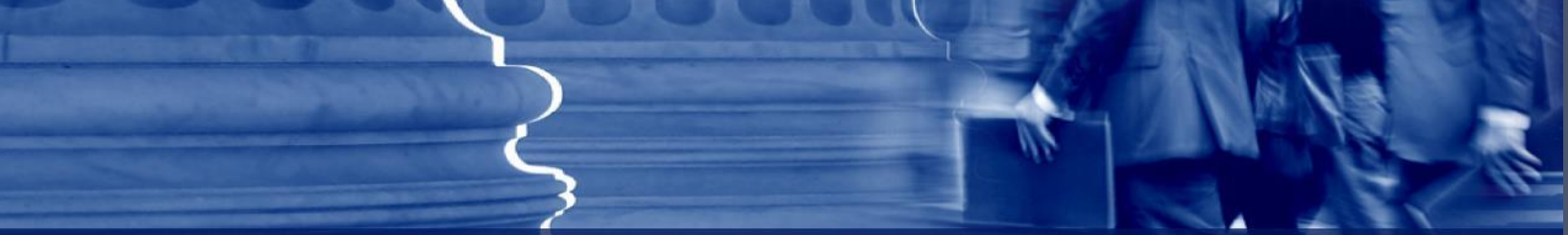

Managing Workplace Risk

Monthly Newsletter January 2016

I. Employer's Remedial Response To Known Complaints Of Discrimination May Limit Liability On A Claim for Hostile Work Environment

Maintaining a complaint reporting and problem resolution procedure is among the few ways for an employer to protect itself. This principle was reiterated in *Crawford v. National Railroad Passenger Corp.,* 2015 U.S. Dist. LEXIS 162608 (D. Conn. Dec. 4, 2015), where plaintiff, an African-American worker, received an email from a Caucasian co-worker containing a picture of a donkey and using the "n word." Immediately after plaintiff reported the incident to his employer's dispute resolution office, the Caucasian employee was placed on administrative leave to permit an internal investigation. Other Caucasian coworkers told plaintiff the email containing the donkey "was no big deal," and threatened the plaintiff with reprisals against the plaintiff and his son, who also worked for the employer, for complaining. The plaintiff did not complain about his co-workers subsequent comments or threats. Following its investigation, the employer suspended the employee who sent the email for 30 days. However, upon the employee's return to work, after the thirty day suspension, the employee was permitted to work alongside the plaintiff once again. The plaintiff requested the he be removed from any shift in which he would have to work with the employee who sent the email. When his request was denied, the plaintiff filed an EEOC charge of discrimination.

Upon the employer's motion to dismiss the complaint, the Court concluded that the alleged conduct was sufficiently severe or pervasive to state a hostile work environment claim. However, the Court dismissed the hostile work environment claims, finding that liability could not be imputed to the employer because plaintiff admitted he reported the incident to his employer and the employer promptly suspended the alleged harasser for 30 days. Moreover, the plaintiff failed to plausibly allege that his employer knew or reasonably should have known about the subsequent harassment but failed to take appropriate remedial action. Therefore, according to the Court, even if a jury could find that the 30-day suspension of the Caucasian employee was inadequate response, there was no basis to conclude that the employer should be subject to vicarious liability for conduct of which it was otherwise unaware.

The *Crawford* case is an important reminder of the importance of maintaining policies which provide an avenue for employees to complain of alleged harassment, and taking remedial action, if necessary. Employers should review their anti-harassment policies to ensure there are adequate complaint procedures in place.

II. Missouri Court of Appeals Rules Parent Company is not 'Employer' under Missouri Law

On November 10, 2015, the Missouri Court of Appeals reversed the lower court's judgment of $1,500,000 in punitive damages against a parent corporation. Diaz v. AutoZoners, LLC, d/b/a AutoZone, et al. The Court of Appeals ruled that where the employer's parent corporation did not "directly act[] in the interest" of the employer, it was not a covered employer under the Missouri Human Rights Act ("MHRA") and, thus, not liable for harassment and retaliation. In its 41-page opinion, the Court applied a modified "economic realities" test to conclude that AutoZone was not covered. In the case, plaintiff sued her employer, the subsidiary, and its parent corporation, for alleged hostile work environment harassment, caused by two customers, and retaliation. At trial, a jury returned a verdict in favor of plaintiff on her hostile work environment claim, but found in favor of the defendants on her retaliation claim. The jury awarded plaintiff $75,000 in compensatory damages and $1,000,000 in punitive damages against AutoZoners. In addition, plaintiff was awarded $1,500,000 in punitive damages against the parent company.

