EMPLOYER'S EDGE

HEYL ROYSTER

A Newsletter for Employers and Claims Professionals *Fall 2018*

OPENING STATEMENT

I want to take this opportunity to let you know about two developments in our Employment & Labor Practice. First, I am pleased to announce that that Brian Smith has recently become the chair of our Practice. Brian has been with the firm for more than a decade, and he has a deep wealth of employment law experience, including counseling and defending employers in disciplinary actions, discrimination claims, terminations, wage-and-hour issues, restrictive covenants, employment agreements, and various leave issues. He has obtained excellent results for our clients, including our state university clients, in federal courts, state courts, and administrative proceedings before the EEOC and IDHR.

Second, in conjunction with the opening of our St. Louis office, employment lawyer Jim Nowogrocki has joined our firm. Jim has successfully tried employment law cases to verdict in Missouri and Illinois. He has 30 years of experience with a focus on employment law counseling and litigation related to the federal and state statutes that are applicable to today's workplace. His practice also includes working with clients on non-compete agreements and trade secret issues. I hope you enjoy Jim's article in this newsletter on the types of harassment that Title VII does and doesn't cover.

Finally, many thanks to Emily Perkins for serving as editor of this newsletter, and helping us to assemble timely and pertinent articles, like those below, on a regular basis.

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SEVENTH CIRCUIT CLARIFIES: TITLE VII PROHIBITS SEX DISCRIMINATION, NOT ALL WORKPLACE HARASSMENT

By: Jim Nowogrocki, jnowogrocki@heylroyster.com

A recent decision by the Seventh Circuit Court of Appeals confirms that under the Civil Rights Act of 1964, there is an important boundary line: Title VII is an anti-discrimination statute, not an anti-harassment statute. For today's workplace, that means harassment which discriminates against an employee because of such individual's sex is unlawful. On the other hand, conduct between co-workers based on "personal animosity or juvenile behavior" does not constitute discrimination under federal law.

The facts set forth in *Smith v. Rosebud Farm, Inc*., No. 17-2626, 2018 U.S. App. LEXIS 21481 (7th Cir. Aug. 2, 2018), illustrate this important legal distinction.

The workplace atmosphere

The plaintiff in this case worked as a butcher in a small grocery store in Chicago. He had been on the job less than three weeks when his male coworkers behind

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the meat counter began harassing him by grabbing his genitals and buttocks. Over the next four years, that behavior was consistent, if not constant. At trial, the plaintiff recalled the many times his coworkers groped him, grabbed him, and even reached down his pants. They repeatedly mimed oral and anal sex.

At trial, the plaintiff offered evidence that only men, and not women, experienced the kind of treatment that he did at the grocery store. According to the Seventh Circuit, there was ample testimony - from both the plaintiff and other witnesses - which established that only men were groped, taunted, and otherwise tormented. Witnesses recounted the numerous times they saw men grabbing the genitals and buttocks of other men.

While the employer argued that such evidence was insufficient because only male employees worked behind the meat counter, the court disagreed. It found that the plaintiff did not work in an all-male environment, but rather the grocery store was a mixed-sex workplace where men and women interacted daily.

Jury verdict and legal analysis

Ultimately, the Seventh Circuit ruled that the plaintiff introduced evidence that his coworkers only harassed male employees, and that the jury was free to conclude that these men discriminated against him on the basis of sex. A verdict was returned in favor of the plaintiff.

In reaching its decision, the court of appeals noted that workplace harassment, even harassment between men and women, is *not* automatically discrimination because of sex merely because the words used have sexual content or connotations. It reviewed a previous case in which an employee was subject to a male coworker's sexual comments and unwanted touching. However, the important legal difference was that the plaintiff in that case did not prove that "that working conditions at his workplace were worse for men than for women." In fact, the evidence reflected that "the offending coworker picked on anyone of either sex he could get away with tormenting."

In sum, Title VII requires that a female or male employee prove that co-workers created a hostile work environment by severely and pervasively harassing a plaintiff because of his or her sex.

Harassment policies and procedures still important

While not all workplace conduct may rise to the level of unlawful behavior under Title VII, it is still important for an employer to take steps - via training, anti-harassment policies and procedures - to prevent discriminatory harassment between employees.

For purposes of a sexual harassment claim under Title VII of the Civil Rights Act of 1964, an employer is entitled to an affirmative defense against liability if it can show: (1) that it exercised reasonable care to prevent and correct promptly any sexually harassing behavior; and (2) that an employee failed to take advantage of any preventive or corrective opportunities provided by the employer to otherwise avoid harm; prevention is the key.

Contact Heyl Royster

The attorneys in our Employment & Labor Practice are well-versed in the creation and implementation of anti-harassment policies and procedures, along with training for management and employees. If you would like to learn more about these services, please do not hesitate to contact us.

