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Labor, Employment & Benefits e-News

JANUARY 8, 2007

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Restaurant May be Liable for Equal Opportunity Harasser under Title VII

Neal Crumity worked at Denny's Restaurant in Hialeah Gardens, Florida. According to Crumity, his supervisor, Judy Pieretti, engaged in inappropriate conduct with him and other male employees, including "patting him on the buttocks, brushing her hands up against his groin, kissing on the lips against his will ... and inquiring about his genitals and sexual practices." Denny's had a sexual harassment policy, which included a reporting procedure. Crumity and Denny's dispute whether Crumity was aware of the policy and whether he reported Pieretti's actions to Denny's Human Resources Department as required by the policy. Thereafter, Crumity took an unpaid leave of absence and, when he returned, his employment was terminated. Crumity filed a discrimination charge with the U.S. Equal Employment Opportunity Commission. The EEOC pursued the case on Crumity's behalf in federal court.

In [EEOC v. R.F.R. Restaurants, Inc.](#) (12/18/06), the U.S. District Court for the Southern District of Florida rejected Denny's defense that Pieretti was "rude, crude, and mean" to all of her employees and did not single out Crumity or other males. The court found that, even if employees of both sexes were exposed to Pieretti's meanness and rude behavior, if male employees were subject to a special kind of offensive conduct because of their gender above and beyond what Pieretti inflicted on female employees, Denny's could be liable under Title VII. The court also found that questions of fact existed regarding whether Crumity

complained to Human Resources and whether his subsequent termination was related to his harassment complaints. Accordingly, the court declined to dismiss Crumity's claims before trial and allowed the case to proceed to a jury.

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Court Declines to Count Employees of Parent Company for FMLA Coverage

Leanne Engelhardt worked for S.P. Richards Company as a customer service representative at its Nashua, New Hampshire, distribution facility. Richards fired Engelhardt following a day and a half absence from work to care for her daughter, who suffered from depression and had attempted suicide. Engelhardt had previously missed work on two other occasions to care for her daughter. Engelhardt sued under the Family and Medical Leave Act and Richards asked the court to dismiss the case because the company employs fewer than 50 employees within 75 miles of Engelhardt's work site, as required to be covered by the FMLA. Engelhardt argued that because Richards is a wholly-owned subsidiary of Genuine Parts Company, an auto parts retailer that employed more than 50 employees at a nearby site, the parent company's employees should be counted. The trial court granted summary judgment for Richards and Genuine, and Engelhardt appealed.

In Engelhardt v. S.P. Richards Co. (12/22/06), the U.S. Court of Appeals for the First Circuit agreed with the trial court that Engelhardt could not count the employees from both work sites because the two companies were not a single "integrated employer" for purposes of the FMLA. The court noted that separate entities will only be deemed to be parts of a single employer for purposes of the FMLA if they meet the "integrated employer test" which looks to such factors as "whether there is shared management, interrelation of operations, centralized control of labor relations, and common ownership." In this case, the court concluded that there was little, if any, evidence to suggest any interrelation between the operations of Richards and Genuine. Englehardt argued that the two were a single integrated employer because Richards adopted Genuine's personal policies on attendance and other conduct and issued employee handbooks and other employment related materials that showed Genuine's logo or letterhead, and that Genuine also issued paychecks to the employees of Richards, which paid an administrative fee to the parent company and reimbursed it for all wages and benefits paid to Richards' employees. However, the court noted that Richards has "separate headquarters, Human Resources department, records and recordkeeping, and separate work sites which fulfilled wholly distinct functions" and the nature of the businesses were distinct, auto parts retailing versus office supplies wholesaling. The court determined that Richards "made its own, independent decisions" regarding hiring, firing, assignment, scheduling, compensation, and application of its employment policies. The court concluded that Richards' use of Genuine's forms, employee benefit plans, and payroll services was "economically advantageous" and not a function of common management and operations. Accordingly, the appeals court ruled that Engelhardt was not protected by the FMLA. [\[back\]](#)

Disclosure of Symptoms Prior to Diagnosis Sufficient for FMLA Notice

David Burnett worked as a detailer for The Habitat Company and was responsible for verifying that apartments, equipment and furnishings were in working order before the arrival of new tenants. As a detailer, his job duties included periodic lifting of heavy objects, such as appliances.

Burnett informed his boss, Sergio Polo, that he was having health problems that required medical attention. Thereafter, Burnett turned down a transfer to a position that would have restricted his access to the restroom, telling Polo that he did not want the job because of his “weak bladder.” Following a week-long absence a few months later, Burnett provided Polo with a copy of a doctor’s order for blood work to substantiate his need for time off. Burnett also informed Polo that his blood work had revealed high cholesterol and a high prostate-specific antigen and that he required further doctor’s appointments to address these issues. During a meeting with Polo, union representatives, and company officials, Burnett stated that he had been “feeling sick” and compared his health to that of his brother-in-law, who had been diagnosed with prostate cancer. Polo later approved a request for leave the next month for doctor’s appointments.

