Editor’s Notepad

This edition of our ALFA Labor & Employment Update is distributed to ALFA’s support network. We strive to provide useful, timely, and informative articles that will assist you and your management team with your employee relations and human resources issues.

In May, ALFA’s Labor & Employment Practice Group conducted an extremely successful and well attended seminar in Chicago, focusing on employment practices liability insurance. The presentations were excellent, primarily due to outstanding support and assistance from our client speakers. The interactive nature of the program, including several break-out sessions allowed those in attendance the opportunity to discuss practical solutions to the problems facing our international client base. Congratulations should be extended to our co-chairs, Chad Reis, of our St. Louis member firm, and Shaun Henry of our Harrisburg, Pennsylvania firm, for their excellent work in organizing and planning the seminar.

It’s now time to place on your calendar our Group’s next Labor & Employment seminar to be held October 3 through 5, 2007, at the Ritz Carlton Half Moon Bay Resort in Northern California. The program Chair, Michael Murphy of our Albany, New York member firm, has put together another excellent program with a phenomenal panel of client and ALFA member speakers. The program will be entitled “Employer of the Year” or “The Office”: Which One Are You? and will again involve group and break out sessions to promote interaction among those in attendance. We will also be distributing the invaluable 50-state compendium of employment-related case law and statutes, as well as a federal case law compendium. This effort will be spearheaded by our compendia editor, Sarah Lamar of our Savannah, Georgia member firm.

We hope that you find our newsletter useful, but if at any time you want to stop receiving it, please let us know.

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Punitive Damages, Philip Morris USA vs. Williams

By William M. Trotter

For a number of years the Supreme Court has been struggling to place limits on punitive damage awards in many contexts, including the employment context. Recently, the Court handed down another decision that may be of benefit to employers faced with claims of punitive damages. In Philip Morris USA v. Williams, ___ U.S. ___, 127 S.Ct. 1057 (Feb. 20, 2007) the Court held that a punitive damages award based in part on a jury’s desire to punish a defendant for harming nonparties, amounts to a taking of property without due process. The Court stated that to permit punishment for injuring a nonparty victim would add a near standardless dimension to the punitive damages equation. The jury would be left to speculate, and the fundamental due process concerns over arbitrariness, uncertainty and lack of notice would be magnified. Justice Breyer wrote the majority opinion of the Court, in which Chief Justice Roberts, and Justices Kennedy, Souter and Alito joined.

The jury had found that defendant’s cigarettes caused a death and awarded $821,000.00 in compensatory damages and $79.5 million in punitive damages. The Court vacated and remanded the case because jury instructions had not made it clear that the jury could not award punitive damages for harm to others. The Court quoted from the closing argument of plaintiff’s attorney in which he told the jury to “think about how many other Jesse Williams in the last 40 years in the State of Oregon there have been. . . . In Oregon, how many people do we see outside, driving home . . . smoking cigarettes? . . . [C]igarettes . . . are going to kill ten [of every hundred]. [And] the market share of Marlboros [i.e., Philip Morris] is one-third [i.e., one of every three killed].”

The Court emphasized that in prior cases holding that the Constitution imposes limits both on the procedure for awarding punitive damages and on amounts that are “grossly excessive.” In BMW of North America, Inc. v. Gore, 517 U.S. 559 (1996), the Court held that unless courts impose proper standards to “cabin” the jury’s discretionary authority, punitive damages may deprive a defendant of fair notice of the severity of the penalty, may threaten arbitrary punishments and may impose one state’s or one jury’s policy choice upon neighboring states with different public policies. The Court in Gore emphasized the constitutional need for punitive damages awards to reflect (1) the “reprehensibility” of the defendant’s conduct, (2) a “reasonable relationship” to the harm the plaintiff suffered, and (3) the presence (or absence) of sanctions for comparable conduct.

Then, in State Farm Mutual Auto Ins. Co. v. Campbell, 1538 U.S. 408 (2003), the Court held that a jury could not base a punitive damages award on acts dissimilar to those of a defendant. Otherwise, such punishment would involve a near standardless dimension to punitive damages that would implicate fundamental due process concerns over arbitrariness, uncertainty, and lack of notice. The Court in State Farm further noted the longstanding historical practice of setting punitive damages at two to four times the size of compensatory damages, and stated that such ratios, while not binding, are instructive. It emphasized that single-digit multipliers are more likely to comport with due process. In Philip Morris, however, even though the multiplier was huge, the Court declined to rule whether the punitive damage award was grossly excessive because of the likelihood of a new trial, limiting its holding to the nonparty aspect.

