

Third Quarter, 1994

LABOR UPDATE

Recent Developments in Labor and Employment Law

SUPREME COURT RULES ON SEXUAL HARASSMENT

In a unanimous decision, the United States Supreme Court recently held that employees need not suffer any actual injury to maintain a suit for sexual harassment. The decision is believed by many to have opened the doors to a host of new sexual harassment claims.

In *Harris v. Forklift Systems, Inc.*, a female plaintiff sued her former employer alleging that she had been subjected to an abusive work environment because of her sex. Harris' complaint was based solely on the company president's insulting sexual comments and innuendos. There were no allegations of unwanted "gropings," or demands for sexual favors.

The trial court found that the president had, in fact, made numerous sexual comments that were not only genuinely offensive to Harris, but would have offended any reasonable woman. Nevertheless, the court concluded that Harris had not been offended to the extent that she suffered any physical or psychological harm. Emphasizing this lack of injury, the court concluded that Harris' work environment was not sufficiently hostile or abusive as to be illegal. Therefore, the trial court entered judgment for Harris' employer, and this judgment was upheld by the court of appeals.

In reversing, the Supreme Court found that the lower courts erred in focusing on whether Harris had suffered true harm. Stating that harassing conduct need not "lead to a nervous breakdown" to be unlawful, the Court held that the question of whether a workplace is illegally "hostile" or "abusive" must be determined by all of the circumstances. These circumstances could include the frequency of the conduct, its severity, and whether it unreasonably interferes with work performance. The Court mentioned that while psychological injury may be one factor in this determination, no one single factor is required.

By eliminating the actual injury requirement, the Supreme Court has eased the ability of plaintiffs to prevail in sexual harassment suits. Given that juries are empowered to award substantial punitive damages in such cases, employers should be more careful than ever to ensure that a clearly established anti-harassment policy is strictly followed, and that any complaints of a hostile environment are properly dealt with. (*Harris v. Forklift Systems, Inc.*, No. 92-1168 (November 9, 1993)).

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COURT WEIGHS ISSUE OF OBESITY AS HANDICAP: EMPLOYER HIT WITH HEAVY LIABILITY

In a groundbreaking decision, a federal appeals court upheld a \$100,000 damage award in favor of a former nurse who alleged that she was denied employment with the Rhode Island state-mental health department because she was "morbidly obese." The case is thought to widely expand the definition of "handicap" under the federal discrimination laws.

The plaintiff filed suit when the department refused to re-hire her as an institutional attendant to the mentally retarded -- a job which she had capably performed during two prior terms of employment. The plaintiff had twice left the department voluntarily, leaving a spotless work record on both occasions. However, when she reapplied for this same job after a two year absence, she stood 5'2" tall and weighed over 320 pounds.

During a routine pre-employment physical, a nurse diagnosed the plaintiff as "morbidly obese," but found no limitations on the plaintiff's ability to do her job. However, notwithstanding the fact that the plaintiff passed her physical exam, the department refused to hire her, claiming that her morbid obesity both diminished her ability to evacuate patients in an emergency and put her at greater risk of developing serious ailments (which the department claimed would foster absenteeism and increase the likelihood of workers' compensation claims).

Because the handicap discrimination laws apply not only to persons who are, in fact, disabled, but also to persons who are not actually impaired but are regarded as disabled by employers, the plaintiff alleged that she was unlawfully denied employment because of a "perceived disability." The department denied that it perceived plaintiff as disabled, stating that it regarded her obesity as not only changeable, but the result of voluntary behavior (i.e. eating).

The department argued that the plaintiff was not entitled to protection under the handicap laws because she could rid herself of her "disability" by simply going on a diet. The court rejected this argument on several fronts. First, examining the text of the discrimination laws, it found no requirement that a condition, actual or perceived, be completely irreversible to qualify as a protected handicap. Instead, the court stated that only those conditions which could be "easily and quickly reverse[d] by behavioral alteration" fell outside the protection of the handicap laws. Citing evidence that the metabolic dysfunctions which lead to morbid obesity can linger in the human body long after weight loss--as well as the department's own admission that it would take years for the plaintiff to safely shed her morbid obesity--the court found sufficient evidence that the department perceived the plaintiff as having an "impairment of a continuing nature."

The court disposed of the department's argument that the plaintiff could not be regarded as disabled because her obesity was "voluntary," by citing numerous other conditions that are protected under law, despite their link to voluntary behavior (e.g., AIDS, alcoholism, cancer resulting from cigarette smoking, etc.).

After upholding the jury's substantial damage award, the court concluded its opinion with a stern warning that employers who unlawfully erect barriers to employment based on weight, "must suffer the consequences." To avoid such suffering, employers should emphasize performance over appearance when making employment decisions. (*Cook v. State of Rhode Island, Department of Mental Health, Retardation and Hospitals*, No. 93-1093 (1st Cir. November 22, 1993)).

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EMPLOYEE DISCIPLINE BOTTOMS OUT

A lawyer in Maryland was recently suspended by his bar association for taking an unusual approach to employee discipline. It was found that at least once a week the attorney pulled his secretary over his knee and spanked her with his hand several times on the buttocks, when she made mistakes in her work, in order, "to teach her to be a good secretary." The Maryland supreme court decision does not mention whether this approach improved the employee's job performance. While the case arose in the context of an attorney licensing review, this barrister may also have exposure to sexual harassment, battery and intentional infliction of emotional distress damages.

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BITS AND PIECES

The United States Supreme Court recently held that vital sections of the Civil Rights Act of 1991, amending Title VII, may not be applied retroactively to cases that were pending before the amendment was enacted. (*Landgraf v. USI Film Products et al.*, No. 92-757 (April 26, 1994)). This spells good news for employers since the Civil Rights Act of 1991 expands plaintiffs' rights to recover punitive and compensatory damages, as well as allowing jury trials, not previously provided by Title VII.

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On July 26, 1994, The American with Disabilities Act of 1990 will cover employers with 15 or more employees, expanding its coverage from its previous threshold level of at least 25 employees. The ADA provides broad rights for "disabled" individuals throughout the hiring and work stages of their employment. Relevant state laws may apply to employers with even fewer workers.

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A logjam of job-bias charges filed with the Equal Employment Opportunity Commission has occurred with 88,000 charges filed in 1993, up from 72,000 in 1992. Charges filed with the EEOC are expected to hit 100,000 in 1994.

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In 1993, measures of work stoppage activity were at the lowest or next-to-lowest levels recorded in 47 years, the U.S. Department of Labor's Bureau of Labor Statistics reports. Thirty-five major stoppages began in 1993, idling 182,000 workers and resulting in about 4 million days of idleness or about 1 out of every 10,000 available work days. The comparatively low levels in 1993 continued the pattern that has prevailed for the past several years.

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The U.S. Department of Labor's Bureau of Labor Statistics reports that labor contracts settled in the first quarter of 1994 averaged 3.2% wage increase in the first year of the agreements and 2.5% annually over the term of the contracts. Corresponding changes in agreements they replace (which were primarily negotiated in 1991) were increases of 5.4% and 3.6%.

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Lump-sum payments keep growing in popularity over straight salary raises. 17% of companies surveyed in 1994 will award such bonuses in lieu of salary increases, up from 14% in 1993 and 7% in 1992. *Wall Street Journal*, April 1994.

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QUOTABLES

"If you think that you can think about a thing,
inextricably attached to something else,
without thinking of the thing it is attached to,
then you have a legal mind."

(Thomas Reed Powell)

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"In saying what is obvious,
never choose cunning, yelling works better."

(Cynthia Ozick)

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