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Weekly Employment Brief

June 27, 2003

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Employer May Be Liable for Failure to Take Action to Prevent Same-Sex Sexual Harassment Within a Week of Notice of Harassment

A California court of appeal recently reversed a grant of summary judgment for the employer in a same-sex sexual harassment case, on the question of whether a week of harassment is enough to create a hostile work environment. In *Sheffield v. Department of Social Services,* a clerk typist, Tina Sheffield, sued the Department of Social Services when it failed to prevent a co-worker from sexually harassing her. Sheffield claimed that Betra Thompson, a female co-worker, called her at home, informed Sheffield that she liked her "like a man likes a woman," and asked her on a date. Sheffield declined, and informed her supervisor, Rosemarie Fernandez, about the conversation and told her the next day at work that she was scared. Sheffield indicated that although she "did not want anyone to lose her job," she wanted the Department to tell Thompson to leave her alone and to do whatever it took ensure that this never again happened. Over the next few days, Sheffield complained about a number of other incidents and provided Fernandez with a copy of a letter she wrote to Thompson asking Thompson to leave her alone. Fernandez showed Sheffield's letter to another supervisor, who told Fernandez to ask Sheffield if she wanted the supervisors to do anything. Sheffield reiterated that she didn't want anyone to lose her job, but that she did want the supervisors to let Thompson know she was not interested and that she wanted to be left alone. Two days later, Thompson walked by Sheffield's desk and stated she was "going to get" Sheffield and "I'm going to get your A-S-S." Thompson then hit Sheffield on the back of the head and the neck for about 15 seconds. Following an investigation, Thompson was terminated. Sheffield filed suit against the County and Thompson alleging hostile work environment sexual harassment. The County argued that since less than seven days had elapsed between the first and last incidents, the environment could not be found to be "hostile." Although the lower court agreed and granted summary judgment, the appellate court held that there was an issue of fact as to whether the environment was hostile, and whether the County had taken reasonable steps to prevent the harassment once it learned of it. This case is a reminder that sexual harassment complaints must be dealt with promptly, even when the victim, like Ms. Sheffield here, seems somewhat reluctant to press the matter and that employers must ensure they take reasonable steps to prevent such harassment.

Gay Plaintiffs One Step Closer to Successfully Suing under a "Stereotype" Theory under Title VII

A Pennsylvania federal district court recently held in a Title VII sex discrimination case that a plaintiff could rely on a theory that he was discriminated against because he failed to live up to gender stereotypes. In *Kay v. Independence Blue Cross,* Harry Kay, a gay employee of Independence Blue Cross ("IBC"), alleged he experienced discrimination because his colleagues perceived that he failed to live up to stereotypes of "what it is to be a man." Kay experienced a number of allegedly discriminatory or harassing incidents over the course of a year, consisting of co-workers' remarks about "fags" and "queers," letters accusing him of staring at other male employees, and a petition on the restroom wall stating, "If you want this queer off the floor, sign here." When Kay complained, IBC conducted an unsuccessful investigation to determine the identity of the letter-writer, and tried to trace messages left on Kay's voicemail. Other incidents involved comments from co-workers stating that Kay was not a "real man," including a note saying "A real man in the corporate world would not come to work with an earring in his ear. But I guess you will never be a 'real man'!!!!!" A female coworker also said that she was "glad there was a real man on the floor" when a male coworker replaced an empty water cooler bottle after Kay declined to replace it. Kay sued IBC for discrimination under Title VII. The court acknowledged that while (unlike California's FEHA) Title VII does not prohibit discrimination on the basis of sexual orientation per se, it does prohibit discrimination against an individual because his or her appearance or conduct is perceived as not conforming to gender stereotypes. It found that although Kay had shown that he was discriminated against based on gender stereotypes, his claims could not succeed because he had failed to show that the discrimination he endured was sufficiently severe or pervasive to create an abusive working environment and because his employer had taken reasonable steps to investigate his complaints and prevent future harassment. This decision is further evidence that it is critical for employers to respond appropriately to all complaints of harassment and discrimination, and a reminder to employers that even in states that do not have laws prohibiting discrimination based on sexual orientation per se, employees may nonetheless have valid claims for this form of discrimination.

Department of Labor Issues Rules for Complaints by Corporate Whistleblowers

The Labor Department recently published interim final rules establishing procedures for the handling of whistleblower complaints under the Corporate and Criminal Fraud Accountability Act of 2002 (the "Sarbanes-Oxley Act"). Sarbanes-Oxley protects employees in publicly traded companies who report violations of federal law relating to fraud against shareholders. Sarbanes-Oxley strictly prohibits companies from retaliating against an employee for (1) providing information or making a complaint regarding conduct the employee believes constitutes a securities violation or securities fraud; or (2) filing or participating in proceedings related to fraud against shareholders. The rules establish procedures and time frames for the handling of discrimination complaints made by employees or by persons acting on their behalf. They designate the Occupational Safety and Health Administration (OSHA) as the agency responsible for receiving whistleblower complaint under Sarbanes-Oxley. The rules outline a long and complex process by which an employee can submit his or her

complaint to OSHA. OSHA is then charged with investigating the complaint and either dismissing it or issuing a "preliminary order." The preliminary order often may require reinstatement of the employee, either if there is reasonable cause to believe the employee, or if the employer has failed to demonstrate that it would have taken the same action in the absence of the employee's protected conduct. In addition, employers (and possibly individuals) found to have retaliated against a whistleblower may be subject to administrative, civil and criminal sanctions. OSHA determinations can be appealed to an Administrative Law Judge (ALJ) and then to the Labor Department's Administrative Review Board. Finally, any party dissatisfied with the ruling of the Administrative Review Board may appeal the decision to the federal court of appeals. Employers should familiarize themselves not only with these new rules, but also the provisions of Sarbanes-Oxley, in order to lessen the risk of a successful claim by an employee.

If you are an attorney or member of an in-house legal team, you can learn more about these and related developments at our next Corporate and Securities Group Breakfast Briefing http://www.fenwick.com/Corporate_and_Securities_BB.htm.