In holding in Philip Morris that due process clause prohibits inflicting punishment for harm to nonparties, the Court acknowledged that juries may consider such harm in determining the first Gore factor of reprehensibility. While a jury can hear evidence of harm to nonparties to show that the conduct that harmed the plaintiff also posed a substantial risk to the public, and therefore was reprehensible, a jury may not go further and use a punitive damages verdict actually to punish a defendant for harm to those nonparties. This distinction raises the practical problem of how to know whether a jury impermissibly punished the defendant for causing injury to others, or permitted such conduct into account under the rubric of reprehensibility. The Court did not address exactly how to resolve this difficulty and left it for lower courts to work out the issues, emphasizing that lower courts cannot employ procedures that create an unreasonable and unnecessary risk of confusion. Although lower courts have some flexibility in determining what kind of procedures to implement to protect against that risk, the Constitution obligates them to provide some form of protection where the risk of misunderstanding is a significant one.

In the specific context of lawsuits against employers, the Court has likewise given guidance as to punitive damages. In Kolstad v. American Dental Ass’n, 527 U.S. 562 (1999), the Court discussed the standards for awarding punitive damages in Title VII cases, noting that punitive damages are permissible only in a subset of intentional discrimination cases where there is a showing of malice or reckless indifference. The Court further discussed the vicarious liability issue of employers for the acts of their employees and stated that employers can escape liability where they have made good faith efforts to comply with Title VII. Taking actions to show such good faith – and preserving evidence of such actions – has therefore become essential to employers.

The prospect of punitive damages awards affects employers in many ways. An employer’s willingness to settle cases and the amounts of such settlements are influenced by the long shadow of potentially ruinous punitive damages awards. The willingness of plaintiffs’ attorneys to file suit often depends on the potential for such awards. The fear is greatest in actions for race discrimination under § 1981 and in actions under various state statutory and common law theories, where, unlike Title VII, caps are not applicable. (Title VII contains a sliding scale of caps on punitive and compensatory damages ranging from $50,000 to $300,000 depending on the number of employees.) Philip Morris may nevertheless assist large, target-defendant employers that constantly face numerous employment discrimination cases under Title VII. Defense counsel should be alert to incorporate the principles of Philip Morris into motions in limine, evidentiary objections at trial and jury instructions.
Could “Staying Connected” Mean Staying On The Clock?

By Jerae Carlson

Jerae Carlson is a trial attorney who assists clients with respect to commercial litigation, including insurance coverage disputes, and employment litigation. Ms. Carlson has represented businesses and individuals in cases involving claims of minority shareholder oppression, breach of contract, breach of fiduciary duty, fraud, misrepresentation, discrimination, harassment, and retaliation. She represents employees as plaintiffs in suits to enforce noncompete and nondisclosure agreements, as well as counsels and advises employers on a variety of employment issues.

Personal digital assistants (“PDAs”) enable us, like it or not, to stay connected with our clients, customers, colleagues, and employees from most any place and at most any time of the day. They can also provide us with quick access to valuable information. For many of us, like it or not, to stay connected with others of an organization. If you either require or permit employees to use PDAs in connection with their jobs beyond their normal workday, heed the warning. Be particularly mindful of how those employees are classified for purposes of the FLSA and consider instituting and enforcing company policies that either restrict the use of PDAs by non-exempt employees outside the workday or require those employees to properly report the time worked so that they can be paid. Alternatively, you might consider using employment contracts to define if, and to what extent, additional work performed via PDAs (or any other medium) to perform work-related activities. These realities raise the issue of whether the employer may be required to compensate employees for work performed via PDAs when the employee would otherwise be considered “off the clock.” The answer to this question will depend on a variety of factors, including whether the employee is covered by the Fair Labor Standards Act (“FLSA”) or a similar state law and the nature of the work performed on the PDA.

The FLSA regulates the national minimum hourly wage that covered, nonexempt employees must be paid, as well as the maximum number of hours those employees may work before becoming entitled to overtime compensation. Generally, overtime compensation must be paid to an employee for each hour worked in excess of forty hours in a workweek at a rate of not less than one and one-half times the employee’s regular rate of pay. However, the FLSA contains exemptions from its overtime pay provisions for several types of employees, including “any employee employed in a bona fide executive, administrative, or professional capacity, or in the capacity of outside salesman” and employees in certain computer-related occupations. In recent years, there has been an increase in actions instituted against employers to recover unpaid overtime compensation for classes of employees on the grounds that the employer misclassified them as exempt employees.

