Wiggin & Dana

Employment Advisory

Winter 2003

Harassment Cases Continue to Thrive

In 1998, the United States Supreme Court decided *Burlington Industries, Inc. v. Ellerth*, 524 U.S. 74 (1998), and *Faragher v. City of Boca Raton*, 524 U.S. 775 (1998), both of which addressed the scope of employer liability in sexual harassment cases. The Court held that an employer may be vicariously liable to an employee whose immediate supervisor subjected him/her to a hostile work environment and imposed a "tangible employment action" upon him/her. A "tangible employment action" is a change in an employee's terms and conditions of employment that typically, though not necessarily, results in economic harm to the employee such as: job termination, demotion and denial of promotion. In the absence of a tangible employment action, an employer may attempt to shield itself from liability by introducing evidence that it attempted to prevent sexual harassment, and had an effective and publicized complaint procedure, but that the victimized employee unreasonably failed to utilize that procedure. Consequently, many cases being decided by the federal courts now focus on whether the alleged harassment victim suffered a "tangible employment action" and the effectiveness of employers' complaint procedures.

Tangible Employment Actions

A few cases illustrate how the federal courts are delineating the scope of a tangible employment action. In *Jin v. Metropolitan Life Ins.* Co., 310 F. 3d 84 (2d Cir. 2002), for example, the plaintiff's direct supervisor made weekly demands that she perform sexual acts with him. In order to coerce the plaintiff, the supervisor threatened her with job termination and withheld her paychecks. The Second Circuit held that the supervisor's conduct constituted tangible employment actions. The Court noted that even though the plaintiff ultimately received her paychecks, the "lost *use* of wages for a period of time is, by itself, an economic injury that can qualify as a tangible employment action." In *Green v. Administrators of Tulane Educational Fund*, 284 F.3d 642 (5th Cir. 2002), the plaintiff's supervisor changed her job title from "office manager" to "administrative assistant" and removed many of the plaintiff's responsibilities. The Fifth Circuit held that the demotion, along with "significant diminishment of [plaintiff's] job responsibilities, was sufficient to constitute a tangible employment action."

On the other hand, in *Hill v. The Children's Village*, 196 F. Supp. 2d 389 (S.D.N.Y. 2002), the Southern District of New York held that there was no tangible employment action where the plaintiff's male supervisor moved her to a less desirable shift and recommended her discharge, but one month after the discharge, the employer reinstated the plaintiff to a preferable shift with full back pay and benefits, and removed her from the harasser's supervision.

Effectiveness of Complaint Procedures

The effectiveness of an employer's complaint procedure has also been hotly contested. In *Walton v. Johnson & Johnson Services, Inc.*, 203 F. Supp. 2d 1312 (M.D. Fla. 2002), the employer, upon receiving plaintiff's much belated complaint, immediately suspended the alleged harasser pending investigation. Upon his return to work, the employer insured that he and the plaintiff did not work together. The employer obtained summary judgment not only because of the actions it took in response to the complaint, but because the plaintiff had unreasonably failed to utilize the complaint procedure. According to the court, the fact that a few employees had observed the harassment did not relieve the plaintiff from her obligation to promptly place the employer on notice of the wrongdoing.

But, in *Hill*, the court denied the employer's motion for summary judgment because there

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Our Next HR Circle breakfast meeting will be held on January 29, 2003 in our New Haven office. John Zandy will be discussing the most effective way to handle discrimination complaints brought at the agency level. Invitations will be mailed out shortly. If you are interested in attending and do not receive an invitation, please call Marcia Keegan at 860.297.3733.

Recent Supreme Court Employment Decisions

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were questions of fact regarding: whether the supervisors to whom the plaintiff was required to complain had sufficient training for handling harassment complaints and whether the investigation was "prompt". Moreover, a supervisor had accepted the alleged harasser's recommendation that the plaintiff be fired without ever meeting with the plaintiff which, in turn, "stripped Plaintiff of her avenue of complaint that is set out in the policy." The court also doubted the effectiveness of the employer's investigation because the investigator had not taken any notes and failed to ask specific questions about the plaintiff's allegations.

