Ferrara, Fiorenza, Larrison, Barrett & Reitz, P.C.

EMPLOYMENT LAW MATTERS

Latest legal developments and practical guidance for effective HR management May 2003

Route to: _____ _____ _____

In this issue …

- Senior Employee Held to be "Supervisor" for Determining Employer's Liability for Harassment
- Federal Courts Split on Whether "Constructive Discharge" is a "Tangible Employment Action" in Workplace Harassment Cases
- Not All Requested Leaves Must be Granted Under the ADA
- "Last Chance Agreement" Limits Union's Ability to Arbitrate Discharge
- State Court Says, Lawyers Can Assist Clients in Secretly Tape Recording Conversations at Work

Ferrara, Fiorenza, Larrison, Barrett & Reitz, P.C. provides comprehensive legal representation and counseling exclusively to public and private sector employers in the areas of employment law and labor relations.

Senior Employee Held to be "Supervisor" for Determining Employer's Liability for Harassment

The Second Circuit Court of Appeals (the federal appellate court with jurisdiction over New York) recently held that an employee does not have to have "tangible employment authority" over another employee to be classified as a "supervisor" for purposes of establishing an employer's vicarious liability for workplace harassment. (*Mack v. Otis Elevator Co.,* 2d Cir., No. 02-7056, 4/11/03). This is a much broader definition of the term "supervisor" than is used elsewhere in employment and labor law, e.g., Fair Labor Standards Act.

In *Mack*, the court noted that James Connolly (the "mechanic in charge") did not have authority over the plaintiff, Yasharay Mack, to hire, fire, promote, reassign, or significantly change her benefits while working at Otis Elevator. However, Connolly was still found to be Mack's supervisor because he was the senior employee at the location where she worked and was responsible for making and overseeing her daily work assignments.

Mack alleged that Connelly told her she had a "fantastic a**," "luscious lips," and "beautiful eyes." Connolly also regularly changed out of his uniform in front of Mack at the end of his shift, stripping down to his underwear and adjusting himself before changing into his street clothes. And on one occasion, in front of all the other mechanics, Connolly grabbed Mack by the waist, pulled her onto his lap, tried to kiss her and touched her buttocks. Connolly also explicitly questioned Mack's place in the elevator business as a woman and an African American. Specifically, he told her that "sp*cs" and "n*****s" did not "belong in the business," and that he did not "know why women are on this job anyway."

The bottom line is ...

An employee does not have to have "tangible employment authority" over another employee to be classified as a "supervisor" for purposes of establishing an employer's vicarious liability for workplace harassment.

Mack alleged that she "repeatedly complained" to Connolly's supervisor and asked for a transfer, but the supervisor took no action. Eventually, she sued in federal district court, claiming sexual harassment. A lower lever federal court granted summary judgment in favor of Otis.

On appeal, the Second Circuit noted that as a threshold matter it had to determine whether Connolly was properly characterized as Mack's "supervisor."

The court noted that Connolly's authority over Mack, "... bestowed upon him by Otis, enabled him, or materially augmented his ability to impose a hostile work environment on her." Thus, the court found Connelly to be a supervisor.

The Court reasoned that: "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 or her subordinates."

If you have any questions about this case, please contact Mike Dodd at 437-7600.

Federal Courts Split on Whether "Constructive Discharge" is a "Tangible Employment Action" in Workplace Harassment Cases

A recent federal appellate court decision has highlighted a sharp division among federal judges concerning a major principle of workplace harassment and discrimination law. *See Suders v. Easton*, __F.3d__, 2003 WL 1879011 (3d Cir., April 16, 2003). The *Suders* decision presents one side's viewpoint that when an employee resigns due to **severe** harassment on the job (based on sex, religion, race, etc.), the law should treat that resignation as if the employer terminated the employee. This is referred to as the principle of "constructive discharge." The opposing viewpoint (which is followed in the federal courts with jurisdiction over New York), holds that constructive discharge should not apply in the context of workplace harassment and discrimination. While the *Suders* decision is not binding in New York, this division will likely have to be reconciled by the U.S. Supreme Court in the near future. Should the Supreme Court agree with the *Suders* viewpoint, employers in New York will have fewer defenses to claims of harassment and discrimination in the workplace.

