ROBINSON & COLE LLP
LABOR, EMPLOYMENT AND BENEFITS

e-News

E-news is an electronic newsletter reporting recent developments in labor, employment and benefits law.

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Supervisors' Failure to Report Inappropriate Conduct Allows Title VII Sexual Harassment Claim to Go to Trial Despite Employee's Failure to Follow Reporting Policy

Audrey Brunson, an African-American manager working for Bayer, claimed that Lewis White, an African-American hourly employee, made inappropriate comments and gestures of a sexual nature to her. At the time, Bayer had a sexual harassment policy that required all supervisors to report incidents of sexual harassment to upper level managers. Brunson did not report White's conduct. Instead, she spoke to two floor supervisors who were neither Brunson's nor White's supervisors. Brunson initially resisted reporting White because she feared a reaction from other African-Americans who might feel that, as a manager, she should not report another African-American. But a few months later, Brunson reported White's conduct to Human Resources. Bayer immediately transferred Brunson to another area, placed White on paid leave, and conducted an investigation. The investigation revealed that three other women had previously reported inappropriate conduct by White;

two of those reports had been made to the same two floor supervisors with whom Brunson had spoken.

As a result of Bayer's investigation, White was discharged. Brunson felt ostracized by co-workers and refused to return to work unless Bayer placed her in a different building where she would not be in daily contact with any of her co-workers. Bayer conducted an investigation of Brunson's claimed "cold shoulder" treatment that included interviews with 34 co-workers but could not corroborate Brunson's claim. Bayer repeatedly requested Brunson to return to work, but she refused. After she was terminated for refusing to return to work, Brunson sued Bayer for sex and race discrimination, retaliation, negligent supervision, and infliction of emotional distress. Bayer sought to dismiss Brunson's claims.

In Brunson v. Bayer Corporation (12/27/02) the U.S. District Court for Connecticut refused to dismiss the sexual harassment and negligent supervision claims. The court found that, even though Brunson failed to follow Bayer's policy for reporting harassment, she had reported the inappropriate conduct to two supervisors who had a duty to take action but failed to do so. As to the negligent supervision claim, the court rejected Bayer's argument that Title VII provided the exclusive remedy and concluded that because of the previous reports, a jury could find that Bayer knew or should have known of White's propensity to engage in inappropriate conduct but failed to properly supervise him. The court dismissed Brunson's retaliation and termination claims finding that the "cold shoulder" treatment Brunson received from other African-Americans following White's termination could not be attributed to Bayer when Brunson did not report it timely to the company, the company investigated her claim, and White's discharge was a consequence of Brunson's refusal to return to work.

Dismissal of Earlier Lawsuit Barred Challenge to Discharge

Cynthia Swaida filed four complaints against Gentiva Health Services challenging Gentiva's decision to terminate her employment. First, Swaida filed an age discrimination complaint with the Massachusetts Commission Against Discrimination that was dismissed for lack of probable cause. Second, Swaida filed a lawsuit in Barnstable Superior Court, claiming that her discharge was in retaliation for having cooperated with an investigation by the U.S. Department of Labor. There was no mention of the age claim in that lawsuit. Gentiva removed this claim to the U.S. District Court for Massachusetts, where it was dismissed after Swaida failed to respond to Gentiva's request for a dismissal. Third, Swaida filed a complaint with the U.S. Equal Employment Opportunity Commission, alleging that her discharge was in violation of the Age Discrimination in Employment Act. Finally, after receiving a "right to sue" letter from the EEOC, Swaida filed her fourth lawsuit in federal court, alleging age discrimination. Gentiva argued that Swaida's lawsuit was untimely, as it was filed almost five years after her discharge. Gentiva also argued that, even if the lawsuit had been timely, it was barred because of the dismissal of Swaida's first lawsuit.

In Swaida v. Gentiva Health Services (12/30/02) the U.S. District Court for Massachusetts

dismissed Swarda's case, ruling that, even though Swarda's state court lawsuit did not contain an age discrimination claim, she had known of that cause of action (she had filed a complaint with the MCAD on that basis) and could have asserted that claim in her first lawsuit. In addition, both lawsuits challenged the same termination and both involved the same parties.

Statute of Limitations for Constructive Discharge Claim Begins when the Employee Gives Unequivocal Notice of Resignation

Mary Flaherty worked for Metromail Corporation for 20 years, the last 10 as a salesperson. She was supervised by a series of five different managers, all reporting to Senior Vice-President Mike Reynolds. According to Flaherty, Reynolds started a campaign to force her to quit. One of her supervisors, Rick Lane, repeatedly told Flaherty that women did not belong in the workplace, that women should be barefoot and pregnant, and that he would never play golf with a woman. Lane transferred Flaherty's largest accounts to male managers. Two years later Lane was replaced by Beth Hurwitz. Flaherty alleged that Reynolds told Hurwitz that Flaherty was "too old and grandmotherly" and directed Hurwitz to terminate Flaherty. When Hurwitz refused to comply, she was transferred to a different division. The new supervisor, Sam Cardonsky, refused to give Flaherty the same level of supervision he gave to male account managers and refused to meet with her customers with a consequent decrease in Flaherty's sales. Cardonsky warned Flaherty that if she did not meet her sales numbers for the year she would be discharged. The next year, Reynolds and Cardonsky had left Metromail and Flaherty believed her warning notice had been rescinded. However, according to Flaherty, her new supervisor, James Kaiser, transferred a lucrative account from Flaherty to a younger woman. Kaiser also refused to meet with Flaherty's customers. Flaherty told Kaiser that she was interested in looking into retirement. The next month, Flaherty notified Kaiser of her intent to retire in four months.

