

Third Quarter, 1998

LABOR UPDATE

Recent Developments in Labor and Employment Law

SUPREME COURT ENDS TERM WITH TWO LANDMARK HARASSMENT RULINGS

The U.S. Supreme Court finished its 1998 summer term by greatly expanding employer liability for sexual harassment perpetrated by its supervisors and managers. In two rulings, the Court held that companies may still be liable for sexual harassment by a supervisor even if the victim suffered no adverse job action (termination, demotion, etc.) and even if the employer knew nothing about the harassment. This pair of decisions effectively overruled every federal appellate court in the country.

The first ruling involved a female lifeguard, Beth Ann Faragher, in Boca Raton, Florida, who claimed that she was repeatedly subjected to unwelcome sexual propositions, inappropriate touching, and demeaning sexual comments and jokes by her supervisors. Although the lower court found that the supervisors' actions created a hostile working environment and constituted harassment, it also held that the plaintiff could not recover from the city. That court reasoned that the lifeguard had not taken steps to make the city aware of the problem and that the city could not reasonably have known of the situation.

In a landmark decision which overruled twelve years of lower court rulings across the nation, the Supreme Court held that the city could be liable for the actions of its supervisors if such action created a hostile work environment. Even though the plaintiff had not complained to city management, the supervisors had used their powers as agents of the city to sexually harass the plaintiff. They were, in essence, the city and Boca Raton was liable.

The Supreme Court did offer employers some hope, however, by specifically stating that anti-harassment policies can constitute a defense to a sexual harassment claim, particularly where the employee did not take advantage of the reporting procedures. While the City did have a sexual harassment policy, it was never distributed to the employees and could not be used as a defense.

The second ruling came in a Chicago case in which Kimberly Ellerth, a female salesperson

for Burlington Industries, alleged that her supervisor had threatened her job unless she complied with his sexual advances. Even though she refused, the threats were never carried out. The plaintiff suffered no tangible retaliation and was promoted once. Despite knowing about the company's sexual harassment policy, Ellerth never informed anyone in management about her supervisor's conduct. Shortly after she quit, Ellerth filed suit alleging that she had been forced to resign due to her supervisor's harassment.

The lower court ruled that Ellerth had been subjected to hostile work environment sexual harassment. The court found that the supervisor's comments and actions were severe and pervasive enough to alter the conditions of Ellerth's employment. However, the court also ruled that because Ellerth never informed the company of the problem and that the company was unaware, it could not be liable.

The Supreme Court agreed that threats of adverse job actions for resisting sexual advances create a hostile work environment even though the victim refuses and the threats are never carried out. Threats of termination, demotion, or pay cuts can be more frightening and/or demeaning than other types of sexual harassment and directly affect the terms and conditions of employment, found the Court. In light of its ruling in the Faragher case that employers were liable for hostile work environment harassment by supervisors even where it was unreported by the employee, the Court ruled that Burlington was liable for Ellerth's harassment. However, because Burlington had a sexual harassment policy, the case was sent back to the lower court to determine whether the policy was a sufficient defense to Ellerth's claims.

These two decisions underscore the absolute necessity of maintaining and distributing anti-harassment/anti-discrimination policies to every employee. These policies should contain a clear explanation of the types of sexual harassment, how it should be reported, and the consequences for engaging in or permitting sexual harassment. In cases of harassment by supervisors, these policies may be the employer's only defense.

NLRB MAKES A "GRAVE" DECISION

During its campaign against a United Auto Workers organizing campaign, the Eldorado tool division of Quamco, Inc. put up a printed "PLANT CLOSURES: UAW WALL OF SHAME" banner. Each day, there appeared a paper tombstone bearing the letters "RIP" and the name of a company where employees had voted in the UAW and the plant had subsequently closed. The day before the election, the company put up another tombstone with the name "Eldorado" on it with a question mark beneath it. The company vice president referred to the wall in a speech to employees about the union's inability to promise job security.

After the union lost the election, it filed objections claiming that the "Wall of Shame" failed to state any reason for the plant closings. Therefore, the only inference which could be drawn was that the UAW caused the plants to close. The union further alleged that the question mark on the Eldorado tombstone the day before the election represented a threat that Eldorado would close if the Union won the election.

