FIREHOUSE LAWYER

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Sexual Harassment - Employers' Risk Increases

Last month we reported briefly on some highlights of the recently completed term of the U.S. Supreme Court. In this issue, we follow up on just two cases, in which the Supreme Court has made the law of sexual harassment even more risky and liability prone for employers. In Burlington Industries v. Ellerth, Ms. Ellerth worked as a salesperson for Burlington Industries. Her second-level supervisor subjected her to constant sexual harassment, including offensive remarks and gestures. She alleged that three times he threatened to deny her a promotion if she did not respond favorably to his advances. The supervisor made repeated comments about her body, suggested she was not "loose enough" and made other suggestive remarks about wearing shorter skirts or about her attire. Eventually Ellerth quit, giving reasons unrelated to the alleged sexual harassment. Three weeks later, however, she sent a letter to the company explaining that she had resigned because of the harassment. Burlington Industries did have a policy against sexual harassment.

At the trial court level, the employer successfully moved for dismissal, as Ellerth had suffered no tangible job detriment. She was promoted once during the 15 months she worked for the company. The trial court ruled that the supervisor's behavior was severe and pervasive enough to create a hostile work environment, but the company was not liable for the harassment because it neither knew nor should have known about the harassment.

In addition to the "hostile work environment", there was a *quid pro quo* element to the claim. *Quid pro quo* refers to sexual harassment in which threats or promises about employment are tied to the employee's acceptance of the sexual advance. On this claim, however, the court ruled also that the employer did not know, nor should it have known, of the claim.

On appeal, however, the Seventh Circuit Court of Appeals reversed, holding that the claim was a *quid pro quo* claim -- not a hostile environment claim, -- and found that the employer was liable in spite of its lack of knowledge of the behavior.

The Supreme Court accepted review. Prior to this ruling in the Ellerth case, in hostile environment claims an employer was liable based on a negligence standard, *i.e.*, the employer could only be liable if it knew or should have known of the harassment. By contrast, in *quid pro quo* cases, where the sexual advance was tied to some reward or threat, the employer was subject to strict liability regardless of knowledge. These differing standards often led employees to plead or allege *quid pro quo* claims even if they really had a

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hostile environment case. The Supreme Court in Ellerth abandoned the distinction between the two types of claims, saying that an employer is subject to vicarious liability (regardless of knowledge or lack thereof) when-ever a supervisor commits sexual harassment. When no tangible employment action is taken against the employee, such as demotion, denial of promotion, discipline, etc., the employer may raise that as an affirmative defense to liability. The employer must prove (to estab-lish the affirmative defense) that the employer exercised reason-able care to prevent and correct promptly the sexual harassment and the employee unreasonably failed to take advantage of any corrective opportunities provided by the employer, or to otherwise avoid harm. This later element usually relates to availing oneself of the remedies under the employer's sexual harassment policy.

In the other type of situation, where the employer has taken some tangible employment action, no such affirmative defense is available. The theory of the Court's decision is that the supervisor is acting as an agent of the employer, using the advantages of the supervisor status. The Court's reasoning was that sexual harassment by a supervisor is not really conduct within the proper scope of their employment but rather arises out of their own personal animus or desire to fulfill urges neither of which appropriately serve the purposes of an employer. The Court said: "A supervisor has been empowered by the company as a distinct class of agent to make economic decisions affecting other employees under his or her control." Thus, it is this unique status of supervisor that requires the imposition of vicarious liability. The status of supervisor obviously applies not only to the immediate supervisor but anyone above them in the chain of command.

The decision was 7 - 2, with only Justices Clarence Thomas and Antonin Scalia, dissenting. They urged that liability should be imposed on employers only if they really are at fault.

In a companion case decided the same day as Ellerth, the Court decided Faragher v. City of Boca Raton. Ms. Faragher was a part-time seasonal lifeguard for Boca Raton, Florida. She sued the City and her immediate super-visors for sexual harassment because during her five years of employment her second-level supervisor put his arm around her and touched her buttocks. He also made crude and demeaning references to women in general and once commented disparagingly on her shape. There were other physical contacts and innuendoes about sex, but Faragher never complained to higher management. The trial court found the harassment pervasive enough to impute knowledge to the City, holding it liable for nominal damages.

