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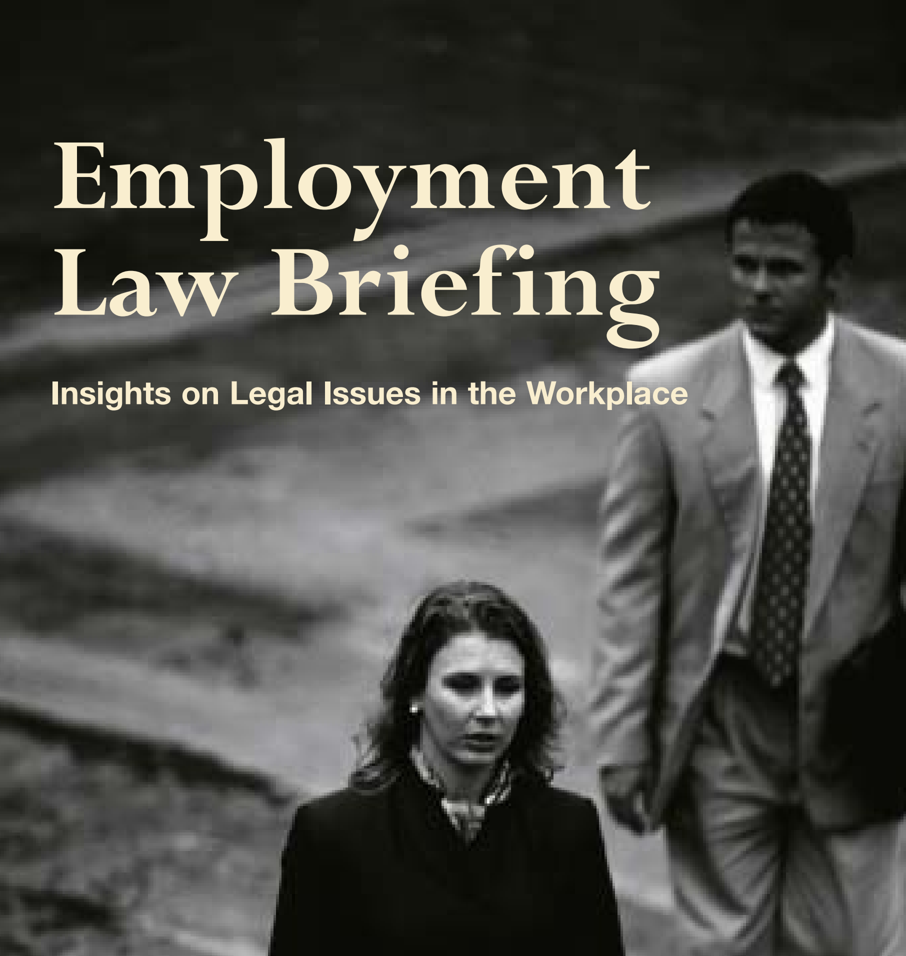

Employment Law Briefing

Insights on Legal Issues in the Workplace

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Sexual Harassment Claim Failed To Meet Title VII Harassment Criteria

When both women and men are subjected to offensive sexual behavior in the workplace, can a woman worker legitimately claim sexual harassment? The 4th Circuit U.S. Court of Appeals considered this issue in *Ocheltree v. Scollon Productions*.

The Work Environment

A woman employed in a production shop was subjected to the primarily male staff's open conversations about sex; comments on other staffers' sexual habits; sexually oriented jokes; and foul, vulgar, and profane language. She also witnessed specific sexual incidents, including employees pretending to perform oral sex and other sexual acts on a mannequin. In another incident, employees asked her opinion of a picture of pierced male genitalia.

The employee tried several times to meet with her supervisors to complain about the work environment, but was never given the opportunity. The company dismissed her after 18 months on the job, alleging excessive absenteeism, excessive phone calls during work hours and because her husband had threatened physical violence against a supervisor.

The employee alleged sexual harassment based on a hostile work environment, in violation of Title VII. Finding in her favor, a jury awarded her $7,280 in compensatory damages and $400,000 in punitive damages. The employer appealed.

The 4th Circuit Decides

The 4th Circuit found that the critical issue was whether members of one sex are exposed to disadvantageous terms or conditions of employment to which members of the other sex aren't exposed. The court found that Title VII doesn't bar all verbal or physical harassment in the workplace, only discrimination based on sex.

The court stated that Title VII clearly wasn't intended to reach "dirty jokes or sexually based profanity spoken by a male supervisor to other male employees." But the court also found that a work environment consumed by remarks that intimidate, ridicule and maliciously demean the status of women can create an environment that is as hostile as an environment that contains unwanted sexual advances.

The court determined the appropriate inquiry was whether "but for" the plaintiff's sex, the harassment would not have occurred — not whether "but for" the

plaintiff's sex she would have felt discriminated against, irrespective of the harasser's motivation. The court held that the employee would have been exposed to the same offensive atmosphere had she been male, thus her claim failed to meet Title VII harassment criteria. According to her own testimony, only three incidents were directed towards her. The remainder occurred in group settings as part of the male workers' daily bantering toward one another and she overheard or witnessed it. The court found that these three incidents were not sufficiently severe or pervasive to establish a hostile environment.

An Invitation to a Lawsuit

Although the employer received a favorable decision here, employers should continue their efforts to eliminate offensive behavior from the workplace. In this day and age, employees shouldn't pretend to perform oral sex on mannequins. Behavior like this is an invitation to a lawsuit. Employers should put in place — and enforce — policies regarding appropriate behavior, and train supervisors and employees about these policies to avoid the time and expense of litigation.

