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From the Editor

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I am pleased to bring you the second client employment law advisory presented by the *Modrall Sperling Employment Law Practice Group*. This Group is comprised of attorneys with expertise in a variety of legal specialties that regularly service employers in many different industries.

Please email comments to: grm@modrall.com or call me at (505) 848-1866.

Thank you.

Inside this Issue

Sexual harassment not limited to male against female

In Kampmier v. Emeritus Corp., 472 F.3d 930 (7th Cir. 2006), the Seventh Circuit considered the case of a licensed practical nurse who claimed that her openly lesbian supervisor sexually harassed her.

Case thrown out

An assisted-living facility hired a nurse but fired her after six months for failing to show up. Nearly a year later, she alleged that the facility's executive director had sexually harassed her. The nurse alleged that the director, a lesbian, frequently made offensive, explicit and sexually perverse comments to her and to other women, joked about being gay, and engaged in unwanted physical contact.

The trial court threw out the case without a trial on grounds that the material facts were undisputed and the facility was entitled to judgment as a matter of law.

The nurse appealed to the Seventh Circuit, which reversed the trial court's decision, finding that there were genuine issues of material fact precluding summary judgment in the employer's favor. It noted that, to establish a prima facie case for sexual harassment, plaintiffs must show that:

- They were subjected to unwelcome harassment,
- The harassment was based on their sex,
- The harassment was sufficiently severe or pervasive so as to alter employment conditions and create a hostile or abusive atmosphere,
- A basis existed for employer liability.

The court examined each of these issues.

Unwelcome harassment

The nurse testified that the director's obscene comments and constant physical contact made her uncomfortable and that she had complained about the behavior on three occasions to higher management. Her direct supervisor confirmed this.

The facility countered that the nurse had engaged in sexual banter herself. But it submitted no evidence that she had in any way encouraged or welcomed the alleged behavior. The Seventh Circuit concluded that the nurse had raised a genuine issue of material fact as to whether she was subjected to unwelcome harassment and was entitled to a trial.

Based on sex

The facility next argued that the director's harassment wasn't because of the nurse's sex, because the director harassed both sexes – making her an "equal opportunity harasser." However, the Seventh Circuit found that the alleged harassment was far more severe and prevalent than what the male employees endured.

Because the nurse alleged that the director constantly referred to female employees, made comments about their "boobs," and told the women that she could turn any woman gay, the court held that, at the very least, the nurse had raised a genuine issue of material fact as to whether the alleged harassment was because of her sex.

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Has the Social Security Administration's "No Match" Letter Met its Match?

The problem

Much to the disappointment of many American employers, the complex interface of employer obligations imposed by the Social Security Administration ("SSA") and the Department of Homeland Security ("DHS") has not gotten any easier. It was supposed to have been cleared up by the DHS' new "safe harbor" regulation, which was to take effect on September 14, 2007. Instead, the new rule has created a quagmire of confusion about employer responsibilities in complying with the Immigration and Naturalization Act (INA) while also respecting employees' civil rights.

The INA prohibits an employer from continuing to employ an alien in the United States knowing the alien is (or has become) unauthorized to work in the United States. The Department of Homeland Security, which is charged with enforcement of the INA, holds employers accountable for violations of the INA even if employers have only constructive knowledge that employees are unauthorized. Under the existing rules, constructive knowledge of unauthorized status requires an employer to take reasonable steps to verify that an employee is using a proper name and social security number. The long-standing challenge for employers has been understanding what constitutes "constructive knowledge" and what response is required thereafter.

The Department of Homeland Security's new rule attempts to address both issues of confusion. First, the new rule states that an employer who receives a "no match" letter from the SSA for an employee who is ultimately discovered to be unauthorized is considered to have constructive knowledge that the employee is (or has become) unauthorized. A "no match" letter is a Social Security Employer Correction Request, stating that there is a mismatch between an employee's name and social security number. Where historically, an employer did not know how to proceed once a "no match" letter was received, the new rule tells an employer what they can do to comply with the INA in order to avoid a finding of "constructive knowledge:"

