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Labor & Employment Law Department

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Hostile Workplace Claims Not Limited To Sexual Harassment

The Connecticut statute prohibiting sexual harassment contains specific language addressing speech or conduct that creates an "intimidating, hostile or offensive working environment." Most employers are well aware of the need to take prompt action if an employee complains that they are being subjected to such treatment. However, Connecticut's other discrimination laws contain no such language, so many practitioners have assumed hostile workplace claims can't be based on allegations of discriminatory treatment based on age, race, religion, etc.

As it turns out, that assumption is incorrect. The Connecticut Supreme Court recently ruled that a hostile workplace claim can be brought by an employee who is taunted by co-workers because of his sexual orientation. Commentators suggest that this opens the door to allegations that an employee has been subjected to mistreatment by co-workers because of any other protected status, ranging from national origin to physical or mental disability.

The case involved an employee of a manufacturer that makes jet parts for Pratt & Whitney and others. After nearly 20 years on the job, his co-workers found out he was gay, and started taunting him in several languages. For example, the plaintiff secretly recorded a co-worker yelling out as he passed the plaintiff's workstation the word "pato," which in Spanish means "duck," but also is a slang term for homosexual. He filed a total of five CHRO complaints over several years, which gained him nothing but a release to sue the company in court, which he did.

A jury awarded him $94,000 in damages for mental pain and suffering, plus attorney's fees. His employer appealed, noting that the phrase "hostile working environment" does not appear in any Connecticut discrimination legislation except the law prohibiting sexual harassment. However, the Supreme Court said that other anti-discrimination laws use the phrase "terms, conditions or privileges of employment," which is broad enough to encompass a hostile working environment.

The employer didn't help itself by making far-fetched arguments such as, how could the plaintiff be sure his co-workers didn't really mean "duck," and how could he be sure the words or phrases used in other languages were not entirely innocent, since he didn't speak those languages? The justices pointed out that "fag" could mean cigarette and "faggot" could refer to a bundle of sticks, but to believe that would require "a naïveté unwarranted under the circumstances."

The case is apparently the first of its kind in the country. Federal law does not address sexual orientation discrimination. Only about 20 states have laws prohibiting bias based on sexual orientation, and most of those focus on overt discrimination by employers. There are no other reported decisions by the high courts of other states finding companies liable for abusive behavior by employees directed toward gay co-workers.

Our advice to employers has always been to establish basic standards of acceptable conduct in the work place. Imposing a "code of civility" may be going too far, and a few stray remarks don't constitute a hostile work environment, but we all should recognize the type of behavior that we wouldn't want a family member or friend to be subjected to. Furthermore, it shouldn't take five CHRO complaints and years of litigation to convince an employer to do something about it.

"Reasonable Efforts" to Find Work Redefined

Connecticut's unemployment compensation laws require claimants to "make reasonable efforts" to obtain work in order to be eligible for benefits. For decades, the Employment Security Division of the Labor Department has interpreted this requirement to mean a claimant must contact at least three employers per week, usually by telephone or in person, seeking employment. However, this standard is nowhere to be found in the statutes or regulations.

A Superior Court judge recently noted that the "three employer" standard has its origins in two court decisions from the 1960s, in which it was held that one or two employer contacts per week did not meet the "reasonable efforts" requirement. The judge said that fell far short of justifying a hard and fast three employer rule. She also pointed out that in the 1960s, personal contact was the normal method of conducting a job search, which is not the case today.

"In today's environment of instant communications and heightened security, it is increasingly rare to find any job applicant admitted to a premises or put through by phone to a decision-maker without an e-posted resume having first been vetted . . . and an invitation extended directly to the applicant to follow up," said the judge, concluding that the idea of a cold call or letter "would likely be regarded as hopelessly quaint."

The case was remanded to the Board of Review for reconsideration without application of a hard-and-fast three employer rule, and taking into consideration the specific circumstances of the case. These included the fact that the claimant was a former business owner who was looking for a managerial position, and showing up on a prospective employer's doorstep would not be likely to produce positive results.

Our opinion is that the Labor Department's preference for hard-and-fast rules is understandable, since they make decisions easier. However, it is probably preferable to make judgments based on the facts of each case, even if that increases the likelihood of inconsistent rulings by different decision-makers. Inflexible rules are best adopted through statutes or regulations, since either process generally offers some opportunity for input from interested parties.

Recent S&G Website Alerts

Supreme Court Decision on Health Care Reform: What It Means for Employers
Published July 16, 2012

Department of Labor Issues Final ERISA Fee Disclosure Rules
Published May 23, 2012

EEOC and NLRB Impose New Rules on Employers
Published May 10, 2012

NLRB's Hartford Office May be Downgraded

The General Counsel of the National Labor Relations Board, Lafe Solomon, is considering a reorganization of the agency that would affect its Hartford office, known as Region 34. If approved by the members of the NLRB itself, this move would make the Hartford office a sub-region of the NLRB's Boston office.

Ironically, Hartford was a sub-region of the Boston office back in the 1970's, but became a full-fledged region when Peter Hoffman, who retired a few years ago, became its director. Rosemary Pye, who was once the NLRB's regional attorney in Hartford under Hoffman, went on to succeed Robert Fuchs as regional director in Boston. If the reorganization goes through, she would have jurisdiction over the Hartford office, which is currently run by Jonathan Kreisberg.