While it seems probable that many employees who are required or permitted to use PDAs during off-hours to stay connected to their jobs will meet an exemption for either “bona fide executive, administrative, or professional” employees or computer employees, it is increasingly likely that nonexempt employees will also be required or permitted to use PDAs as those devices become more prevalent across the national workforce. Moreover, the risk remains that some “exempt” PDA users will have been misclassified and thus, entitled to overtime compensation. The cost of noncompliance with the FLSA can be staggering.

In 2006, the Department of Labor’s Wage and Hour Division, which enforces the FLSA, recovered more than $120.5 million in back wages for FLSA overtime violations. That amount represented approximately 89 percent of all FLSA back wages collected and the number of employees due overtime back wages accounted for approximately 87 percent of all employees due back wages. Federal regulations and the DOL caution:

It is the duty of management to exercise control and see that work is not performed if the employer does not want it to be performed. An employer cannot sit back and accept the benefits of an employee’s work without considering the time spent to be hours worked. Merely making a rule against such work is not enough. The employer has the power to enforce the rule and must make every effort to do so. Employees generally may not volunteer to perform work without the employer having to count the time as hours worked.

At this time, there is no reported case addressing whether time spent off-the-clock on work-related activities performed via a PDA is compensable overtime under the FLSA. However, in evaluating whether any off-the-clock employment-related activity constitutes time worked for purposes of the FLSA, the following factors must be considered:

1. whether the employer controls or requires the hours spent in the particular activity;
2. whether the employer has any freedom to leave the premises during those hours;
3. whether the employer is aware of and approves of the activity;
4. whether the activity is primarily for the employer’s benefit; and
5. whether the employee is free to engage in the employee’s own activities during the hours in question.

The determination of whether “time worked” is compensable requires a very fact specific inquiry. It would not seem that the device or medium used to perform the activity at issue should significantly impact the inquiry. However, to the extent an employer provides a PDA to its employee or reimburses an employee, in whole or in part, for use of a PDA, the employer could more likely be found to be “aware of and approve of the activity” and possibly to “control or require” the additional work. And as a practical matter, an employer who provides PDAs or permits their use to perform work-related activities probably considers the practice to be in the employer’s interest and for its benefit. In such situations, the work-related activity at issue could be found to be compensable.

All indications are that the use of PDAs will continue to increase and may do so at all levels of an organization. If you either require or permit employees to use PDAs in connection with their jobs beyond their normal workday, heed the warning. Be particularly mindful of how those employees are classified for purposes of the FLSA and consider instituting and enforcing company policies that either restrict the use of PDAs by non-exempt employees outside the workday or require those employees to properly report the time worked so that they can be paid. Alternatively, you might consider using employment contracts to define if, and to what extent, overtime work is permitted. No employment contract, however, can contravene the FLSA overtime provisions. In determining your approach, weigh the value and importance of additional work performed via PDAs (or any other medium) to your company against its projected cost to the company and potential liability exposure for FLSA violations.

2 The current federal minimum wage is $5.15 per hour. 29 U.S.C. § 206. The Texas minimum wage law incorporates the federal minimum wage. TEX. LABOR CODE ANN. § 62.051.
5 2006 Statistics Fact Sheet, Wage and Hour Collects $172 Million in Back Wages for over 246,000 Employees in Fiscal Year 2006, http://www.dol.gov/esa/whd/statistics/2006.pdf. A significant amount of the back wages collected were for workers in low-wage industries. It is unclear how much of the overtime back wages collected were due to misclassification of employees.
6 Id.
8 Work that is not requested by the employer, but is “suffered or permitted” by the employer is work time, even if performed away from the employer’s premises, the job site, or at home. 29 C.F.R. §§ 778.223, 785.11, 785.12.
Employers Must Use Care In Posting Job Requirements

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It is not unusual for an employer to hire an individual for a position even though he or she does not possess every one of the posted required qualifications. A recent decision of the U.S. Court of Appeals for the Third Circuit, however, reveals that doing so may increase the employer’s risk of liability for discrimination. In Scheidemantle v. Slippery Rock University, the court held that a plaintiff asserting a Title VII failure to promote or hire claim need not prove that he or she was qualified for the position where the employee selected for that position also lacked the required qualifications.

