ROBINSON & COLE LLP
Labor, Employment & Benefits

Broader Test of Supervisor Status for Hostile Work Environment Claims under Title VII

Yasharay Mack, an African American woman, worked as an elevator mechanic's helper for Otis Elevator Company. James Connolly, the mechanic-in-charge, repeatedly made comments about Mack's appearance, calling her "the most attractive helper" and telling her that she had a "fantastic ass," "luscious lips," and "beautiful eyes." Connolly once grabbed Mack by the waist, pulled her onto his lap, and touched her buttocks as he tried to kiss her. In addition, Connolly remarked that "spics," "n---ers" and "women" did not belong in the elevator business.

Otis had a policy prohibiting racial discrimination or sexual harassment, instructing employees to report improper conduct to their supervisor "unless s/he was the alleged harasser." Otis also had an 800 number to report complaints. Mack did not report Connolly's conduct through the 800 number, but she complained to Connolly's supervisor (who was not on-site) and asked to be transferred to a different department. Mack also asked the union steward for a transfer. After Connolly told Mack that he would get away with everything, Mack's father contacted a union representative. A meeting was held between Mack, her father, and two union representatives. The representatives promised an investigation and offered Mack a transfer to another site. Mack never returned to work. Instead she filed a lawsuit against Otis alleging a hostile work environment in violation of Title VII, constructive discharge, and retaliation. Otis asserted that it was not strictly liable as Connolly was not Mack's supervisor and that she did not follow Otis's policy. The trial court agreed with Otis and dismissed the case. Mack appealed.

In Mack v. Otis Elevator Company (4/11/03) the U.S. Court of Appeals for the Second Circuit reinstated the hostile work environment claim. The court ruled that, even if he could not hire, fire, demote or promote, Connolly was Mack's supervisor. He directed and oversaw her work assignments and was the senior employee at the work site. The court explained that the issue in determining supervisory status is not whether the employer has given the employee the power to make economic decisions (to hire, fire, demote, promote or transfer), but whether the authority granted by the employer enhanced the employee's ability to create a hostile work environment. Under that standard, Connolly was aided by the authority vested as "mechanic-in-charge" and Mack's claim could proceed to trial.

Employee Fired after Disagreeing with Supervisor Cannot Show Retaliatory Discharge under ADA

Candice Mitchell was a grant coordinator for Iowa Protection and Advisory Services, a non-profit agency that provides advocacy and support services for people with disabilities. Iowa P & A operated the Partners in Policymaking Program, a six-month advocacy program. Mitchell was responsible for reviewing applications to the Partners Program to determine what accommodation would be needed by the applicant if selected to participate. Mitchell received applications from persons who, in addition to their developmental disabilities, had been charged with sexual offenses or had engaged in sexually inappropriate conduct. Sylvia Piper, Mitchell's supervisor, instructed Mitchell not to consider those applicants because of the risk of liability. Mitchell told Piper she believed it would be discriminatory to exclude those individuals from the applicant pool and refused to do so, instead forwarding the applications to the Planning Committee. Two of the applicants were later selected to the Partners Program. Five days later, Mitchell was discharged. She sued Iowa P & A under the Americans with Disabilities Act claiming her termination was in retaliation for refusing to engage in discrimination. Iowa P & A responded that Mitchell's discharge was prompted by budget cuts. In Mitchell v. Iowa Protection and Advocacy Services, Inc. (4/15/03) the U.S. Court of Appeals for the Eighth Circuit ruled that Mitchell had presented no evidence to connect her termination to her argument with Piper. The persons involved in the termination decision were not aware of Mitchell's exchange with Piper. Also, the short time lapse between the argument and her discharge was insufficient to support a retaliation claim.

