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## **LABOR UPDATE**

*Recent Developments in Labor and Employment Law*

### **STICKS, STONES AND SEXUAL HARASSMENT**

As most employers know, sexually tinged behavior that contributes to a hostile working environment is against the law. What is often less clear, however, is the degree to which sexual behavior or harassment must be “hostile” to be deemed unlawful.

The United States Supreme Court has provided guidance on this issue, stating that unlawful harassment must be “sufficiently severe or pervasive to alter the conditions of [a worker’s] employment and create an abusive working environment.” The Court has found that harassing conduct must be “extreme” to amount to a change in the terms and conditions of employment. The Court has stressed that the question of whether an environment is unlawfully hostile can be answered “only by looking at all circumstances,” which include: “the frequency of the discriminatory conduct; its severity; whether it is physically threatening or humiliating, or a mere offensive utterance; and whether it unreasonably interferes with an employee’s work performance.” *Faragher v. City of Boca Raton*, 524 U.S. 775 (1998); *Harris v. Forklift Systems, Inc.*, 510 U.S. 17 (1993); *Meritor Savings Bank v. Vinson*, 477 U.S. 57 (1986).

Although cases involving sexual harassment ultimately turn upon their particular facts, two recent decisions, issued by different courts in different parts of the nation, illustrate the increased weight courts are assigning to whether the behavior is physically threatening. In one of these decisions, a few incidents occurring over several days were found sufficient to constitute sexual harassment. In the other, a series of incidents spread over 30 months was not. The difference? The former harassment contained an aspect of physical violence.

Both cases involved harassment by persons of the same sex. In the first case, a female employee, Thompson, asked a female co-worker, Sheffield, out on dates several times over a few days. Sheffield told Thompson she was not interested and reported the incidents to her employer. Once, after having rejected Thompson’s advances, Sheffield heard Thompson call out her name in an “angry manner.” Sheffield was scared by Thompson’s tone of voice and, because she was bigger than Sheffield, intimidated by Thompson’s size. Sheffield wrote Thompson a letter in which she reiterated to Thompson that she was not attracted to her, and began avoiding Thompson at work. Sheffield’s fear of Thompson escalated when Thompson later confronted Sheffield, and pounded her fist into her palm while scowling at Sheffield. Sheffield complained to her employer again about Thompson. Two days later, Thompson told Sheffield that she was “going to get [her]” and hit Sheffield on the back of the head. The employer ultimately fired

Thompson. Sheffield sued her employer and Thompson in California State Court, alleging sexual harassment.

Sheffield's claim for sexual harassment was originally dismissed on grounds that Thompson's misconduct was insufficiently pervasive. However, in reversing this dismissal, the appeals court noted that although the much larger Thompson's behavior was mostly just boorish, slamming her fist into her palm (while looking at Sheffield and glaring) "added an aspect of violence that could be found to have changed the conditions of [Sheffield's] employment." The court also observed that Sheffield's employer waited until she had been attacked before acting on her complaints. Recognizing that "case law appears to adhere to the old adage that 'sticks and stones may break my bones, but words will never hurt me'," the court nonetheless held that harassment accompanied by violence or threats of violence can sufficiently alter conditions of employment to create a hostile environment. *Sheffield v. Department of Social Services County of Los Angeles*, 109 Cal.App.4<sup>th</sup> 153 (2003).

In the second case, Harry Kay, an analyst with Independence Blue Cross, was mocked and derided by his co-workers, called "faggot" and "fem," and accused of not being a "real man." Kay's co-workers left prank messages on his voice-mail and sent him advertisements for gay chat lines. They also posted a petition on the restroom wall stating: "If you want this queer off the floor, sign here." Kay reported these incidents to his employer, and it conducted investigations into his complaints. Kay allegedly was subjected to his co-workers' ridicule for over 30 months. Kay took a three month leave of absence from employment, citing stress from the alleged harassment. Kay ultimately filed suit in a Pennsylvania federal court.

Despite finding "ample evidence" of his co-workers' misconduct, the court dismissed Kay's claim for harassment on grounds that the conduct was not sufficiently severe or pervasive. In so holding, the court relied heavily on the absence of any aspect of violence. Although the court observed that some of the harassment "involve[d] a degree of intimidation," it declared that "it is significant that Plaintiff was never physically threatened or humiliated." Further, while acknowledging that the harassment was "not trivial," the court held that it involved conduct "more accurately described as offensive utterances [rather] than something more egregious." *Kay v. Independence Blue Cross*, 2003 WL 21197289 (E.D. Penn. 2003).

Although these cases indicate a trend may be developing where courts consider whether particular harassment is physically threatening in deciding its unlawfulness, employers are advised to continue to take affirmative measures to eliminate all forms of sexual harassment whenever they occur, especially *before* any aspect of violence arises.

