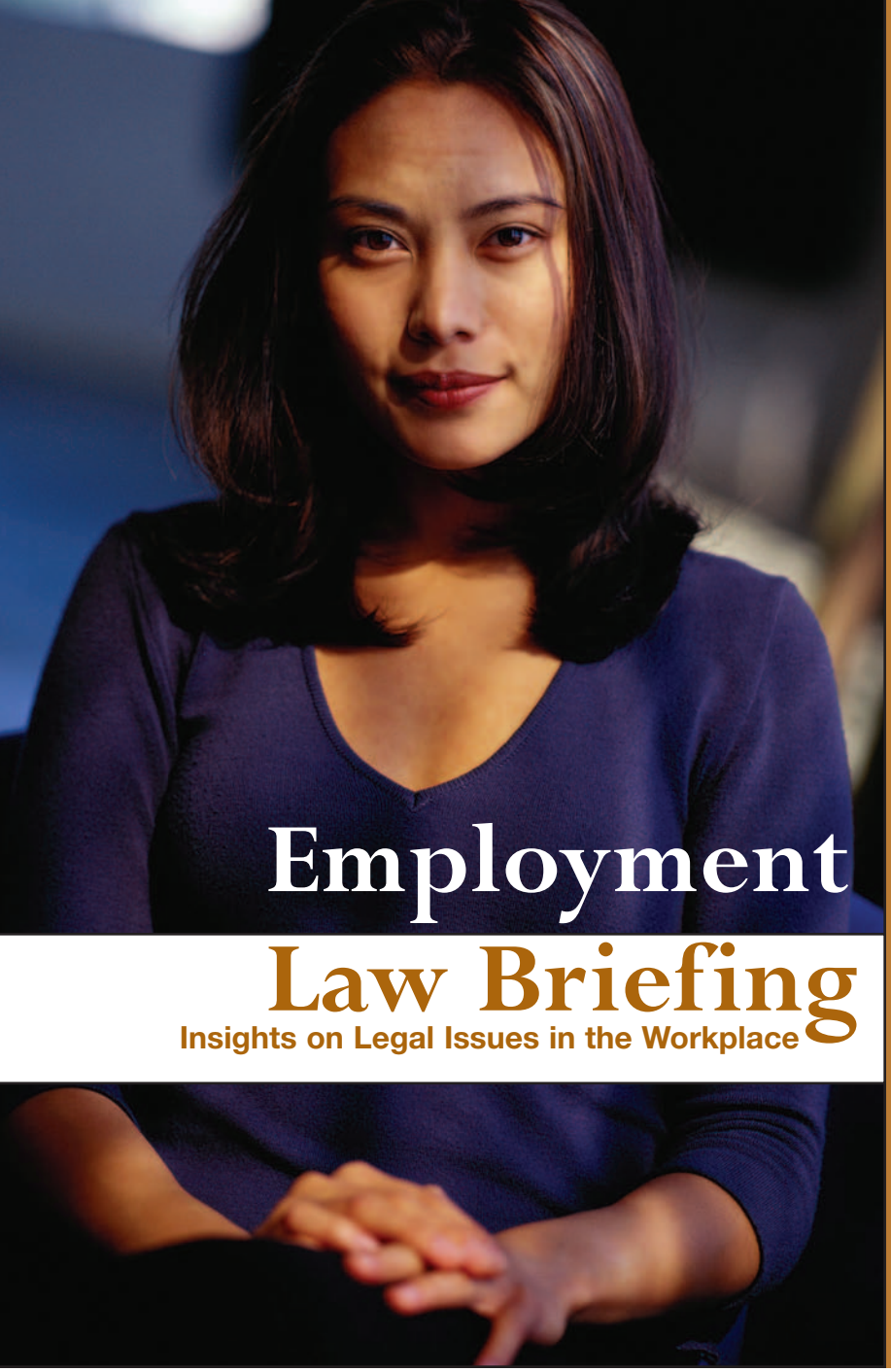

Employment Law Briefing

Insights on Legal Issues in the Workplace

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INSIDE …

HALL, RENDER, KILLIAN, HEATH & LYMAN P.S.C.

