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Labor and Employment Law Notes

DON'T LOOK NOW BUT THE ILLINOIS SUPREME COURT'S INTERPRETATION OF THE ILLINOIS HUMAN RIGHTS ACT IS BECOMING MORE EMPLOYEE FRIENDLY

In April the Illinois Supreme Court issued a ruling on sexual harassment in the workplace that interprets the Illinois Human Rights Act as being more favorable to employees seeking to sue supervisors and employers as compared to a similar provision under Title VII of the Civil Rights Act. This may lead employees in the State of Illinois to sue employers pursuant to state law rather than turning to federal law. This may be especially true in light of the fact that federal judges are more apt to grant employers' motions for summary judgment and federal jurors are more willing to find in favor of the employers than are their counterparts in state court.

In the *Sangamon County Sheriff's Department v. Illinois Human Rights Commission*, the plaintiff, a records clerk with the Sangamon County Sheriff's Department, filed a charge of sexual harassment and retaliation against the Sheriff's Department and a sergeant. The sergeant was a supervisor in the Sheriff's Department but was not the plaintiff's immediate supervisor. In her charge filed with the Illinois Human Rights Commission, the plaintiff alleged three counts: (1) that the sergeant had retaliated against her because she refused to engage in sexual activity with him; (2) that the sergeant's actions, and the Sheriff Department's response, created a hostile, embarrassing, and intimidating work environment; and (3) that she experienced different terms and conditions of employment following her report of sexual harassment.

The Illinois Supreme Court ruled that the sergeant who created a hostile workplace for a woman he harassed made his employer liable for his misconduct, despite the fact that he was not the plaintiff's immediate supervisor. The justices, in issuing their opinion, acknowledged that Title VII may hold the employer liable when the supervisor committing the harassment lacks authority over the victim, i.e., that the supervisor was not the victim's immediate supervisor or in the victim's supervisorial chain of command. The justices noted that the Illinois Human Rights Act does not make the same exception between a supervisor and one's immediate supervisor whereas Title VII does. In their ruling, the justices stated that the issue in this case is whether an employer is strictly liable under §2-102(d) of the Illinois Human Rights Act for the "hostile environment" sexual harassment committed by its supervisory employee, where that supervisory employee has no authority to affect the terms and conditions of the complainant's employment. The justices answered that question by stating yes.

This is a precedent setting case in Illinois that may result in more hostile workplace cases being brought in state court under the Illinois Human Rights Act rather than being taken to

federal court under Title VII. Normally, this type of case would be filed under Title VII in federal court and the plaintiff generally would not prevail because under Title VII, an employer is not strictly liable for hostile environment sexual harassment committed by a supervisory employee where that supervisor has no authority to affect the terms and conditions of the complainant's employment.

The end result is that employers and their insurers must be aware that hostile workplace claims previously brought in federal court will now likely be brought in state court because the Illinois Human Rights Act has now been interpreted to be more favorable to employees than Title VII of the Civil Rights Act in the area of supervisory hostile environment sexual harassment. Employers and their insurers must also be aware there will be more opinions in the coming months and years by the Illinois Supreme Court interpreting the depth and breadth of the Illinois Human Rights Act now that the Illinois Human Rights Act has been amended to permit plaintiffs to file directly with the state court rather than having to file administrative charges and proceed with claims under the Act through the Illinois Human Rights Commission.

On the Horizon

House democrats have introduced a new version of the Protecting America's Worker Act which would amend the Occupational Safety and Health Act ("OSHA") of 1970 to expand the coverage, enhance whistleblower protections and stiffen civil and criminal penalties for safety violations. This will not only affect employers but potentially affect their insurance carriers, insofar as Employment Practice of Liability Insurance policies/endorsements will need to be examined to determine whether they were intended to and/or do cover OSHA violations and whistleblower lawsuits. Stay tuned for updates on this as the Bill progresses through the House and Senate.

Recent United States Supreme Court News Regarding Employment Law Cases

The United States Supreme Court recently heard the reverse discrimination case titled *Ricci v. The New Haven Connecticut Fire Department*. The case could have ramifications that could transform hiring nationwide. The City of New Haven Connecticut gave a promotional test for firefighters. It was a once in a decade chance to move up to a command rank in the fire department, Mr. Ricci earned a top score but received no promotion. The city had coded the test-takers by race. Out of the top 15 scorers, 14 were white and 1 was Hispanic. Because there were only 15 vacancies in the top ranks in the fire department, it looked like no blacks would be promoted. After months of hearings and debates, the city's Civil Service Board rejected the test scores and promoted no one. The outcome of the case could re-shape hiring and promotion policies for millions of the nation's public employees and possibly for private employers as well. In past decisions, Chief Justice Roberts has made it clear he believes it is time to forbid the use of race as a factor in the government's decisions. The key issue in the case is whether an employer can waive the racial impact of a hiring or promotional standard. A decision on this case will be issued in the next 60 days.