

Cray • Huber

DISCRIMINATION **COMPLAINTS REMAIN AT** **RECORD HIGHS AND THE 7TH** **CIRCUIT FINDS THAT A** **SINGLE ACT CAN CONSTITUTE** **A HOSTILE WORK** **ENVIRONMENT**

A. DISCRIMINATION CLAIMS CONTINUE TO CLIMB

According to the Equal Employment Opportunity Commission (“EEOC”), employment discrimination claims reached record numbers in 2008 and 2009. There is no indication that 2010 will be any different. In 2009, 93,000 people filed discrimination claims with the EEOC and tens of thousands more with local and state agencies, including the Illinois Department of Human Rights. The prevailing wisdom is that the reason for these record highs is the down turn in the economy, which began in December 2007. Workers losing their job have little to lose by filing claims with the EEOC or similar state agencies. Under the best economic circumstances workers who lose their jobs based on poor work performance or disciplinary problems almost always think that it was based on their status as a member of a protected class, e.g., race, gender or age.

The EEOC statistics show that the largest increase in discrimination claims are filed by pregnant workers and those workers over 40 years of age falling under the auspices of the Age Discrimination in Employment Act. The Illinois Human Rights Act protects virtually all of the same protected classes as do federal anti-discrimination laws. Likewise, the Illinois Human Rights Act prohibits retaliation against an employee who makes a claim, opposes discrimination or otherwise engages in a protected activity. Claims handling personnel should be on the lookout for claims made against their insureds and employees of insureds to determine if they have an Employment Practices Liability insurance policy or endorsement. With the increased number of discrimination claims being filed the odds that an employment-related claim will come across your desk increases by the day. The EEOC reports that discrimination claims continue to be on the rise in record numbers.

B. EMPLOYERS BEWARE: A SINGLE ACT CAN CONSTITUTE A HOSTILE WORK ENVIRONMENT.

The 7th Circuit Court of Appeals, encompassing Illinois, determined that a single act can amount to a hostile environment, if that act is considered to be “severe enough.” In *Barry v. The Chicago Transit Authority*, Cynthia Barry filed a complaint with the CTA’s human resources department after allegedly being grabbed by the breasts by a male co-worker, lifted into the air and in the process having her buttocks rubbed against the front of her male co-worker’s body from chest to penis three times before she was forcefully brought to the ground. Ms. Barry landed off-balance and she claims the male co-worker pushed her into a fence. The 7th Circuit, in reversing the lower court’s grant of summary judgment on the hostile work environment claim in favor of the defendant, determined that with respect to the male co-worker’s actions, Barry provided enough evidence to permit her hostile work environment claim to go forward. As noted in several 7th Circuit district court decisions, a single act can create a hostile environment if severe enough. Instances of uninvited physical contact with intimate parts of the body are among the most severe types of sexual harassment.

In ruling that the employer was liable for the male co-worker’s actions, the court noted the fact that Ms. Barry presented facts revealing that the supervisor to whom she complained made insensitive statements and potentially sabotaged the investigation regarding the incident. In order for employers to combat against being found liable for the acts of co-workers in creating a hostile work environment it is absolutely critical that employers have a rigid and thorough training program for managers and supervisors on how to handle complaints of a hostile work environment. Employers should also train those non-supervisory employees regarding what constitutes sexually harassing conduct. Such training may provide a defense to such claims in the future.

c. RECENT NOTEWORTHY 7TH CIRCUIT AND ILLINOIS STATE COURT EMPLOYMENT LAW DECISIONS

Purvis v. Oest: In a former high school teacher’s suit against a school district superintendent and others claiming deprivation of due process to false arrest, arising from a prosecution for allegedly having a sexual relation with a 15-year-old student, of which she was acquitted, the district court’s denial of the defendant’s motion for summary judgment was reversed where: (1) A genuine issue of material fact existed as to whether the school’s investigation was biased and deprived the plaintiff of due process; (2) The superintendent, dean and the principal are entitled to qualified immunity; and (3) The police chief had probable cause to arrest the plaintiff.

