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Newsletters

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First Circuit Clarifies "Severe or Pervasive" Standard on Hostile Work Environment Claim

The employee was hired as the area manager for a national company and began experiencing performance problems almost immediately. She was fired less than a year after beginning her employment and subsequently filed a lawsuit alleging that she was subject to sexual harassment and was terminated in retaliation after reporting the harassment. The employee appealed from the district court's grant of summary judgment in favor of the employer alleging that the court erred in finding that no reasonable juror could conclude that 1) the two incidents of harassment were "severe or pervasive enough to create a hostile work environment" and 2) the employee satisfied the but-for standard of alleged adverse action by the employer to support her claim for retaliation. The U.S. Court of Appeals for the First Circuit affirmed the entry of summary judgment regarding the harassment claim, finding that the conduct of the employee's supervisor of putting his arm around her on two separate occasions, although inappropriate physical contact, was "not pervasive by any measure" and thus, could not constitute a hostile work environment. Because the employee's performance problems began before the two harassing incidents, and the complaints about the performance issues came from the clients themselves and not her supervisor, the retaliation claim was also properly adjudicated. This decision provides guidance as to evaluating hostile work environment claims predicated on allegations of limited inappropriate physical contact and confirms

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that documented performance issues can help to defeat a claim for retaliation.

Ponte v. Steelcase Inc., No. 13–2011 (1st Cir. January 31, 2014)

Retaliation Claim Fails if Decision-Makers Unaware of Complaints of Harassment

A terminated Hispanic employee working as the director of global finance for an auto parts company in Michigan could not sustain a retaliation claim since he was unable to show that the managers who fired him were aware of his complaints to human resources about disparaging remarks. The employee claimed that his employer violated Title VII of the Civil Rights Act of 1964, as amended, by terminating him after he complained to human resources for being subjected to racially and ethnically derogatory comments made in his presence by a co-executive employee. The U.S. Court of Appeals for the Sixth Circuit granted the employer's motion for summary judgment on the grounds that the employee could not state a *prima facie* retaliation claim because he could not establish that the management-level employees who recommended his termination had knowledge of the employee's protected activity (i.e., complaining about racially disparaging remarks concerning his Hispanic heritage). The Court also rejected the employee's claim that the complaint to human resources was imputed to the decision makers and therefore the retaliatory motive could be established. When investigating complaints of harassment, discrimination, and/or retaliation, it is a good idea to share the nature, extent, and results of the investigation with others on a need-to-know basis, as knowledge may serve to either help or hurt an employer's defense of such claims.

Trujillo v. Henniges Automotive Sealing Systems of North America, *Inc.*, No.13-1376, (6th Cir. February 18, 2014)

African-American Female CEO who was Replaced by Hispanic Female has Race Discrimination Claim

A female African-American employee was the Chief Executive Officer for a transit management company. Other executives of the company had issues with the employee, and they exchanged disparaging e-mails referring to the employee as a "prima donna" and "helluva bitch." She was eventually fired by a founder of the company and replaced by a Hispanic woman. The employee filed suit in federal district court alleging race discrimination, among other claims. In her complaint, the employee argued that the executive's disparaging e-mails were code for "angry black woman" or "uppity black woman." The district court granted summary judgment in favor of the company as to the employee's discrimination claims. On appeal, however, the U.S. Court of Appeals for the Sixth Circuit reversed, finding that the employee had presented sufficient evidence, albeit circumstantial, to support her discrimination claims. As to her race discrimination claim, the Court held that the employee's replacement was Hispanic and therefore not a member of the same statutorily protected class. Therefore, her race discrimination claim was able to survive summary judgment. This case exemplifies how e-mail communications can be both useful and/or harmful to an employee's case or an employer's defense.

Shazor v. Prof'l Transit Mgmt., Ltd., No. 13-3253 (6th Cir. February 19, 2014)

White Waitress in her 50s who Quit Job Cannot Establish Race or Age Claims

A Caucasian restaurant waitress who was in her 50s was allegedly subjected to daily comments about her age by an African American general manager (GM). She claimed that she was called "old woman," "old lady" and "grandma." The GM also encouraged the waitress to transfer to another location, and allegedly went so far as to tell the waitress that the transfer had gone through, even though she had never applied to work at the other location. Based on the belief she was being transferred, the waitress took a three-week vacation for the period of time between the jobs. During that vacation, she received a check in the mail from her employer indicating that her employment had been terminated. The waitress filed a charge with the U.S. Equal Employment Opportunity Commission, alleging she was fired because of her sex, age and race, and in retaliation for her a prior discrimination claim. The federal district court dismissed her case on summary judgment. The U.S. Court of Appeals for the Seventh Circuit affirmed the district court ruling. The Court opined that the waitress failed to establish a *prima facie* case because she was did not suffer an adverse employment action and that she voluntarily abandoned her position in the belief that a transfer was impending. Since she did not claim constructive termination, and ultimately left of her own accord, the Court found that she could not maintain her claims. Even casual, off-the-cuff comments such as those alleged herein, can be actionable under certain circumstances. Accordingly, it is important for employers to advise employees so as to avoid any inferences of discrimination.

