

#### **IV. RECENT DEVELOPMENTS IN EMPLOYMENT DISCRIMINATION LAW**

By John L. Valentino (June, 2008)

##### **I. Laws Prohibiting Harassment and Discrimination.**

###### **A. State Statutes.**

1. Executive Law. Article 15 of the New York State Executive Law, known as the New York State Human Rights Law, makes it an unlawful discriminatory practice for an employer to refuse to hire an employee or to discharge from employment or to discriminate against (an) individual "in compensation or in the terms, conditions or privileges of employment" because of an individual's age (18 or over under New York law), race, creed, color, national organ, sex, disability, marital status, or sexual orientation. Executive Law § 296(1). The statute also creates a Division of Human Rights and provides for administrative procedures before the Division.

2. Correction Law. Article 23-A of the New York Correction Law prohibits denial of employment on the basis of an applicant's criminal conviction record unless there is a "direct relationship" between a specific offense and the employment sought or unless the granting of employment would pose "an unreasonable risk to property" or human safety.

3. Military Law. New York's Military Law prohibits discrimination by public and private employers against citizens and residents of New York who are subject to military duty under state or federal law and prohibits persons doing business in the state from refusing to employ such persons because they are subject to military duty.

B. Federal Laws.

1. Title VII of the Civil Rights Act of 1964. Prohibits discrimination by employers against an individual on the basis of the individual's race, color, religion, sex (including pregnancy) and national origin. Title VII prohibits discrimination in connection with the hiring and discharge of an employee and "with respect to his compensation, terms, conditions or privileges of employment." 42 U.S.C. § 2000 e-2 (a)(1).

2. Age Discrimination in Employment Act (ADEA). Prohibits an employer from discriminating against employees or applicants age forty (40) or older. An employer may not refuse to hire, discharge, or "otherwise discriminate" against an individual with respect to his compensation, terms, conditions or privileges of employment on the basis of the individual's age. Discrimination is permitted, however, if age is a bonafide occupational qualification. 29 U.S.C. § 623(f)(1).

3. Americans with Disabilities Act (ADA). Prohibits an employer from discriminating against a qualified individual with a disability because of such disability in regard to job application procedures, hiring, advancement, discharge, compensation, training, and "other terms, conditions and privileges of employment." U.S.C. § 12112(b)(5). Disability discrimination may include failure to make reasonable accommodations for an employee. An employer may not accommodate an individual's disability if doing so would impose an undue hardship on the operation of the employer's business. A disability under the ADA is defined as a "physical or mental impairment that

substantially limits a major life activity," "a record of such an impairment," or "being regarded as having such an impairment."

4. Rehabilitation Act of 1973. § 504 of the Rehabilitation Act of 1973 bars discrimination against "otherwise qualified handicapped individuals" in programs and activities (including employment) of recipients of federal financial assistance. 29 U.S.C. § 794.

5. Equal Pay Act. Requires that women and men receive "equal pay for equal work". An employer may not "discriminate between employees on the basis of sex" in paying wages for work that requires "equal skill, effort and responsibility." 29 U.S.C. § 206(d)(1). An employer may, however, establish a pay system based on seniority, merit, quantity or quality of production, or any fact other than sex.

6. Family and Medical Leave Act (FMLA). The Family and Medical Leave Act of 1993 requires employers with fifty (50) or more employees to provide eligible employees with an unpaid leave of a maximum of twelve (12) weeks in any twelve (12) month period for:

- (a) The birth of a son or daughter, and to care for the newborn child;
- (b) The placement of a son or daughter with an employee for adoption or foster care;
- (c) The care of an employee's spouse, son, daughter or parent with a serious health condition; and

- (d) Because of the serious health condition that makes the employee unable to perform the functions of his/her job.

29 U.S.C. § 2601-2654.

7. Uniform Services Employment and Re-Employment Rights Act from 1964 (USERRA). Prohibits discrimination against individuals because of their past, current or future military obligations. This prohibition extends to discrimination in hiring, promotion, re-employment, termination and benefits. Moreover, USERRA provides special protection to employees that have returned from military service. Employers may not, for a specified period of time, terminate the re-employed individual without cause. Specifically, an individual whose military service was more than six (6) months may not be terminated without cause for one (1) year after his date of re-employment. For those whose service was between thirty-one (31) and one hundred and eighty (18) days, there is a six (6) month period of protection.

NOTE: Virtually every federal anti-discrimination statute contains an anti-retaliation provision.

## II. Sexual Harassment.

### A. Defining Sexual Harassment.

1. Quid Pro Quo and Hostile Environment Harassment. Title VII of the Civil Rights Act of 1964 prohibits discrimination on the basis of sex. Courts first recognized sexual harassment as a violation of the Title VII prohibition of sex discrimination in 1977 in the landmark case of Barnes v. Costle, 561 F. 2d 983 (D.C. Cir. 1977). Quid pro quo harassment is found to exist when submission to a superior's sexual

demand was made as a condition of employment or the submission to our rejection of such a demand was used as a basis for an adverse employment action. Hostile environment sexual harassment exists when verbal or physical conduct of a sexual nature had the purpose or effect of unreasonably interfering with the employee's work and/or created an intimidating, offensive or abusive work environment;

2. The United States Supreme Court first recognized hostile environment sexual harassment as actionable under Title VII in Meritor Savings Bank, F.S.B. v. Finson, 477 U.S. 57 (1986). The Court made such pronouncements as:

- "Title VII affords employees the right to work in an environment free from discriminatory intimidation, ridicule and insult."
- "For sexual harassment to be actionable, it must be sufficiently severe or pervasive to alter the conditions of the victim's employment and create an abusive working environment."
- "The correct inquiry is whether respondent by her conduct indicated that the alleged sexual advances were unwelcome, not whether her actual participation in sexual intercourse was voluntary."
- "While voluntariness in the sense of consent is not a defense to such a claim, it does not follow that a complainant's sexually provocative speech or dress is irrelevant as a matter of law in determining whether he/she found particular sexual advances unwelcome. To the contrary, such evidence is obviously relevant in light of the record as a whole and the totality of the circumstances, such as the nature of the sexual advances and the content in which the alleged incidents occurred."

The Supreme Court did not impose strict liability principles as a substitute for employer knowledge. The Meritor Court relied on agency principles which long had governed the relationship between employer and employee. Thus, strict liability was not imposed in hostile environment cases where the employer did not know or could not reasonably have known about the harassment.

3. Harris v. Fork Lift Systems, Inc. 510 U.S. 17 (1993). Here the court continued to address sexual harassment law holding in part that the conduct must be severe and pervasive using a reasonable person standard. The Harris Court stated that:

mere utterance of an . . . *epithet* which engenders offensive feelings in an employee does not sufficiently affect the conditions of employment to implicate Title VII. Conduct that is not severe or pervasive enough to create an objectively hostile or abusive work environment - an environment that a reasonable person would find hostile or abusive - is beyond Title VII's purview. NOTE: In Faragher v. City of Boca Raton, 524 U.S. 775 (1998) the Supreme Court reiterated that (Title VII does not become a general civility code).

As the Court in Harris stated, the reasonable person test focuses on the totality of the circumstances and looks at such factors as:

1. The frequency of the discriminatory conduct;

2. The severity of the conduct;
3. Whether it is physically threatening or humiliating or "merely offensive"; and
4. Whether it reasonably interferes with an employee's work performance or environment.

In addition to proving that a reasonable person would find the environment hostile or offensive, the Harris Court held that the plaintiff herself must find the environment to be hostile.

B. Employer Liability for Sexual Harassment.

1. Basic standard of liability prior to Burlington Industries, Inc. v. Ellerth, 524 U.S. 742 (1998); and Faragher v. City of Boca Raton, 524 U.S. 775 (1998).

Both the EEOC and the Second Circuit recognized four (4) distinct bases of imputing liability for hostile work environment to an employer including where:

(a) The person who is harassing is a supervisor at a sufficiently high level in the company;

(b) The harassing individual is a supervisor who uses his/her actual or apparent authority to further the harassment or is otherwise aided in accomplishing it by the existence of the agency relationship;

(c) The employer did not provide a reasonable avenue for employees to complain of sexual harassment; or

(d) The employer knew, or should have known, of the harassment but failed to take steps reasonably calculated to end it. Gallagher v. Delaney,

139 F. 3d 338 (1998); Karibian v. Columbia University, 14 F. 3d 773 (2d Cir. 1994) cert. denied 512 U.S. 1213 (1994). See also 24 C.F.R. § § 1604.11(c) and (d).

2. The Burlington and Faragher Decisions. The Supreme Court examined the issue of employer liability in what had previously come to be known as quid pro quo and hostile work environment sexual harassment cases. Following an extensive review of agency principal and policy considerations, the Court articulated a test to be applied in cases involving the conduct of supervisors within a plaintiff's direct chain of command for imposing vicarious liability;

3. The new standard of liability created for employers in sexual harassment cases by Burlington and Faragher may be summarized as follows:

(a) Employers will be automatically liable for sexual harassment by supervisors where the harassment culminates in a tangible adverse employment action, such as discharge, demotion, failure to promote, undesirable reassignment, or significant change in benefits, and;

(b) Employers will be automatically liable for sexual harassment by supervisors that does not involve a tangible employment action, unless:

(i) the employer exercised reasonable care to prevent and promptly correct any sexually harassing behavior; and

(ii) the employee unreasonably failed to take advantage of any preventative or corrective opportunities provided by the employer or to avoid harm otherwise.

C. Recent Decisions Post Burlington and Faragher.

1. Suders v. Easton, 124 S. Ct. 2342 (2004). The Supreme Court held that a constructive discharge in and of itself does not constitute a tangible adverse employment action. The Court held that the employee could pursue a separate claim of constructive discharge but unless she could show that her resignation was prompted by an official adverse job action, the employer could avoid liability by showing that it had a complaint process that the employee failed to use (and therefore the employer could use the Burlington/Faragher affirmative defense). This decision is the first time the Supreme Court had recognized a cause of action for constructive discharge. To succeed in such claim, however, the employee would have to show that "the abusive working environment became so intolerable that her resignation qualified as a fitting response". 124 S. Ct. at 2357. Absent evidence of an official act that was the last straw resulting in the resignation, the employer could defend by satisfying the Burlington/Faragher affirmative defense.

