ROBINSON & COLE LLP

Labor, Employment & Benefits

Female Supervisor's Hugs and Compliments toward Female Employee Not Actionable Harassment under Title VII

Roberta Mann, a customer service representative for Sovereign Bank, alleged that her supervisor, Mary Jo Lima, sexually harassed her by repeatedly complimenting her, touching her on the hand "in a massaging motion," and repeatedly asking her for a hug, despite Mann's protests. Mann complained to Sovereign Bank's human resources department and Lima was given an oral reprimand. Several months later, Mann was absent from work for a week following an incident where Lima sat on Mann's desk and complimented her, and Mann subsequently resigned her employment. Mann sued Sovereign Bank under Title VII, alleging sexual harassment. Sovereign Bank responded that Lima's actions were insufficiently severe to constitute harassment and that, even if the harassment occurred, the bank promptly investigated and corrected the conduct.

In Mann v. Lima (10/10/03), the U.S. District Court for Rhode Island agreed that Lima's statements and advances were insufficiently severe or pervasive to meet the standard for sexual harassment, and dismissed the case. The court noted that female-on-female sexual harassment claims "are about as common as a baseball post-season that includes the Cubs and the Red Sox." The court concluded that, although Lima's actions were "unwelcome, tasteless, inappropriate and unprofessional," they were never threatening, nor was there evidence that Mann was intimidated by the conduct. The court noted that the request for a hug, although inappropriate, "is not unheard of and is one of the more innocuous forms of physical touching."

Employee's Failure to Timely Complain of Harassment Bars Liability under Title VII

Lucianne Walton, a salesperson for Ortho-McNeil Pharmaceutical, waited nearly three months to first report to the human resources department allegations of sexual harassment against her supervisor. Within a week following the report, the company investigated the allegations. Following a three-day investigation, the alleged harasser was suspended until he was terminated several months later. Walton sued Ortho-McNeil for supervisory sexual harassment. In response, Ortho-McNeil asserted the affirmative defense that it exercised reasonable care to prevent any inappropriate behavior and promptly corrected any sexually harassing behavior in the workplace, and that Walton unreasonably failed to take advantage of any preventative or corrective opportunities. The trial court dismissed Walton's claim and she appealed.

In Walton v. Johnson & Johnson Services, Inc. (10/20/03), the U.S. Court of Appeals for the Eleventh Circuit found that Ortho-McNeil was entitled to avail itself of the affirmative defense based on the fact that it distributed an anti-harassment policy and acted promptly when the salesperson reported her allegations. Although Walton claimed that the sexual harassment policy was insufficient because it did not name a specific person to whom a report should be made, the appeals court disagreed, finding that the policy adequately informed victims that complaints would be handled by the company's human resources department. With respect to whether Walton failed to act reasonably, Walton claimed that she told the supervisor his advances were unwelcome, that she filed a complaint five days after the last harassing act, that any delay was reasonable because she feared for her job and future promotion, and that she was intimated by a gun the supervisor showed her in his apartment. Although the court noted that severe harassment can be traumatic, it found that the victim "has an obligation to use reasonable care to avoid harm whenever possible," and that Walton could have avoided most, if not all, of the actual harassment by reporting the supervisor's behavior. The court concluded that, "by failing to [report the harassment], Walton did not give Ortho an opportunity to address the situation and prevent further harm from occurring."

Executive May Not Be Entitled to Severance Based on Misconduct

Stephen Prozinski worked as the Chief Operating and Financial Officer for Northeast Real Estate Services. At the time of his hire, Prozinski and Northeast executed a letter, signed by both parties, which offered employment to Prozinski and detailed Prozinski's entitlement to certain severance pay and benefits. Thereafter, Northeast received complaints from three female employees that Prozinski had created a hostile and discriminatory working environment. Northeast terminated Prozinski on grounds of financial misconduct and sexual discrimination and harassment. Northeast later learned that Prozinski also had harassed a fourth female employee and that he had used company computers to distribute pornography. Prozinski sued Northeast alleging a variety of claims, including breach of the employment agreement for non-payment of the severance. Northeast countersued alleging that Prozinski breached his fiduciary duties by engaging in financial improprieties and discriminating against female employees. Northeast also argued that Prozinski's misconduct constituted a material breach of his employment contract, thereby nullifying Northeast's obligation to provide him severance. The Massachusetts Superior Court ruled in favor of Prozinski prior to trial and Northeast appealed.

In Prozinski v. Northeast Real Estate Services, LLC (10/16/03), the Massachusetts Court of Appeals ruled that the trial court correctly determined that there was an enforceable contract between Prozinski and Northeast providing for severance benefits. However, the appeals court found that the trial court should not have granted judgment in favor of Prozinski because there was an unresolved question regarding whether his misconduct amounted to a breach of his fiduciary duty to the company and a material breach of his employment contract. The appeals court concluded that "as COO-CFO, Prozinski owed Northeast the duties of loyalty, of utmost good faith, and of protecting Northeast's interests." Therefore, the appeals court ruled that a jury should have been permitted the opportunity to consider whether Prozinski breached his fiduciary duties by placing his own interests above those of the company and whether his conduct amounted to a material breach of his employment contract, which would terminate Northeast's obligation to pay severance benefits.