The Eleventh Circuit Court of Appeals reversed, ruling that there was no adverse action, that the City was not aided by the supervisor's agency relationship with the City and that the supervisors were not acting within the scope of their employment. Finally, the Court held that because the harassment occurred only intermittently at remote locations, over a long period and there was not an adequate factual basis to conclude that the harassment was so pervasive that the City should have known of it.

The Supreme Court held that an employer is vicariously liable for a supervisor's discrimination but that the employer could assert an affirmative defense, if it has a complaint procedure that the employee did utilize. The Court reiterated that an employer is not automatically liable for a super-visor's harassment. The Court addressed two possible options or alternative rules: (1) Either the Court could require the employee to prove that the supervisor had affirmatively invoked his or her authority or (2) the Court could recognize an affirmative defense

Sexual Harassment - Employers' Risk Increases (Continued)

to liability. The Court rejected the first approach and chose the second. It is difficult for the employee to prove supervisor misconduct, because sometimes it is quite covert. Instead, the Court adopted the Burlington Industries v. Ellerth affirmative defense approach. But in this case the Court decided the City had no chance of prevailing on an affirmative defense. The City had failed to disseminate its policy against sexual harassment among the beach employees. City officials made no attempt to supervise the lifeguard supervisors. The policy did not include any assurance that harassing supervisors could be bypassed and complaints could be registered at a higher level.

For these reasons, the Supreme Court held the City did not exercise reasonable care to prevent the harassing conduct and was therefore vicariously liable.

It seems that what these two decisions really teach employers, in a practical sense, is that it is now absolutely imperative that an employer establish a sexual harassment policy, including a detailed complaint procedure. This complaint procedure must allow for bypassing the immediate supervisor or even higher-level supervisors if they are the harassers, allowing the harassed victim to go as high as necessary in the management structure to report the wrongdoing. Further, it seems prudent for employers to have formal education and training programs regarding sexual harassment so that supervisors are advised that anything of this nature can create vicarious liability for the employer and therefore could lead to their discharge. Regardless of the size of the employer, we would recommend that every employer, public and private, have a written policy against sexual harassment, which includes a detailed complaint procedure. The policy should be disseminated to all employees and then redistributed periodically, to make sure all new employees have received it, and to keep the issue always in the minds of even the long-term employees.

Because of the special, and difficult, rules for employers in *quid pro quo* cases, perhaps a portion of every adverse employment action should be a review to make sure that the disciplined party was not being disciplined as a retaliation for a rebuffed unwelcome advance. While it would not be the ordinary case that would lead to rejection of the adverse employment action on this basis, it should be something on the checklist because it is another way of preventing sexual harassment liability. In other words, whenever a recommenda-tion for discipline is made, the decision making body should review the motives of the party recommending the adverse employment action, *i.e.,* the supervisor, to make sure of the purity of their motives. It is unfortunate that we have to be so skeptical in the world today but it seems prudent for the decision-makers to know that the discipline can stand on its own merits.

Compulsory Arbitration Setback

In recent years, U.S. Supreme Court and Circuit Court of Appeals decisions, as well as state court decisions, have been very supportive of alternative dispute resolution, and particularly arbitration, as a means of resolving all types of disputes. In fact, it has become quite commonplace for employers and employees to agree to binding arbitration as a condition of employment, and such clauses are included in many forms of collective bargaining agreements and other employment agreements.

However, in a recent Ninth Circuit Court of Appeals decision, Duffield v. Robertson Stephens & Company, the Ninth

Compulsory Arbitration Setback (Continued)

Circuit held that under the Civil Rights Act of 1991, employers may not compel individuals to waive their right to file in court their Title VII claims. Title VII is the broad discrimination law, allowing claims for damages for discriminatory acts based on race, color, religion, sex or national origin.

The plaintiff was a stock broker. All stock brokers in this country are required to sign, as a condition of employment, a form U-4, which is a "Uniform Application for Securities Industry Registration or Transfer." The form is used to register stock brokers with the securities exchanges. That form has an arbitration provision requiring the employee to agree that any dispute arising between employee and employer must be arbitrated. Duffield argued that the arbitration requirement was not a knowing and voluntary waiver of her rights. She argued that the arbitration system did not adequately protect Title VII rights and that it was an unconscionable contract of adhesion, which is a one-sided unfair contract that is unenforceable.