Presumably the proposed changes are the result of a decline in union activity in Connecticut and some other areas of the country. It is well known that unions now represent less than 10% of the private sector workforce, down from around 35% in the middle of the last century. Various explanations are given for this trend, ranging from more enlightened employers to competition from non-union companies in other parts of the country and around the world.

Meanwhile, the NLRB has branched out into non-traditional settings, some say in an effort to stay relevant. These include protection of employees who use social media to criticize their employers or register work-related complaints, scrutiny of employer policies (including widely used employment-at-will disclaimers) that could be construed as restricting employee rights, and generally broadening the definition of "concerted protected activity" as it relates to employees in non-union workplaces.

Our opinion is that the Hartford office of the NLRB has been at the forefront of this trend, aggressively prosecuting cases that would never have been pursued even a few years ago. While labor supporters deny that anything has changed, employers who have had to defend these cases know otherwise. The proposed reorganization wouldn't change the overall direction of the Board, but it would at least reduce any incentive the Hartford office might have to pursue cases simply to maintain a level of activity appropriate to full "region" status.

Legal Briefs
and footnotes...

Indian Affirmative Action: We're all familiar with the decades-old debate over whether affirmative action on behalf of minority groups means preferential treatment, or merely assures equal treatment. Foxwoods Resort and Casino has no such uncertainty; it employs a "Native American Preference Officer" whose duties include review and input in any disciplinary action imposed on a Native American employee. A tribal court recently voided the discharge of an employee caught drinking on the job simply because the Preference Officer was not involved in the termination decision.

Lack of Transportation: If an employee loses her driver's license, and is unable to arrange other transportation to work, is that a voluntary quit which disqualifies her from unemployment compensation? The Employment Security Board of Review thought

SHIPMAN & GOODWIN LLP®
COUNSELORS AT LAW

ANDREANA BELLACH
GARY BROCHU
BRIAN CLEMOW*
LEANDER DOLPHIN
BRENDA ECKERT
JULIE FAY
VAUGHAN FINN
ROBIN FREDERICK
SUSAN FREEDMAN
SHARI GOODSTEIN
GABE JIRAN
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CLARISSE THOMAS
CHRIS TRACEY
LINDA YODER
HENRY ZACCARDI
GWEN ZITTOUN

* Editor of this newsletter. Questions or comments? Email bclemow@goodwin.com.

so, and now a court has agreed. It was found that the employer still had work available for the claimant, and that her inability to get to work meant she had "left work voluntarily and without good cause attributable to the employer." One wonders whether the result would have been the same if the claimant's loss of transportation had been the result of circumstances beyond her control.

What Constitutes Retaliation? As we've said before in this publication, retaliation claims are becoming more and more frequent in employment litigation, and sometimes an employer successfully defends against a discrimination claim only to be found guilty of retaliating against the employee for making the claim. But what constitutes "retaliation"? It doesn't have to be discharge, discipline or transfer to an undesirable assignment. One recent Appellate Court decision holds that refusing to allow a separating employee to pack his own belongings, resulting in an unexplained delay of four months in returning his property, was sufficient to constitute retaliation because it would likely dissuade a reasonable employee from whistleblowing.

$100,000 for Drug Test Violation: Connecticut law prohibits employers from requiring a current employee (as opposed to an applicant) to take a urinalysis drug test, unless it has "reasonable suspicion" that the employee is under the influence of drugs on the job. But what if an employer orders an employee to be tested and he never actually does so? A UPS driver was fired after an altercation with a supervisor. He sued, making a variety of claims, one of which was that the supervisor insisted that he undergo drug testing following the altercation, even though there was no reasonable basis to suspect drug use. Although he was fired before actually taking the test, a jury awarded him $100,000 for violation of his rights under the drug test law, as well as other damages. An appeals court confirmed that it was not necessary for a drug test to be actually performed in order to prove a violation of the statute.

CHRO vs. Grievance Arbitration: One headache that employers try to avoid is dealing with essentially the same claim in two different forums. Employers with unions often negotiate contract provisions that say an employee can't take the same complaint to both the CHRO or EEOC and to grievance arbitration. The CHRO generally resists employer arguments that an employee's right to file a discrimination complaint has been waived by a union representative. However, a State Board of Mediation and Arbitration panel recently found non-arbitrable a harassment complaint by a City of Bridgeport employee who had also filed with the CHRO, enforcing a union contract clause prohibiting two bites of the apple.

Fluctuating Workweek: A Connecticut court has ruled that an employer who meets the requirements of federal law under the "fluctuating workweek" method of calculating overtime pay is also in compliance with state wage and hour laws, even though the result is that the overtime premium gets smaller as the workweek gets longer. The fluctuating workweek method is sometimes used in situations where the number of hours worked by a non-exempt employee varies widely from week to week, but he or she is guaranteed a certain "salary" even in weeks when there is less than 40 hours of work. That salary is divided by the total hours worked by the employee in a given week to determine the base rate on which his or her overtime premium is computed for each hour worked over 40 in that week.

Save the Date

S&G's Labor & Employment Fall Seminar for private sector employers will be held on Friday, November 2, 2012 at the Hartford Marriott.

One Constitution Plaza
Hartford, CT 06103-1919
860-251-5000

300 Atlantic Street
Stamford, CT 06901-3522
203-324-8100

1133 Connecticut Avenue NW
Washington, DC 20036-4305
202-469-7750

289 Greenwich Avenue
Greenwich, CT 06830-6595
203-869-5600

12 Porter Street
Lakeville, CT 06039-1809
860-435-2539