Employee with Chronic Pancreatitis Is Not Disabled under ADA

William Waldrip worked at a General Electric plant where he operated heavy machinery. Waldrip was diagnosed with chronic pancreatitis, a condition that can cause bleeding, death of the pancreatic tissue, and pancreatic cancer. To treat his condition, Waldrip was prescribed medication, which carried a warning against operating heavy machinery. Three years later, Waldrip disclosed his use of prescription medication to a company nurse, who asked him to bring in his prescription bottles. The company doctors, noting the warning label against use of heavy machinery, told Waldrip he could not work while under the influence of the medications. Waldrip claimed he had been fired and did not return to work. He then filed a disability discrimination claim under the Americans with Disabilities Act.

In Waldrip v. General Electric Company (4/1/03) the U.S. Court of Appeals for the Fifth Circuit ruled that Waldrip's condition was not a disability. Waldrip claimed that his chronic pancreatitis substantially limited the major life activity of "eating." While the court acknowledged that chronic pancreatitis is a physical impairment and that eating is a major life activity, it found that Waldrip had not presented evidence that *his* condition substantially limited *his* eating. The only evidence of substantial limitation was Waldrip's own testimony that his eating and digestion were affected and that of his doctor that when the pancreatitis flared up Waldrip would need to take time off from work. The court found that Waldrip's conclusory opinion was not sufficient and that the doctor's testimony about time off did not establish a limitation on eating.

No FMLA Claim for Employee on FMLA Leave Who Violated Company Policy

Viengsamon Pharakhone was a production technician at a Nissan automobile plant. After the birth of his child he submitted a request for leave under the Family and Medical Leave Act. Pharakhone claimed to have told his supervisor, Rodney Baggett, that during his leave he would work at the restaurant recently purchased by his wife. Nissan had a policy prohibiting outside employment of any kind without prior approval. On the first day of Pharakhone's leave, Baggett learned that Pharakhone was working at the restaurant and informed James Bowles, a Human Resources representative. Baggett and Bowles told Pharakhone that company policy prohibited him from working at the restaurant. Bowles sent Pharakhone written notice to that effect, warning him of termination if he violated the policy. During his four weeks of leave, Pharakhone continued to work at the restaurant. When he returned to work at Nissan, he was discharged. Pharakhone then filed a claim for violation of the FMLA. In Pharakhone v. Nissan North America, Inc. (4/2/03) the U.S. Court of Appeals for the Sixth Circuit rejected Pharakhone's claim. The court determined that Pharakhone was not discharged for taking FMLA leave, but for violating company policy. Acknowledging that the right to reinstatement upon return from FMLA leave is "not absolute," the court ruled that an employer is not required to reinstate an employee if application of a uniformly-applied rule resulted in the employee's discharge.

Newspaper Carriers Are Independent Contractors Not Entitled to Unemployment Compensation

In Athol Daily News v. Board of Review of the Division of Employment and Training (4/15/03) the Massachusetts Supreme Judicial Court determined that newspaper carriers are independent contractors and thus not entitled to unemployment compensation benefits. The court observed that the agreement between the carriers and the News required only that newspapers be delivered in good condition and by a certain time each day. The carriers were free from the News's control or direction because they were free to choose their method of delivery, to expand their number of customers, and to hire assistance to help with their deliveries. Although the carriers' services were performed in the usual course of the News's business, they performed the services outside all of the News's places of business. The nature of the newspaper delivery business does not make the carriers dependent on the News to continue their services. The court distinguished this case from Boston Bicycle Couriers, Inc. v. Deputy Director of the Division of Employment and Training (reported in the 12/2/02 issue of

e-News), in which the Appeals Court affirmed a decision that bicycle couriers were employees of a delivery business and not independent contractors because the on-call pick-up and delivery business was virtually indistinguishable from the services performed by the bicycle couriers themselves. Here, the newspaper carriers were free to advertise their services and to deliver newspapers to anyone who contracts with them, so they were not limited to a single employer. The court overturned the DET's decision that the News had failed to meet its burden of establishing each of these elements and ruled that no employment relationship existed between the carriers and the News.

Bill to Repeal Sexual Orientation as a Protected Class in filed in New York

In December 2002, New York became the 13th state to enact protections from discrimination in housing, employment, education and public services on the basis of sexual orientation. A bill to repeal the newly-amended New York Human Rights Law was introduced on March 25, 2003.