- An employer must first verify that the "no match" is not due to clerical error.
- If the error is clerical in nature, the employer must report back with a correction to the DHS within 30 days of receiving a "no match" letter.
- If the error is not clerical in nature, the employer must verify the status of the employee in question.
- Verification includes completing a new I-9 form as if the employee in question was a newly hired employee, except that the I-9 form must be submitted within 93 days of receipt of the "no-match" letter, and cannot reference any document containing the incorrect SSN or Alien No. identified in the "no match" letter.
- The new I-9 form must also verify that the document used to establish employee-identity contains a photograph of the employee in question.
- Verification may also include sending updated information to other agencies (DHS and SSA), and perhaps physically visiting a SSA office to show proof of identity, age, etc. for the employee in question.
- If, despite the Employer's efforts to resolve the discrepancy, the agencies nonetheless maintain incorrect information 90 days after the employer receives the "no match" letter, the proposed rule outlines yet another procedure to resolve the discrepancy.

In walks trouble

On August 31, 2007, two weeks before the new rule was to take effect, a district court in Northern California told the Social Security Administration that it could not send out any more "no match" letters and the Department of Homeland Security could not enforce its new rule. AFL-CIO, et al. v. Chertoff, et al. (N.D. Cal. Case No. 07-CV-4472 CRB). On October 1, 2007, the judge presiding in that case, Charles Breyer, gave the Plaintiffs ten more days to demonstrate that irreparable harm will certainly come to millions of legal immigrants if the DHS is allowed to enforce the new rule.

Where the new rule was intended to alleviate confusion about employer duties and create a "safe harbor" for compliance with the INA, the Plaintiffs in the Chertoff case now argue that using the letters as a means to determine authorization status in accord with the new rule effectively discriminates against legal immigrants on the basis of national origin.

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Be wary when using tests to screen job applicants

The Eighth Circuit had to decide whether an employer engaged in sex discrimination in violation of Title VII when it used a weight-lifting test that resulted in a substantial drop in female hires. Here's what happened in EEOC v. Dial Corp. 469 F.3d 735 (8th Cir. 2006).

Measures to reduce injuries
A sausage factory required entry-level employees to be able to carry about 35 pounds of sausage and lift it to heights between 2 feet and 5 feet above the floor. These employees experienced disproportionately more injuries than the plant's other workers.

To reduce injuries, the plant implemented several measures, and injuries trended downward. Four years later, the plant started screening potential hires with a test that required lifting a 35-pound bar from a frame, carrying it to and placing it on another frame. The frames were about 2 feet and 5 feet high. An occupational therapist recorded how many lifts applicants completed working at their own pace in seven minutes and commented on each applicant's performance.

The test's impact?
After the test was implemented, the decline in workers' strength-related and overall injuries, which had begun after the implementation of the initial measures, continued. But only 15% of new hires were women — down from 46%. Adding the test was the only change in the plant's hiring practices.

An applicant who wasn't hired even though she had passed the test filed a discrimination complaint with the EEOC. It sued the plant on her behalf and on behalf of 53 other women who were denied employment after taking the test, 24 of whom had been unable to complete it.

At trial, the jury found that the plant had engaged in a pattern or practice of intentional discrimination. The trial court held that:

- The test had a discriminatory effect,
- The plant had failed to demonstrate that the test was a business necessity or to show either content or criterion validity, and
- The plant had failed to effectively control for other variables that may have caused injuries to decrease, including other previously implemented safety measures.

The plant appealed.

Intentional discrimination?
The Eighth Circuit noted that plaintiffs alleging a pattern or practice of intentional sex discrimination must prove "regular and purposeful" discrimination by a preponderance of the evidence. This requires more than the mere occurrence of an isolated discriminatory act. Rather, plaintiffs must show that discrimination was the employer's standard operating procedure.

The Eighth Circuit rejected the plant's argument that the EEOC had failed to establish a pattern or practice of intentional sex discrimination. The court found that women and men had worked the same job for many years before the test was instituted, but that the percentage of women hired vastly decreased after the test. Despite this, the plant continued to use the test, and the percentage of women who passed it declined with each use.

Also, other evidence showed that, while women and men received similar comments on their test forms, the plant offered to hire only the men. So the court held that a reasonable jury could have found a pattern and practice of intentional discrimination against women.

Business necessity?
The plant also disputed the trial court's findings of disparate impact and the conclusion that the plant had failed to prove the test was necessary to establish effective, safe job performance.