In 1998, the U.S. Supreme Court (in the landmark *Ellerth* and *Faragher* decisions) held that employers are automatically liable – or "strictly liable" – for discriminatory "tangible employment actions" by a supervisor against an employee. "Tangible employment actions" are supervisory decisions which cause significant changes to an individual's employment status, like firing, refusing to hire, demotion, failure to promote, etc. In *Ellerth* and *Faragher*, the Supreme Court ruled that if a supervisor takes any such action against an employee, and that action is motivated by the fact that the employee is of a particular race, gender, religion, etc., then the employer will be financially responsible for any harm suffered by that employee. It does not matter whether the employer was actually aware of the supervisor's conduct or not. These Supreme Court decisions solidified the principle that for purposes of workplace harassment and discrimination law, the supervisor **is** the employer.

For example, if a male supervisor terminated a female employee because she refused his sexual advances, the supervisor's employer would be held strictly liable for any harm she suffered, regardless of whether the president of the company knew about the supervisor's actions or not. The law, in essence, would treat this case as though the president engaged in the discriminatory tangible employment action him/herself.

> **The bottom line is ...**
>
> ***If the Supreme Court resolves the split of authority among the federal courts in favor of this recent decision, employers in New York will have fewer defenses to claims of harassment and discrimination.***

However, the *Ellerth* and *Faragher* decisions also did away with strict liability for a different kind of discriminatory act by supervisors. They created an "affirmative defense" for employers where the supervisor engages in "hostile environment harassment" of an employee. "Hostile environment harassment" is another form of discrimination where an employee's work atmosphere has become so permeated with hostility based on sex, race, religion, etc. that the employee is harmed even without being discharged, demoted, etc. When confronted with harassment of this sort, employees will sometimes resign and sue the employer.

Unlike tangible employment action discrimination suits, however, an employer in New York has been able to avoid — not only strict liability but — liability entirely by raising the *Ellerth*/*Faragher* affirmative defense. The defense requires that: (a) the employer exercise reasonable care to prevent and correct any harassing behavior, and (b) the employee unreasonably fails to take advantage of any preventive and corrective opportunities provided by the employer.

Last month, in the *Suders* case, the federal Third Circuit Court of Appeals held that "constructive discharge" constitutes a "tangible employment action." In this case, Nancy Drew Suders alleged that while working for the Pennsylvania State Police she suffered mistreatment and sexual harassment so severe that she ultimately felt compelled to resign. The Third Circuit's holding was as follows:

> On the basis of the record presented to the trial court, we hold that Suders raised genuine issues of material fact as to her claim of constructive discharge. [Also], we hold that a constructive discharge, when proved ... constitutes a tangible employment action within the meaning of *Ellerth* and *Faragher*. This precludes the PA State Police's assertion of the affirmative defense ....

Thus, under the *Suders* line of thought an employee could resign because of hostile environment harassment by a supervisor – of which the employer is unaware – and the employer could still be held strictly liable for those harassing actions.

We will keep you apprised of any future developments in this regard.

Not All Requested Leaves Must be Granted under the ADA

Under the Americans With Disabilities Act ("ADA"), an employer may be obligated to provide "reasonable accommodation" to an employee's disabilities, where the accommodation enables the employee to perform the essential functions of his or her position. Companion regulations to the ADA specifically cite the use of accrued paid leave, or providing additional unpaid leave for necessary treatment, as a potential reasonable accommodation to an employee's disabilities. However, as a recent court decision made clear, an employer's possible obligation to grant a disabled employee a leave of absence is not open-ended, and leaves that do not enable an employee to perform the essential functions of his or her position presently or in the immediate future need not be granted.

In *Wood v. Green*, 323 F.3d 1309 (11th 2003), a federal appeals court ruled that an employer was not obligated by the ADA to grant an employee an indefinite leave of absence as a "reasonable accommodation" to his disability. The employee, who worked as a court clerk and who had for years suffered from "cluster headaches" that made it impossible for him to report to work, had received numerous leaves of absence of varying duration in the past, from which he had always returned to duty. However, one month into his last headache-related leave of absence, his employment was terminated. The employee then filed an ADA suit, claiming that continuing his indefinite leave of absence was a "reasonable accommodation."

