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Fondling a Co-Worker's Breast is Not Sexual Harassment under Title VII

In Brooks v. City of San Mateo (10/23/2000) the plaintiff, a female telephone dispatcher for the City's emergency communications center, alleged that a male dispatcher touched her stomach and, despite her pleas to stop, forced his hand under her sweater and fondled her bare breast while she was taking an emergency call. She immediately reported the incident and, the following day, the City placed the co-worker on administrative leave pending an investigation. During the investigation, the City learned that the co-worker had subjected at least two other female dispatchers to similar conduct. However, neither dispatcher reported the misconduct. The co-worker resigned and later was sentenced to 120 days in jail for misdemeanor sexual assault charges.

The dispatcher sued the City for sexual harassment under Title VII, alleging that the fondling incident was severe and pervasive so as to alter the conditions of her employment and created an abusive working environment. The U.S. Court of Appeals for the Ninth Circuit explained that "an isolated incident of harassment by a co-worker will rarely (if ever)

give rise to a reasonable fear that sexual harassment has become a permanent feature of the employment relationship." Although the court called the actions of the co-worker "egregious," the court noted that the City promptly removed him from his job. As a result, his misconduct could not have permanently altered the terms or conditions of her employment. Accordingly, the court affirmed dismissal of the dispatcher's claims.

The states within each Circuit Court of Appeals are shown at Circuit Map.

FMLA Regulations Again Ruled Invalid

In Brungart v. Bellsouth Telecommunications, Inc. (10/24/2000) the U.S. Court of Appeals for the Eleventh Circuit ruled invalid the provisions of the Family and Medical Leave Act regulations requiring Bellsouth to give prompt notice of ineligibility to employees. The court also ruled that Bellsouth did not retaliate when it terminated the employee one day before she was to begin FMLA leave.

The court ruled that the FMLA regulations enacted by the U.S. Department of Labor exceed the scope of the FMLA statute. The employee was not eligible for FMLA leave because she failed to work the statutorily-required minimum 1,250 hours of service during the prior twelve-month period. Nevertheless, she claimed that the FMLA regulations entitled her to leave because Bellsouth failed to inform her that she was not eligible for leave. The court ruled that the FMLA statute was clear and that the regulation was invalid to the extent that it purported to extend the eligibility provisions of the FMLA to an otherwise ineligible employee.

On the employee's retaliation claim, the court noted the general rule that close temporal proximity between an employee's protected conduct and an adverse employment action generally offers sufficient circumstantial evidence to send a case to a jury. However, the court noted an exception where the decision-maker did not have knowledge that the employee had engaged in the protected conduct. The employee's manager testified that he did not know she had applied for FMLA leave. The employee argued that her manager's truthfulness should be tested by a jury, but the court rejected that argument. Accordingly, the court affirmed dismissal of the plaintiff's case.

Failure to Promote Following Filing of EEOC Charges Did Not Establish Retaliation Under Title VII

In Nguyen v. City of Cleveland (10/11/2000) U.S. Court of Appeals for the Sixth Circuit ruled that temporal proximity alone is not sufficient to establish retaliation under Title VII. The plaintiff, an air pollution control engineer, filed a series of charges with the U.S. Equal Employment Opportunity Commission claiming he was paid less on account of his national origin, Vietnamese, and not promoted to certain management positions. Noting the absence of any evidence supporting a connection between his protected activity and the failure to

promote, the court ruled that the mere failure to promote following the filing of his EEOC charges did not establish retaliatory conduct. Accordingly, the court affirmed dismissal of his claims.

Whether Employees Are Similarly Situated in a Title VII Race Discrimination Claim Must Be Decided by a Jury

In Graham v. Long Island Railroad (10/19/2000) the U.S. Court of Appeals for the Second Circuit ruled that a jury should decide whether Graham, a black employee who had signed a last chance agreement following a positive drug test for cocaine, was treated differently from non-black employees. Following enactment of a drug policy, Graham tested positive for cocaine. He signed a last chance agreement which gave the railroad the right to terminate him for any subsequent positive test for illegal substances or failure to submit to a test. He later tested positive for alcohol and the railroad terminated him.

Graham claimed race discrimination in violation of Title VII. The lower court dismissed the claim finding that disciplinary records showed that black and non-black employees were treated alike in disciplinary proceedings involving alcohol or drug infractions. The court ruled that the employees proffered by Graham to show disparate treatment were not similarly situated.

On appeal, the court ruled that whether two employees are similarly situated generally presents a question of fact that must be resolved by a jury. The court explained that Graham is not required to show that he was identical to his comparators but only that there was a reasonably close resemblance of the facts and circumstances of his and his comparator's cases. The court found that there were similarly situated non-black employees who received multiple last chance waivers before being dismissed compared with Graham who was fired for violating his only waiver. Therefore, the court reversed summary judgment and reinstated Graham's claims.