Casanova v. American Airlines, Inc.: A former baggage handler’s suit against American Airlines claiming he was terminated in retaliation for claiming workers’ compensation benefits, obtained a jury verdict of \$1,000,000, \$112,000 for lost wages, \$250,000 for emotional injury, and \$724,000 for punitive damages. The district court’s denial of the defendant’s post-judgment motions are reversed as the defendant is entitled to judgment as a matter of law under Rule 50 as plaintiff’s dissembling and insubordination was sufficient for his discharge.

Joan v. Res-Care, Inc.: In plaintiff’s suit against her employer and another employee claiming discrimination because of race and retaliation under Title VII, as well as state law claims, the district court’s grant of defendant’s motion for summary judgment is affirmed where: (1) The plaintiff’s Title VII claims, except her retaliation claims, are barred due to her failure to either timely file with the EEOC or to include those claims in her EEOC charge; (2) Plaintiff has not

met her burden to avoid summary judgment on her retaliation claims; (3) Summary judgment was properly granted as to a defamation claim as the defendants had shown that a privilege applies and plaintiff has not shown that there was abuse of privilege; and (4) Summary judgment was properly granted on the plaintiff's claim against the employer for vicarious liability as this claim depended on the defamation claim.

Runyon v. Applied Extrusion Technologies, Inc.: The district court did not err in granting defendant-employer's motion for summary judgment as a matter of law at the conclusion of the plaintiff's case-in-chief in a bench trial on a claim under the ADEA alleging that the defendant terminated the plaintiff on account of his age after the plaintiff and a younger co-worker had participated in a confrontation over a work-related dispute. The plaintiff was not sufficiently similar to the younger co-worker where the record shows that: (1) The plaintiff had more extensive history of confrontations with his co-workers than the younger co-worker; and (2) Unlike the younger co-worker, the plaintiff failed to accept responsibility for his actions in the subject dispute. The fact that the defendant terminated the plaintiff without terminating the younger co-worker was insufficient by itself to submit the case to the jury.

Hatmaker v. Memorial Medical Center: The district court did not err in granting a defendant-employer's motion for summary judgment in a Title VII action alleging the plaintiff was fired in retaliation for participating in an internal complaint the plaintiff made against his supervisor. The internal complaint did not qualify for protection under the participation element of the retaliation provisions of Title VII, which covers only investigations performed by an official governmental agency. Moreover, the plaintiff failed to present sufficient evidence under the opposition element of the retaliation provision of Title VII and that the plaintiff's complaint did not constitute reasonable belief that the supervisor had violated Title VII where the plaintiff did not make any sort of discrimination claim in the internal complaint, and where the plaintiff conceded that the internal complaint was merely an attempt to head-off the future emergence of a potential hostile work environment.

Hill v. Potter: The district court did not err in granting the defendant-employer's motion for summary judgment in a Title VII action alleging that the defendant reduced the plaintiff's hours and failed to promote the plaintiff to a different position in retaliation for the plaintiff filing an unrelated EECO complaint against her supervisors. The plaintiff failed to show that the reduction in hours was an adverse act where the plaintiff was not entitled to a 40-hour work week, and where the plaintiff failed to show what she could have been assigned for additional work that she was qualified to do. As to the plaintiff's failure to promote claim, the plaintiff failed to show that the defendants rationale, that the plaintiff did not obtain the job because had she failed to submit a written application, was pretextual. The fact that the written application requirement was part of the unwritten policy did not require a different result.

Lindsey v. Walgreens Company: The district court did not err in granting the defendant-employer's motion for summary judgment in an action under the ADEA alleging that the defendant terminated the plaintiff from her staff pharmacist position on account of her age. The defendant explained that the plaintiff was terminated due to her failure to comply with company policy regarding the filing of prescriptions that posted potential dangers to customers, and an internal investigation revealed that the plaintiff improperly overrode her supervisors notation when filing prescriptions. The court rejected the plaintiff's claim that her termination was based on her age because the innocent decision maker relied on biased information from her supervisor

who held and anti-age animosity where the plaintiff failed to show that the information provided by the supervisor was inaccurate, and where the decision maker conducted her own investigation prior to terminating the plaintiff.

Stiles v. International Bio Resources LLC: Under Illinois law, as predicated by the district court the Illinois Whistleblower Act did not abrogate a former employees retaliatory discharge claim that alleged the former employer terminated him for making internal complaints about alleged safety violations. The employee did not report the illegal activity to government officials, as required for the statute to apply.