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### **CALLING WORKER "CRIPPLED" DOES NOT VIOLATE THE AMERICANS WITH DISABILITIES ACT**

Last month, a federal appellate court upheld the dismissal of a discharged truck driver's American with Disabilities Act (ADA) claim, even though the worker's employer allegedly had called him "crippled," "disabled," and "handicapped."

While in the Army, Robert Tockes suffered a "crushing" injury to his right hand, which resulted in permanent restrictions on its use. The Army found the injury serious enough to award

Tockes a 20% disability pension. Subsequently Tockes applied for a job at Air-Land Transport Services, Inc. and disclosed his hand injury. After he passed a full road test and a physical examination, Air-Land hired Tockes to load and drive a flatbed truck. A month later, Air-Land fired Tockes after discovering that he had violated company safety rules by using only one hand to fasten a load to the bed of the truck.

Tockes sued Air-Land under the ADA provision that penalizes employers that take adverse personnel action against an employee because they think the employee is disabled within the meaning of the ADA, even though the employee is not. Tockes alleged that when he was fired, Air-Land told him that he was being discharged because of his disability; he was crippled; and Air Land was at fault for having hired a handicapped person.

The Court rejected Tockes's arguments, finding no evidence that Air-Land erroneously believed that he was disabled within the meaning of the ADA. The Court found that to be disabled within the meaning of the ADA, Tockes would have had to be unable to drive without some accommodation to his disability. The Court pointed out that Air Land hired Tockes to perform a strenuous job knowing that he had a damaged hand. The Court noted that if Air-Land had regarded Tockes as disabled within the meaning of the ADA, it probably would not have hired him in the first place.

Concerning the alleged statements, the Court determined that calling an employee "crippled," "disabled" and "handicapped" does not without more connote a belief that the individual is under the protection of the ADA. The Court observed that a "false belief" case is more plausible when an employee who was healthy when he was hired later experiences some injury that his employer mistakenly considers disabling.

In affirming summary judgment for Air-Land, the Court observed that allowing Tockes's case to go forward would discourage Air-Land and other employers from offering jobs to workers who are partially disabled. *Tockes v. Air-Land Transport Services, Inc.*, 2003 WL 22096493 (7<sup>th</sup> Cir. 2003).

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## **NEW LAW EXPANDS RIGHTS OF WHISTLEBLOWERS**

Whistleblowers are employees who report their employer's potentially illegal or wrongful activity or who refuse to participate such activity. Governor Rod R. Blagojevich recently signed into law the Illinois Whistleblower Act. The new law protects Illinois employees from employer retaliation and gives them potential claims against their employers for violating the Act.

Before the Act, Illinois law permitted employees who were fired for whistle blowing activities to bring a common law retaliatory discharge action against their employers. Because Illinois is an at-will state, the courts limited common law retaliation claims to cases where the employer's termination decision violated clearly mandated Illinois public policy. For example, courts recognized retaliatory discharge claims when employees were fired after reporting violations of state wage laws. However, Illinois law does not permit common law retaliatory discharge claims where the whistle blowing resulted in something less than termination, such as demotion or harassment.

The Illinois Whistleblower Act recognizes broader employee rights than those at common law. The Act's retaliation provisions prohibit employers from retaliating against an employee who discloses "information to a government or law enforcement agency, where the employee has reasonable cause to believe that the information discloses a violation of state or federal law, rule or regulation." Also, the Act expands the definition of adverse employment action beyond termination. Unlike a common law retaliatory discharge claim, the Act forbids other adverse employment actions, such as harassment or demotion.

Under the Act, in addition to other relief, a prevailing plaintiff is entitled to litigation costs, attorney fees and expert witness fees. The Act becomes effective January 1, 2004.

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## **EMPLOYEE BENEFITS UPDATE**

### **Health Insurance**

The United States Department of Labor, Bureau of Labor Statistics reported that as of March 2003, employee contributions to medical care premiums averaged \$228.98 per month for family coverage and \$60.24 per month for single coverage. The rising costs have caused employees to decline health insurance coverage. The U.S. Census Bureau reports that 15.5% of Americans have no health insurance coverage (29.6% of young adults, and over 30% of Hispanics and foreign born individuals). With employer health insurance projected to rise another 12% in 2004 (the fifth consecutive year of double digit increases), the number of uninsured workers will likely continue to rise.

The Watson Wyatt 2003 Strategic Rewards Survey found that 74% of employers increased employee contributions to health care premiums this year, compared to 57% in 2002. Eleven percent of employers have reduced benefits to deal with the problem of skyrocketing health care costs.

### **Retirement Plans**

The Bureau of Labor Statistics reported that slightly less than one-half of employees in private industry participated in employer provided retirement plans.

### **Other Benefits**

The 2003 Benefits Survey by the Society for Human Resource Management confirmed the trend of employers to reduce benefits in dealing with the current economic recession.

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## **QUOTABLE**

**"Eighty percent of success is showing up." - Woody Allen**

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