The Facts

Judy Scheidemantle worked for Slippery Rock University (“Slippery Rock”) as a labor foreman. In March 2003, Slippery Rock posted a vacancy for a locksmith position. The posting reflected that the candidates must have two years of locksmithing experience. Scheidemantle did not have that required experience, but she nevertheless applied for the position along with three male applicants who also did not possess the required two years’ experience. Slippery Rock selected one of the male applicants, Calvin Rippey, who had more relevant experience than Scheidemantle.

Scheidemantle filed a claim with the Equal Employment Opportunity Commission (“EEOC”) alleging age and gender discrimination in violation of Title VII of the Civil Rights Act of 1964 (“Title VII”) and Pennsylvania state law. The EEOC dismissed the claims on the grounds that Scheidemantle could not substantiate her claims of discrimination because Slippery Rock had selected the candidate with the most relevant experience or training. Scheidemantle then filed a lawsuit in the district court.

Thereafter, in April 2004, Slippery Rock promoted Rippey, leaving the locksmith position vacant once again. When Slippery Rock posted the position, the posting reflected that three years’ experience in locksmithing was required. Scheidemantle applied despite the fact that she again did not meet the experience qualification. On this occasion, Slippery Rock did not select an applicant to fill the position on a permanent basis, but instead informally assigned the job to another male employee, Bradley Winrader, who also did not meet the experience qualification.

Scheidemantle filed another complaint with the EEOC in October 2004, and the EEOC again dismissed the complaint. Scheidemantle then amended her federal court Complaint to assert age and gender discrimination claims against Slippery Rock for the 2004 failure to promote, and she also added a claim that the 2004 failure to promote was retaliation for her 2003 EEOC complaint.

The District Court Decision

The district court granted Slippery Rock’s motion for summary judgment and dismissed Scheidemantle’s Complaint. The court concluded that because Scheidemantle was not qualified for the position according to the “objective criteria listed in the position announcements,” she could not establish a prima facie case of discrimination under Title VII. Scheidemantle then appealed the district court’s decision, holding instead that the employee’s failure to meet the requirements under those circumstances did not preclude her from establishing a prima facie case because the fact that she had been promoted despite her lack of qualifications was sufficient to establish that she was “qualified” for the job in the employer’s eyes.

The Third Circuit Opinion

In its opinion reversing the decision of the district court, the Third Circuit identified two guiding principles. First, the court observed that “Title VII is a remedial statute, so it must be interpreted broadly.” Second, the court concluded that “there is a low bar for establishing a prima facie case of employment discrimination.”

The court explained that to establish a gender discrimination claim for failure to promote under Title VII, a plaintiff must satisfy the three-step inquiry from the U.S. Supreme Court’s decision in McDonnell Douglas Corp. v. Green. The court further explained that if a plaintiff successfully establishes a prima facie case, the burden shifts to the employer to articulate a legitimate, non-discriminatory reason for the failure to promote. If the employer articulates such a reason, the burden then shifts back to the plaintiff to demonstrate that the reason is merely a pretext for discrimination.

Slippery Rock argued that Scheidemantle did not satisfy the second prong of the prima facie case because she lacked the required objective qualifications for the position. Even in question (two or three years of experience), Scheidemantle argued that she was not required to meet the objective qualifications of the job postings because she was at least as qualified as the male employees who were selected for the positions.

In finding for Scheidemantle, the court began its analysis by looking at its 2005 decision in Hugh v. Butler County Family YMCA for guidance. In Hugh, the employer promoted a woman despite the fact that she lacked the objective posted qualifications for the job. When the employer subsequently terminated her employment and she sued for gender discrimination, the employer argued that she could not establish a prima facie case because she failed to establish that she was qualified for the job in question. The Third Circuit rejected that argument, holding instead that the employee’s failure to meet the requirements under those circumstances did not preclude her from establishing a prima facie case because the fact that she had been promoted despite her lack of qualifications was sufficient to establish that she was “qualified” for the job in the employer’s eyes.

Applying its holding in Hugh, the court observed in Scheidemantle that “Hugh stands for the proposition that, by departing from a job posting’s objective criteria in making an employment decision, an employer establishes different qualifications against which an employee or applicant should be measured for the position.” According to the court, “[i]f an employer could, with impunity, appeal to objective qualifications to defeat any female job applicant’s challenge to its hire of an objectively unqualified male in her place, discrimination law would be reduced to bark with no bite.”