This decision by the Ninth Circuit Court of Appeals throws into doubt, at least in the Ninth Circuit (in the Western United States), the enforceability of compulsory arbitration clauses, at least with respect to Title VII. It may well be that the Supreme Court will accept review of this decision. The Ninth Circuit Court did say that if the parties agree to arbitrate a Title VII allegation after a claim has arisen under Title VII and if that agreement is knowingly and voluntarily made, it will be enforced. The Ninth Circuit also said agreements to arbitrate state law claims, under tort or contract, will be enforced. The Supreme Court has heretofore held that claims made under the Age Dis-crimination in Employment Act (AD) are subject to compulsory arbitration.

It seems to this author that it is really nothing new to require that an arbitration agreement be knowingly and voluntarily made, or that other rights are knowingly and voluntarily waived. What seems unusual about Duffield, however, is that at least in the Ninth Circuit, compulsory arbitration is not seen as in keeping with public policy with respect to enforcing rights under Title VII with respect to discrimination. Probably about the only way an employer in the Ninth Circuit can deal with Duffield is to seek a binding arbitration agreement as soon as an employee asserts a discrimination claim, explaining that arbitration would be a less costly alternative to federal court litigation. Actually, it might be beneficial to achieve clarification if the Supreme Court would accept review of the Duffield case.

FLSA Follow-up

As a follow-up to our previous articles about the FLSA case involving firefighters in Anne Arundel County, Maryland (see Firehouse Lawyer, Vol. 2, No. 4), we would like to report that Chief Justice William Rehnquist temporarily stayed the lower court order, which would have required the county to pay nearly $3,000,000 in overtime pay. As reported previously, the Fourth Circuit ruled that the County violated the FLSA when it failed to pay overtime to firefighter paramedics who worked in excess of 40 hours in a seven-day period. Justice Rehnquist's ruling will hold the matter in abeyance until after the Supreme Court decides whether it will grant the petition for certiorari and hear the Anne Arundel case.

Apparently, the County plans to argue to the Supreme Court that the FLSA should not be enforced against local governments, arguing that the federal law intrudes on vital local functions. The applicability of the FLSA to local governments has not always been clear, but ever since the Court's ruling in the Garcia case a few years ago

FLSA Follow-up (Continued)

the FLSA has been deemed to apply to municipal governments. It will be interesting to see whether the Court accepts the case, and if the Court will entertain any general attack on the FLSA's applicability to local government agencies. Obviously, we will be following this case especially if the Court accepts review.

Employee Handbooks - Statute of Limitations

In the State of Washington, ever since Thompson v. St. Regis Paper Company, 102 Wn. 2d 219 (1984), an employee whose employer utilized an employee handbook could bring an action for a wrongful discharge if the employer did not live up to policies and procedures set forth in the handbook, with respect to specific procedures. In a recent case, DePhillips v. Zolt Construction Company Inc., (August 6, 1998), the Washington State Supreme Court ruled that the six-year limitations period applicable to written contracts does not apply to a claim based upon an employee handbook, under facts and circumstances presented in the case.

This particular employee handbook gave effect to the disclaimer language in the employee handbook, which stated "this manual is not a contract and there is no promise of any kind by the company contained in this manual. The company reserves the right to change provisions or conditions as it deems necessary." Because of the disclaimer the Court held the employee handbook argument was not a argument "based upon a contract in writing," and therefore was subject to the three-year statute of limitations based on oral contracts. The ruling was based on previous contract case law holding that if parol (oral) evidence is necessary to establish any material element of a contract, then the contract is partly oral and the three-year statute of limitations, not the six-year statute applies.

What the Supreme Court has done in DePhillips is make it clear that the theory of Thompson is to allow recovery on promises of specific treatment in specific situations and that the Thompson theory is not based upon traditional contract analysis. Unless all of the essential elements of a contract are in a written document, a claim based upon it is not a contractual claim subject to the six-year limita-tions even if there is a written document or instrument upon which the plaintiff relies. In summary, the Supreme Court accepted the applicability of the three-year statute of limitations, rejecting the six-year statute of limitations although on a dif-ferent ground and by different reasoning than the court of appeals.

