Employment Law Briefing

Insights on Legal Issues in the Workplace

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Employer liable for religious discrimination

Title VII bars employers from harassing — or discriminating against — employees because of their religious beliefs. This case, *Johnson v. Spencer Press*, shows how costly religious discrimination can be.

The harassment begins

A former pastor at an Assembly of God Church who had a Bible Studies degree took a job as a custodian. He remained active in his church, discussed his religious beliefs with co-workers and asked for Sundays off so he could go to church.

The custodian got a new supervisor and again asked for Sundays off. The supervisor, on learning of the custodian's religious views, began making lewd and inappropriate sexual comments to him, but not to other employees. The supervisor told the custodian that he "was getting real tired of hearing" that the custodian couldn't work overtime on Sundays because of his church activities.

The supervisor asked him, "If you could work overtime … and make $120 or love Jesus, what would you do?" When the custodian answered that he would love Jesus, the supervisor screamed, "Well, why don't you take Mary and turn her upside down and pull her dress over her head?"

The employee complains

The custodian complained that the supervisor threatened to kill him with a hand grenade, run over him with a car, and shoot him with a bow and arrow, and once unsheathed a knife and put its point under his chin. He complained at least six times over his nine-year employment to the H.R. department

The court found sufficient evidence for a jury to conclude that the custodian's religious beliefs motivated the harassment.

but was told nothing could be done and that he could leave if he didn't like how he was treated. One H.R. person told him the company would fire him if he pursued his complaints. The company also denied his many transfer requests.

The custodian resigned and filed complaints with the Maine Human Rights Commission and the EEOC. The supervisor then went to the custodian's house and threatened to beat him up if he didn't withdraw his complaints.

The jury awards $300,000

The case went to trial and the jury found that the supervisor had repeatedly harassed the custodian because of his religion and awarded him $300,000 in damages. The court denied the employer's motion for a new trial.

The employer appealed to the First Circuit, arguing that the evidence didn't show that the harassment was because of the custodian's religion and didn't show that it was severe and pervasive. The court rejected these contentions and affirmed.

The employer relied on a previous appellate decision that found a "conceptual gap between an environment that is offensive to a person of strong religious sensibilities and an environment that is offensive because of hostility to the religion guiding those sensibilities." The employer argued that the environment here was offensive to a person of strong religious sensibilities but wasn't offensive because of hostility to the religion guiding those sensibilities.

The First Circuit finds sufficient evidence

The First Circuit noted that the harassment began *after* the supervisor learned of the custodian's religious beliefs. Moreover, most of the inappropriate comments focused on a consistent theme: that the custodian was too chaste and sober and this was because of his religious beliefs. Significantly, the supervisor didn't make similarly inappropriate and offensive comments to other employees. Under these circumstances, the court found sufficient evidence for a jury to conclude that the custodian's religious beliefs motivated the harassment.

The court also rejected the argument that the harassment wasn't severe and pervasive. It noted that the supervisor repeatedly and continuously insulted the custodian and mocked his religious beliefs and more than once threatened him with violence.

The employer learns a lesson

This case shows the importance of training someone to deal with employee harassment complaints and empowering them to act on all complaints. Nothing is accomplished by having an antiharassment policy and complaint procedures in place unless they are enforced and followed.

Does equal opportunity harassment produce a hostile work environment?

Employers can usually be held liable for employees' sexually offensive conduct that produces a hostile work environment. But in *Petrosino v. Bell Atlantic*, the Second Circuit had to decide whether an employer was off the hook because the sexual harassment was directed at both male and female employees.

Rampant profanity and crude humor

A phone company hired a woman technician to install and repair phone systems in buildings and on telephone poles. She was the only female technician in her work group. She alleged that the workplace was more like a locker room than a place of business, with profanity, crude humor and sexually demeaning conversations occurring daily.

Although male co-workers frequently insulted each other and often made vulgar claims about imaginary sexual exploitation of each other's wives, their remarks always revealed a profound disrespect for women. When working outdoors, the technician constantly found crude and vulgar sexual graffiti and images that co-workers had scrawled inside terminal boxes.

Harassing jokes and graffiti

A co-worker assaulted the technician at a Christmas party a few months after she began work, groping and kissing her. The incident became a subject for jokes and graffiti for months. In the ensuing years, she was frequently subjected to disparaging comments about her body, menstrual cycle, weight and eating habits, and at least one drawing showed her performing a sexual act on a supervisor.

One of the technician's supervisors referred to her as "a damn woman" and told her to calm her "big tits down." He also dismissively attributed her job concerns to her menstrual cycle.

