



# Recent Developments In Employment Law

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## RETALIATORY HARASSMENT ACTIONABLE UNDER TITLE VII

In a case of first impression, the U.S. Sixth Circuit Court of Appeals has determined that retaliatory harassment by a supervisor of an employee who has complained of other harassment (such as race, sex, handicap, *etc.*) is actionable under Title VII, **even if the underlying harassment is not actionable.**

In *Morris v Oldham Fiscal Court, John W Black and Brent Likins* (January 20, 2000), a long-term secretary in the County Road Department complained that she was sexually harassed by her new supervisor, County Road Engineer Brent Likins. The initial harassment included jokes with sexual overtones, referring to the secretary as “Hot Lips,” and comments about her state of dress. The most damaging allegation was that the supervisor told the secretary in front of another supervisor that if she would come into his office, by the time they were finished, she would get an “excellent” evaluation. Both the secretary and the witnessing supervisor construed this remark as meaning that if the secretary provided sexual favors, she could improve her evaluation rating.

The secretary complained about these incidents to County Judge John Black, who advised both parties to “work out any problems and differences.” After this complaint, the supervisor became excessively critical and gave the secretary the “cold shoulder.” After further complaints, the judge transferred the supervisor’s office from the Road Department to the County Courthouse out of concern “about everyone’s working environment.” He further ordered the supervisor not to communicate directly with the secretary and not to be around her without a third person present.

Despite this directive, the supervising engineer visited the Road Department alone at least 15 times, called the secretary on the phone at least 30 times, drove to the Road Department to sit outside the secretary’s window and make faces, followed her home and gave her “the finger,” destroyed the television set she watched at the Road Department, and on many occasions,

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threw roofing nails on her home driveway. These actions caused the secretary to have anxiety attacks. She eventually took a disability leave and sued, alleging sexual and retaliatory harassment by her supervisor with the assistance or acquiescence of county supervisors, under both Title VII and the Kentucky civil rights act.

The trial court dismissed the claims in their entirety, but the Sixth Circuit reversed the lower court's dismissal of the retaliatory harassment claim. The Sixth Circuit ruled that an employer could be held liable for retaliatory harassment by a supervisor that culminates "in a tangible employment action, such as discharge, demotion or undesirable assignment," even if the underlying harassment is not actionable.

The court made clear that retaliatory harassment, in and of itself, does not constitute a "tangible employment action." Therefore, as with sexual harassment claims, when there is no tangible employment action, the employer has the opportunity to raise the affirmative defense that (1) the employer exercised reasonable care to prevent and promptly correct any harassing behavior and (2) that the employee unreasonably failed to take advantage of any preventative or corrective opportunities provided by the employer to avoid harm. As with sexual harassment claims, the employer must prove **both elements of the affirmative defense** to prevail.

To establish retaliatory harassment, an employee must show: (1) she opposed a violation of Title VII; (2) her employer was aware of her opposition; (3) the employer subsequently took adverse action or a supervisor engaged in severe or pervasive retaliatory harassment and (4) a causal connection between the opposition and the adverse action or harassment.

This newly recognized claim for retaliatory harassment makes it even more important for employers to police the conduct of supervisors. An employer must impress upon its supervisors that it will not tolerate inappropriate harassment — whether sexually or racially motivated or motivated by revenge for an employee's report of harassment.

In this case, even moving the supervisor's office location did not prevent further harassment and retaliation. Employers must monitor post-complaint

interactions between a complainant and the alleged harasser. We also recommend that a designated representative follow up with the complainant periodically to prevent her from being ostracized, or worse, by co-workers or supervisors.

Note: the judge's initial reaction of telling the parties to work things out probably created the atmosphere in which the alleged harasser felt he could get away with his retaliation. The county might have avoided this litigation if the secretary's initial complaint had been treated more professionally.

### **LIGHT DUTY PROGRAM RESERVED FOR EMPLOYEES INJURED ON THE JOB NEED NOT BE EXTENDED TO PREGNANT EMPLOYEES**

The Eleventh Circuit has ruled, consistent with the Fifth Circuit, that reserving a light duty program exclusively for employees suffering from work-related injuries does not violate the Pregnancy Discrimination Act.

In *Spivey v Beverly Enterprises, Inc* (November 30, 1999) a nurse's assistant employed by a rehabilitation center whose primary duties included lifting and repositioning patients and providing general patient care sought light duty work after presenting a doctor's note stating she could not lift more than 25 pounds due to pregnancy. The employer denied her request because its light duty program was reserved exclusively for employees who had sustained work-related injuries. The employee was discharged because she was unable to perform her duties, but was later rehired following childbirth. She then sued her employer under the Pregnancy Discrimination Act to recover benefits and seniority lost as a result of her discharge. The trial court granted the employer's request for dismissal and the employee appealed.

The Eleventh Circuit reviewed this pregnancy discrimination claim under both disparate treatment and disparate impact theories. To establish disparate treatment, an employee must present either direct evidence of discrimination or circumstantial evidence, *i.e.*, that she: (1) was a member of a protected class; (2) was qualified to perform the job; (3) experienced adverse treatment; and (4) was

treated differently than persons outside the protected class.

In this case, the employee was a member of a protected class, *i.e.*, pregnant women, and suffered adverse treatment, *i.e.*, discharge, but could not show disparate treatment for two reasons: (1) she was not qualified for her job because of her lifting restriction; and (2) she was not treated differently than non-pregnant women since persons temporarily disabled due to conditions other than pregnancy also were excluded from the light duty program.