The court then looked to the qualifications of the employees selected over Scheidemantle “to determine whether Slippery Rock created the inference that something other than the posted objective qualifications was sufficient” to qualify for the position. Because both of the candidates selected for the job lacked the objective qualifications listed in the job postings, the court determined “that something other than the
job postings’ two or three years of locksmithing experience” had satisfied the experience requirement. The court found that “by departing from the objective requirements in its hiring decisions, Slippery Rock thereby established different qualifications by which Scheidemantle – as a protected applicant who suffered an adverse employment decision – met the qualifications prong and completed her prima facie case of discrimination.” The court therefore reversed the judgment of the district court and remanded the case for further proceedings.

Conclusion

As the Scheidemantle decision makes clear, employers must critically assess the qualifications which they identify in job postings. Employers should carefully analyze the position in question in terms of the qualifications needed, and should include in the official job posting only those qualifications which they intend to rely upon in making their selections. It is also of critical importance for employers to recognize that selecting a candidate who does not satisfy each of the listed requirements may result in a waiver of the defense in a subsequent lawsuit that the complaining employee was not “qualified” for the position in question, as the opinion in Scheidemantle can be read to support an inference that the employer did not pay credence to the posting requirements in its selection process.

We send these Alerts to our clients and friends to provide information on recent developments in the law. The Alerts, however, should not be relied on for legal advice in any particular matter.

Outsourcing & Transfer of Undertaking Protection of Employees (TUPE)

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Introduction

In the EU employees are protected against the transfer of their undertaking or the outsourcing of the activity in which they are involved.

What Is TUPE?


The 1977 Directive has been the subject of much litigation, both in the national courts and in the European Court of Justice. One of the areas of controversy in some Member States has been its applicability to outsourcing. There were problems with the meaning of what is a transfer of an undertaking. The 1998 Directive amended the 1977 one, partly with the intention of bringing it into accord with decisions of the European Court of Justice.

When TUPE applies the only difference as far as employees are concerned should be a change in their employer’s identity. Their terms and conditions remain exactly the same (except in relation to occupational pension rights) and their continuity of service is preserved.

When Does TUPE Apply?

One of the most challenging aspects of TUPE is determining when the Regulations apply as there are no hard and fast rules as to when the Regulations apply and each case must be assessed on its facts.

Only an Employment Tribunal can determine definitively whether TUPE applies. The parties can assess all of the factors against the backdrop of the case law and take a view on the likelihood of TUPE applying.

TUPE applies where there is a legal transfer of a business, or a part of a business, as an economic entity (i.e. a fully functioning business). A decisive factor in establishing whether TUPE applies is whether the “entity” retains its identity after the transfer. “Entity” means an organised group of people and assets which are essential to the running of a long-term, stable, economic activity which has specific business objectives.

It is not possible for the parties to contract out of TUPE. The fact that the new contractor already has sufficient staff to undertake the work without needing additional staff is irrelevant, as are the financial implications of TUPE applying.

The Application Of TUPE In Outsourcing Situations:

TUPE can apply to first and subsequent generation outsourcing. In a re-tendering situation the fact that there is no privity of contract between the outgoing and incoming contractors does not prevent TUPE from applying;

TUPE can also apply when a customer brings the provision of outsourced services back in-house;

TUPE may not apply if the undertaking is not readily identifiable e.g. it is spread over a number of departments and is an ancillary part of a wider function;

It is not necessary for any or a significant number of assets to transfer for TUPE to apply e.g. in labour intensive undertakings.

The Courts have taken a multi-factoral approach to determine whether an entity is transferred in that all the factors involved in the transfer need to be considered:

1. The type of the undertaking or business;

   1 ECI, 24 January 2002, Case 51/00 Temco v. Service Industries SA v Samir Imzilyen and Others
• Whether or not tangible assets such as buildings and movable property are transferred;
• The value of intangible assets at the time of transfer;
• Whether or not the majority of employees are taken over by the new employer;
• Whether or not the customers are transferred;
• The degree of similarity between the activities carried on before and after the transfer;
• The period, if any, for which those activities were suspended.

All of these factors will be taken “in the round” in order to determine whether TUPE applies.

Public Sector Outsourcings

The EU Directive applies to all contracting-out exercises with the public sector, for both first and subsequent generation transfers. It provides that contracting-out exercises should be conducted on the basis that the staff will transfer and TUPE applies unless there are genuinely exceptional reasons to the contrary.

