ROBINSON & COLE LLP
Labor, Employment & Benefits

Employee Failed To Establish a Prima Facie Case of Sexual Harassment Despite her Manager's Threats of Adverse Action If She Refused To Have Sex with Him

A Costco Wholesale Corporation employee, Jessica Mormol, was told by her manager that if she did not have sex with him, he would not approve her vacation request. Her request for a month long, unpaid vacation was approved even though she did not accede to his request. While she was on vacation, however, the manager threatened to fire her, or transfer her to a different department if she did not cut short her vacation. When she returned from vacation a few days early, her manager offered to allow her to work part-time but punch her time card as if she was working full-time if she would sleep with him, and said he would transfer her if she did not sleep with him. She declined the offer. The next day, the manager issued her a written warning for being late returning from a break. Mormol reported the manager's harassment to her supervisors, who promptly investigated her claim and terminated the manager's employment. Mormol continues to work for Costco.

In Mormol v. Costco Wholesale Corp. (4/6/04), the U.S. Court of Appeals for the Second Circuit ruled that Mormal had failed to establish a prima facie case of sexual harassment under either a quid pro quo or a hostile work environment theory, and affirmed summary judgment in favor of Costco. The court concluded that Mormol had not suffered a tangible job action because she was not fired or transferred and because returning a few days early from a month long unpaid vacation did not constitute a significant change in benefits. The court also ruled that the manager's conduct was not sufficiently severe or pervasive to create a hostile work environment.

Stereotyping about the Qualities of Mothers May Support a Claim of Gender Discrimination under the Equal Protection Clause

Elana Back, a school psychologist, alleged that she was denied tenure and terminated from her employment because her supervisors believed that, as a young mother, she would not devote the necessary time and effort to her job. Back filed suit against her supervisors and the school district claiming gender discrimination in violation of the Equal Protection Clause of the U.S. Constitution. In support of her claim, Back alleged that her supervisors made comments that the job was "not for a mother," and expressed concerns about her ability to balance her work and family. Her supervisors and the school district argued that they never made such comments and that the decision to deny tenure was based on legitimate performance problems. Ruling that stereotyping about the qualities of mothers is a form of gender discrimination, the U.S. Court of Appeals for the Second Circuit in Back v. Hastings on Hudson Union Free School District (4/7/04) decided that Back was entitled to pursue her claims at trial. The court also held that she could prove gender discrimination on this theory without having to offer evidence of how the school district treated fathers.

Employer's Prompt Remedial Action – Although Not Perfect – Was Sufficient to Relieve it from Liability under Title VII and Section 1981

Two white employees of Waste Management of Illinois created a hostile work environment for Travis Williams through their race-based comments and actions. Even though Waste Management had an anti-discrimination policy, Williams did not report the conduct to his managers. On one occasion, Williams denied being harassed when his supervisor, Roy Whittinghill, asked if anyone was hassling him because of his race. It was not until Whittinghill asked Williams for a second time if there had been any racial incidents that Williams finally reported his co-workers' conduct. Whittinghill immediately notified the supervisor of the two men, Mark Baccadutre. Baccadutre confronted the two men who denied the allegations. Baccadutre verbally warned them that the alleged behavior would not be tolerated and told them they would be terminated if the allegations were found to be true. Because Williams claimed that there had been no witnesses to the incidents, Baccadutre did not interview anyone else and concluded there was no way to determine the truth of the accusations. Neither Whittinghill nor Baccadutre documented their actions. Nor did they notify upper management, human resources, or the legal department about the complaint. After Baccadutre spoke to the two men, Williams experienced no further harassment.

Williams sued Waste Management for race discrimination in violation of Title VII and Section 1981. In Williams v. Waste Management of Illinois, Inc. (3/23/04), the U.S. Court of Appeals for the Seventh Circuit acknowledged that Waste Management's response to the complaint was severely flawed by the failure of Whittinghill and Baccadutre to document their actions, Baccadutre's failure to conduct a thorough investigation, and his failure to impose a harsher punishment. Notwithstanding these problems, the court concluded that Waste Management's response had both the purpose***and*** effect of eliminating further race-based harassment. Accordingly, the court ruled in favor of Waste Management.