Under the MHRA, an "employer" is defined as "any person employing six or more persons within the state, and any person directly acting in the interest of an employer." AutoZone did not employ at least six persons in Missouri. As a result, the appellate court sought to determine whether the parent corporation "directly acted in the interest" of the subsidiary. The Court found it did not and considered the following factors:

- who was responsible for establishing policies and training employees concerning harassment;
- who was responsible for receiving, investigating, and responding to harassment complaints; and
- who had the power to discipline employees who may have failed to comply with anti-harassment policies.

Applying this test to the facts of the case, the Court found that although the parent corporation provided the subsidiary with documents including a store handbook, code of conduct, and other human resources guidelines, providing such documents alone did not establish that the parent company directly oversaw or was actively involved. In addition, the fact that the parent company responded to plaintiff's charge of discrimination (after the harassment occurred and had been remedied), did not establish that the parent company was plaintiff's employer at the time or that it directly oversaw or was actively involved.

In light of this decision, parent companies with operations in Missouri should consider the above factors discussed to avoid potentially liability as an "employer" under the MHRA.

III. Third Circuit Holds That Being Physically Present At Work Can Be An Essential Function Of A Job

In *Gardner v. School District of Philadelphia*, the Third Circuit affirmed the grant of summary judgment in favor of a school district on an employee's discrimination and retaliation claims under the Americans with Disabilities Act (ADA) and Pennsylvania state law. Over a two year period, the school district authorized all of plaintiff's leave requests, except five weeks in 2011 and twelve in 2012. Plaintiff alleged the district failed to accommodate his disabilities by denying him use of earned sick leave and wage continuation benefits, and that the district retaliated against him when it refused to approve his sick leave requests and subsequently recommended that his employment be terminated.

Initially, the Third Circuit found that plaintiff failed to show his proposed accommodation would have qualified him to perform the essential functions of his job, which included "being physically present at a school." The Court observed, in an almost two-year period, plaintiff had hardly worked at all. Despite the district's generous sick leave approvals, plaintiff's extended absences did not allow him to perform the essential functions of his job. As a result, the Third Circuit agreed that the plaintiff was *not* a qualified individual. As to Plaintiff's retaliation claims, the Third Circuit found that the district offered legitimate, non-retaliatory reasons for its adverse actions namely, (1) plaintiff was discharged because he was absent from work; and (2) its leave policies consistently were applied. Plaintiff failed to present any evidence that the reasons were pretextual.

Employers are reminded that being physically present may – depending on the circumstances – qualify as an essential function of an employee's job. Further, an employer may be able to terminate an employee based on an inability to return to work; however, that too, must be determined on a case-by-case basis.

IV. NYC Makes Caregiver Status A Protected Category

New York City continued its campaign of pro-employee legislation by passing a bill banning employment discrimination based on an individual's actual or perceived status as a caregiver. It is expected Mayor de Blasio will sign the bill into law shortly.

The New York City Human Rights Law ("NYCHRL") already prohibits discrimination based upon categories such as age, race, gender, sexual orientation, and gender identity. Now, the NYCHRL will be amended to include "caregiver status." Under the statute, a "caregiver" is someone who provides direct care for a minor child or someone who lives with the caregiver and is also defined as a "covered relative" under the new law (e.g., spouse, sibling, parent, domestic partner).

Under this new law, NYC employers may not consider caregiver status in any employment related decisions. We can thus expect a significant increase in litigation in NYC over discharges related to, for example, frequent absenteeism. Often absent or tardy employees may now claim their discharges were caused by their status as caregivers. While employers will assert the basis for discharge was the frequent absenteeism and tardiness – not caregiver status – documentation and consistency in application of absenteeism policies become ever critical.

Due to the new potential for liability under the NYCHRL, and the ever-present possibility of uncapped punitive damages, NYC employers should conduct an audit of policies and practices to ensure compliance with this new law.

Questions?

Jackson Lewis attorneys are available to answer questions about employers' compliance obligations. Please contact Paul J. Siegel, at siegelp@jacksonlewis.com, John Porta, at portaj@jacksonlewis.com, Ana Shields, at shieldsa@jacksonlewis.com, or the Jackson Lewis attorney with whom you regularly work. Visit us at www.jacksonlewis.com.

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