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Can an employer be held liable for a single harassment incident?

That was the question before the Eighth Circuit in *McCurdy v. Arkansas State Police*. The case involved an employer that was sued for sexual harassment despite having no previous notice of any similar conduct by the alleged harasser and having acted promptly to prevent future misconduct.

Complaint, response, lawsuit

The Arkansas State Police hired a radio dispatcher and gave her an employee handbook that barred sexual harassment and set out complaint procedures. About two months after the dispatcher began work, a police sergeant entered the workplace during the Friday-evening shift, walked up to the dispatcher and touched her left breast, saying she had a hole in her shirt. When she looked down at her shirt, he said, "Stop looking at your tits."

He then sat down and asked why she wasn't wearing her uniform. When she told him uniforms weren't required on Fridays, he replied that if it were up to him, her uniform would be panties and a tank top. He then began to play with her hair. Later, he told her she had a really sexy voice and that she turned him on. As he prepared to leave, he hugged her and a female co-worker.

The dispatcher immediately reported the sergeant's behavior to the duty officer, who relayed the allegations to his supervisor, a lieutenant who was at home. The lieutenant told the duty officer to make sure the parties had no contact for the rest of the weekend and informed her supervisor of the allegations when she reported for work the following Monday. They began an investigation, interviewing the sergeant, the complainant and her co-workers. The investigation resulted in the sergeant's eventual demotion and transfer.

The dispatcher filed suit in federal court, based on the single harassment incident. The court granted the employer's motion for judgment without a trial, and the dispatcher appealed.

Square peg, round hole

The Eighth Circuit affirmed. It found that the dispatcher, to establish a hostile-work-environment claim, had to show that the single harassment incident was sufficiently severe and pervasive to constitute actionable sexual harassment. The court noted that based on the facts here, some courts would rule that a single incident wasn't sufficient to establish a case. But the Eighth Circuit sidestepped this issue. It held that the employer here — even if a single incident didn't meet the threshold for actionable harm — had established an affirmative defense that shielded it from liability.

The Eighth Circuit relied on *Burlington Industries v. Ellerth*, in which the Supreme Court laid out an affirmative defense for employers that haven't subjected complainants to any adverse employment action — such as a discharge. The Court said the affirmative defense must be composed of two elements:

1. The employer must have exercised reasonable care to prevent and promptly correct any sexually harassing behavior, and

2. The complainant must have unreasonably failed to take advantage of any of the employer's preventive or corrective opportunities or otherwise acted to avoid harm.

A sufficiently severe incident

In *McCurdy v. Arkansas State Police*, the Eighth Circuit didn't answer the question of whether a single sexual-harassment incident could be sufficiently severe and pervasive to constitute an actionable claim for hostile work environment.

But the Ninth Circuit did, in *Little v. Windermere Relocation*. It held that a single sexual-harassment act may be sufficient to sustain a hostile-work-environment claim if the act "is of such a nature and occurs in such circumstances that it may reasonably be said to characterize the atmosphere in which a plaintiff must work."

In that case, a relocation company's female employee performed some services for a client who was Starbucks' director of human resources. After a business dinner with him, the employee became ill and passed out. She awoke in his car to find him raping her. When she reported the rape to her supervisor, he responded that he didn't want to hear anything about it and cut her salary. The court held that the single act of rape was sufficient to establish a hostile work environment that required the employer's investigation and action.

The Eighth Circuit found that the employer here had met the defense's first element and didn't need to meet the second, because only one harassment incident had occurred. The court noted that both *Ellerth* and its sister case, *Faragher v. City of Boca Raton*, involved multiple sexual-harassment incidents. The court held that strict adherence to the Supreme Court's two-prong affirmative defense would be like trying to fit a square peg into a round hole.

