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LABOR UPDATE

Recent Developments in Labor and Employment Law

SUPREME COURT ALLOWS SAME-SEX HARASSMENT CLAIM

In a significant decision on March 3rd, the United States Supreme Court unanimously held that federal law bans sexual harassment in the workplace even when the harasser and victim are the same sex. Although the decision offers some guidance regarding what constitutes sexual harassment, business leaders warned that employers must now be increasingly vigilant in their watch for inappropriate workplace conduct.

The decision came in a Louisiana case filed by Joseph Oncale, an oil rig worker who claimed that he was sexually pursued and repeatedly harassed by two male supervisors and another male employee. For four months, Oncale claimed, he was sexually assaulted, battered and threatened by the three men. After his complaints to superiors went unaddressed, the plaintiff quit amid fears that he might be raped by his co-workers.

Oncale filed suit under Title VII of the Civil Rights Act of 1964, the federal statute which prohibits discrimination based on sex, race, religion, and national origin. The district court dismissed the suit, holding that Title VII was never intended to prevent same-sex sexual harassment. This decision was upheld on appeal.

The U.S. Supreme Court, however, revived Oncale's suit by finding that Title VII prohibits all sexual harassment based on sex, regardless of the gender of the participants and victim. The Court relied on previous Title VII decisions allowing same-sex and same-race claims involving conduct other than harassment. "We can see no justification for a categorical rule excluding same-sex harassment claims from the coverage of Title VII," write Justice Antonin Scalia in the brief, seven page decision.

A national group of employers, the Equal Employment Advisory Council, told the Supreme Court that permitting same-sex harassment suits could convert Title VII "into an unmanageably broad code of working behavior." However, the Court denied that the statute would become a "general civility code for the American workplace". "[Title VII] does not reach genuine but innocuous differences in the ways men and women routinely react with members of the same sex and of the opposite sex. The prohibition of harassment ... forbids only behavior so objectively offensive as to alter the conditions of the victim's employment," wrote Scalia.

Justice Clarence Thomas, perhaps most famous for his confirmation hearings marked by then-law professor Anita Hill's allegations of sexual harassment, agreed with the Court's ruling "because the Court stresses that in every sexual harassment case, the plaintiff must plead and ultimately prove Title VII's statutory requirement that there be discrimination *because* of sex."

As with most Supreme Court decisions, it can take years for lower courts to interpret and define the general rules laid down by the nation's highest court. However, in addition to dealing with workplace romances and sexual discrimination, employers must now keep an eye on "locker-room horseplay". *Oncale v. Sundowner Offshore Services, No. 96-568*.

With a docket crowded with sexual harassment cases, the Supreme Court is also poised to decide questions concerning employer liability for sexual harassment. The first case deals with a school district's liability for the sexual harassment of students by their teachers. The second concerns whether an employer can be liable for an employee's sexual harassment where the company is unaware of the conduct. Decisions on these two issues are expected this summer.

INADEQUATE RELEASE ALLOWS EMPLOYEE TO KEEP SEVERANCE WHILE SUING EMPLOYER

When terminating an employee over 40 years old, many employers require the departing worker to sign a waiver releasing the company from a host of employment-related legal claims. Signing the waiver is often a condition of receiving severance benefits. In theory, once the release is executed and severance payments are made, the employer has a virtually "bullet proof" defense to any subsequent employment suit brought by the employee. Recently, however, the Supreme Court took a much closer look at these release agreements and held that suit was not barred if the waiver was legally defective, even if the employee received and retained severance payments.

The U.S. Supreme Court's decision involved the case of Dolores Oubre, a scheduler at a privately run Louisiana power plant. After she received a poor performance rating in 1994, the employer gave her the option of improving her performance or accepting a voluntary severance arrangement. She received a packet of information regarding the severance package and was given fourteen days to consider her options. After consulting with her attorneys, Oubre signed the severance agreement which contained a release of "any and all claims, demands, damages, actions, or causes of action" against the employer. Thereafter, she accepted six severance payments totaling over \$6,000.

After receiving the last severance payment, Oubre filed suit alleging that she was discharged in violation of the Age Discrimination in Employment Act ("ADEA"). The employer sought to dismiss the claim on grounds that Oubre had executed a release of all claims and that she had accepted and retained the severance payments. The federal trial and appellate courts agreed and dismissed Oubre's suit.