2. Jin v. Metro Life Insurance Co., 310 F. 3d 84 (2d Cir. 2002). The Second Circuit held that a former employee who claimed she was forced to submit to unwanted sexual acts to keep her job stated a tangible employment action that could lead to employer liability. It found that the trial court's jury instruction applied too narrow a definition of "tangible employment action" by limiting it to situations involving actual "economic harm". Here, the plaintiff's supervisor had required the plaintiff to attend meetings in his locked office after hours where he threatened her with a baseball bat, licked and fondled her, pushed her against him and threatened to fire her if she did not

accede. The Court concluded that this was classic quid pro quo harassment even though the threatened termination never occurred. Although the Jin decision has not been expressly overruled, several other districts have disagreed with its holding including the Lutkewitte v. Gonzales, decision which is discussed below.

3. Lutkewitte v. Gonzales, 436 F.3d 248 (D.C. Cir. 2006). The Court of Appeal for the District of Columbia addressed whether employment benefits granted to an employee being harassed by her supervisor fall within the definition of a tangible employment action. In Lutkewitte, the plaintiff submitted to the sexual advances of her supervisor based upon the belief that she would be terminated if she did not submit. In an effort to demonstrate that she suffered a tangible employment action, the plaintiff offered proof that she was provided certain benefits, including additional overtime pay, a company car and a promotion, as a result of her submission to her supervisor's sexual advances.

Ultimately, the Circuit found that there was no proof that these benefits were provided in exchange for sex. Interestingly, however, it also noted that the Supreme Court had yet to determine if an employer can be held strictly liable when the employee submits to a supervisor's demand for sex. Citing Jin, it further noted that the Second Circuit had determined that such benefits can constitute a tangible employment action. Although, the Circuit declined to directly address whether such benefits can be a tangible employment action, a concurring opinion expressed disagreement with Jin.

First, the concurring opinion determined that Faragher and Ellerth clearly imply that a tangible employment action must be materially adverse in nature in a

submission case. Id. at 262. It stated that "only adverse actions can truly fill the admonitory role for which the [Supreme] Court created the concept of tangible employment actions." Id. at 263-64. It reasoned that when a benefit is given to an employee for a discriminatory reason other employees are adversely affected – not the harassment victim.

After arriving at the above conclusion, the concurring opinion then undertook an extensive analysis of Jin and a pre-Faragher/ Ellerth Second Circuit decision called Karibian v. Columbia University, 14 F.3d 773 (2d Cir 1994) (concluding that actual economic loss is not required in *quid quo pro* harassment cases) upon which Jin relied. It determined that the Second Circuit's rulings in these cases failed to recognize the changes in the framework of sexual harassment case law created by Faragher/ Ellerth.

It stated that Faragher/ Ellerth require a plaintiff to demonstrate more than simple *quid quo pro* harassment for strict liability to attach to an employer for supervisory harassment. From this, it stated that proof of a tangible employment action is required for an employer to be liable for harassment by a supervisor. Based upon the conclusion that a tangible employment action must be adverse, the concurring opinion criticized the Jin decision for removing "tangibility" and presumably a showing of adversity from a plaintiff's burden of proof.

4. Finnerty v. Sadlier, Inc., 2006 WL 910399 (2d Cir. April 7, 2006).

In an unpublished Summary Order, the Second Circuit rejected the argument that a hostile work environment can itself constitute a tangible employment action. It held that

no employer could avail itself of the Faragher/ Ellerth defense, if a hostile work environment could constitute a tangible employment action.

5. Mormol v. Kost Co. Wholesale Corp., 364 F. 3d 54 (2d Cir. 2004).

The Second Circuit affirmed summary judgment for the employer, holding that an employee who alleged that her supervisor asked her to have sex with him, cut her hours when she refused, and asked her to come back early from vacation, failed to establish a tangible employment action.

D. Severe and Pervasive Standard for Sexual Harassment.

1. Harris v. Fork Lift Systems, Inc. 510 U.S. 17 (1993). The

Supreme Court determined the allegedly harassing conduct must be severe and pervasive using a reasonable person standard. Specifically, it held that s work environment becomes actionable under Title VII when it is "permeated with discriminatory intimidation, ridicule and insult that is sufficiently severe or pervasive to alter the conditions of the victim's employment." The Harris Court further stated that:

mere utterance of an . . . *epithet* which engenders offensive feelings in an employee does not sufficiently affect the conditions of employment to implicate Title VII. Conduct that is not severe or pervasive enough to create an objectively hostile or abusive work environment - an environment that a reasonable person would find hostile or abusive - is beyond Title VII's purview.

2. Burden of Proof: Additional Factors. In addition to the foregoing

an employee asserting a harassment claim must demonstrate that he/she subjectively perceived the work environment to be abusive. The employee must also demonstrate that the conduct alleged objectively created an environment that a reasonable person would

find hostile or abusive. The objective hostility of a work environment is measured by looking at the frequency and severity of the alleged conduct, whether it was physically threatening, if it affected the employee's mental well-being, and if it was humiliating or merely offensive.

The plaintiff must demonstrate "either that a single incident was extraordinarily severe, or that a series of incidents were sufficiently continuous and concerted to have altered the conditions of a working environment." Cruz v. Coach Doors, Inc., 202 F.3d 560 (2d Cir. 2000). The plaintiff must establish that the environment was "both objectively and subjectively offensive, one that a reasonable person would find hostile or abusive, and one that the victim did in fact perceive to be so." Faragher v. City of Boca Raton, 524 U.S. 775 (1998).