The court found that Title VII didn't envision strict employer liability for a single incident of sexual harassment if an employer acts swiftly and effectively to insulate a complaining employee from further harassment. Thus, the court concluded that the employer here was entitled to assert the *Ellerth* and *Faragher* affirmative defense, even though it couldn't establish the defense's second prong.

Swift action, smart employer

This case illustrates the importance of responding quickly to harassment complaints. By responding quickly, the employer here was able to assert the Supreme Court's affirmative defense. The case is also another example of the importance of having antiharassment policies and complaint procedures in place. Be sure to investigate all complaints of sexual harassment, even if they are isolated single incidents. Then, after investigating, you may act according to the incidents' severity and frequency.

When employees' private and work lives intersect

Can a church-affiliated university legally fire two tenured professors who allegedly hadn't been truthful about their personal relationship? Let's take a look at what happened in *Hope International University v. Rouanzoin*.

University requires Christian conduct

The university, which was affiliated with the Church of Christ, stated that its purpose was to educate its students to "be equipped for a fruitful Christian service, and particularly for the Christian ministry." It considered the Bible its "ultimate constitution" and required its professors:

- To "abstain from all appearance of evil,"
- To accept the Bible "as the authoritative word of God," and
- To belong to at least one Christian denomination.

According to the faculty handbook, professors were to assume the role of Christian exemplars and were required to abide by the school's mission "in every activity that might have an effect on any of our students." The school required its faculty to "conduct both on- and off-campus activities and relationships so as to model a demonstration of growing Christ-likeness." The handbook further provided that the school could immediately discharge any faculty member "in the case of grievous moral failure."

Engaged couple allege discrimination

The case arose when a licensed psychologist, who was chair of the Marriage & Family Therapy Department and had been a professor at the school for more than 20 years, filed for divorce after 27 years of marriage. A few months later, he was rumored to be having an affair with a female professor in his department. Both professors assured the provost, vice president and the dean of the school of graduate studies that the rumors were false. But when the chair told them of his pending divorce, the school stripped him of his chair.

Two weeks after his divorce became final, the ex-chair began dating the female professor and they became engaged. A few months later, while discussing his engagement with the dean of the school of graduate studies, the ex-chair assured the dean that he had had no "relationship" with his fiancée before his divorce. Nevertheless, the school decided not to renew the professors' teaching contracts because of the perception that they hadn't been truthful when they denied their personal relationship and because the school had a rule barring a husband and wife from working in the same department.

The professors sued the school, alleging: 1) discrimination based on marital status, and 2) breach of their employment contracts. The university moved for summary judgment. That is, it asked the court to rule for it without a trial. The court denied the motion and the university appealed.

The court considers the ministerial exception

The first question before the appellate court was whether the "ministerial exception" to California's discrimination laws protected the school from the claim of marital-status discrimination. The court noted that the exception's purpose was based on the idea that courts shouldn't construe anti-discrimination laws to govern the relationship between a church and its ministers.

The appellate court found that for the ministerial exception to apply to employees, their primary duties must consist of teaching, spreading the faith, governing a church, supervising a religious order, or supervising or participating in religious worship or ritual. Because the professors were nonordained and taught a subject (psychology) that was not necessarily religious, the court held that a trial was necessary for the school to try to establish that the exception protected it from suit.

The claims require a trial

The appellate court then found that the professors had alleged only one viable claim of marital-status discrimination: that the school's antinepotism rule barred employing a married couple in the same department. The court noted that states were split on the issue of whether antinepotism rules violate marital-status-antidiscrimination laws.

The court found that California bars per se rules against married persons working together and requires employers to make reasonable efforts to assign job duties so as to minimize supervision, safety, security or morale problems. The court held that nothing about a married couple working in the same department implicated problems of "supervision, safety, security or morale" that would justify ruling for the school without a trial.

The court also held that the professors couldn't bring a marital-status claim based on the school's firing them because of its *perception* that they had had an extramarital affair — no matter how unreasonable that might seem from a secular viewpoint. But the court found that the professors could allege a contract claim not to be fired without objective reasonable cause, so a trial was required to decide their claim alleging breach of employment contract.