DISTRICT COURT ALLOWS COUNT FOR INFLICTION OF EMOTIONAL DISTRESS TO STAND AGAINST EMPLOYER

By: Anthony Ashenhurst, aashenhurst@heylroyster.com

On July 18, 2018, Judge Alonzo of the United States District Court for the Northern District of Illinois held that a female employee of Exxon Mobile could pursue her common law claim of intentional infliction of emotional distress against Exxon Mobile relating to acts that also may violate the Illinois Human Rights Act (HRA) as well as the Illinois Workers' Compensation Act (WCA). *Phillips v. Exxon Mobile Corp.,* No. 17 C 7703. Phillips alleged in her complaint a long history of harassment and offensive behavior by Exxon employees and that Exxon took no steps to stop the behavior.

Although just at the pleading stage, this case serves as a warning to all employers that failure to act on an employee's complaints of harassment or other offensive behavior could lead to an employee's tort claim for intention infliction of emotional distress.

Amy Phillips alleged in her complaint for intentional infliction of emotional distress that co-workers and supervisors at Exxon Mobile directed sexist and homophobic slurs at her and subjected her to threats and physical abuse. Exxon Mobile moved to dismiss Phillips' complaint on the basis that the HRA and WCA preempt her common law actions because the HRA governs sexual harassment claims and the WCA governs workplace injury claims.

Judge Alonzo rejected both of Exxon's arguments. As to the HRA, Judge Alonzo held that Phillips' claim was not preempted because, while under the HRA, the Human Rights Commission has exclusive jurisdiction over alleged civil rights violations, HRA preemption would only apply if the intentional infliction of emotional distress claim was "inextricably linked with her sexual harassment claim." Judge Alonzo stated, however, that just because the facts alleged by Phillips support both a sexual harassment claim and an intentional infliction of emotional distress tort claim, the overlap does not mean that there is not an independent basis for both claims.

As to the claim of preemption by the WCA, Judge Alonzo opined that, while the WCA provides the exclusive remedy for accidental injuries, including claims of intentional injuries inflicted by a co-worker, it does not preempt certain claims alleging that the employer itself intentionally inflicted the injury on the employee. Judge Alonzo based his conclusion on the fact that a co-worker's intentional conduct is accidental since such injuries are unexpected and unforeseeable from both the injured employee's and the employer's point of view. However, intentional torts are not accidental from the employer's perspective if the employer either directly authorized the behavior or an employer's "alter ego" engaged in the behavior.

Judge Alonzo made it clear that, depending upon the facts presented as the case proceeds, Phillips may find her claim preempted by the WCA.

It should also be noted that the judge dismissed Phillips' claims of negligent infliction of emotional distress and negligent retention and supervision claims, finding that they were both preempted by the WCA.

This opinion did not reach the merits of Phillips' case but, rather, only addressed whether or not the plaintiff had alleged sufficient facts in her complaint to support a common law claim for intentional infliction of emotional distress, independent of the Illinois Human Rights Act or the Illinois Workers' Compensation Act.

Please feel free to contact the attorneys in Heyl Royster's Employment & Labor Practice for more information, or if you are interested an in-house anti-harassment training program for your supervisors.

AMENDMENTS TO THE ILLINOIS HUMAN RIGHTS ACT (775 ILCS 5)

By: Patricia Hall, phall@heylroyster.com

The Illinois Human Rights Act governs claims of discrimination and sexual harassment within a variety of settings. Several notice and procedure changes which may affect the way that employers approach issues falling within the purview of the Illinois Human Rights Act were recently approved by the Governor. Public Act 100-1066, reflecting these changes became effective on August 24, 2018.

Relevant Changes:

Employees alleging a violation under this Act will now have 300 calendar days from the time the alleged violation occurred to file a claim. This is an increase from the former 180 day requirement. *Section 7A-102*.

Commission decisions must now be published within 180 days of the date the decision is reached. This imposes a deadline whereas the prior requirement was "in a timely fashion." *Section 8-102*.

Commission decisions must now be made available on the Commission's website and to online legal research companies within 14 calendar days of publication by the Commission. *Section 8-110*.

The Commission is now required to send out notice to all parties that no exception to its decision was filed by the exception deadline. This notice must be issued within 30 days following the exception deadline. *Section 8A-103*.

If an exception is filed and the Commission declines to review its decision, it must issue a notice of its decision not to review within 30 days after it votes to decline review. *Section 8-110*.

Who: These changes apply to any claimant or respondent involved in an alleged violation filed under the Act on or after the effective date of August 24, 2018.

Employers: The notice restrictions placed on the Illinois Human Rights Commission should provide employers opportunities to hold the Commission more accountable in its duty to issue timely decisions.

How to Proceed: Consistent evaluation of internal policies and procedures will help ensure discriminatory practices are avoided. These policies and procedures will aide in the limitation of potential liability under the Illinois Human Rights Act.

The best way to prevent discrimination is to encourage diversity and implement internal diversity training. For questions, please contact any of the Heyl Royster attorneys in the Employment & Labor Practice.

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