FENWICK & WEST LLP

Fenwick Employment Brief

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MANAGER'S SEXUAL RELATIONS WITH SUBORDINATE EMPLOYEES MAY CREATE HOSTILE WORK ENVIRONMENT FOR *OTHER* EMPLOYEES

On July 18, 2005, the California Supreme Court ruled that managers' widespread sexual relations with subordinate employees, even if consensual, may create a hostile work environment for *other* female employees under the Fair Employment and Housing Act. In *Miller v. Department of Corrections*, plaintiffs Edna Miller and Frances Mackey sued their former employer, California Department of Correction, for sex discrimination and harassment. Plaintiffs claimed their manager, a prison warden, had sexual relations with three subordinates and gave them preferential treatment, including job promotions. The Supreme Court held that: "when such sexual favoritism in a workplace is sufficiently widespread it may create an actionable hostile work environment in which the demeaning message is conveyed to female employees that they are viewed by management as 'sexual playthings' or that the way required for women to get ahead in the workplace is by engaging in sexual conduct with their supervisors or management." In this case, Plaintiffs had presented sufficient evidence that the warden's conduct was so severe and pervasive as to allow their claims for sexual harassment to proceed to a jury trial. As part of mandatory sexual harassment training of managers (see reminder below), employers should ensure that supervisors understand the potential serious consequences from sexual relations with subordinates, including claims by other employees who may be affected by a hostile work environment.

EMPLOYER LIABLE FOR DISCRIMINATION IN ATTEMPTING TO "WESTERNIZE" AN EMPLOYEE'S NAME

In a recent decision, the Ninth Circuit Court of Appeals recognized that imposing a "Western" name on an employee of Arab decent constitutes discrimination under federal employment discrimination laws. In *El-Hakem v. BJY Inc.*, plaintiff Mamdouh El-Hakem sued his employer for race discrimination. His manager repeatedly called El-Hakem "Manny" rather than "Mamdouh," urging that customers would be more accepting of him if he used a Western name. When El-Hakem objected, he suggested that the manager use his last name "Hakem" if Mamdouh was too difficult for the manager to pronounce. Instead, the manager started to call Hakem "Hank." Over El-Hakem's continued objections, the manager called him "Manny" or "Hank" on a regular basis for almost a year. The jury found that the manager discriminated against El-Hakem. On appeal, the Ninth Circuit rejected Defendants' argument that "Manny" was not a racial epithet and could not constitute actionable discrimination. Rather, the court recognized that "names are often a proxy for race and ethnicity" and that misuse of names may be discriminatory. Accordingly, employers should use an employee's proper name and consider using a nickname only when acceptable to the employee.

EMPLOYER LIABLE FOR FAILURE TO STOP CUSTOMER HARASSMENT ABOUT ENGLISH ACCENT

The Ninth Circuit Court of Appeals recently held that an employer may be liable for failing to investigate and remedy harassment by customers about an employee's English accent. In *Galdamez v. Potter*, plaintiff Arlene

Galdamez sued her employer, the United States Postal Service ("USPS") for unlawful discrimination under Title VII. Galdamez, a Honduras-born woman with an English accent, became the postmaster in Willamina, Oregon, a small rural community. Galdamez instituted changes within the office in compliance with postal regulations, which angered the community and resulted in hostility, including offensive comments based on Galdamez' race, accent and national origin, threats to her life and safety, and vandalism of her car. Galdamez reported the harassment, which she attributed to her accent and foreign birth, and alleged that USPS failed to properly respond. The Ninth Circuit determined that employers may be liable for third-party customer harassment of employees where the employer ratifies or condones the conduct by failing to investigate or redress such conduct after learning of it. Accordingly, employers must properly respond to employee complaints of customer harassment by investigating the complaint, and effectively stopping further harassment.

$20 MILLION VERDICT IN AGE BIAS CASE

On July 18, 2005, a Los Angeles Superior Court awarded an 80-year-old doctor $20 million for age discrimination, harassment, and retaliation in violation of the Fair Employment and Housing Act. In *Johnson v. California*, plaintiff Robert Johnson, a prison doctor, sued the California Department of Correction for its conduct in attempting to coerce him to retire. Such conduct included allegedly spreading false rumors about Johnson's mental health, threatening to report Johnson to the Medical Board if he refused to retire, waiting four months to interview Johnson about his discrimination complaint, and failing to explain claims of substandard care against him. The jury awarded Johnson $1.6 million in economic damages and $18.4 million for emotional distress and pain. Employers should carefully avoid suggesting an employee retire or making derogatory comments about an employee related to age.

PROPER 401(K) DOCUMENTATION IS ESSENTIAL

It has become more common in corporate acquisitions to find a company's failure to properly document its 401(k) plan. Something as simple as failing to ensure that all plan documents were properly executed and dated at the time of the plan's creation may later jeopardize a 401(k) plan's qualified status, create significant financial risk for the company, and make the company an unattractive target for acquisition. In the context of a corporate acquisition, the potential acquirer will normally conduct a thorough due diligence of the target company's documentation and will likely uncover such deficiencies. Employers should avoid the embarrassment and legal risk of having a 401(k) out of compliance by conducting an internal audit now to ensure proper documentation. The IRS and the Department of Labor provide various correction and amnesty programs that a company may use to voluntarily correct such problems and minimize sanctions.

REMINDER: EMPLOYERS MUST COMPLETE MANDATORY HARASSMENT TRAINING FOR SUPERVISORS BY DECEMBER 31

The end-of-year deadline for employers with 50 or more employees to complete mandatory sexual harassment training for their supervisors is fast-approaching. In addition to its ability to train managers at client sites, Fenwick & West will host a special Breakfast Briefing on September 15, 2005, during which we will deliver an interactive, 2-hour training session for newly-minted supervisors and/or supervisors who may have missed prior training opportunities. Further details about the September 15 Briefing will be published soon. In the interim, contact Shawna Swanson if you wish more information at sswanson@fenwick.com.