Comment: We believe that this case underscores the necessity of having a clear and conspicuous disclaimer in every employee handbook reciting that the employee handbook or personnel manual is not a written contract and employees should not rely on it as such.

Last Chance Agreements are Valid

Frequently, one of the vehicles used to correct or change behavior is disciplinary probation. Unlike probation when newly appointed or promoted, the disciplinary probationer has effectively been given notice that they need to work on correcting certain behaviors or else their future with the employer may be rather short. I find disciplinary probation to be most effective when (1) expec-tations are placed in writing and; (2) the employee agrees to meeting these standards "or else." This type of arrangement is now sometimes referred to as a "last chance agreement". These agreements are being used more

Last Chance Agreements are Valid (Continued)

often in the United States and now have received recognition in some cases.

In Mills v. U.S. Postal Service, 977 F. Supp. 116 (D.R.I. 1997), a federal district court upheld the firing of a postal worker who violated his last chance agreement. The worker was a recovering substance abuser who received a notice of removal but was allowed to enter into a last chance agreement. The agreement allowed him to continue working under certain conditions, including enrolling in a treatment program. A violation of the agreement would result in immediate termination. By entering the agreement, the employee expressly waived his right to appeal any decisions by his employer concerning the agreement. The employee failed to comply with the agreement and met with his employer to discuss the violation. He was told the violation would not be reported if he entered into a resignation agreement whereunder he would still be able to receive disability benefits. Subsequently, the employee entered into a resignation agreement in which he promised not to seek reinstatement in the postal service. He also agreed that there was no intimidation, coercion or duress regarding the signing of the agreement. However, he later sought to rescind the resignation agreement unsuccessfully. He sued the employer in U.S. District Court for the District of Rhode Island to rescind the resignation and asked for money damages under the Civil Service Reform Act and the Rehabilitation Act.

The court found that the employee's claim fell directly within the scope of the Civil Service Reform Act and he could not circumvent the administrative remedies thereunder by claiming that he was no longer a postal service employee. Because he was subject to a collective bargaining agreement his remedies remained limited to that even though he was no longer employed. The court found that he failed to explore any of his collective bargaining agreement remedies and thus was barred from filing a suit in court. The court also rejected his claim that he was forced to sign a resignation agreement, dismissing the suit.

Last chance agreements have also been successfully used with employees suffering from alcoholism. The Office of Personnel Management (OPM) in accordance with the federal government's obligations under the Rehabilitation Act, established procedures to guide federal employers in accommodating employees suffering from alcoholism. These procedures include last chance agreements. As mentioned above, such an agreement allows an opportunity to an employee who would otherwise be terminated because of performance problems caused by alcohol one last chance to enter into the agreement, consenting to enter an alcohol rehabilitation program and abstain from drinking in exchange for the employer refraining from exercising its right to terminate. However, as the agreement provides, in the event the employee violates the agreement by continuing to drink alcohol, the employer retains the right to terminate. In the private sector, last chance agreements are also often used, especially where issues of just cause under collec-tive bargaining agreements may arise in connection with dis-cipline and the employer is seeking finality about the ground rules for further employability.

The Firehouse Lawyer will be recommending last chance agree-ments to my clients, because I believe that it is very important to give employees one last chance if the situation warrants, but on the other hand it is important to obtain their "buyoff" on the concept that this is their last chance and if they violate the agreement they can be terminated summarily without lengthy pro-cedures. Any practical employer can see the advantages of such an agreement.

Order to Undergo Psychological Exam Upheld

When allegations of sexual assault were brought against an Illinois police officer, his supervisor ordered him to undergo a psychological exam to determine whether he was fit for duty or should be referred for counseling. Even though the psychological exam was not considered part of the disciplinary process, the offi-cer refused because he believed the request was improper. The police board fired the officer based on his insubordination -- refusal to obey a direct order -- and because of his prior disciplinary record of nine sustained charges of misconduct.

