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Fenwick Employment Brief

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No Personal Liability for Co-Worker Harassment Committed Before 2001 Amendment

The California Supreme Court recently held that non-supervisory employees are not personally liable for acts of harassment committed before January 1, 2001, when the California Legislature amended the Fair Employment and Housing Act (FEHA) to include such liability. In *McClung v. Employment Development Department*, Lesli McClung filed a complaint against the Employment Development Department (her former employer) and a co-worker, Manuel Lopez, alleging that they subjected her to a hostile work environment in January 1998. The trial court dismissed McClung's claims on summary judgment. When the case was before the Court of Appeal, the court reinstated McClung's claim against her co-worker, Lopez, relying on the January 1, 2001 amendment to FEHA, which imposed personal liability for harassment on non-supervisory co-workers. The amendment specifically stated it was simply "declaratory of existing law."

On further appeal, the California Supreme Court reversed, holding that the amendment could not impose retroactive liability for acts committed before January 1, 2001. The California Supreme Court had previously determined in 1999 that FEHA did not extend liability to co-workers, and the Court held that the Legislature could not change that prior interpretation with its subsequent amendment to the law. Notwithstanding Lopez's fortune, this case serves as an important reminder that all employees now can be personally liable for workplace harassment.

Conduct Which Ridicules Both Sexes May Still Create a Hostile Work Environment

The Second Circuit Court of Appeals (covering New York, among other states) recently held that conduct which ridicules both sexes can create a hostile work environment where the conduct could be perceived as being more demeaning to women than to men. In *Petrosino v. Bell Atlantic*, Lisa Petrosino worked as Bell Atlantic's only female technician in its Staten Island facility. Profanity was commonplace and crude humor routine throughout the workplace. On certain occasions, male co-workers insulted each other, while in other instances, their remarks, though not directed specifically at Petrosino, conveyed a disrespect for women. The district court dismissed Petrosino's hostile environment claim, holding that the conduct, while "undeniably boorish and offensive," was not "motivated by hostility toward Petrosino because of her sex." Rather, the court held, the conduct was directed to all employees, both male and female alike. Petrosino appealed.

On appeal, the Second Circuit reversed the district court's holding, concluding a reasonable jury could find the conduct more offensive to women than to men. The court found that the male employees' insults to each other were directed only at certain men. However, their remarks about women sexually demeaned the gender as a whole, and thus could create a hostile work environment for women. Although employers commonly associate harassment with conduct directed at a particular individual or group based on a protected characteristic, this case serves as a reminder companies should train employees to refrain from any harassing speech or conduct, even if it appears directed equally at men and women.

Employer Liable for Retaliatory Employment Reference Even if it Does Not Result in Tangible Harm

The Tenth Circuit Court of Appeals (covering Colorado, among other states) recently held that an adverse employment action under Title VII does not have to result in tangible harm for an employee to successfully bring a retaliation claim. In *Hillig v. Rumsfeld*, Terrie Hillig worked in a clerical position for the Defense Finance Accounting Service ("DFAS"). During her employment, she filed two racial discrimination complaints against DFAS. The parties eventually settled both of these complaints, resulting in DFAS upgrading Hillig's performance appraisal and expunging negative information from her personnel file.

Eventually, Hillig applied for a position with the Department of Justice ("DOJ"). Although the DOJ manager told Hillig during the interview that she would be a "perfect fit" for the position, she did not receive the job. Hillig subsequently learned that her supervisors at DFAS had provided the DOJ strong negative feedback during a reference check. Hillig sued DFAS, alleging they retaliated against her because of the prior discrimination complaints. During trial, though, the DOJ manager testified that he did not hire Hillig because he thought her very long fingernails would have adversely impacted her typing speed, and not because of the negative DFAS references. The jury found that Hillig did not prove she would have obtained the DOJ position but for the alleged retaliation. Nonetheless, the jury found the negative references were illegally retaliatory and awarded her $25,000. Because the jury found the retaliation was not the cause of Hillig's failure to obtain the DOJ position, however, the trial court reversed the finding of liability, and Hillig appealed.

The Tenth Circuit, consistent with decisions from the Ninth Circuit (the appeals court covering California), found that an adverse employment action must be materially adverse to the employee's job status, but need not cause tangible harm to constitute actionable retaliation. The court held that since the DOJ would not have hired Hillig over an applicant who did not have negative references, DFAS was liable for retaliation. This case in an important reminder of one of the many potential pitfalls associated with providing references for former employees. To avoid this type of exposure, many employers follow a policy of not providing reference information regarding former employees other than dates of employment and positions held.

Pretextual Reason for Layoff Results in $4.8 Million Jury Verdict

A recent Sacramento-area jury verdict illustrates the importance of applying company policies consistently. In *Wrysinski v. Agilent Technologies*, project manager Colleen Wrysinski sued Agilent for wrongful termination and pregnancy discrimination under both Title VII and the California Fair Employment and Housing Act. Wrysinski, who had begun maternity leave in June 2001, was laid off in September 2001 as part of a reduction in force. The primary reason Agilent included Wyrsinski in the layoff, was because she was on a "bottom ten per cent list." However, contrary to company policy, Agilent never informed Wrysinski she was on the bottom ten percent list, because it did not want to upset her during her pregnancy. In contrast, Agilent notified other employees they were on the list and provided them an opportunity to improve their performance (which occurred while Wrysinski was on leave). Moreover, while Agilent was processing Wrysinski's name for termination, it specially manufactured an analysis of her skillset as a justification for her layoff, even though her position on the bottom ten per cent list was the sole reason for the termination.

On these facts, the jury awarded Wrysinski over $4.8 million in compensatory and punitive damages. This case highlights the importance of communicating candidly with employees about performance issues and the dangers of fabricating artificial reasons to support a termination.