The Second Circuit has instructed the district courts to consider the totality of the circumstances in determining whether a plaintiff has submitted evidence sufficient to support a finding that a hostile environment existed. Schwapp v. Town of Avon, 118 F.3d 106 (2d Cir. 1997). The factors outlined must therefore be considered "cumulatively" so that the Court can "obtain a realistic view of the work environment" and this includes evaluating the "quantity, frequency, and severity" of the incidents. Doe v. R.R. Donnolly & Sons Co., 42 F.3d 439 (2d Cir. 1994); Rivis v. Mike Barnard Chevrolet-Cadillac, Inc., 468 F.2d 489 (W.D.N.Y. 2007).

E. Recent Cases – Harassment v. Obnoxious Behavior.

1. Fairbrother v. Morrison, 412 F.3d 39 (2d Cir. 2005). The Second Circuit reversed the lower court's dismissal of the plaintiff's hostile work environment

claim. The plaintiff alleged that she had been called names such as "bitch" almost daily, "whore" between 10-15 times, and that her male coworkers discussed their sexual activities in front of her and routinely asked her about her sex life. She also claimed that her coworkers would frequently show her pornography that was kept in the office. When she complained about her coworkers' actions, her supervisor stated that she was not going to prevent him from running the office his way.

On appeal, the Second Circuit determined that the plaintiff presented sufficient allegations that could cause a jury to find that her conditions of employment had been altered and that a hostile work environment existed.

2. Garone v. United Parcel Service, 436 F.Supp.2d 448, 2006 WL 1755953 (E.D.N.Y. June 27, 2006). The Eastern District of New York addressed the question of harassment versus obnoxious behavior. In support of her harassment claims, the plaintiff identified a few occasions when her supervisor had made certain comments about her. Her supervisor used the terms "office bitch," "Brooklyn Bimbette" and "cat fight" in her presence. The plaintiff's supervisor was also confrontational and frequently excluded her from certain meetings. Plaintiff also claimed that several of her male coworkers made sexual comments about her and even showed her photos of other women in the nude.

The Court granted summary judgment in favor of the employer after an extensive review of her harassment claims. With respect to her claims against her supervisor, the Court determined that his use of the terms "office bitch," "Brooklyn Bimbette" and "cat fight" were trivial. It further held that these terms were not severe,

were not physically threatening nor did they interfere with her work performance. With respect to Plaintiff's coworkers, the court acknowledged that their comments were crass but determined that they were not frequent and pervasive enough to establish that her workplace was permeated with discriminatory intimidation.

3. Drummond v. IPC International, 400 F.Supp.2d 521 (E.D.N.Y. 2005). The plaintiff, a male, alleged a hostile work environment claim based upon his sex. To support his claims, the plaintiff alleged that a non-employee and client of his employer ("Client") engaged in several sexually explicit conversations with him regarding her sex life and several affairs that she had with her coworkers. He also claimed that the Client had the authority or influence to remove him from his position with his employer.

After reviewing the evidence in its totality, the court dismissed the plaintiff's claims for a failure to demonstrate that the conduct at issue was severe and persuasive enough to create a hostile and abusive work environment. The court further found that the Client's comments were only "off-hand remarks" that were "mere offensive utterances" rather than physically threatening or humiliating conduct. Moreover, these comments were not offensive to the plaintiff, intended to intimidate, or ridicule him. For these reasons, the court dismissed the plaintiff's hostile work environment claims.

F. Individual Liability Under Human Rights Law. An employee is not individually subject to a suit under the New York Human Rights Law. However, when an individual has actually participated in the discriminatory practice, he may be individually liable under Section 286(6), which prohibits anyone from "aiding and

abetting" in discriminatory practices. Tomka v. Seiler Corp., 66 F.3d 1295 (2d Cir. 1995).

A plaintiff may only recover under §296(6), however, where she can show that the defendant "aided and abetted" a primary violation of the Human Rights Law committed by another employee or the business itself. Bennett v. Progressive Corp., 225 F.Supp.2d 190 (N.D.N.Y. 2002).

NOTE: Although the Second Circuit has not definitively addressed the issue of whether an individual can aide and abet his/her own conduct, the Northern and Southern Districts have so far disapproved of this theory. Jordan v. Cayuga County, 2004 W.L. 437459 (N.D.N.Y. 2004); Dewitt v. Lieberman, 48 F.Supp.2d 280 (S.D.N.Y. 1999).

G. Other Forms of Discrimination: Religion and National Origin.

1. Title VII condemns religious discrimination in the employment as well as discrimination based upon national origin.

2. Recent cases and standard. Baker v. The Home Depot, 445 F3d 541 (2d Cir. 2006). The Second Circuit acknowledged that a plaintiff who seeks to make out a prima facie case of religious discrimination must show that:

(a) they held a bona fide religious belief conflicting with an employment requirement;

(b) they informed their employer of this belief; and

(c) they were disciplined for failure to comply with the conflicting employment requirement.

Once a prima facie case is established by the employee, the employer must offer him or her a reasonable accommodation, unless doing so would cause the employer to suffer an undue hardship.

The Court noted that the term "religion" includes all aspects of religious observance and practice, as well as belief, unless an employer demonstrates that he is unable to reasonably accommodate to an employee's or prospective employee's religious observance or practice without undue hardship on the employer's business.