The Eighth Circuit noted that, after a disparate-impact plaintiff establishes a prima facie case, the burden shifts to the employer to show that the challenged practice is "related to safe and efficient job performance and is consistent with business necessity." To use the business-necessity defense, an employer must prove that the practice was related to the specific job and its required skills.

The plant contended that the test was valid, and its physiology expert testified that the test highly represented job-required actions. But the trial court was persuaded by the EEOC's industrial-organization expert, who testified that a crucial test aspect was "more difficult than the sausage-making jobs themselves" and that the average applicant had to perform four times as many lifts with with no rest breaks as current employees performed on the job.

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Sexual harassment not limited to male against female

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An abusive atmosphere
To prove that her work environment was hostile, the nurse had to demonstrate that it was both objectively and subjectively offensive. She estimated that, during her employment, the director hugged her 50 to 60 times, jumped in her lap 10 times and touched her buttocks 30 times. Based on the sustained physical contact — combined with the sexually explicit remarks — the court held that a jury could reasonably find that the comments and physical contact were objectively offensive.

The issue of whether the nurse subjectively found the conduct offensive was more closely contested. She had allowed the director's lover to baby-sit her daughter in the director's home, she had visited the director in the hospital after she had surgery and had given her a card, and she had at least once medically assisted the director's mother.

The Seventh Circuit found that this evidence seemed to belie the nurse's claim that she felt harassed by the director. Nonetheless, the court held that her repeated complaints and objections regarding the harassment were sufficient to raise a genuine issue of material fact.

Basis for employer liability
Finally, the nurse had to prove that a basis for employer liability existed. An employer may be vicariously liable to a victimized employee for an actionable hostile environment created by a supervisor with authority over the employee. When no tangible employment action is taken, a defending employer may raise an affirmative defense to liability or damages, subject to proof by a preponderance of the evidence. This defense consists of two necessary elements:

- The employer exercised reasonable care to prevent and promptly correct any sexually harassing behavior.
- The employee unreasonably failed to take advantage of any employer-provided preventive or corrective opportunities or to otherwise avoid harm.

Here, because the nurse was fired for failure to show up and didn't allege that her firing was connected to the harassment, the facility was allowed to raise an affirmative defense that it had exercised reasonable care to prevent and correct the sexually harassing behavior. But the nurse testified that, despite her complaints about the harassment to three different managers, the facility didn't discipline the director. And the nurse's supervisor testified that the director's actions "negatively impacted the workplace," but the regional operations director said she "did not want to hear about it."

The court held that this evidence was sufficient to create a genuine issue of material fact as to whether the facility had exercised reasonable care to prevent and correct the director's behavior. So the court concluded that the nurse had presented enough evidence for a jury to decide her sexual harassment claim.

Be wary when using tests to screen job applicants

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The plant also argued that the test was valid because both overall and strength-related injuries decreased dramatically after it was implemented. The plant claimed that injuries decreased because the test predicted which applicants could safely handle the strenuous job.

But the Eighth Circuit noted that the injury rate started to decline before the test was implemented. Moreover, fewer women than men employees were injured in two of the three pretest years. So the Eighth Circuit concluded that the plant had failed to demonstrate that the test was a business necessity.

Check for disparate impact
Before implementing any test to screen job applicants, prudent employers will check for any disparate impact. They also will keep in mind that they may be hauled into court some day to justify a test's business necessity.

Has the Social Security Administration's "No Match" Letter Met its Match?

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Although the California district court is expected to issue a final ruling by October 11, 2007, notably, both the Social Security Administration and the Department of Homeland Security report that the SSA will not observe the district court's ruling from Northern California. Instead, the SSA will send out this year's "no match" letters and employers are still required to address and correct inaccuracies in reporting. In an effort to provide clarity about an employer's continuing obligations under the INA – despite the California court's ruling – this year's "no match" letters will be accompanied by a guidance letter from the DHS outlining what steps an employer should take to both comply with the INA and avoid liability for civil rights violations.