Advice for Employers

These cases reinforce the need for employers to properly train their managers, supervisors and staff with respect to workplace harassment and to have effective policies in place. When employers do whatever they can to prevent harassment and then take appropriate action upon receipt of a complaint, they are more likely to successfully defend such a claim.

Are Websites Covered by the Americans with Disabilities Act?

In a case that could have wide-reaching implications for companies that engage in e-commerce, a Florida District Court recently held in *Access Now, Inc. v. Southwest Airlines Co.*, 2002 WL 31360397, that internet sites are not "public accommodations" subject to the requirements of Title III of the Americans with Disabilities Act ("ADA").

Title III

Title III of the ADA prohibits private entities from discriminating on the basis of disability in "places of public accommodation." Title III requires places of public accommodation to remove any barriers to access and provide alternative services when barriers cannot be easily and inexpensively removed. The term "public accommodation" in the ADA generally includes all private businesses that offer goods and services to the public. One important issue under Title III is whether public accommodations are limited to actual, physical structures. Some federal appellate courts have taken a restrictive view of Title III and held that its public accommodations provisions relate only to the ability to gain access to physical structures, while other courts have read Title III much more broadly.

Websites as Public Accommodations

In *Access Now, Inc.* the court squarely addressed the issue of whether an internet site is a "place of public accommodation" within the meaning of Title III of the ADA. This case involved Southwest Airlines' website, which is incompatible with screen-reading software that enables the vision-impaired to use the internet. The plaintiffs sued Southwest, seeking a court order that Southwest make its site compatible with that screen-reading software. Although the plaintiff urged the court to apply the reasoning of the First Circuit, which had interpreted the scope of Title III broadly in *Carparts Distribution Center, Inc. v. Automotive Wholesaler's Association of New England*, 37 F.3d 12 (1st Cir. 1994), the court noted that the Eleventh Circuit had read Title III much more restrictively than the First Circuit. Therefore, the court ruled, an internet website is not a place of public accommodation because it is not a physical, concrete structure. Accordingly, the court held that a website is not bound by the requirements of Title III. The plaintiff plans to appeal the decision to the Eleventh Circuit Court of Appeals.

Implications for Businesses

The *Southwest Airlines* case is noteworthy, because it directly addresses the applicability of the ADA to internet websites. The federal courts of appeals will undoubtedly disagree about the answer to this question and in all likelihood it will ultimately be up to the Supreme Court or Congress to resolve the issue. In the meanwhile, business owners would be well-advised to be aware that offering their products and services to the public over the internet may subject them to the requirements of Title III of the ADA.

New H-1B Visa Extension Law

In a major immigration law development, on November 2, 2002, President Bush signed into law a measure that allows H-1B nonimmigrant visa holders to extend their status in one year increments beyond the six year limitation if a labor certification application has been pending for at least 365 days. Employers sponsor foreign workers for H-1B visas for specialty occupations such as positions that require, at a minimum, attainment of a bachelor's degree. Subsequently, the employer may decide to sponsor the H-1B visa holder for permanent resident status ("green card"). For many H-1B visa holders, the labor certification application is the first step in the permanent resident process. The Department of Labor processes the labor certification application. After that application is processed, the I-140 immigrant petition and the I-485 adjustment of status to a permanent resident petition are filed with the INS.

Under previous law, an H-1B nonimmigrant visa holder reaching the end of the six year period of stay could apply to extend his or her status beyond the sixth year if the I-140 petition had been filed and the labor certification application had not only been processed, but had been filed at least 365 days earlier. Many H-1B visa holders could not seek extensions under the previous law because, although the labor certification applications had been pending for over a year, severe backlogs had prevented the Deparmtne of Labor from processing them in a timely manner. As a result, the I-140 immigrant petition could not be filed to allow for the filing of the H-1B extension. Recognizing that processing delays for labor certification applications exceeded a year, the new law allows for an extension of the H-1B visa if the labor certification application has been filed and pending for 365 days. To benefit from this new law, the H-1B visa holder does not have to be at the I-140 immigrant petition stage.