After the Baker plaintiff became employed by The Home Depot, he learned though teachings and counseling of his religion's requirement that all work should cease on the Sabbath and of his responsibility to make sure that "his spouse and children also obeyed the word" and observe the Sabbath. The plaintiff states that he came to understand that Sunday is a "day of rest and meditation" and that strict observance of the Sabbath is a *sine qua non* of his faith. Upon transferring to a new Home Depot store and during the interview with the store manager, the plaintiff advised that he was unable to work on Sundays because of his religious convictions. After discussions with the employer, Home Depot offered the plaintiff the opportunity to work a late shift on Sundays, but would not relinquish the right to schedule him to work on Sundays. Home Depot also offered part-time employment with Sundays off, but could not guarantee a forty (40) hour week. Thereafter, the plaintiff was scheduled to work on Sunday, did not show and was terminated for an unexcused absence. Although the District Court granted the employer summary judgment, the Second Circuit held that a genuine issue of material fact precluded summary judgment on the issue of whether

plaintiff had made out a prima facie case and also concluded that the employer's offer to schedule the employee in the afternoon or evenings on Sunday, rather than in the mornings, was not a "reasonable accommodation" under Title VII.

H. Definitions: Supervisor.

1. The finding of whether harassment occurred by a supervisor is critical under the standard of liability created by Burlington and Faragher. Employers are automatically liable for sexual harassment by supervisors where the harassment culminates in a tangible adverse employment action. Moreover, employers remain automatically liable for sexual harassment by supervisors even if there is no tangible employment action unless:

(a) the employer exercises reasonable care to prevent and promptly correct any sexual harassing behavior; and

(b) the employee unreasonably failed to take advantage of any preventative or corrective opportunities provided by the employer or to avoid harm otherwise. (hostile environment by supervisor)

I. Recent Case Law.

2. Mack v. Otis Elevator Co., 326 F. 3d 116 (2d Cir. 2003). The Court held that an employee did not need to have "tangible employment authority" over another employee to be classified as her supervisor for purposes of an employer's vicarious liability. The person in question did not have authority over the plaintiff to hire or fire her, promote her, reassign her or significantly change her benefits and therefore, did not have "tangible employment authority" over her. Nonetheless, the employee was

her supervisor as he was a senior employee regularly on site who oversaw her daily work assignments. The Court stated "the question in such cases is not whether the employer gave the employee the authority to make economic decisions concerning his or her subordinates. It is, instead, whether the authority given by the employer to the employee enabled or materially augmented the ability of the latter to create a hostile work environment for his/her subordinates. "NOTE: The Second Circuit rejected the Seventh Circuit's requirement that the supervisor have authority to take a tangible employment action against the complaining employee.

3. Heskin v. Insite Advertising, Inc., WL 407646 (S.D.N.Y. 2005).

The court found that a material issue of fact existed as to whether the alleged harasser could be considered the employee's "de factor supervisor". The court relied on the definition created in Mack to confirm that "having the broader power to hire, fire, demote, promote, transfer or discipline an employee was unnecessary to establish supervisory status". The Court also referenced the EEOC Guidelines that provide a broader definition of supervisor as someone with authority to direct the daily activities of an employee or someone with the authority to "undertake or recommend tangible employment decisions affecting the employee". In Heskin, the alleged supervisor was one who merely recommended that the employee be removed from a project and other functions which caused the employee's actual supervisor to ultimately terminate her employment.

4. Prince v. Madison Square Garden, 427 F.Supp. 2d 372 (S.D.N.Y.

2006) where Southern District relied on Mack to conclude that supervisory authorities

should not be narrowly defined and that the question a court must ask is whether "the authority given by the employer to the employee enabled or materially augmented the ability of the later to create a hostile environment by his or her subordinates". The Southern District found supervisory authority to exist where the alleged harasser had the authority to assign the plaintiff to potentially valuable public appearances which could affect her career.

J. Acceptable Policies and Training.

5. General Tips. In order to protect your business from discrimination and harassment claims an employer should implement meaningful antidiscrimination policies and a training program. When preparing such policies and programs the employer should ask:

- (a) Is there a current policy?
- (b) Does the policy contain a definition of sexual harassment?
- (c) Is there a complaint procedure?
- (d) Does it designate appropriate person(s) to whom a complaint can be submitted?
- (e) Should a complaint be in writing?
- (f) Does the policy include a non-retaliation provision?
- (g) What does the policy say about confidentiality?
- (h) What does the policy say about the investigation process?
- (i) What does the policy say about possible discipline?

6. Policy Communication. Consideration should be given to ensure that the policy is properly distributed to all employees.

(a) Other relevant considerations include:

(i) How is the policy posted or distributed?

(ii) Is the policy in a handbook?

(b) Is the policy distributed to new employees?

(c) How are updated versions of the policy handled?

(d) Have employees signed a document acknowledging their receipt and understanding of the policy?

7. Training/Questions to Ask:

(a) Has harassment training been provided to all employees?

(b) How often is the training provided?

(c) What is the nature of the training?

(d) Is separate training provided to supervisors?

(e) Does Management support the training?

K. Considerations for Protecting Your Business: Conduct a Thorough Investigation.

8. Use of outside counsel. Outside counsel uses less of time of in-house personnel and created a greater appearance of impartiality. Outside counsel can also better prepare the file in the event of litigation.