Avoiding liability

Although this opinion doesn't set precedent outside California, it nevertheless demonstrates the potential exposure an employer in any state can face when its employees' private lives intersect with their work lives. Employers must examine their anti-nepotism rules to see whether they comply with state law.

Be careful when sending reference letters

Employers face a dilemma when asked to provide reference letters for former employees who have unsatisfactory work records. Should employers follow past common wisdom that dictated disclosing only ex-employees' positions and times of employment, even though this could allow an unsuspecting new employer to get stuck with a poor or dangerous worker? Or should employers truthfully report an ex-employee's work record and risk being sued for defamation by the ex-employee?

A recent state-court opinion, *Passmore v. Multi-Management Services*, casts new light on this dilemma. Let's take a look.

Reference omits misconduct rumors

Before hiring a maintenance supervisor, a nursing home received a reference from the worker's previous nursing-home employer stating he was eligible for rehire and had generally performed his job adequately. The reference didn't mention

unsubstantiated rumors of misconduct with patients or that he was fired for having sexual relations with a mentally infirm patient.

After the supervisor began his new job, an aide at the nursing home found bruises on an Alzheimer's patient. The patient's daughter worked at the supervisor's previous nursing home and had heard the misconduct rumors about him. She believed that the supervisor had assaulted her mother and caused the bruises.

The patient's family sued the supervisor's previous employer for negligent misrepresentation. The Indiana trial court threw out the case without a trial, and the appellate court affirmed. The family appealed to the Indiana Supreme Court, asking it: 1) to hold that a nursing facility owes a duty to third persons to truthfully represent material facts about a former employee's qualifications and character, and 2) to allow for the recovery of damages for physical harm resulting from reasonable reliance on conscious or negligent misrepresentation.

The supreme court weighs in

On the issue of conscious misrepresentation, the Indiana Supreme Court held that someone who knowingly supplies false information in response to an employment inquiry should be liable for any physical injury that flows therefrom.

The Indiana Supreme Court held that a former employer that wrongly gave a favorable reference for an employee can be held liable under Indiana law for misrepresentation.

The court cited a case involving a California school district that gave a reference letter vouching without reservation for a former employee even though it knew he had committed offensive sexual acts. Later, the employee assaulted a student at his new school.

The California court held that giving the reference letter constituted an affirmative misrepresentation, presenting a foreseeable and substantial risk of physical harm to a third person. So the California court held that the student had a cause of action against the former school district.

The Indiana Supreme Court held that the facts in *Passmore* didn't support a conclusion that the previous employer had

knowingly misrepresented the supervisor's work record. But it could support a conclusion of *negligent* misrepresentation. Nevertheless, the court refused to adopt a rule imposing liability to third parties for negligence in supplying employment recommendations.

The court noted that under Indiana law, employees were entitled to file defamation claims for falsehoods in employment recommendations. But to promote "free and open intra-company communications" and human resources' legitimate management needs, a qualified privilege protected personnel evaluations from defamation claims. The court held that a statement protected by a qualified privilege loses its privileged character when:

- Ill will primarily motivated the false statement,
- The defamatory statement was excessively published, or
- The statement was made without belief or grounds for belief in its truth.

The court held that the same set of considerations should apply to job references, stating that they should be filled with facts — not rumors or innuendo. Without substantial evidence, these statements would subject employers to defamation litigation. On the other hand, the court held that declaring employers liable for negligence would lead to employer reluctance to provide any information other than "name, rank and serial number." The court concluded that a policy of discouraging assessments wouldn't make nursing homes or other workplaces safer.

Proceed with caution

This case highlights how one state court chose to resolve these conflicting interests. The lesson for employers: Take care when providing employment references — especially when you know of behavior indicating an employee may be a danger to others. Then consult with counsel to ensure your actions are consistent with state law.