New Mexico Employers Can Win No Matter What

Despite the hoopla arising from the California litigation, a recent judicial opinion governing New Mexico employers may be helpful, irrespective of the outcome of the AFL-CIO v. Chertoff case. In February, 2007, the Tenth Circuit federal Court of Appeals upheld dismissal of a case in favor of an employer who terminated an employee who could not resolve a mismatch between his social security number and his name. In that case, the employer did not use a "no match" letter, but instead hired two data services to "verify" the SSNs of all of its employees in response to information that the employer might soon thereafter be "raided" by the then-INS. Although the Tenth Circuit did not specifically address whether using such a data service was appropriate, the court ultimately determined that the employer properly relied on information garnered therefrom. Critical in reaching this determination seemed to be the fact that the employer verified the SSNs of all of its employees in a uniform manner which did not single out certain employees or certain classes thereof.

Data service companies can perform the verification of an entire workforce and provide information regarding inconsistencies in I-9 information for every employee. A couple of examples of such services can be found in the Zamora opinion.

UPDATES WILL BE PROVIDED IN THE NEXT EDITION

"Be wary when using tests to screen job applicants"
Sidebar Article - *A slippery slope at Slippery Rock*

In Scheidemantle v. Slippery Rock University State System, 470 F.3d 535 (3d Cir. 2006), a woman who worked as a labor foreman at a college applied – along with three men – to be promoted to a posted locksmith job that required two years' locksmithing experience. None of the applicants had the requisite experience.

But the college ultimately hired one of the male applicants anyway, and a year later the job opened up again when he was promoted. This time the job posting required three years' locksmithing experience. The woman applied again, but the college gave the job to a man with even less experience than the previous jobholder had when hired.

The woman alleged gender discrimination for both rejections. The trial court ruled that she wasn't qualified for the locksmith position according to the posted objective criteria. But the Third Circuit disagreed. It held that, because the college had placed similarly "unqualified" men in the locksmith position, it could no longer point to the job posting's objective qualifications as a valid reason for refusing to promote the female applicant.

So the court held that – by departing from the objective requirements in its hiring decision – the college had established different qualifications, by which the woman applicant was qualified. Thus, as a protected applicant who suffered an adverse employment decision, she could establish a prima facie discrimination case.

Court clarifies employees' FMLA rights

The issue before the Fourth Circuit in Csicsmann v. Sallada was whether an employer had retaliated against an employee who had taken leave under the Family and Medical Leave Act by eliminating his position while he was on leave, restoring him to a different position when he returned and later eliminating that position as well.

Case arises

While a manager in a company's information technology (IT) department was on FMLA leave for hip surgery, the company eliminated his position. On his return, he was assigned to different IT duties with the same salary, title, bonus eligibility, and retirement and health care benefits as before.

After a merger the following month, the company eliminated his new position and discharged him. He alleged that, because he had taken FMLA leave, the employer retaliated and discriminated against him by failing to restore him to an equivalent position.

The trial court rejected all his claims without a trial, ruling that the facts were undisputed and the employer was entitled to judgment as a matter of law.

Intangible vs. measurable differences

On appeal, the Fourth Circuit first noted that the FMLA allows two options when employees return from qualifying leave: Give them back their previous positions or give them "equivalent" positions with "equivalent employment benefits, pay, and other" employment terms. In other words, employees returning from FMLA leave are not absolutely entitled to be restored to their previous positions.

Here, no one disputed that the manager's salary, title, bonus eligibility, health care and retirement benefits remained the same. And he continued to work the same schedule in the same physical office. So the court held that both positions' concrete and measurable aspects were exactly the same.

But the manager argued that his new position wasn't equivalent to the one eliminated while he was on leave because it was less prestigious and less visible. The Fourth Circuit rejected this argument, noting that an equivalency determination excludes a position's intangible aspects. Federal rules clarify that the requirement of equivalent employment terms "does not extend to de minimis or intangible, unmeasurable" job aspects. The court held that his positions' concrete and measurable aspects were exactly the same.

Finally, the manager argued that the new position was ultimately slated for layoff while his previous position wasn't. The court rejected this argument because the company had eliminated his previous position before he returned from leave, and eventually closed the entire department after the merger. He presented no evidence that his previous position would have survived.

So the Fourth Circuit concluded that the trial court had appropriately thrown out the manager's claims.

Jobs can legitimately be eliminated

This case demonstrates that the FMLA doesn't provide employees who take leave under it with an absolute right to return to their exact same positions. The act permits re-instatements to equivalent positions. Moreover, an employer may make legitimate business decisions that can result in eliminating an employee's job altogether.

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