9. General Advice on the Investigation Process.

(a) Take the investigation seriously.

- (b) A prompt and thorough investigation is essential.
- (c) The duty to investigate exists regardless of whether the complainant wants the investigation or the complaint is in writing;
- (d) Minimize the risk of a lawsuit by demonstrating your intention to be fair and thorough in the investigation.
- (e) Inform the complainant about how the process will work and reiterate the company's position against harassment.
- (f) Keep in mind the Elaherth/Faragher standard.
- (g) The employee must have a reasonable avenue for giving notice;
- (h) Do not promise complete confidentiality, but be sensitive to good HR practices. Adopt a "need to know" approach;
- (i) Detailed notes with analysis are a must;
- (j) When the investigation is conducted by in-house personnel, consider having two (2) people perform each interview;
- (k) Any concluding investigative report should contain the following items:
  - (i) A description of the investigative process including how the investigation was conducted and what issues were explored;
  - (ii) Provide a summary of the facts, including those substantiated and those remaining uncertain;
  - (iii) A description of corrective action to be taken;

- (iv) A description of disciplinary action to be taken.

L. Claims by the Harasser

10. Employment At Will Doctrine. In New York, the Doctrine of Employment At Will ("Doctrine") allows an employer to terminate an employee for any non-discriminatory reason. Under the Doctrine, an employer need not justify an adverse employment action. Thus, an at-will employee may generally not challenge the propriety of an adverse employment action. Some theories that an alleged harasser can raise may include:

- (a) breach of contract;
- (b) violation of Title VII or similar state statutes;
- (c) tortious interference with an employment relationship;
- (d) intentional infliction of emotional distress; and
- (e) Defamation/libel and slander;

See generally, Sexual Harassment in the Workplace §§1102A. Certain harassers have also sought attorneys' fees as a result of the alleged discriminatory termination. Id.

III. Practical Strategies for Terminations and Reductions in Force

1. Handling RIF Selection.

(a) The reduction in force provides a legitimate non-discriminatory reason for the termination of an individual. Laberick & Haines v. New York State Department of Human Rights, 88 N.Y. 2d 734, 650 N.Y.S. 2d 76 (1996); Viola v. Philips Med. Sys., 42 F. 3d 712 (2d Cir.); Waldo v. Xerox, Inc., 1991 F. Supp. 174 (N.D.N.Y. 1998).

(b) Courts will generally grant summary judgment to an employer unless the employee can make a showing that the selection criterion applied were discriminatory. Cronin v. Aetna, 46 F. 3d 196 (2d Cir. 1995); Beirne v. Fiedcrest Cannon, 74 F.E.P. Cases 30 (S.D.N.Y. 1997). Mauro Losciale v. The Port Authority of New York and New York, 1999 WL 587928 (S.D.N.Y. 1999).

(c) Maintaining a selection process free of discriminatory criterion.

(i) Review of Policies. Conduct an audit of company policies and procedures prior to layoff selections to ensure that all company policies provide maximum flexibility in making decisions and confirm the at-will employment relationship. Typically, changes to the policy can be made at anytime by the employer and updates should be provided to employees. Consider how the existing or anticipated policies, such as severance plans, will be implicated by reductions in force. Avoid specific policies on reductions in force as each reduction typically has its own peculiar circumstances.

(ii) Consider the Selection Criteria. For example, should seniority be a factor. This is considered a very objective method for choosing employees, but may result in the selection of more qualified employees for layoff. Typically, employers prefer to rely on performance and skills in determining the most appropriate employees for layoff. This method can open the door to more litigation, as it is often difficult to make distinctions among employees and appraisals may not accurately reflect their skills and performance.

(iii) Designate a Selection Committee. May wish to consider a group of people to oversee the layoff process. This way, decisions are cross checked among the participants, who should be objective and removed from the departments where the reduction will occur.

(iv) Process. Determine how many layoffs are necessary and whether a restructuring will take place after the reduction in force. Also create a "matrix" to use in evaluating employees that are part of the workforce that will be subject to a reduction in force. The matrix should include the criteria that will be considered, such as length in service, education and training, information about performance evaluations, and any other work related information that would be relevant to the decision.

(v) Examine Possible Bias. Once the layoff selections have been made, the list of chosen employees should be more closely examined to determine whether or not there may have been possible bias in the decision.

(vi) Severance. Consider the use of severance conditioned upon the execution of a waiver and release to further minimize the risk of lawsuits and strengthen employee morale.

## 2. Drafting Releases and Waivers.

(a) What claims can be waived. Generally, all federal and state employment claims are waivable, including unknown claims. Beickings v. Bethlehem Luken's Plate, 82 F. Supp. 2d 402 (3d Cir. 2000), holding that "a release that bars

unknown claims will be enforced, even if a party claims that it was unaware of the matter at the time that the release was executed."

(b) What claims cannot be waived.

(i) Future claims are not waivable as a matter of law.

(ii) Claims under the Fair Labor Standards Act cannot be waived without court or U.S. Department of Labor approval. Thus, practitioners should include in a settlement agreement a representation by the employee that he is not owed any monies for wages, salary, over-time, bonuses or commissions.

(iii) Workers' Compensation claims varies from state to state.

In New York, "no release of liability or compromise agreement is valid unless it is proved by the Appeals Board Referee". N.Y. Workers' Comp. Law § 32.