The new law allows for the extension of the H-1B visa status passed the sixth year even if the foreign worker has since changed his or her status or has left the country. Subsequently, if the labor certification application, I-140 petition or I-485 petition is denied, then the extended H-1B visa status simultaneously ends. Given the processing backlogs, this extension provision will be beneficial for an employer who has sponsored a foreign worker for a green card based on employment as it provides a mechanism for such worker to remain in the U.S. working while his or her green card petition is in processing.

An Update on Affirmative Action Obligations

Functional Plans

Several months ago Deputy Assistant Secretary Charles E. James of the Office of Federal Contract Compliance Programs ("OFCCP") signed the Functional Affirmative Action Plan Directive outlining provisions for contractors to request approval to prepare functional, rather than establishment, based plans. Contractors have had varied success in getting such requests approved. It is, however, worth making the request if an employer's business is structured in such a manner that preparing plans by physical location has little meaning. For example, if reporting relationships are based on a business line consisting of geographically dispersed employees, rather than on the location at which the employee physically reports to work, a functional plan may be appropriate.

Contractors who would like to prepare a functional plan should send a written request to the OFCCP. The request should briefly outline why the contractor believes a functional plan is the most appropriate format for its corporate structure and must be submitted at least 120 days before the current plan for the company's headquarters expires. According to recent statistics, the OFCCP has approved approximately 30% of requests from contractors who were seeking to develop functional plans.

EO Surveys

The OFCCP is mailing EO surveys to 10,000 federal contractors. The survey requires respondents to submit detailed information on compensation and other personnel activity of its workforce by race and gender. The survey currently being sent remains unchanged from the last form sent to employers. Employers will have 90 days to complete the form. Two years ago under the Clinton Administration, the survey was sent to more than 49,000 contractors. The Bush Administration has questioned the usefulness of the survey and has hired an outside consulting firm to provide input as to its future value.

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Most people are aware that Title VII prohibits workplace discrimination on the basis of race and sex. As our page 1 article points out, Title VII cases continue to be brought on a regular basis. It is important, therefore, to remember that Title VII also requires employers to provide a workplace that is free of discrimination or harassment based on national origin, ethnicity or religion. The Equal Employment Opportunity Commission ("EEOC") recently issued a directive regarding investigation of national origin discrimination that provides some helpful guidance regarding common workplace issues.

1. What type of behavior may be considered unlawful discrimination?

Actions taken against members of an ethnic group (for example, discrimination against someone because he is Arab) may constitute national origin discrimination, as well as action directed against someone because he/she does not belong to a particular ethnic group (for example, less favorable treatment of anyone who is not Hispanic). Discrimination based on physical, linguistic, and/or cultural characteristics closely associated with a national origin group may also be illegal. Employers may be liable for discriminatory actions based on a belief, whether it is accurate or not, that someone is a member of a particular national origin group (for example, a perception that someone is Arab, even if he is not).

2. May employers make decisions based on an individual's ability to speak English?

The EEOC cautions that because linguistic characteristics are a component of national origin, employers should carefully scrutinize employment decisions that are based on accents or English fluency. An employment decision based on a foreign accent is acceptable only if the accent materially interferes with the ability of the individual to perform job duties. If an accent interferes with the communication skills necessary to perform job duties, for example, it may be taken into account. Such jobs may include teaching, customer service, and telemarketing. As a general rule, English fluency requirements are only permissible if they are required for effective performance. Such a determination must be made on a position by position basis and employers may only require the degree of fluency that is necessary to perform the duties of the relevant position.

3. Are English-Only Rules Permissible?

English-only rules are permissible under limited circumstances. For example, such a rule will be allowed when applied to situations in which employees must speak a common language to promote safety, or under circumstances that will enable a supervisor who only speaks English to monitor the performance of an employee whose job duties require communication with coworkers or customers.

4. When are foreign nationals protected under the discrimination laws?

The EEOC takes the position that foreign nationals are covered by the discrimination laws when they apply for U.S. based employment from outside the United States. If employment is outside the United States, however, foreign nationals are not protected by the equal employment opportunity statutes.