The court found that though the workplace insults may have been directed at individual men, they weren't directed to men as a group.

Another supervisor said she was "too thin-skinned" to do her job and that this was typical of all women. Yet another supervisor cited her — but not male workers — for minor job infractions.

A problem ignored

The technician complained about her work environment throughout the years but the employer did nothing to address the problem. Instead, her co-workers and supervisors ridiculed her for complaining and harassed her even more.

Eventually, the technician quit and sued the company, alleging sex discrimination based on a hostile work environment. The trial court conceded that the complained-of conduct was boorish and offensive. But it found that hostility toward the technician because of her sex hadn't motivated the conduct because both male and female employees were subjected to it equally. So the court dismissed her hostile-work-environment claim without a trial, and the technician appealed.

The equality question

The Second Circuit agreed that a work environment that is equally harsh for both men and women can't support a claim for sex discrimination. But the mere fact that both men and women are exposed to the same offensive conduct on the job doesn't mean that their work conditions are necessarily equally harsh.

Rather, the court found that a work environment's objective hostility depends on the circumstances' totality. The court held that the evidence here would permit a jury to conclude that a reasonable person would consider the sexually offensive comments and graffiti more offensive to women than to men. So they constituted sex discrimination.

Furthermore, the court found that though the workplace insults may have been directed at individual men, they weren't directed to men as a group. By contrast, the offensive jokes and graffiti uniformly sexually demeaned women and sent the message that women as a group were available for men's sexual exploitation.

The court also found that this disparagement of women — repeated day after day over the course of several years without supervisory intervention — seriously impedes any woman's efforts to deal professionally with male colleagues.

Finally, the court found that just because much of the offensive material was not specifically directed at the technician didn't preclude a jury from finding that the conduct subjected her to a hostile work environment. And much offensive conduct *was* directed specifically toward her. So the Second Circuit reinstated her suit for trial.

Shop talk, court talk

Why is this opinion significant? Because it recognizes that even though men and women may be subjected to the same offensive conduct, sex discrimination can still result when one gender can reasonably be expected to react differently to the conduct.

This means that employers who may have believed they were immune to harassment suits because of the uniformity of "shop talk" or a "locker room" atmosphere must revisit the issue of their possible exposure. Employers must ensure that:

- They have put proper policies in place,
- Managers follow complaint procedures, and
- Managers act appropriately on substantiated complaints.

Otherwise, employers may find that the "shop talk" becomes "court talk."

Ignore FMLA reinstatement rules at your peril

Suppose workers return to work from taking leave under the Family and Medical Leave Act (FMLA) and the employer can't conveniently reinstate them immediately in their previous or equivalent positions. Does delay in reinstatement violate the act? That was the question before the Sixth Circuit in *Hoge v. Honda of America*.

No job immediately available

A Honda production worker's back injury limited her physical movements, so Honda moved her to a job she could perform on the door-assembly line. Five years later, she took FMLA leave for unrelated abdominal surgery. After Honda approved two leave extensions, the exact date she was to return to work was unclear.

While the worker was on leave, Honda changed models. When she returned, she was told that no positions were available for her because of her physical restrictions and the model change. More than a month later, Honda found a job she could do on the engine line. She sued, alleging that Honda illegally interfered with her FMLA rights by not promptly reinstating her. The trial court ruled for her without a trial.

Restoration rights disputed

Honda appealed, and the Sixth Circuit found that the worker could prevail on her interference claim if she could establish that:

1. She was an eligible employee,
2. Honda was a covered employer,
3. She was entitled to FMLA leave,
4. She gave Honda notice of her intent to take leave, and
5. Honda denied her FMLA benefits or interfered with her FMLA rights.

The parties agreed that she met the first four elements, but disagreed whether the reinstatement delay established the fifth element. Honda argued that the FMLA required it to restore

her to her former or an equivalent position only within a reasonable time after she was able to return.

Prompt reinstatement mandated

Disagreeing with Honda, the Sixth Circuit affirmed. It found that the FMLA provides that employees returning from leave are entitled to be restored to their previous or equivalent positions. An equivalent position is virtually identical to the former position in terms of pay, benefits and working conditions — including privileges, perquisites and status. It must involve the same or substantially similar duties and responsibilities and must entail substantially equivalent skill, effort, responsibility and authority.

But employers don't have to restore employees who would have lost their jobs or been laid off even if they hadn't taken FMLA leave. In addition, returning employees must be able to perform the essential functions of the position or an equivalent.

