



Supervisor's Actions "At Best Inappropriate, At Worst Cruel," but Not Sexual Harassment

In an unusual decision, the Sixth Circuit ruled that sexual harassment under Title VII must involve conduct that is more than inconsiderate or cruel. In *Walker v. National Revenue Corp.*, the court affirmed dismissal of plaintiff Walker's claim against his former employer, on the grounds that the alleged conduct was not so severe or pervasive that it altered the conditions of his employment, or that it was motivated by gender. Walker, a gay male claims collector, alleged that he suffered harassment at the hands of his female supervisor, "Military Mary" Quinones. Walker maintained that, among other things, Quinones touched his legs, thighs, neck and hair, sat in a way that revealed her underwear to him, and repeatedly recounted her sexual exploits and asserted that she could change his sexual orientation. When Walker rejected her advances, Quinones allegedly began to abuse him physically and verbally. Walker ultimately requested and was granted a transfer. Following the transfer, Quinones allegedly continued to engage in inappropriate behavior towards Walker, including coming into his new work area to "glare at him." Ultimately, Walker resigned his position and sued. The court noted that while Quinones may have been the "type of supervisor for whom no employee wanted to work," he failed to show that his work performance was negatively affected by Quinones' conduct. Moreover, Walker did not show that he was singled out for this treatment because of his gender, as he admitted that Quinones engaged in similar behavior towards other employees, both male and female. Although this case affirms that the burden of proof in sexual harassment claims remains high, employers should not allow supervisors to engage in the type of inappropriate behavior described above. In California, these same facts may support a claim of sexual orientation discrimination.

\$21 Million Verdict Upheld in Sexual Harassment Case

A Michigan court of appeals recently affirmed a \$21 million jury verdict in favor of a female millwright who alleged she was sexually harassed by her supervisors and co-workers at a Chrysler plant over a seven year period. In *Gilbert v. DaimlerChrysler Corp.*, the court found that Gilbert, the first female millwright hired at Chrysler's Jefferson North assembly plant, was subjected to sustained and severe harassment. Gilbert, hired in 1992, claimed that from her first days on the job, she was subjected to harassment. She was verbally abused and subjected to postings of cartoons and obscene messages on her locker and around the plant. In January 1994, following a relapse into alcoholism, a suicide attempt and a stay in a psychiatric hospital, Gilbert sued Chrysler. After she filed suit and returned to work, Gilbert claimed she was subjected to "almost daily" harassment. In March 1995, she made a second suicide attempt. A third attempt followed in 1997. Gilbert's testimony about harassment was corroborated by several of her co-workers, who also noted that Chrysler management failed to address the harassment. Awarding \$21 million to Gilbert, the jury rejected

Chrysler's defenses that the alleged incidents of harassment were insufficient to constitute a hostile environment, that she failed to report the names of her harassers to management (thus hampering the investigation), and that Gilbert's personal life (not the harassment) caused her depression and relapse into alcoholism. The court also rejected Chrysler's argument that it did not have "notice" of the harassment because Gilbert withheld the names of her harassers. The court further held that Chrysler knew that Gilbert was experiencing harassment and failed to take adequate steps to remedy the harassment. This case is a sobering reminder that employers must take immediate, proactive measures to properly address any allegations of harassment or face potentially costly verdicts.

Pregnancy Discrimination: Key Factors is When Decision is Made, not When Termination is Carried Out

In its first ruling on the subject, the Sixth Circuit ruled that, in order to establish pregnancy discrimination arising out of an employee's termination, the employee must prove the employer knew about her pregnancy at the time the decision to terminate was made. In *Prebilich-Holland v. Gaylord Entertainment Co. d/b/a WSM Radio*, the court held that mere temporal proximity between an employee's announcement of her pregnancy and her termination is insufficient to support a pregnancy discrimination claim. Prebilich, a new business assistant and development coordinator for WSM Radio, resigned her position to follow a former boss to a new job when WSM persuaded her to come back. Almost immediately after her return, WSM alleged Prebilich's performance deteriorated. She missed deadlines, arrived late, and behaved inappropriately at company functions. Within a few months of her return, the company gave her a verbal warning. Although she promised to improve, Prebilich's performance remained unsatisfactory. On or about November 20, the company decided to terminate her employment on November 25. On November 24, Prebilich told her supervisor she was pregnant. Two days later, Prebilich was terminated. The court rejected Prebilich's argument that her termination was connected to her pregnancy based on the timing of the discharge immediately after the announcement. Noting that Prebilich had no idea when the decision to terminate was made (as opposed to when the termination was carried out), the court held that Prebilich could not establish the required nexus between her pregnancy and her termination. Prebilich would have to show that the employer was informed of her pregnancy, or that her pregnancy was apparent to the company to prove pregnancy discrimination under Title VII. This decision reaffirms that employers should carefully document the date and circumstances of termination decisions.

Ninth Circuit Affirms that Reliability of Expert Testimony is Key to its Admissibility

The Ninth Circuit recently buttressed the court's role as "gatekeeper" with respect to the admissibility of expert evidence in employment

cases. In *Mukhtar v. California State University Hayward*, the Ninth Circuit overturned a \$637,000 jury verdict for a professor who alleged he was denied tenure because of his race, religion and national origin, and remanded the case for a new trial. Mukhtar, the first black, Muslim tenure-track professor in the mass communications department at the University, was hired in 1990. Although the University gave Mukhtar a reduced teaching load the first year with the expectation that he would complete his doctoral dissertation, and although it repeatedly expressed concerns regarding his need to complete his doctorate, Mukhtar failed to complete his degree until December 1995. Despite the department chairman's recommendation in April 1993 that Mukhtar be terminated for his failure to complete his Ph.D., and despite the expression of "grave reservations" by the dean in May 1995, the University kept Mukhtar on. In fall 1995, Mukhtar applied for tenure. After a series of committee meetings and votes, the University denied Mukhtar tenure. Mukhtar brought suit for discrimination under Title VII. At trial, over the University's objection, Mukhtar was allowed to introduce expert testimony by a supposed expert in university administration that the university's explanation for denying tenure lacked credence, its tenure policies were unevenly applied in a way that disadvantaged black professors, and that it failed to follow tenure procedures, trivialized Mukhtar's achievements, and failed to follow policies for reducing racial inequality. In admitting the evidence, the trial judge failed to comment on its reliability. That, said the Ninth Circuit, was reversible error. Under the U.S. Supreme Court's decision in *Daubert v. Merrell Dow Pharmaceuticals*, expert testimony is admissible only if it is relevant and reliable. By failing to make a determination on the reliability of the evidence, the trial judge failed in his gate-keeping role. The error was not harmless because the testimony was "cloaked in authority" and went to the central issue in the case, i.e., the reason for denying Mukhtar tenure. Noting that the remaining evidence showed only a "disagreement among academic professionals," the Court remanded the matter for a new trial. This case will assist employers, who are often faced with highly prejudicial expert testimony of dubious reliability.