Effect of TUPE

Where TUPE applies those employees who are assigned wholly or mainly to the undertaking which is transferring (ie to the services) will transfer to the contractor on their existing terms and conditions (save in relation to occupational pension rights). This includes those employees who are absent from work immediately prior to the transfer due to holiday, sickness, maternity, paternity or parental leave. Employees’ continuity of service will be preserved following the transfer.

All pre-transfer liabilities in relation to the employees (except in relation to occupational pensions and criminal liability) transfer to the new contractor.

Employees can object to the transfer of their employment. If they do in most EU member states their employment will come to an end at the point of transfer and they will not be entitled to notice pay or a redundancy payment.

Any dismissals which take effect before or after the transfer and are “transfer connected” will be automatically unfair, unless the employer can show that there is an “economic, technical or organisational reason entailing changes in the workforce” (“ETO”). An example would be where the new contractor intends to provide the services from a different location many miles from where the employees are currently based - any redundancies due to the change in location would be potentially fair (provided it went through a fair redundancy process).

Consultation With Staff

Where TUPE applies there is an obligation on the customer/outgoing contractor to carry out collective consultation with employee representatives “in good time before the transfer”. In most member states there is no fixed period in advance of the transfer for which the transferor must consult with the employee representatives.

The new contractor is obliged to communicate details of any “measures” which it proposes post-transfer as part of the pre-transfer collective consultation process. These might include a change to the pay roll date, the application of new employment policies or proposed redundancies post-transfer.

The new contractor is obliged to carry out collective consultation with employee representatives “in good time before the transfer”. In most member states there is no fixed period in advance of the transfer for which the transferor must consult with the employee representatives.

Liability for failure to carry out TUPE consultation transfers to the new contractor and may give rise in certain member states to an additional indemnity or damages.

“Offshoring” and TUPE

“Offshoring” is the operation of services outside the jurisdiction of the customer and is an increasingly common element in many outsourcing scenarios, particularly to India, Sri Lanka and Eastern Europe.

Although Directive 2001/23 is only applicable to transfers within the remit of the EU, some member states have implemented TUPE to apply to offshoring scenarios, and theoretically the relevant obligations may transfer to the new contractor. This means that in reality employees can insist on transferring to the new operation overseas and it would be very difficult to enforce this liability against the transferee.

The key issue for the customer at the end of a contract is usually the retention of key skills, and a stable workforce generally, in the lead-up to termination, and post-termination in the hands of a new contractor (or, if the work is taken in-house, the customer). The customer cannot rely on TUPE to ensure that it, or a successor contractor, receives the bulk of assigned employees. The parties, for example, may agree a secondment arrangement whereby overseas key staff will be seconded by the contractor to the customer and/or the successor contractor for the period immediately following termination.

In any event, local labour law needs to be borne in mind at the time of termination, perhaps with indemnity protection to ensure that the customer does not get drawn into claims by the contractor’s employees.

Conclusion

The application of TUPE in relation to outsourcing is complex and guidance should always be obtained to determine whether TUPE applies in respect of a particular project as well as to ensure the customer is sufficiently protected in an outsourcing contract from potential liabilities created by the outsourcing (and offshoring). The customer will need to consider a range of HR issues relating to the outsourcing including:

• What are the services?
• How are staff currently organised - are they assigned wholly/mainly to the services?
• If the parties believe TUPE doesn’t apply, on what basis have they come to this conclusion?
• Has due diligence been carried out to establish numbers of staff transferring?
• Are redundancies envisaged pre/post transfer?
• Is this a first or subsequent generation outsourcing?
• Is this a public sector outsourcing (first or subsequent generation)?
• Transitional arrangements - will there be a period of transition/knowledge transfer?
• Exit plan - what is proposed?
• If the services are to be provided offshore, will the transfer of responsibility offshore occur immediately post-transfer, or will there by a transition period?
ALFA Newsletter Update

By Michael W. Hawkins & Daniel J. Greenberg

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The Court’s opinion reversed the decision of the district court, which had held that a ban on filing charges with the EEOC constituted facial retaliation in violation of the various federal anti-discrimination statutes. The release at issue contained a charge-filing waiver provision that read as follows: “Releasor on behalf of himself and other releasors expressly agrees that she will not institute, commence, prosecute or otherwise pursue any proceeding, action, complaint, claim or charge against the Company in any administrative forum whatsoever.” One of the employees who was let go refused to sign the release and was, therefore, not given the severance. She thereafter filed a charge with the EEOC alleging, among other things, that the release “violates the Laws administered by the EEOC.” In addition to holding that the release was not facially retaliatory, the Court further held that that the refusal to pay severance under these circumstances does not, as a matter of law, constitute an adverse employment action. Accordingly, the EEOC could not make out a prima facie case of retaliation.