Practitioners should consider including a factual representation by the employee in the settlement agreement to the effect that he has not suffered any work related injuries.

(iv) Unemployment Benefits. In New York, an employee cannot waive a statutory right to file a claim for unemployment compensation benefits. New York Workers' Compensation Law § 591(1).

(v) Right to File a Charge of Discrimination with the EEOC.

The EEOC issued an enforcement guidance on non-waivable employee rights under EEOC enforced statutes in April 1997 declaring that any attempt by employers to limit an individual's right to file an agency charge of discrimination is "null and void as a matter of public policy". The EEOC even took the position

that requiring an employee to sign such an obligation, standing by itself, constitutes a separate and distinct violation of an EEOC enforced statute, prohibited by statutory anti-retaliation provisions.

Moreover, settlement with an individual does not terminate the EEOC's jurisdiction to investigate a potential violation of law, or prohibit the agency itself from bringing an enforcement action. See EEOC v. Goodyear Arrowspace Corp., 813 F. 2d 1539 (9th Cir. 1987). However, an employer can be shielded from liability from the claims of an individual who signed a waiver agreement and otherwise settled his claims. Practitioners should include in their settlement agreements a promise by the employee that he will not accept compensation as a result of the EEOC pursuing a case on his behalf.

3. Creating an enforceable Waiver and Release.

(a) Provide adequate consideration. Consideration must be offered to the employee in exchange for the release. The consideration must be something of value in addition to that which the employee is already entitled in the absence of the release.

(i) The employee's actions must be "knowing and voluntary".

Courts generally look to the "totality of the circumstances" to consider whether the employee's release is "knowing and voluntary". Factors to be considered may include:

- A. Employee's education and business experience;
- B. The amount of time the employee had to review the agreement;

C. Whether the employee had legal counsel to review the agreement;

D. The complexity of the agreement.

Interesting note: If an employee knowingly and voluntarily executes a release and violates it by bringing an action based upon a released claim, the employer may be entitled to damages for the employee's breach. Glugover v. Coke Cola Bottling Co., #91 CIV 631, 1994 U.S. District Lexis 14182 (S.D.N.Y. Oct. 6, 1994); Releases and waivers may also be set aside in the event of duress or fraudulent inducement. See Paolillo v. Dresser Industries, Inc., 821 F. 2d 81 (2d Cir. 1987) (Election to retire was involuntarily because less than six (6) days was given to decide). George v. Mobile Oil Corp., 739 F. Supp. 1577 (S.D.N.Y. 1990) (where court denied summary judgment to employer and stated that it was "by no means clear that the consideration given in exchange for the waiver exceeds the benefits to which the employee was already entitled").

(b) Tax Considerations.

(i) Under the old standard prior to August 1996, damages or settlements received "on account of personal injury or sickness" were excluded from a taxpayer's gross income under Internal Revenue Code § 104(a)(2). Thus, damages received for emotional distress and other tort actions were generally excludable from gross income. Parties to a settlement agreement generally structured the settlement to apportion as much of the settlement as possible to "emotional damages"; and

(ii) The Small Business Job Protection Act of 1996 amended the Internal Revenue Code by providing that the exclusion from income tax applies only to damages received on "account of personal physical injury or physical sickness". Consequently, damages in employment related cases became taxable unless received "on account of personal physical injury or physical sickness". As result, the allocation of a settlement payment in employment cases to "emotional damages" does not, by itself, relieve the plaintiff's obligation to pay tax on the settlement monies. Tying the non-taxable part to "physical injury or sickness" is generally demonstrated by actual medical expenses.

(iii) Attorneys' Fees. There is a split among the Circuit Court of Appeals as to whether attorneys' fees in employment related cases are properly included in the plaintiff's gross income. The Second Circuit has concluded that contingent fees paid to an attorney directly out of an award must be included in the plaintiff's gross income. Raymond v. United States, 355 F. 3d 107 (2d Cir. 2004). The United States Supreme Court has granted Cert. to review two (2) recent circuit court cases, presumably to determine whether a taxpayer must include in its gross income the portion of damages recovered that is used to pay attorneys' fees pursuant to a contingent fee agreement.

4. Advice on Drafting the Waiver and Release Agreement.

(a) Broad Waivers. As Court's tend to construe releases narrowly, waivers should be broadly drafted. Common practice to a site every statutory claim encompassed by the release.

(b) Dismissal of Underlying Claim. Require the dismissal or withdrawal of complaints and charges. Also, settlement agreements should require that the employee dismiss all pending litigation with prejudice. Note: Withdrawal of an EEOC charges is not a matter of right as the agency has the power to pursue the claim independently. Practioners should prepare the agency documents necessary for the employee to complete and have a clause requiring that the employee will cooperate to execute all additional documents necessary to achieve the dismissal or withdrawal.

(c) Consideration. The agreement should specifically provide that it is providing compensation in addition to what the employee would have been entitled to in exchange for the waiver and release. Practioners should point out when the payments will be made, whether taxes will be withheld and to whom the checks will be made out.

(d) Confidentiality Provision. Counsel should look to include or address the following circumstances:

(i) Should the confidentiality agreement apply to the terms of the settlement agreement or more broadly to other facts and circumstances;

(ii) To whom should the confidentiality agreement apply;

(iii) What should be the consequence of a breach of the confidentiality provision;

(iv) Notice should be required to the employer if disclosure of the terms of the agreement become required.