Later that month, Burnett requested leave to undergo a biopsy; however, his documentation was given to a different manager and Polo denied that he received it. Over the next week, Polo issued Burnett several reprimands for substandard work and disruptive behavior. Burnett filed a union grievance and did not return to work until the day of the grievance meeting. His absences resulted in more reprimands and a three-day suspension without pay. At the grievance meeting, Burnett informed Polo and others that the biopsy was scheduled for the next day. After the biopsy, Burnett was given a treatment plan that instructed him to refraining from heavy lifting or strenuous activity, a copy of which Burnett provided to Polo. A few weeks later, Burnett requested time off because he had not been given a light duty assignment and he was worried about violating his work restrictions. At a meeting later in the day with Polo, Burnett stated he felt sick and wanted to go home. After arguing with Polo, he left. Burnett was fired the next day for insubordination. He was diagnosed with cancer 10 days later. Burnett sued Habitat, stating that his termination violated the Family and Medical Leave Act and the Americans with Disabilities Act. The trial court found in favor of Habitat prior to trial and Burnett appealed.

In Burnett v. LFW Inc. (12/26/06), the U.S. Court of Appeals for the Seventh Circuit reversed the trial court’s decision and ruled that Burnett could proceed to trial on his FMLA claim. The appeals court explained that Burnett had provided Habitat with evidence he had a serious health condition protected by the FMLA and that he had satisfied his notice obligation once he provided information sufficient to show that he “likely” had an FMLA qualifying condition. The court noted that, while Burnett’s bare assertion that he was sick and wanted to go home was, in and of itself, insufficient notice of the need for FMLA qualifying leave, the surrounding context of Burnett’s remarks, including his “weak bladder, frequent medical visits, biopsy, his feeling sick, and equating his condition to his brother-in-law’s prostate cancer,” taken together, put Habitat on notice of the need for the qualifying leave.

The appeals court also allowed Burnett’s FMLA retaliation claim to proceed to trial, pointing out that “Burnett’s alleged insubordinate act *was* his request for FMLA leave, or at least a component of it. That is, his demand to go home because he felt ill is the very act that Habitat labels as insubordination.” The court, however, rejected Burnett’s argument that he was fired in violation of the ADA because Burnett failed to show that he was substantially limited in his ability to perform a class or broad range of jobs and, therefore, did not establish that he was disabled. [\[back\]](#)

Speaking Engagement at Gay Church Not Valid Reason for Decision Not To Hire

Paul Scarbrough was the elected superintendent of Morgan County Schools in Tennessee when Tennessee law changed to require school boards to appoint a director. Scarbrough, along with others, applied for the appointment. A short time later, Scarbrough accepted an invitation to speak at a convention of the Metropolitan Community Church of Knoxville, not knowing at the time that its congregation was primarily homosexual. Scarbrough did not fulfill the speaking obligation because of scheduling problems. However, a newspaper reported that Scarbrough was planning to speak at the convention, noting that mostly gays and lesbians attended the church. Scarbrough responded in a letter to the editor that, while he did not condone homosexuality, he was not adverse to associating with homosexuals. Soon thereafter, members of the school board received complaints about his comments. The school board ultimately selected another applicant as the Director of Schools. Scarbrough sued the school board alleging that its decision violated his constitutional right to free speech under the U.S. Constitution. The trial court found in favor of the school board prior to trial, concluding that, because Scarbrough never actually spoke at the conference, his free speech rights were not implicated. Scarbrough appealed.

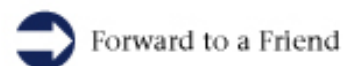
In Scarbrough v. Morgan County Board of Education (11/22/06), the U.S. Court of Appeals for the Sixth Circuit disagreed with the trial court and reinstated Scarbrough's lawsuit. Although Scarbrough never actually spoke at the church, the appeals court determined that his free speech rights were implicated because the school board acted based on his intent to speak. The appeals court concluded that Scarbrough's intent to speak must be protected because retaliation based on disagreement over beliefs was what the First Amendment was intended to prevent. The court determined that sufficient evidence existed that the school board members would have voted for Scarbrough for the director position but for his speech, noting that evidence was presented that two board members told Scarbrough prior to the publication of his letter in the newspaper that they planned to vote for him and did not like the candidate who ultimately received the position. [\[back\]](#)

Termination of Black Manager for Cursing Workers Upheld, Despite Similar Conduct by White Manager, Due to Additional Misconduct

Darryl Haughton, an African American factory foreman, worked for Orchid Automation. After being fired for cursing workers, Haughton sued Orchid for race discrimination, alleging that a Caucasian foreman who likewise cursed workers was not terminated. The trial court ruled in favor of Orchid prior to trial and Haughton appealed.

In Haughton v. Orchid Automation (11/20/06), the U.S. Court of Appeals for the Sixth Circuit agreed with the trial court. The appeals court determined that, while both Haughton and the Caucasian foreman cursed workers, Haughton also falsified time cards and his subordinates requested transfers to avoid working for him. Although the appeals court noted that, the two foremen may have engaged in substantially identical conduct in speaking offensively toward their subordinates or in treating the subordinates with disrespect, but the evidence showed that Haughton routinely falsified his subordinates' time cards. The appeals court further noted that the fact that subordinates did not want to work with Haughton was relevant to Orchid's different disciplinary decisions. However, the court rejected Haughton's efforts to discount the accuracy of witness statements, determining that the

witness statements were not offered to prove the underlying truth of the allegations but rather to demonstrate the state of mind and motive of Haughton's managers in discharging him. Because Orchid could establish its "honest belief" of the facts before it made the decision to fire him, Haughton could not show that Orchid's reasons for his termination were a pretext for race discrimination. The appeals court also rejected Haughton's attempt to challenge the methods of Orchid's investigation, noting that Orchid's investigation need not be perfect. [\[back\]](#)



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