's most important defense against liability.

Anderson Kill & Olick has developed a model anti-harassment policy and complaint procedure to help employers avoid or greatly reduce liability for sexual harassment and we would be happy to provide you with a copy upon request. ■

Employment Law Update: Measure of Employer Liability Under WARN Act

By Benett Pine

Under the federal Worker Adjustment and Retraining Notification Act ("WARN"), an employer who fails to provide its employees sixty days advance written notice of a "plant closing" or "mass layoff" is liable for back pay for each day of the violation. The issue of whether the measure of an employer's liability for

violation of the WARN Act's notice requirement should be calculated based on (i) working days or (ii) calendar days has been addressed by several courts.

On October 5, 1998, the U.S. Supreme Court declined to disturb an appeals court ruling that the remedy for a violation of the WARN Act should be measured in terms of the actual work days at issue during the 60 day notice window, and not the calendar days. (*Breedlove v. Earthgrains Baking Co.*, No. 98-77, *cert. denied* 10/5/98)

The U.S. Court of Appeals for the Eighth Circuit had agreed with the vast majority of federal courts that have considered the scope of the WARN ActÕs remedy. Of the five federal appellate courts that have considered the appropriate measure of damages under the WARN Act other than the Eighth Circuit, four have used working days rather than calendar days to calculate back pay.

The issue arose from the closing of Earthgrains' baking facility in Little Rock, Arkansas. Earthgrains and its former employees agreed that Earthgrains breached the WARN Act, but disagreed over whether compensation should have included back pay based upon each calendar day the statute was violated or each working day. The Eighth Circuit affirmed the lower court's finding that Earthgrains adequately compensated its former employees when it paid them for each "working" day it was in violation of the WARN Act.

The Eighth Circuit concluded that the "plain" language of the WARN Act, which provides "back pay for each violation," is ambiguous. Although the court noted that the phrase "back pay for each violation" could include "calendar" days, such an interpretation would write "back pay" out of the statute. The court concluded that "[s]ince damages are to be measured by the wages the employee would have received," the number of working days within the violation period must be used to calculate the amount owed by the employer. By contrast, a measure of damages based on calendar days would impose a penalty on the employer, not contemplated by Congress which "did not intend to provide employees who did not receive notice more compensation than they would have received had notice been given." ■

Practice Pointer: Lay-Off Decisions Must Be Documented

By Dona S. Kahn and Meredith Fein Lichtenberg

In a recent decision by the U.S. District Court for the Eastern District of New York, *Halfond v. Legal Aid Society* (September 1, 1998), the court denied the employer's motion for summary judgment on the basis that the management committee which recommended lay-offs and demotions in a reduction in force at the Legal Aid Society did not adequately document its decisions. The court cited with approval a holding of a Virginia court which found that:

> [A]ll that the *McDonnell Douglas* presumption of discrimination has

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activities of a public, economic, or daily character. Reproduction is no less important than learning, working, or other activities which constitute major life activities, reasoned the Court.

In addition, the court found that the plaintiff's HIV status substantially limited her ability to reproduce because of the potential risk to both the male partner in conceiving a child and the child itself during gestation and child birth. The Court found that, while "[c]onception and child birth are not impossible" for a person with HIV, the prospect of such reproduction was sufficiently "dangerous to the public health" to meet the definition of substantial limitation. The Court, moreover, identified six states which forbid persons infected with HIV from engaging in consensual sex with others.

Ultimately, the Court upheld the determination of the appeal court that HIV infection is a disability under the ADA and remanded the case for a determination of whether the women's HIV infection posed a significant threat to the health and safety of others so as to justify the dentist's refusal to treat her in his office.

Bragdon will have an immediate impact on disability discrimination claims. By finding that a person has a physical impairment of a major life activity when the individual has a potentially severe disease but no symptoms, the Supreme Court has lowered the bar for bringing disability discrimination claims. Indeed, a dissenting opinion by the Chief Justice of the Court cautioned that the Court was inviting claims by "every individual with a genetic marker for some disease . . . because of some possible future effects." For employers' sake, courts likely will not take *Bragdon* to the logical extreme suggested by the dissent. Moreover, numerous courts have ruled that employers have no liability for discrimination on the basis of a disability of which they are unaware. Nevertheless, individuals who make employment decisions based on an employee's medical condition or health status should be justifiably concerned about the Court's extension of the ADA to protect individuals who have no symptoms of a disabling condition. ■

> required of American business and governmental agencies is that they document their employment decisions so as to leave an adequate record of nondiscriminatory bases for such actions. The [defendant] here failed to live up to that very minimal obligation — an obligation imposed both by law and by practical business necessity.

Although the Legal Aid Society alleged that the terminated employees had been evaluated on specific job-related criteria, it did not provide contemporaneous documentation of plaintiff-specific evaluations. Moreover, the court found the "Legal Aid's vague and ambiguous explanation[s]" insufficiently clear to give the plaintiffs "a full and fair opportunity to demonstrate pretext."