The National Labor Relations Board agreed that the "Wall of Shame" and the Eldorado

tombstone violated federal labor law. The Labor-Management Relations Act permits employers to make predictions of the effect of unionization so long as it is "carefully phrased on the basis of objective facts so as to avoid any implication that the employer is threatening to act or not act in retaliation for union activities rather than for economic reasons". In this case, the company did not provide any basis for its assertion that the UAW was to blame for the closings of the other plants. Nor did it offer any objective facts as the basis for a belief that, for reasons beyond its control, unionization would cause the Eldorado plant to suffer the same fate. In the absence of some explanation, the message conveyed to the employees was not that economic realities might force the plant to close, but rather that the company might retaliate against them and close the plant because the employees chose union representation.

TWO MAJOR SEXUAL DISCRIMINATION SUITS SETTLED

Mitsubishi and the Equal Employment Opportunity Commission announced that they settled one of the largest class actions ever brought by the federal agency. The suit, brought on behalf of approximately three hundred and fifty current and former female Mitsubishi employees, alleged that female employees at the Normal, IL manufacturing plant were repeatedly harassed both verbally and physically, that employee "sex parties" were organized on company time, and that at least twenty women were terminated after they refused to submit to sexual demands by supervisors.

The \$34 million settlement will be divided among the class members according to the severity of the conduct they were exposed to. In addition, the Normal plant has adopted a "zero tolerance" harassment policy and will set up a three member panel to deal with any future complaints or claims or harassment in the plant. Mitsubishi officials, while denying any wrongdoing, apologized to any of its employees who may have been subjected to harassment. The settlement comes on the heels of the \$9.5 million settlement of a private harassment suit filed by twenty seven other female employees.

The nation's largest securities house, Merrill Lynch & Co., has agreed to a \$600,000 settlement with eight female brokers who claimed that they were denied promotions because of their sex. One current and seven former financial consultants alleged that Merrill Lynch had created a "glass ceiling" preventing women from reaching higher levels of management. In addition to the monetary settlement, the company also agreed to modify its arbitration program which requires employees to bring gender bias complaints before a panel of arbitrators. Employees had claimed that these panels were too pro-company. As a result of this case, the Securities and Exchange Commission, the federal agency which regulates brokerage houses, has announced that it intends to modify or eliminate its own arbitration program.

LAW OFFICES OF DONALD PETERS UNVEILS NEW CUSTOM EMPLOYEE HANDBOOKS

Since the beginning of 1998, our office has been working to design and implement new software and databases to curb the time and expense of updating/creating our client's Employee Handbooks/Policy Manuals. This system is now operational.

Employee handbooks can be powerful and effective tools to explain company policy to the workforce, fend off union organizing attempts and defend against litigation. An updated handbook which clearly states the company's position on discrimination, harassment, at-will employment status and a host of "nuts and bolts" issues can save a company from unnecessary and expensive litigation. The handbook will also provide employees with a clear explanation of what the company expects and what can be expected of the company.

With our new system in place, we can create a custom employee handbook within one to two weeks, all at a reasonable, flat rate. If you would like us to review and update your existing handbook or create a brand new one, feel free to contact our office.

BITS AND PIECES

Two employees who were terminated for greeting cafeteria customers with phrases such as "God bless you" and "Praise the Lord" will have their day in court. The employees, who filed a religious discrimination suit against their employer, were fired after they were repeatedly ignored supervisor's warnings to stop the greetings. Although a few customers complained, the court held that there was no evidence that the employer suffered a loss of business as a result of the employees' conduct. Therefore, allowing the employees to remain in their positions would not constitute an undue hardship for the employer. A trial is scheduled for early next year.

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The Equal Employment Opportunity Commission (EEOC) continues to chip away at its backlog of cases where a charge of discrimination has been filed but has not been investigated. At the end of 1995, nearly 100,000 cases were unresolved whereas the backlog now stands at 64,000. The EEOC hopes to further reduce this number by increasing the use of mediation. In a related note, the Illinois Department of Human Rights reported that as of June 10, 1998, it had completely eliminated its case backlog.

QUOTABLE

The brain is a wonderful organ; it starts working the moment you get up in the morning and does not stop until you get to the office.

Robert Frost

I always turn to the sports pages first, which record people's accomplishments. The front page has nothing but man's failures.

Former Chief Justice Earl Warren

Since 1984, the LABOR UPDATE has been provided as a service to clients, fellow attorneys and other friends of the Law Offices of Donald F. Peters Jr. Written entirely by this office, it is intended to provide useful information as to the matters covered, but should not be viewed as an exhaustive treatment of the subjects addressed nor as covering all significant developments in labor and employment law. The LABOR UPDATE is not intended to be a substitute for legal advice.

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