Court Rules that Employee Terminated after Incorrect Background Check Can Proceed to Trial

Advest hired Comprehensive Information Services to perform a background check on one of its employees, Robert Feldman. In response, Comprehensive provided Advest with a criminal background report accurately listing criminal charges against Feldman, but mischaracterizing some charges as felonies. After receiving the report, Feldman was terminated. Feldman sued Comprehensive, alleging he lost his job because of inaccuracies in the report.

In Feldman v. Comprehensive Information Services, Inc. (10/6/03), the Connecticut Superior Court dismissed Feldman's allegation of reckless libel, finding that Feldman failed to prove that Comprehensive acted with reckless disregard for the truth of the criminal report. The court also dismissed Feldman's claim that Comprehensive willfully violated the Fair Credit Reporting Act because Feldman failed to show that Comprehensive knowingly and intentionally acted in conscious disregard for his consumer rights, offering no evidence to refute an affidavit by the president of Comprehensive that he did not intend or know about the report's inaccuracies. However, the court found that questions remained regarding whether Comprehensive negligently failed to appropriately ascertain the truth or falsity of the statements in the report and so did not dismiss that claim. The case settled before trial.

Security Guard Fired for Accepting Food May Show Race Discrimination

Roland Cockfield, the only African American guard at a Pratt & Whitney plant, was terminated for accepting free food from a cafeteria worker in violation of the company's conflict of interest policy. When confronted, Cockfield admitted that he had been receiving free food from a cashier who had cancer as thanks for Cockfield's aid in getting her a handicapped parking permit and helping her lift heavy objects. Co-workers testified that other security guards also received free or discounted food from cafeteria workers. Other than one white employee who was terminated for stealing food, but later reinstated, no one else was

disciplined for that conduct. Cockfield sued Pratt & Whitney under Title VII, alleging that he was terminated on the basis of his race. Pratt & Whitney responded that Cockfield was terminated for violating the company's conflict of interest policy, which prohibited employees from accepting, among other things, gifts or other forms of compensation from suppliers doing business with the company.

In Cockfield v. United Technologies Corporation (10/7/03), the U.S. District Court for Connecticut concluded that Cockfield had presented sufficient evidence that his termination was a pretext for race discrimination, because white employees were not discharged for similar offenses. Based on his co-workers' testimony, the court found that the company was aware of the "pervasive practice" of employees getting free food, but the "drastic disciplinary step of terminating an employee was never used before." The court rejected Pratt & Whitney's argument that Cockfield violated its conflict of interest policy, because the cashier paid for any shortfall out of her own pocket and was not improperly seeking favorable treatment for her own employer.

Employee May Satisfy 12-Month Requirement for FMLA Eligibility Even if Out on Leave

Kimberly Babcock worked for BellSouth Advertising and Publishing Company as an outside sales representative selling yellow page advertisements. She began experiencing health problems, including headaches, dizziness, sinus trouble, exhaustion, and depression. Her physician diagnosed early stages of cancer and suggested that Babcock take six weeks off from work. Babcock discussed this with her supervisor and a BellSouth benefits manager, who instructed Babcock on the paperwork that her physician needed to complete. Babcock's physician faxed in the paperwork. Thinking that she had been approved for a six week leave, Babcock left town for ten days. When she returned home, she found letters from BellSouth stating that BellSouth would only approve a short term disability leave for five days, that she should return to work within ten days, and that if she failed to do so she could be terminated. Babcock contacted BellSouth's benefits manager and requested leave under the Family and Medical Leave Act, but the benefits manager said that Babcock was not eligible because she had not worked for BellSouth for twelve months. Babcock did not return to work and BellSouth terminated her employment a few days later. Babcock sued BellSouth for terminating her employment in violation of the FMLA. A jury found that BellSouth violated Babcock's FMLA rights and awarded her $92,000. BellSouth appealed.

In Babcock v. BellSouth Advertising & Publishing Corporation (10/28/03) the U.S. Court of Appeals for the Fourth Circuit affirmed, ruling that Babcock proved that she was an eligible employee under the FMLA and, therefore, was entitled to FMLA leave. The court explained that an eligible employee must be employed for at least 12 months and perform at least 1,250 hours of service within the previous 12 month period. Babcock worked the requisite 1,250 hours. But BellSouth asserted that, because Babcock left work thinking that her leave had been approved, she had not been employed for at least 12 months. Babcock's one year anniversary was during her 10 days of leave before her termination. The court noted that BellSouth had instructed Babcock to return to work after the ten day leave, and therefore she was still employed during that time. Because she was still employed, the time counted toward her 12 months of required employment, making her eligible for FMLA leave.

Another LEB Attorney Joins Robinson & Cole

We are pleased to announce that Michael G. Petrie has joined R&C's Labor, Employment and Benefits practice group. Michael concentrates his practice in the areas of employment litigation, affirmative action compliance and labor and employment counseling. He defends employers in a wide range of employment disputes and counsels them on preventive employment practices and litigation avoidance techniques. He can be reached at 860-275-8393 or by e-mail at mpetrie@rc.co mpetrie@rc.comOur LEB practice group now has 41 attorneys.

This is an archive of past issues. As a result, it may contain information that is not current.