The Court’s decision in Sundance Rehabilitation Corporation seemingly clears up the issue of charge-filing waivers in the 6th Circuit, but the issue remains murky across the county. On August 8, 2006, the U.S. District Court for the District of Maryland held that an employer’s conditioning of the receipt of severance benefits on an employee’s withdrawal of an EEOC discrimination charge constitutes unlawful retaliation. The Maryland District Court relied primarily on the Northern District of Ohio’s decision in Sundance Rehabilitation, which, as described above, recently was reversed. Other Circuits have yet to address the issue and it remains to be seen whether the U.S. Supreme Court will resolve the issue.

Sexual Harassment In The Workplace

When Does Sexually Explicit Banter Directed To a Member of The Same Sex Support a Claim For Sexual Harassment?

By James M. Peterson

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Claims for sexual harassment find their validity and basis in the anti-discrimination statutes under state and federal law. That is because courts have held that sexual harassment is a form of gender discrimination. In California, the Fair Employment and Housing Act makes it an unlawful employment practice for an employer, “because of the ... sex ... of any person, ... to discriminate against the person in compensation or in terms, conditions, or privileges of employment.” Calif. Gov. Code § 12940(a). Similarly, it is an unlawful employment practice for an employer, “because of ... sex, ... to harass an employee.” Id. at subd. (j)(1). Under this statutory scheme, harassment “because of sex” includes sexual harassment and gender harassment “...”. Id. at subd. (j)(4) (C). According to regulations interpreting and implementing this statute, the prohibition against discrimination of employment “because of sex” is intended to guarantee that members of both sexes will enjoy equal employment benefits. Calif. Code Regs., Title 2, § 7290.6(b).

Like the Fair Employment and Housing Act, Title VII of the Federal Civil Rights Act of 1964 (42 U.S.C. §2000e, et seq.) prohibits sexual harassment, making it an unlawful employment practice for an employer “to discriminate against any individual with respect to his compensation, terms, conditions, or privileges of employment, because of such individual’s ... sex ...” In April of 2006, the California Supreme Court issued its decision in Lyle v. Warner Bros. Television Productions (2006) 38 Cal.4th 264. In the Lyle case, a former writer’s assistant for the Friends television show sued producers and writers of the show for race and gender discrimination, racial and sexual harassment and retaliation. The trial court granted defendant’s motion for summary judgment (dismissing the claims) but an intermediate court of appeal reversed the sexual harassment allegations. The California Supreme Court then reviewed the case and reversed and remanded the decision of the court of appeal, finding the plaintiff failed to establish a sexually objectionable work environment that was sufficiently severe and pervasive to support a hostile work environment sexual harassment claim. Id. In the decision, the California Supreme Court analyzed the United States Supreme Court decision in Oncale v. Sundowner Offshore Services, Inc. (1998) 523 U.S. 75, 118 S.Ct. 998, 140 L.Ed.2d 201, and in particular its focus on what type of verbal or physical harassment, constitutes “discrimination because of sex.” As the California Supreme Court explained: “This means a plaintiff in a sexual harassment suit must show the conduct at issue was not merely tinged with offensive sexual connotations, but actually constituted ‘discrimination ... because of ... sex,’ citing Oncale, supra, 523 U.S. at 81. In most of the cases analyzing this issue, the facts have involved members of the opposite gender being subjected to sexually explicit harassment and/ or banter. The California Supreme Court summed it up as follows: “Accordingly, it is..."
the disparate treatment of an employee on the basis of sex -- not the mere discussion of sex or use of vulgar language -- that is the essence of a sexual harassment claim.” Lyle, supra, at 280.

In Singleton v. United States Gypsum Co., 140 Cal. App. 4th 1547 (2006) the California Court of Appeal in Los Angeles analyzed this guidance in the context of a sexual harassment claim by a male worker based on sexually-harassing comments directed at him by two male co-workers. The case involved comments by two heterosexual male co-workers to another heterosexual male that “challenged his manhood.” The trial court granted summary judgment for the employer finding that the comments were not “sexually suggestive” and not sufficiently severe to alter the terms and conditions of plaintiff’s employment.