Reasonableness element lacking

Finding that the statutory language contained no "reasonableness element," the Sixth Circuit refused to read one into the act. The court found that the act's language was unambiguous

and that the court's role wasn't to address the act's perceived inadequacies. The court recognized Honda's need to juggle "the realities of a dynamic business environment" with its FMLA obligations. But its policy arguments were more appropriately addressed to Congress.

The court found that when the worker was expected to return to work might have been unclear, and she may have returned earlier than expected. But FMLA rules required her to give only two business days' notice of her intent to return. Thus, even if Honda hadn't expected her on the day she showed up, it couldn't keep her waiting for reinstatement for more than two business days.

Precise compliance best

This case shows the importance of precisely complying with the FMLA's technical provisions. Employers can't presume that what they believe to be reasonable will constitute compliance with the law.

Employer fires worker for being a domestic violence victim

Can an employer lawfully discharge an employee because he was the victim of domestic violence? That was the question before the North Carolina Court of Appeals in *Imes v. City of Asheville*.

A 27-year at-will city employee was fired after he was seriously injured and hospitalized from gunshots inflicted by his wife. He alleged that his supervisor told him he was let go because he was "a victim of domestic violence." He claimed that this violated public policy because state law protects domestic violence victims as a class. The trial court disagreed and dismissed his suit.

Public policy?

The issue on appeal was whether the employee's complaint stated a valid claim for wrongful discharge in violation of public policy. Under law in North Carolina (and most states), employers may discharge at-will employees for no reason or for an arbitrary or irrational reason but not for an unlawful reason or for a purpose that contravenes public policy.

Many companies have adopted programs to minimize threats to their employees from outsiders.

Public policy is defined as the legal principle that no citizen can lawfully do something that tends to injure the public and is against the public good. North Carolina courts have upheld wrongful-discharge claims filed by employees discharged for refusing to:

- Follow an employer's request to violate a law,
- Testify falsely in a medical-malpractice case, or
- Work for less than the statutory minimum wage.

The appellate court found that the employee hadn't alleged that the employer had violated any explicit statutory or constitutional provision. Nor did he allege that the employer encouraged the employee to violate any law that might result in harm to the public.

Rather, his complaint alleged that "domestic violence is a serious social problem in North Carolina" and that any

employment termination "based on the employee's status as a victim of domestic violence tends to be injurious to the public and against the public good."

Protected class?

The court conceded that, though a North Carolina statute offers various protections for domestic violence victims, it doesn't establish them as a protected class or extend employment security to them. The court noted that this was just one of many social problems — such as poverty, child abuse, juvenile delinquency and substance abuse — addressed by North Carolina statutes that could be construed as protected by general public policy.

But the court refused to interpret these statutes to create specialized and protected classes entitled to employment and other status protection, stating that that was something for the North Carolina legislature to do. So the court affirmed dismissal of the suit.

Policy needed?

This decision — while limited to North Carolina — is typical of what could be expected in most states. That is, legislative action is required to extend protection to domestic violence victims.

The problem of workplace violence — notably domestic violence — is more widely known today. Many companies have adopted programs to minimize threats to their employees from outsiders — including spouses and lovers. Your attorney can help you develop workplace violence policies.

Should employers be concerned when domestic violence affects the workplace?

Traditionally, employers haven't inserted themselves into their employees' personal problems. According to this view, an employee's problems at home don't excuse poor work performance. But an increasing number of companies — including Polaroid, Philip Morris, BellSouth and Liz Claiborne — are developing policies to address the issue of domestic violence that spills over into or affects the workplace.

The origins for this concern are both legal and practical. Domestic violence in the workplace costs U.S. companies an estimated $4 billion to $5 billion per year in absenteeism, employee turnover, reduced productivity and higher health premiums, according to the American Bar Association Commission on Domestic Violence. U.S. Department of Labor statistics reveal that 17% of women killed at work were attacked by current or former husbands or boyfriends. The workplace clearly attracts potential abusers because they can predictably find their victims there.

The Occupational Safety and Health (OSH) Act requires employers — as a general duty — to provide a workplace free from recognized hazards likely to cause death or serious physical harm. This includes the prevention and control of workplace violence. Employers can be cited for violating the OSH Act's general duty clause if they recognize violence in their establishments and do nothing to prevent it.

Here are some steps companies have taken to address the issue of domestic violence affecting the workplace:

- **Training staff to respond to domestic violence issues,**
- **Implementing comprehensive security measures to reduce the likelihood of an attack at work,**
- **Keeping employee information confidential so that abusers can't locate their victims,**
- **Giving victimized employees information about groups that assist battered spouses and how to obtain civil protection orders, and**
- **Providing flexible leave to allow victims to pursue legal remedies against abusers.**

Your attorney can assist you in developing a policy.

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.

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