Flaherty filed a claim with the U.S. Equal Employment Opportunity Commission and then sued Metromail for sex and age discrimination under Title VII and the Age Discrimination in Employment Act, claiming that she had been constructively discharged because her work conditions were so intolerable. Metromail argued that Flaherty's lawsuit was not timely, asserting that the EEOC's 300-day limitations period for filing those claims began to run when Flaherty received a warning from Cardonsky. In Flaherty v. Metromail Corporation (12/19/02) the U.S. Court of Appeals for the Second Circuit disagreed with Metromail and ruled that Flaherty's complaint was filed timely. The court determined that Cardonsky's warning notice was not a definite notice of termination and could not mark the start of the limitations period. The court explained that in a constructive discharge claim the employee is the one who knows when the conditions are so intolerable as to force him or her to leave and, thus, the limitations period begins to run when the employee gives an unequivocal notice of resignation. Measured from the date of Flaherty's notice of resignation, her lawsuit was timely filed within the 300-day limitations period.

Court Rejects Resignation Date as the Start of Statute of Limitations for Racial

Harassment Claim

Jaqueline Lassiter, an African-American female, sued her former employer, the Massachusetts Bay Transportation Authority, claiming violation of the Equal Pay Act because two white males earned higher compensation than her and race discrimination under Title VII due to incidents of racial harassment that Lassiter claimed forced her to resign from her job. In Lassiter v. Massachusetts Bay Transportation Authority (1/3/03) the U.S. District Court for Massachusetts ruled that Lassiter's claims were time-barred. Under the EPA, Lassiter had three years to file an action. Her last paycheck was on August 28, 1998 and her September 6, 2001 complaint was filed about a week after the expiration of the three year period. In addition, the court found that the two white males who earned more than Lassiter had seniority over her and the law does not prohibit an employer from applying different standards of compensation pursuant to a bona fide seniority system. The racial harassment claims also were found to be untimely, because the last improper acts occurred four years earlier. Lassiter claimed that she was constructively discharged because of the racially hostile work environment and that her resignation, which was on September 11, 1998, was the date from which the three year period should run. The court disagreed, noting that the only conduct in the year preceding the resignation was Lassiter's claim that the supervisors did not properly investigate her complaints. The resignation date, coming a year after the last act of racial harassment, was not the proper date for determining the start of the statute of limitations.

Breast Cancer is Not Necessarily a Disability under the ADA

Mary Ann Pimental, a licensed registered nurse, worked as a manager for the Dartmouth-Hitchcock Clinic. Pimental was diagnosed with breast cancer and she was given eight months of leave. While Pimental was on leave, DHC reorganized its management team and Pimental's position was eliminated. Pimental applied for other positions within DHC, but was hired only for a part-time job with no benefit eligibility.

Pimental continued to apply for other positions at DHC. When she was not hired for any DHC positions, she secured a job as a school nurse and resigned from DHC. Pimental then sued DHC claiming that she was not hired into any of the positions she sought (or made eligible for benefits) because of her breast cancer, in violation of the Americans with Disabilities Act. In Pimental v. Dartmouth-Hitchcock Clinic (12/30/02) the U.S. District Court for New Hampshire found that Pimental failed to establish a case of disability discrimination under the ADA. The court recognized that breast cancer is an "impairment" under the ADA, but noted that merely having an impairment does not mean that a person is disabled. Citing to the U.S. Supreme Court's decision in Toyota Motor Manufacturing, Kentucky, Inc. v. Williams (reported in the 1/14/02 issue of e-News), the court stated that the ADA requires that "those claiming the Act's protection must prove a disability by offering evidence that the extent of the limitation caused by their impairment in terms of their own experience is substantial." The court rejected Pimental's claim that she was substantially limited in her ability to care for herself, sleep, and concentrate because the

evidence indicated that medications reduced those conditions. While there was evidence that chemotherapy induced early menopause and prevented Pimental from reproducing, the court noted that Pimental, who was the mother of two young children, had not presented any evidence of wanting to have more children. Because the court decided that Pimental's condition did not result in a substantial limitation of any major life activity, the court also rejected Pimental's argument that, even if she was not "disabled," she was entitled to protection under the ADA as having a "record of an impairment" or being "regarded as having an impairment."

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