(e) Non Disparagement Clauses. Important to employers that employees not engage in conduct which would negatively reflect on the employer and its business.

(f) No Admission of Wrong Doing. Employers often wish to include a clause expressing that they are not admitting to having engaged in any wrong doing as to the employee or others by entering into the settlement agreement.

(g) No Assistance/Cooperation Clauses. Settlement agreements commonly contain provisions requiring that the employee neither assist counsel nor others in the prosecution of any claims against the company. The EEOC and the SEC contend that such a clause is invalid.

(h) Deal with Attorneys' Fees Issues. A "prevailing party" under Title VII may recover attorneys' fee if the party obtains some form of "ordered relief". A settlement agreement should make clear that any waiver specifically includes a waiver of attorneys' fees.

(i) Restriction from Future Employment. Most employers desire to obligate the employee never to apply for employment with the company again. Plaintiffs have unsuccessfully argued that these provisions are unlawful attempts to waive future legal rights. See Adams v. Phillip Morris, Inc., 67 F. 3d. 580 (6th Cir. 1995). A properly drafted covenant should not seek to waive rights but rather elicit a promise not to seek employment.

(j) Return of Company Property. Employers often attempt to commit employees to return company property as part of the settlement agreement.

(k) Restrictive Covenants. Commonly included in settlement agreements for higher level employees.

(l) Severability. To ensure the enforceability of agreements containing invalid as over broad clauses.

(m) Tax Indemnification Issues. Employers seek to protect themselves in the event of an unanticipated tax liability due to the payment to the employee.

(n) Choice of Law and Form for Litigation. Employers often look for the home court advantage.

## Supplement to June, 2008 Seminar Outline

### G-1. Retaliation Revisited.

Burlington Northern & Santa Fe Railway Co. v. Sheila White, 548 U.S. 53, 126 S.Ct. 2405 (2006). In this case, an employee complained to management that her immediate supervisor had repeatedly told her that women should not be working in her department. She also complained that the supervisor made insulting and inappropriate remarks to her in front of her male colleagues. The supervisor was ordered to attend sexual harassment training. The company also moved the complaining employee from her forklift duty and assigned her to perform standard truck laborer tasks. The employee filed a complaint with the EEOC claiming the reassignment amounted to retaliation for her earlier complaints. In a subsequent dispute with another supervisor, the facts of which were in dispute, the employer suspended the complaining employee without pay for 37 days for being "insubordinate". The money was later returned to the employee.

In the Title VII lawsuit, the employer argued that the retaliation claim should be dismissed because the employee had not suffered an "adverse employment action" which "materially altered the terms and conditions of her employment". The Supreme Court disagreed.

In reviewing the text of Title VII, the court noted that the antidiscrimination provision seeks a workplace where individuals are not discriminated against because of their racial, ethnic, religious or gender base status. The substantive provision seeks to prevent injury to individuals based on who they are.

The anti-retaliation provision seeks to secure the primary objective (anti-discrimination) by preventing an employer from interfering (through retaliation) with an

employee's efforts to secure or advance enforcement of the Act's basic guarantees. The anti-retaliation provision, therefore, seek to prevent harm to individuals based not on who they are, but on what they do, i.e. their conduct.

In the first objective, Congress did not need to prohibit anything other than employment related discrimination, but the court stated:

"one cannot secure the second objective by focusing only on employer actions and harm that concerns employment in the workplace. An employer can effectively retaliate against an employee by taking actions not directly related to his employment or by causing him harm outside the workplace. Thus, the anti-retaliation provisions, unlike the substantive provisions, are not limited to discriminatory actions that would effect the terms and conditions of employment.

NEW RULE: A retaliation plaintiff must show that a "reasonable employee" would have found the challenged action "materially adverse", which in this context means that it might have well persuaded a reasonable worker from making or supporting a charge of discrimination.

Employer argued that reassignment of duties within the same department cannot constitute retaliatory discrimination. The Supreme Court did not agree. The Court stated that almost every job category involves some responsibilities or duties that are less desirable than others. "Common sense suggests that one good way to discourage an employee from bringing discrimination charges would be to insist that she spend more time performing the more arduous duties and less time performing those that are easier and more agreeable."

The employer also argued that the 37 day suspension without pay lacked statutory significance because the employee was ultimately reinstated with back pay. The Court stated that the employee and her family had to live for 37 days without income. "They did not know during that time whether or when the employee could return to work. Many reasonable employees would find a month without a paycheck to be a serious hardship. A reasonable employee facing the choice between retaining her job (and paycheck) and filing a discrimination complaint might well choose to former."

(a) Moses v. City of New York, 2007 W.L. 2600859 (S.D.N.Y. 2007). An employee claimed retaliation when the company introduced intervening managers to serve between the plaintiff and her acting supervisor and increase scrutiny of plaintiff by her supervisors (among other things), and the Southern District stated:

"even in the wake of *Burlington North*, increased scrutiny does not constitute adverse action." See, Scott v. Cellco Partnership, 207 W.L. 1051687 (S.D.N.Y. 2007) ("As to plaintiff's assertion of defendant's general reprimands about plaintiff's lateness and other accusations, and alleged excessive scrutiny of plaintiff...the court concludes that those allegations, if true, do not constitute adverse employment actions as now defined in *Burlington*."