Andrews v. CBOCS West Inc., No. 12-3399, (7th Cir., February 14, 2014)

Employee Fails to Establish Link Between Termination and Filing of Workers' Comp Claim

The employee, who worked as a passenger general trucker, was terminated after 22 years when he failed to submit to a mandatory drug test following a workplace accident. The employer has a mandatory written substance abuse policy that requires drug testing in certain situations. The employee filed suit claiming retaliatory discharge. The employee failed to establish causation as the undisputed facts, including the employee's own deposition testimony, noted that he was terminated because he refused to take a drug test upon initiation of a workers' compensation claim as required by the employer's drug policy. The employee had no evidence that the employer had any other reason for his termination other than his violation of the drug testing policy. The employee also could not establish that the drug policy was discriminatory as he could not provide evidence that the policy discourages employees from filing workers' compensation claims. As such, the U.S. Court of Appeals for the Seventh Circuit affirmed the lower court's finding that the employee's employment was terminated solely as a result of his refusal to take the mandatory drug test and not in retaliation for his seeking to file a workers' compensation claim. Temporal proximity between the protected activity and the alleged adverse employment action may bolster an employee's claim; thus, it is always important to work with human resources professionals before administering any adverse employment action to manage risk.

Phillips v. Continental Tire The Americas, LLC, No 13-2199 (7th Cir., February 14, 2014)

Foreign National's Complaint About Foreign Law Violations Not "Protected Speech" Under Sarbanes-Oxley

The general manager of the Columbian subsidiary of a Dutch publicly traded parent company reported alleged Columbian tax law violations by the subsidiary occurring solely in Columbia to the subsidiary's controller, as well as the parent's Columbia-based accounting assistant and Houston-based chief accounting officer. The Columbia subsidiary subsequently passed him over for a pay raise given to other employees and terminated him. The employee then filed a retaliation complaint with the Occupational Safety and Health Administration (OSHA) asserting that the parent and subsidiary violated § 806 of the Corporate and Criminal Fraud Accountability Act of 2002 and Title VIII of the Sarbanes-Oxley Act, which prohibits a publicly traded company from retaliating against an employee who engages in protected speech by providing information the employee reasonably believes violates any one of six categories of American federal law. OSHA's Administrative Review Board dismissed the complaint, finding that the general manager had not engaged in protected speech because he reported violations of Columbian tax law, not violations of any of the six categories of American federal law to which § 806 applies. The general manager appealed and the U.S. Court of Appeals for the Fifth Circuit affirmed, rejecting his contentions that the speech was protected because parent company officials in Houston used mail, e-mail, and telephones to direct the fraud. The court reasoned that although he objected to the conduct of parent company officials in Houston, the objected-to conduct was still not a violation of any of the six relevant categories of federal law. This case is important because it demonstrates that a company may have protection from retaliation liability even though its American employees may have been complicit in actions occurring in foreign countries in violation of foreign law.

Villanueva v. U.S. Dep't of Labor, No. 12-60122 (5th Cir. February 12, 2014)

Governmental Employer Not the "Moving Force" Behind Employee's Sexual Misconduct

An out-of-work massage therapist interviewed for a position with the county hospital. She was interviewed by a politically appointed staffer who had no actual authority to interview or hire applicants. Ultimately, the massage therapist learned that she was duped into engaging in sexual contact with the staffer in exchange for a nonexistent job. She sued the county for, among other things, sex discrimination and sexual harassment. The U.S. Court of Appeals for the Seventh Circuit held that although the county could have been more vigilant in its hiring process, because the county did not give the staffer any real power to interview or any official reason to conduct interviews, the county was not the "moving force" behind what happened and therefore there was no liability for the employer. Though this case ended favorably for the county, private employers must nevertheless be mindful of those individuals over which it has control, as the employer may be liable for his/her actions.

Wilson v. Cook County, No. 13-1464 (7th Cir. February 10, 2014)

Employee's Failure to Utilize Protected Leave Results in Termination

The employee worked at a poultry processing plant and sought time off of work to care for her ailing father in Guatemala. Because this was potentially a qualifying leave under the Family and Medical Leave Act (FMLA), the employee was offered such leave, but expressly rejected it. After failing to comply with the employer's "three day no-show, no-call" rule after the end of the approved two-week period of leave, she was terminated. The employee filed suit, claiming the employer interfered with her rights under the FMLA and corresponding California Family Rights Act, and the matter was tried to a jury. Before a verdict was rendered, both parties sought judgment as a matter of law. The court denied the employer's motion, and after a jury verdict was returned in favor of the employer, the employee renewed her motion and sought a new trial. The district court denied both requests and the employee appealed. The U.S. Court of Appeals for the Ninth Circuit affirmed. The panel declined to disturb the district court's determination because it found that an employee is entitled to affirmatively decline FMLA leave, even if the underlying reason would have involved FMLA protection. This case serves as a reminder that it is employees, not employers, who ultimately have the ability to determine whether their time off of work is characterized as protected, FMLA leave — or not — despite the occurrence of a qualifying event.

Escriba v. Foster Poultry Farms, Inc., No. 11-17608 (9th Cir. February 25, 2014)