The Halfond decision confirms our firm's experience conducting employment discrimination trials before juries, which find lack of documentation suspicious, and underscores the need for companies to take pains to document the criteria it uses to make decisions and the reasons for applying those criteria to a particular employee and other similarly situated employees. ■

Negligent Retention Claim Falls Outside Employment Practices Liability Exclusion

By Pablo Quiñones

A female employee brought an action against her male supervisor and her employer, alleging that the supervisor placed his hands on her neck and made sexual comments to her while at work. Her complaint contained three counts. The first count was against the supervisor personally for battery. The second count was against her employer on a vicarious liability theory for her supervisor's battery. The third count, also against her employer, was for negligent retention of her supervisor.

The employer made a timely claim for insurance coverage to Continental Insurance Company. Continental originally defended the employer but later withdrew its defense and moved for summary judgment because of an "employment-related practices exclusion" in the employer's insurance policy. The exclusion precluded coverage for, among other things, injuries arising out of a refusal to employ, a termination of employment, harassment and other employment-related acts or omissions. At issue was whether the exclusion precluded coverage for the negligent retention claim against the employer.

The insurance company contended that the employee's injury arose out of harassment, and therefore, fell within the exclusion. The court rejected the insurance company's argument on two grounds. First, none of the claims against the employer were for harassment. Second, the employee's injury against the employer arose out of its negligence and not its battery. Since the policy contained a severability clause which required the court to look to each claim against each defendant separately, the court held that the negligent retention claim did not fall under the employment practices exclusion. *Mactown, Inc. v. Continental Ins. Co.*, 716 So. 2d 289 (Fla. Dist. Ct. App. 1998). ■

Employers Face Potential Exposure When Making Decisions Based On Subjective Factors

By Bennet Pine

Employers wishing to reduce the size of their work force or making other business decisions involving transfers, promotions or demotions, understandably prefer to retain or reward their "better" employees. As a result, such decisions usually are made on an employer's perception of its employees' relative performance or job qualifications. As employment attorneys, we routinely advise our clients that the system used to evaluate employee performance must be unbiased and applied in a uniform manner. If an employer's decision among employees is based on objective or other measurable factors Ñ such as seniority or volume of sales generated — it will be easiest for an employer to rebut an inference of discrimination (race, age, sex, etc.), by demonstrating its decisions were based on legitimate business reasons.

All too often, employers face problems when they attempt to terminate an (often long term) employee on the basis of "poor performance" when the record fails to support the employer's justification because one or more of the following factors are present:

there are no written performance evaluations; the employee's file shows good performance; the employee has never been confronted or informed of any dissatisfaction with his work; employees retained have poorer performance records; or trainees or improper new hires are retained. Similarly, employment decisions based purely on subjective factors invite inferences of discriminatory conduct. For example, courts have often commented that employer decisions based solely on an individuals "potential" have a disparate impact on older employees protected by the Age Discrimination in Employment Act. A recent decision by a United States District Court serves to reinforce the principle that undue reliance on purely subjective factors in making employment decisions may be perceived as a pretext for bias.

In *Mitchell v. Utah State Tax Commission*, No. 94 CV 576 K, 1998 U.S. Dist. LEXIS 18184 (D. Utah Nov. 17, 1998), applicants for a promotion received credit for work experience, education and veteran's status, and also were scored on their responses to set interview questions. In addition, each applicant received a score on such criteria as "attitude," "assertiveness," "professionalism" and "communications skills." A Hispanic employee who was turned down for several positions because she did not "interview well" filed a discrimination complaint alleging that the selection process was discriminatory. In denying the Tax Commission's motion for summary judgment, thus allowing Mitchell's claim to proceed to trial, the court found that the inclusion of a number of subjective factors in computing each applicant's determinative score, along with the types of subjective standards examined by the interviewers, might have offered a convenient pretext for discrimination.

Practice Tip

To avoid liability, employment decisions which purport to be based on an employee's job performance should focus on an employee's demonstrated skills and ability to perform. Shortcomings in an employee's performance, ideally, are communicated to the employee in writing. In the alternative, a file memorandum is a useful tool in summarizing a verbal evaluation or other suggestion for improvement. Finally, care must be taken to ensure that the stated rationale for employer action (e.g., "poor performance") is not inconsistent with other, recent file or personnel records (e.g., commending the employee for "superb performance"). ■

Supreme Court Tacitly Approves Grooming Policies Forbidding Long Hair For Men But Not Women

By Meredith Fein Lichtenberg

On November 16, in *Harper v. Blockbuster Entertainment Corp.*, the U.S. Supreme Court let stand a decision by the U.S. Court of Appeals for the Eleventh Circuit enabling employers to implement work rules dictating different permissible lengths of hair for male and female employees. The Eleventh Circuit found that employees discharged for not cutting their hair and for protesting Blockbuster's grooming policy did not have viable claims under Title VII.

According to the Eleventh Circuit, every circuit court to have examined the issue has reached the same conclusion and even the Equal Employment

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For more information, please visit our web site at www.andersonkill.com or call (212) 278-1000 to contact the Employment Law Insider's Editor-in-Chief, Pablo Quiñones, Esq., or the Employment and Labor Law Department's Co-Chairs, Bennett Pine and Dona S. Kahn, the department's senior litigator. The other members of the department are Ann S. Ginsberg, Melissa Golub, Michael J. Lane, Meredith Fein Lichtenberg, Samuel Meirowitz, Shawn E. Phillips, Melvin Salberg and Edward A. Velez.

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