Sexual Favoritism Was Insufficient to Create Hostile Work Environment but Did Support Claim of Retaliation

Mary Ritchie, a state police officer, filed a complaint against the Massachusetts Department of State Police, claiming that the romantic relationship between her supervisor and a co-worker created a sexually hostile work environment. In Ritchie v. Dept. of State Police (3/19/04) the Massachusetts Appeals Court ruled that Ritchie did not allege sufficient facts to support her claim that the romantic relationship created an atmosphere that was so sexually charged as to create a hostile work environment. The court, however, left open the possibility that in another situation, "the facts and circumstances of the favoritism and the office paramour's conduct" may rise to the level of creating a sexually hostile environment. The court also ruled that Ritchie's claim -- that she experienced adverse employment actions after she complained about the supervisor's relationship with her co-worker -- was sufficient to support a claim for retaliation.

While Eyebrow Piercing May Be Protected as a Religious Belief, the Employee's Rejection of her Employer's Reasonable Accommodation Efforts Doomed her Claim of Religious Discrimination

Kimberly Cloutier has several tattoos and body piercing, including an eyebrow ring. Several years after getting her first tattoo and body piercings, Cloutier learned about the Church of Body Modification, "a congregation whose goal is to achieve acceptance in this given society so that members of the Church may celebrate their bodies with body modification." Although it is not a tenet of CBM, Cloutier believes she should display her body modifications at all times. Accordingly, when her employer, Costco Wholesale, adopted a dress code prohibiting visual facial piercings, Cloutier refused to comply with the dress code. Upon being told that she could either remove the jewelry or go home, Cloutier chose to go home and did not return to work. Indeed, even after Cloutier learned that Costco would permit her to wear a retainer, an unobtrusive clear plastic spacer, so that the piercing would not close, Cloutier refused to report to work.

When Costco terminated her employment, Cloutier filed a lawsuit claiming religious discrimination in violation of Title VII and state law. Costco took the position that CBM was not a legitimate religion for purposes of the state and federal anti-discrimination laws and claimed that, even if it was, Cloutier was not required by CBM to wear her facial jewelry at all times. In Cloutier v. Costco Warehouse (3/30/04), the U.S. District Court for Massachusetts refused to consider Costco's claim that CBM was not a religion. It assumed for purposes of summary judgment that CBM was a religion and that Cloutier's belief that she should not cover or remove her eyebrow piercing was religiously based and sincerely held. However, the court ruled in favor of Costco on the basis that the accommodation offered by Costco (i.e., permitting Cloutier to wear the retainer) was reasonable as a matter of law.

Court Upholds Claims against Company that Relied on Last Chance Agreement and Failed to Inform Employee of FMLA Rights

Richard Conoshenti worked for 17 years as a mechanic for Public Service Electric & Gas Company. To resolve allegations that he kept inaccurate time records and left his shifts early, he signed a last chance agreement. In the agreement, Conoshenti agreed that he would comply with PSE&G's work rules and that any violations would automatically constitute just case for his immediate discharge. Four months later, he sustained injuries in an automobile accident outside of work. Conoshenti informed his supervisor that he needed two weeks to recover. His doctors informed PSE&G that he needed surgery and that he would be unable to work for about five months. PSE&G did not inform Conoshenti of his right to take leave under the Family and Medical Leave Act nor was his leave designated as FMLA leave. When Conoshenti returned to work after a four-month leave, PSE&G terminated his employment for violating his last chance agreement. Conoshenti sued PSE&G for violating his rights under the FMLA. The trial court dismissed his claims and he appealed.

In Conoshenti v. Public Service Electric & Gas Company (4/13/04) the U.S. Court of Appeals for the Third Circuit reinstated Conoshenti's claims that PSE&G failed to advice him of his FMLA rights, thereby interfering with his ability to meaningfully exercise his rights under the FMLA and that PSE&G improperly used his taking of FMLA leave as a negative factor in its decision to terminate his employment.

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