The Supreme Court reversed the dismissal and reinstated Oubre's claims. The Court noted that the ADEA sets forth very specific requirements for releases which were not included in the document Oubre signed. A valid release of an age discrimination claim must make specific reference to the ADEA, must give the employee twenty-one days in which to consider the release, and allow the employee to revoke the agreement within seven days after signing, the Court stated. It held that the fact that Oubre accepted the severance payments did not otherwise render the defective release valid. The Court also

ruled that Oubre did not need to return the severance to maintain her lawsuit.

This decision serves as a warning to employers to ensure that any release given to a departing employee is carefully drafted and reviewed by legal counsel. The failure to adhere to even a single technical requirement can render a release invalid and expose the company to unnecessary litigation.

THE CURRENT STATE OF AFFAIRS IN CORPORATE AMERICA

Once upon a time, spouses met in school or through mutual friends. Today, with employees thrown together in larger numbers for longer hours, they increasingly meet at work. But with sexual harassment suits headlining the six o'clock news, how are employers reacting to this relatively new development? Generally, with concern and confusion.

As recently as the 1980's, the issue of workplace romances was easily, if unfairly, resolved. The subordinate, often female, was terminated and the male supervisor was given either a quiet reprimand or a pat on the back. However, in today's corporate and legal culture, bosses are more often being held accountable and companies are reluctant to terminate well-qualified employees. Yet the nagging question remains: How does a company deal with the inevitable workplace romance?

Some corporations have attempted to ban romantic relationships at work by corporate fiat. However, such policies have done little to curb office romances. Instead, the amorous couple is often driven "underground" and the relationship only surfaces after a stormy break-up possibly culminating in a sexual harassment or discrimination suit. In addition, the courts have found some corporate policies prohibiting inter-office dating and/or marriage to violate human rights statutes.

Other companies have taken a more creative approach. One common policy prohibits employees in a reporting relationship to also engage in a romantic one. When an amorous relationship is brought to management's attention, the employees involved are offered various options ranging from inter-departmental transfers to facility and shift changes. Another variation allows the employees to retain their positions, but the management hierarchy is shuffled so that one employee does not supervise or evaluate the other. The most important aspect of these solutions is that the employees are removed from the reporting relationship.

A few employers have taken a step further and require the involved employees to sign detailed legal agreements affirming that the relationship is consensual, that both employees understand the corporate anti-harassment policy and agree to abide by its terms, and that both employees will immediately notify the human resources department if the employee feels the policy has been violated. Such agreements also instruct the employees to refrain from any romantic or sexually suggestive conduct in the workplace.

Most human resource professionals agree that it is difficult, if not impossible, to prohibit romantic relationships in the workplace. "Trying to outlaw romance is like trying to outlaw the weather", said an unidentified IBM manager in a recent Wall Street Journal article. In addition, employees terminated for alleged workplace romances are now suing their employers for invasion of privacy and slander. In 1994, an IBM employee won \$375,000 after he was terminated for dating a subordinate. Two former Sears supervisors are seeking over \$150 million in damages after they were accused of having an extramarital affair and terminated.

To avoid walking the legal tightrope between a sexual harassment or wrongful termination suit, most employers have adopted a softer, more well-reasoned approach to romantic relationships in the workplace. Accepting that such relationships are inevitable, many companies gear their policies towards accepting and dealing with relationships, instead of prohibiting or ignoring them.

BITS AND PIECES

A recent edition of the Labor Update reported on a supervisor who was sued over her practice of requiring a hug before handing over an employee's paycheck. The suit was dismissed, but the company also discontinued the practice. Now, Health Care & Retirement Corp., a Toledo, Ohio corporation, has made it corporate policy to encourage friendly embraces as a way to boost morale. One important difference, however, is that the hugger must get the huggee's permission first.

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Bills have been introduced in both the U.S. House and Senate to reduce the number of employees required for Family and Medical Leave Act coverage from the current fifty to twenty-five. Critics of the bills believe that small businesses will be financially and practically unable to provide employees with twelve weeks of unpaid leave in the event of a serious illness, family emergency or pregnancy. Members of Congress say it will be some time before votes are called on the bills.

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A recent study revealed that 70% of large employers in New York, 70% handled at least one sexual-harassment complaint in 1997. This is down 24% from a 1995 poll. In addition, 62% of the 1997 employers surveyed reported that supervisors were trained to recognize and deal with sexual harassment.

QUOTABLE

"I have my faults, but being wrong ain't one of them."

Jimmy Hoffa

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