After the officer appealed to a state trial court and lost, he then appealed to the appellate court of Illinois. That court found his refusal not justified by his mis-taken belief that he should not have to take a psychological exam. The court said an officer does not have the prerogative of actively disobeying an order from a supervisor while he subjec-tively determines whether the order was lawful or reasonable. In an effectively disciplined police department, such a practice would thwart the respect and authority which is the foundation of such an organization, the court said. The court then affirmed the decision, holding it not arbitrary or capricious. Haynes v. Police Board of Chicago, 688 N.E. 2d 794 (Ill. App. 1st Dist. 1997). This type of case illustrates what the Firehouse Lawyer has been saying all along -- management in a paramilitary organization must have the authority to assure the safety of the workplace in a dangerous occupation. Therefore, if psychological fitness is put in doubt by aberrant or psychotic behavior, the employer must have the prerogative of referring the offender for a psychological evaluation. It is difficult to put such a policy in place without collectively bargaining, but it is probably best to have one rather than to take your chances on making the order without a policy. If a district or department needs a policy on physical or psychological fitness, they should contact the Firehouse Lawyer.

Sector Boss

An arcane and archaic term in the fire service, a sector boss was the guy who was called upon when the chips were down, to put out the fire. In other words, the sector boss has all the answers. (You have to admit, it is much more exciting than "Q&A column".)

Question: We operate a rural, remote fire protection district, staffed only by volunteers, near a national park. While we have out-of-district contracts with individual cabin owners and an aid contract with a neighboring county and a mutual aid agreement with the national park, there are instances when we are out of district on a call and unable to respond in our own district. Because we are a small district with not too many volunteers, and because the closest mutual aid is more than 30 minutes away, we are concerned as to whether we might be held legally liable for damages due to our failure to respond. Can you comment on whether these facts could lead to liability for non-response?

Chief Michael Smith
Greenwater, WA

Answer: In Washington, and probably in other states, it is entirely valid and within your authority to provide service outside of your district pursuant to contract, mutual aid or automatic aid agreements. The question becomes whether there is any liability for failure to respond because of these out-of-district contracts. I believe this fact situa-tion would be governed by the public duty doctrine discussed by the Firehouse Lawyer last month. This doctrine holds that your duty to provide fire and emergency medical service response runs to the public in general, but not to

Sector Boss (Continued)

any particular member of the public, including a citizen and resident of your district. Only if there has been some special relationship established between your district or its personnel and the party seeking assistance would our courts recognize an exception to the public duty doctrine.

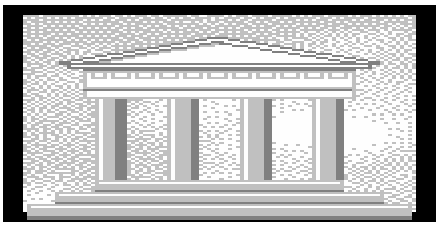
For example, suppose a caller called 911 and the dispatching agency informed them that responders were being dispatched when in fact they were not. Or alternatively, they estimated the time of arrival when they simply did not have enough information to do so. In that circumstance, some courts have held a special relationship exists and the dispatch agency could be held liable. In this case, the dispatch agency is different from your municipal entity, and I do not believe you could be held liable for the error of the dispatch agency.

If the facts were different there could be some liability exposure. Suppose, for example, that your district made no efforts to keep your volunteer program strong, and the number of volunteers available for response during the day dwindled to a point where you simply could not respond to calls within your district very often. This fact situation concerns me in that, by holding itself out as the fire and emergency service provider within a district, the district is implying that it has the staffing, budget, equipment, etc. to do the job. What if for some reason the district simply does not have the forces to accomplish its basic mission? I believe that any municipal entity providing emergency services which is unable to accomplish its essential mission should probably arrange for (1) automatic aid agreements; (2) consolidation or merger with another department; or (3) dissolution of the district.

Safety:

In 1997 I developed a fire department safety checklist and a set of forms for safety officers. Designed to help fire departments comply with the new WAC 296-305 safety standards, these materials are available to fire departments throughout the state, subject to payment of $50.00 to defray reasonable copying and mailing costs.

In June, 1997, a model Safety Resolution and complete set of operating instructions (SOPs) were completed, to comply with the "vertical standards". Cost $100.



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