When the employee prevailed at trial, his employer appealed, arguing that the employee was not a qualified individual within the meaning of the ADA because his requested accommodation of indefinite leaves of absence was not reasonable. The appeals court agreed, ruling that neither the statute nor its regulations require an employer to wait for an indefinite period of time for an accommodation to achieve its intended effect. Rather, the court explained, a reasonable accommodation is most logically construed as that which, presently, or in the immediate future, enables the employee to perform the essential functions of the job in question. The employee was not requesting an accommodation that allowed him to continue work in the present. Rather, he sought an accommodation that would allow him to return to work in the future, at some indefinite point in time. Therefore, the ADA did not prohibit his termination.

Importantly, the court in *Wood v. Green* did not rule that a leave of absence can never be a reasonable accommodation. In fact it specifically noted that "a leave of absence might be a reasonable accommodation in some cases." However, the court's ruling does provide employers with some guidance in considering disability related employee requests for leaves of absence, which must always be analyzed on a case-by-case basis, taking into account the specific circumstances of the employee's disability, its impact on the performance of essential duties, and whether or not the requested accommodation will enable the employee to perform those duties.

"Last Chance Agreement" Limits Union's Ability to Arbitrate Discharge

An employee and an employer signed a "last chance agreement," which stated that any future violations of the employer's code of conduct, regardless of the gravity of the offense, would result in immediate dismissal without any right to grieve the action. Almost seven years later, the employer terminated the employee, allegedly for not following safety rules and leaving work early without approval. The union filed a demand for arbitration under the collective bargaining agreement. The employer sought a court order staying arbitration, arguing that by signing the last chance agreement the employee had waived any right to arbitration.

Initially, a N.Y. State Supreme Court judge granted the employer's petition for a stay. However, the Appellate Division reversed. *Von Roll Isola USA, Inc. v. IUEW*, __ A.D.2d __, (3d Dept. 4/10/03). It determined that the last chance agreement settled the issue of what the penalty should be. If there was a finding that the employee had committed any violation of the code of conduct, an arbitrator would not have the authority to overturn the discharge.

On the other hand, the agreement did not address who was to determine whether a violation of the code of conduct had occurred. Since the collective bargaining agreement otherwise allowed arbitration of disciplinary matters, the court held that the union had the right to pursue arbitration in this case, limited to the issue of whether the employee did, in fact, violate any provision of the code of conduct.

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State Court Says, Lawyers Permitted to Assist Clients in Secretly Tape Recording Conversations at Work

According to a recent State Trial Court decision, lawyers can help their clients secretly record telephone conversations with third parties without violating the law or the lawyer's code of ethics. (*Mena v. Key Food Stores Co-operative, Inc.*, ___ Misc. 2d ___, 2003 WL 1792950 [Sup. Ct., Kings Co., 3/20/03].) Generally speaking, New York law permits the surreptitious taping of conversations – regardless of whether the conversations are on the telephone or face-to-face – by one of the parties to the conversation (or if one of the parties to a conversation consents to the taping). Moreover, such tapes can be offered as evidence at trial. However, until a recent change in the lawyer's Code of Professional Responsibility, it was still considered an ethical violation for an attorney to assist a client in this regard. The *Mena* case is the first time that a court has addressed this issue and the new ethical rules.

The case involved a workplace discrimination law suit. The plaintiffs alleged that obscenities, foul language, racial slurs and epithets directed at women and African Americans were "common parlance at the Key Food offices." Approximately one year before the law suit was filed, a female Key Food employee conferred with her attorney about this problem and sought advice regarding the legality of secretly taping some of these comments. The attorney not only advised her regarding the law in New York but assisted her in undertaking the secret taping. Specifically, the lawyer obtained the services of a private investigator who procured recording equipment and instructed the employee in its uses in the attorney's presence. Subsequently, on one of the tapes, a voice alleged to be a Key Food supervisor is heard asking whether a job applicant was a "f*****g n****r", whether she had dread locks and whether she smelled. Her attorney then publicized this information which subsequently resulted in its airing on New York's major television stations, and in print media.

The New York State Supreme Court (Kings County) upheld both the taping and the publicity, and rejected Key Foods' assertions that disciplinary rules were violated. A trial in this case is now anticipated for the fall of 2003.

Ferrara, Fiorenza, Larrison, Barrett & Reitz, P.C.
5010 Campuswood Drive
East Syracuse, New York 13057