What is significant about the Singleton decision is the court’s focus on whether the evidence showed that the alleged harassers treated plaintiff differently than they did women. The court held that since the alleged harassers had targeted Singleton’s identity as a heterosexual male, “it is axiomatic that they would treat women ‘differently,’ i.e., not attack them for the same reason.” The court then concluded that the harassment was “because of sex,” i.e., “it employed attacks on plaintiff’s identity as a heterosexual male as a tool of harassment”.

The facts of the Singleton case warrant some explanation to place the impact of this decision in context. Singleton was hired by defendant United States Gypsum Company (USG) in the engineering department as a maintenance mechanic to repair production equipment. Singleton worked the graveyard shift and was the only mechanic on duty during the shift. Singleton was eventually terminated on an employee report that he had stated “if we work on Christmas, he was going to come in here with a gun and shoot everybody except Sandy.” Singleton was suspended by his supervisor prior to the termination, and on the same date of his suspension he submitted a written statement to USG accusing two co-workers of repeatedly calling him “sing-a-ling” which, according to plaintiff, was a reference to a homosexual character played by actor Bernie Mac in the movie “Life.” Singleton also claimed that the co-workers made a series of other statements that constituted harassment based on sex which he generally described as “things that I would say challenge me as a man, for one thing.” Plaintiff claimed that the co-workers made comments about him performing oral sex on his supervisor and other sexually-explicit comments “continuously, every night,” and claimed this conduct was the only reason he was still employed by the company. The employees disputed the comments described by Singleton. The trial court granted summary judgment finding that the “undisputed evidence demonstrates as a matter of law that none of the harassing behavior about which plaintiff complained is sex discrimination or sex harassment.”

The court found that while the behavior by the non-supervisory employees was hostile and abusive, there was no triable issue of fact that the hostility or abuse was related to plaintiff’s gender or sexual orientation and that it was thus not protected by California’s Fair Employment and Housing Act.

The Court of Appeal reversed the trial court’s decision and remanded the case back to the trial court. The court analyzed the California Supreme Court decision in Lyle and focused on whether the facts demonstrated that the vulgar comments by Singleton’s co-workers were directed at him “because of his sex.”

The court spent a great deal of time analyzing the United States Supreme Court’s decision in Oncale, supra, and quoted that portion of the opinion describing the factual and social context in which same-gender sexual harassment cases must be decided. The United States Supreme Court had cautioned that the courts must ensure that fact finders do not mistake ordinary socializing in the workplace -- such as male-on-male horseplay or intersexual flirtation -- for discriminatory “conditions of employment” . . . in same-sex (as in all) harassment cases. “That inquiry requires careful consideration of the social context in which particular behavior occurs and is experienced by its target. A professional football player’s working environment is not severely or pervasively abusive; for example, if the coach smacks him on the buttocks as he heads onto the field -- even if the same behavior would reasonably be experienced as abusive by the coach’s secretary (male or female) back at the office. The real social impact of workplace behavior often depends on a consolation of surrounding circumstances, expectations and relationships which are not fully captured by a simple recitation of the words used or the physical acts performed.”

In analyzing this language, the Court of Appeal in Singleton held that the social context within which the employees acted, made it clear that what the two men intended to do was to harass Singleton. One employee was angry with Singleton for having reported him and for having spoken disparagingly of his skills. The other employee appeared to have been a follower. The court found that what took place between these three employees was not “male-on-male horseplay,” but the acting out, on the part of the employees, of their anger and rage at Singleton. The court also placed great emphasis on the fact that the employer submitted no evidence that the employees treated women the same way they treated Singleton [in fact, there was no evidence that any women were present during the referenced conduct].

This case broadly expands the circumstances under which vulgar and sexually-explicit attacks by a male co-worker against another male co-worker can give rise to statutory liability under California’s Fair Employment and Housing Act and Title VII. There are many workplace environments where this type of banter is routinely prevalent and many believe it to lighten the atmosphere and expect it as a part of their environment. Obviously, such action cannot be tolerated -- and as part of any sexual harassment training program, the facts of the Singleton case will serve as a good lesson of how sexually-explicit comments directed to a same-sex co-worker are just as actionable as words directed to persons of the opposite sex. While those of us who defend management in labor and employment disputes may not agree with the Singleton facts and analysis unless and until the California Supreme Court deems otherwise, it is the most recent authority in California on this area.
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