Court Rejects "Inhospitable Environment" Exception to Title VII

In Conner v. Schrader-Bridgeport International, Inc. (9/13/2000) the U.S. Court of Appeals for the Fourth Circuit rejected an "inhospitable environment" exception under Title VII. The plaintiff was a female factory worker. Over a three year period, she offered evidence that male employees mocked her when her machine malfunctioned, her supervisor asked her inappropriate questions with sexual innuendo, she and other women were forced to mop the factory floor and were spoken to in a condescending manner, she was singled out for discipline relating to absences caused by, among other things, uterine hemorrhaging, her supervisor forced her to remove rags used to cover her blood-stained pants, she was timed with a stop watch when she went to the bathroom, she was assigned to machines at opposite ends of the factory requiring her to run back and forth between them, she was given less training than male machine operators and, in response to complaints of unfair treatment, she was told she would be fired if she ever mentioned the words "sexual harassment." The

employee sued claiming wrongful termination on account of her sex in violation of Title VII, creating a hostile work environment and willful violations of the Equal Pay Act. A jury returned an award of $20,000 in compensatory damages and $500,000 in punitive damages on her hostile environment claim and $1,700 on her Equal Pay Act claim. However, the court set aside the verdict finding that the evidence did not support her sexual harassment claim. The lower court noted that the factory floor was an open "rugged environment" with physically demanding work and that "those of us who work in refined office jobs where socially-imposed speech codes predominate must not lose sight of the fact that Title VII was not meant to transform the rough into the sublime."

On appeal, the court rejected the lower court opinion stating that there was no "inhospitable environment" exception to Title VII's mandate that employers may not discriminate based on employees' sex. The court found ample evidence supporting the jury's finding of severe or pervasive conduct sufficient to constitute a hostile work environment. Accordingly, the appeals court reinstated the jury's verdict.

Hurt Feelings and Wounded Pride Do Not Support Constructive Discharge Claim Under ADEA

In Suarez v. Pueblo International, Inc. (10/11/2000) the U.S. Court of Appeals for the First Circuit ruled that a senior executive could not establish a constructive discharge under the Age Discrimination in Employment Act where he resigned following a restructuring, relocation of his direct reports and instructions that he knock on doors like a traveling salesman. The court noted that, to establish a claim of constructive discharge, the working conditions imposed by the employer must be so onerous, abusive or unpleasant that a reasonable person would feel compelled to resign. The executive's treatment did not rise to that level. Noting that the constructive discharge standard does not guarantee a workplace free from the usual ebb and flow of power relations and inter-office politics, the court noted that "the workplace is not a cocoon, and those who labor in it are expected to have reasonably thick skins -- thick enough, at least, to survive the ordinary slings and arrows that workers routinely encounter in a hard, cold world." Accordingly, the court affirmed dismissal of the executive's claims.

Senior Executive Who Orchestrated Mass Departure of Employees Owed Fiduciary Duty to Former Employer

In GAB Business Services, Inc. v. Lindsey & Newsom Claim Services, Inc. (8/29/2000), as amended by a Modified Opinion (9/26/2000), GAB sued its former regional vice president and his new employer, Lindsey, following his soliciting 17 key employees and convincing them to resign and join him in new positions at Lindsey. Upon receiving an offer to join Lindsey, the regional vice president secretly approached two managers of GAB and flew them to meet with Lindsey's president. Within months, the regional vice president compiled a list and contacted 15 employees and negotiated new salaries with each. He then presented

the entire package to Lindsey as an "all or nothing deal." He also instructed the group to keep their planned defection secret from GAB. Following Lindsey's agreement to hire all 18 of them, they simultaneously announced their resignations. The mass resignations included the entire corporate skeleton of the western region and severely crippled GAB's operations.

Ten days later, GAB sued for damages and an injunction alleging that the regional vice president violated a fiduciary duty not to engage in conduct harmful to GAB. GAB obtained a temporary restraining order and preliminary injunction restraining Lindsey's use of GAB's customer list, pricing information and other confidential information and from interfering with GAB's existing customer contracts or employment relationships. After a long trial, a jury found that no fiduciary duty was owed by the regional vice president and dismissed the claims.

On appeal, the California Court of Appeal ruled that a corporate officer participating in management who exercises some discretionary authority is a fiduciary of the corporation as a matter of law. The court further determined that the regional vice president owed a fiduciary duty to GAB because he exercised significant managerial discretion including supervision of 34 employees who in turn supervised over 400 other employees. The court determined that, as an officer of GAB, he used his insider knowledge of employee skills and salaries to recruit valued employees away from GAB and into jobs with its competitor. Accordingly, the court remanded the case for a new trial on the claim of breach of his fiduciary duty.

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