Pretextual firing of transsexual firefighter backfires

A recent lawsuit involved a transsexual who alleged he was harassed and dismissed for not conforming to masculine stereotypes. The courts had to decide whether he stated a claim for sex discrimination under Title VII. Here's how the Sixth Circuit decided *Smith v. City of Salem*.

Co-workers' harassment

A firefighter was diagnosed with gender-identity disorder (GID), which the American Psychiatric Association characterizes as a disjunction between a person's sexual organs and sexual identity. In accordance with medical protocols for treating GID, the firefighter began femininizing his appearance. His co-workers commented that he didn't look or act "masculine enough."

He told his immediate supervisor about the GID diagnosis and treatment so the supervisor could deal with co-workers' comments and inquiries. Despite the firefighter's request for confidentiality, the supervisor reported the conversation to the fire chief, who met with the city's law director to determine how to dismiss the firefighter.

The city's executive body held a meeting (that incidentally didn't conform to Ohio law governing meetings) and decided to require the firefighter to undergo three psychological evaluations designed to cause him to either resign or refuse to comply. Refusal would have constituted grounds for dismissal for insubordination. Two days later, the firefighter's attorney notified the mayor of the plan's potential legal ramifications.

City's retaliation

When the EEOC issued a right-to-sue letter to the firefighter on his complaint against the city, the city fired him for an alleged policy infraction. He claimed that the firing was the result of selective enforcement in retaliation for his having obtained legal counsel. He filed suit in federal court, alleging sex discrimination and retaliation.

The city filed a motion to dismiss on the pleadings. The court granted the motion on the ground that Title VII doesn't protect transsexuals.

Court's decision

The Sixth Circuit reversed and reinstated the case, finding that the firefighter had sufficiently pleaded a prima facie case of sex discrimination and retaliation. The court cited many opinions holding that a plaintiff may be able to prove a sex-discrimination claim by showing that a belief that the victim didn't conform to gender stereotypes motivated the harassment.

The Sixth Circuit cited a case involving a man with a soft voice, slight physique and long hair who was harassed because his way of exhibiting his masculinity didn't meet his co-workers' idea of how men are to appear and behave. That court held that the co-workers' conduct constituted harassment based on sex. Here, the Sixth Circuit held that the firefighter's classification as a "transsexual" and his "nonmasculine" behavior didn't remove him from Title VII protection.

On his retaliation claim, the court found that the protected conduct's closeness to the suspension sufficiently established a prima facie case.

Firing backfires

In this case, the city panicked when it learned that a firefighter had GID and discharged him on trumped-up violations of department policy. The city should have first determined whether firing based on GID violated Title VII. A calm and rational analysis would have shown the potential exposure that firing someone on these grounds would bring. Firing someone on false pretenses is always a mistake. Citing pretextual dismissal reasons allows a jury to conclude that a dismissal was for unlawful reasons.

A message to our clients and friends …

The attorneys in our Employment and Labor Section are available to answer your questions about the articles in the Briefing. We also stand ready to respond to any other questions you might have.

It has always been our goal to provide timely and practical advice whenever and wherever a client has a problem.

You can contact each of us directly. Call us or send us an email message. We will be there for you.

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HALL, RENDER, KILLIAN, HEATH & LYMAN P.S.C.

Indianapolis
Louisville
Troy

www.HallRender.com

Our Employment Attorneys

Steve Lyman
(317) 977-1422
slyman@HallRender.com

Greg Moore
(248) 457-7858
(317) 977-1421
gmoore@HallRender.com

Sam DeShazer
(502) 568-9361
shdeshaz@HallRender.com

John Ryan
(317) 977-1423
jryan@HallRender.com

Laura Napiewocki
(586) 753-0496
lnapiewo@HallRender.com

Jon Bumgarner
(317) 977-1474
jbumgarn@HallRender.com

Kevin Stella
(317) 977-1426
kastella@HallRender.com

Dana Stutzman
(317) 977-1425
dstutzma@HallRender.com

Kevin Gfell
(317) 977-1479
kgfell@HallRender.com