To establish disparate impact, the employee needed to show that the employer's policy of restricting its light duty program had a statistically disproportionate impact on pregnant women. The employee failed to present any statistical evidence and the court affirmed dismissal of this claim. The court observed that its ruling was consistent with the Fifth Circuit's ruling in *Urbano v Continental Airlines, Inc* (1998), which the U.S. Supreme Court declined to review.

The federal Pregnancy Discrimination Act in 1978 amended the scope of Title VII's prohibition of sex discrimination to include pregnancy, childbirth and related medical conditions. Like Title VII, Michigan's Elliott-Larsen Civil Rights Act was amended in 1978 to prohibit discrimination on the basis of pregnancy, childbirth and related medical conditions. The Michigan Supreme Court was presented with a similar question regarding whether the unavailability of light duty for pregnant employees constituted pregnancy discrimination under state law in *Koester v City of Novi* (1998). In *Koester* the employer had a no light duty policy. Ms. Koester claimed the policy adversely affected pregnant employees, but failed to show that the policy affected women more severely than men. As a result, the Michigan Supreme Court affirmed the dismissal of Ms. Koester's disparate impact claim concerning the absence of a light duty policy.

### **COBRA ELECTION NOTICES MAY BE SENT TO ALL BENEFICIARIES AT THEIR COMMON RESIDENCE**

In a published opinion letter the Pension and Welfare Benefits Administration has said that a single COBRA election notice may be sent to all

beneficiaries who reside at a single address. Former employees, their spouses and dependents may all be COBRA beneficiaries in certain cases, and each beneficiary is entitled to make an independent COBRA election. Until now it has been clear only that dependents and another beneficiary residing at a single address could be sent a single notice, but now it is clear that the employee, his or her spouse and all dependents may be sent one election notice if they have a common address. The single notice, however, must be addressed to each of the COBRA beneficiaries and clearly inform them of their individual election rights.

Many employers' COBRA election notices are maintained on separate forms for employees, spouses and dependents because different events and coverage periods apply to the different COBRA beneficiaries. Employers who maintain separate forms must remember to send all of the types of forms applicable to all of the addressees. We also recommend that the names of all of the COBRA beneficiaries appear as addressees.

### **EMPLOYMENT PRACTICES LIABILITY INSURANCE OFFERS EXPANDED COVERAGE IN EMPLOYMENT LITIGATION**

Employment practices liability insurance ("EPLI") policies are designed to provide insurance coverage for typical employment litigation. Traditional business insurance policies, such as general liability, directors and officers liability policies and ERISA riders do not cover the majority of employment claims. These policies typically have exclusions, such as for claims which arise from "intentional actions" or "in the course of employment." Such exclusions generally pose an insurmountable barrier to obtaining coverage for employment matters.

While EPLI policies had a rocky start about 20 years ago, more recently they have been offered by reputable carriers who provide valuable coverage. EPLI policies usually cover claims for wrongful termination, employment discrimination, sexual, racial and other types of employment-related harassment and retaliation. Policies sometimes cover other matters, such as wage and hour claims. But

EPLI policies usually do not provide coverage for deliberate violations of employment laws and union-management issues.

Because EPLI policies are written for a national market, the policies typically do not provide coverage for state-specific claims, such as claims under the Michigan Whistleblowers' Act, and claims of height, weight and marital discrimination under the Elliott-Larsen Civil Rights Act. Sometimes the insurers will cover such additional areas, but a special endorsement or rider is necessary.

The amount of coverage provided by an EPLI policy varies widely, often from \$250,000 to \$10 million or more. Deductibles and premiums also vary widely. Typically, policies provide coverage for costs of settlements and jury awards, attorney fees and other costs of defending claims. Some policies do not allow the insured to choose the attorneys who will defend it. In such cases, the insurance company assigns an attorney to handle the case on an insured's behalf, regardless of whether the insured has a valued relationship with a particular law firm or attorney.

Employers who choose to obtain EPLI insurance should choose an EPLI policy which provides coverage for claims made by *all* types of employees: full-time and part-time, seasonal and temporary employees. It is also advisable to obtain coverage for claims which may be made by leased employees and staff from temporary service agencies. Although one of the aims of using temporary staff and leased employees is to reduce employment obligations and liabilities, the fact is that some claims from temporary staff and leased employees have been successful against employers. To address this potential liability, an employer sometimes can be added to the EPLI coverage of the temporary services agency or the leasing company as "an additional insured," so that coverage for temporary service and leased employees is provided either at a modest charge or at no charge at all. If that is not done, it is important to obtain coverage for temporary staff and leased employees on your own EPLI policy.

Much like the reviews made by insurers providing fire coverage for a building, EPLI carriers often have audits and reviews and impose specific requirements prior to providing coverage. For example, an EPLI carrier may review the employee handbook, job

application and other forms and may require that employers have certain policies, keep certain records and follow certain procedures, so that potential claims under the EPLI policies are minimized.

EPLI policies can provide valuable protection in the litigation-prone arena of employment practices. When considering EPLI coverage, it is important to review the policies. Key items are: (1) the dollar limits of coverage; (2) whether defense and liability coverages are provided, and not only to the company, but also to its officers and supervisors; (3) the types of claims covered; and (4) whether defense counsel can be your own law firm or whether a law firm will be assigned to you.

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We are distributing this RECENT DEVELOPMENTS IN EMPLOYMENT LAW to our clients and friends. This newsletter is intended to provide a concise overview of some recent legal developments which may affect employment practices. The matters discussed are intended to provide general information only and are not intended to provide legal advice. Specific action should be taken only after obtaining competent legal advice.

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