No Age Discrimination If Replacement Is Older

Can a worker replaced by someone the company believes to be older claim age discrimination? That was the question before a federal trial court in *Tarshis v. The Riese Organization*.

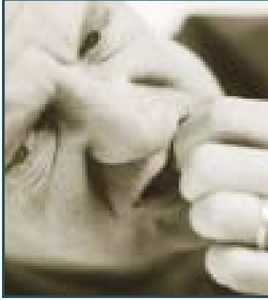
Here's how the court ruled and what employers can learn from the decision.

The Case Arises

A company that owned several restaurant franchises hired a relief manager in 1974 to split his time between two restaurants — a Brew Burger and a Lindy's. When he returned from a vacation in 1994, a Lindy's manager told him the company had closed the Brew Burger and replaced him at Lindy's with another Lindy's relief manager who, at 59, was older than he was. The manager wrote on the separation/termination notice that the relief manager had been laid off but that he was "ok to rehire for any small operation, low-volume location." Company records showed his age as 56 at the time, though he was actually 66. In addition, he had allegedly claimed to at least one manager to be in his mid-fifties.

The court found that a younger worker replaced by an older worker has difficulty in maintaining an age-discrimination claim, because a fact-finder can draw no reasonable, immediate inference of discrimination.

A few months later, the company reopened the Brew Burger as Martini's Restaurant, but rehired none of the former Brew Burger managers. The laid-off manager replied to the company's *New York Times* ad for assistant and general managers at Martini's — without success.



The Manager Sues

The manager sued the company under the Age Discrimination in Employment Act, alleging willful discrimination against him based on his age. But he admitted that during his entire employment, he had never heard any supervisors make disparaging remarks concerning his age. Thus, in the absence of direct evidence of discrimination, he had to show that:

1. *He was a member of a protected group,*
2. *He was qualified for the position in question,*
3. *He was discharged from that position, and*
4. *The discharge occurred under circumstances giving rise to an inference of discrimination.*

The Court Decides

The company, alleging that no facts were in dispute, moved for judgment as a matter of law without a trial. It claimed it had a legitimate, nondiscriminatory reason for discharging him: that no full-time relief manager's positions were open at Lindy's when he returned from his vacation and that he had turned down a suitable position at one of its Dunkin' Donuts restaurants.

The court agreed, finding the company's firing basis was legitimate. The court also found that a younger worker replaced by an older worker has difficulty in maintaining an age-discrimination claim, because a fact-finder can draw no reasonable, immediate inference of discrimination. Here, as far the company knew, the laid-off manager's replacement was three years older than he was.

Finally, the laid-off manager didn't produce any other evidence to support a finding of age discrimination. He conceded that the ages of other employees discharged at about the same time ranged from 22 to 67.

Older for Younger Is OK

This case demonstrates that an employer can help avoid an age-discrimination claim by replacing an age-protected employee with someone as old or older.

But when an employer conducts a mass layoff, it should determine the layoff's impact on all protected groups. If a layoff disproportionately affects a particular group, the employer must articulate a legitimate, nonpretextual reason for its action. Here, the employer was prepared to back up its actions with undisputed documentary evidence. As a result, the court ruled in its favor as a matter of law without a trial.

Employer May Dismiss Probationary Worker Without Violating Title VII

A bank considered the first three months of employment an introductory period during which employees could resign without giving notice and the bank could fire them without notice or an opportunity for corrective action.

But when the bank fired a Haitian clerk for cause during her introductory period, she alleged her firing was pretextual. She sued the bank for discrimination on the basis of national origin in violation of Title VII of the Civil Rights Act.

Let's take a look at how a federal trial court decided *Laurent v. Citibank*.

The Facts

The clerk's duties included handling client transactions — such as deposits and withdrawals — and referring clients to the sales staff. Before starting her duties, she attended a mandatory training class. The class supervisor deemed her class performance unsatisfactory because she:

- *Failed to check identifications or witness endorsements when clients cashed checks,*
- *Failed to total transactions at the end of the day,*
- *Had a $911 overage on the last training day, and*
- *Arrived late for work or after lunch at least four times during the nine-day training period.*

At the close of training, the bank discharged her and she filed suit. She claimed that her supervisor asked her where she was from when he heard her speaking Creole on the phone and "gave her a funny look" when she responded that she was Haitian. She claimed he displayed a negative attitude toward her following this conversation. Specifically, she alleged that he:

- *Yelled at her for breaking training rules by entering the classroom during breaks, but allowed other employees to remain in the classroom during breaks,*
- *Took fake money from her training drawer during breaks, causing her to be short at the end of the day,*
- *Disparaged her performance and embarrassed her in front of the rest of the class, and*
- *Saved her work when she made mistakes and discarded it when she didn't.*

The Decision

The bank moved for judgment as a matter of law without a trial because no facts were in dispute. In considering the bank's motion, the court found that with no direct evidence of discrimination, the burden was on the clerk to show that:

This case demonstrates how designating an introductory period for new employees can be useful.

1. *She was a member of a protected group,*
2. *She was qualified for the position,*
3. *She was subjected to an adverse employment action, and*
4. *The adverse action occurred under circumstances giving rise to an inference of discrimination based on membership in the protected group.*

The only contested issue was whether the clerk was qualified for her position. She argued she was qualified because the bank had hired her based on her qualifications. She buttressed this argument by pointing out that the bank spoke with the references she provided before hiring her.

The court dismissed this line of reasoning. It noted that employers can reasonably be assumed to carefully evaluate applicants and hire only those found qualified. But employers can't reasonably be assumed to evaluate applicants as thoroughly when continued employment is subject to satisfactory completion of an introductory period.

Because the bank's policy allowed it to dismiss new employees during the introductory period, the clerk's qualifications couldn't be inferred from the mere fact that the bank had hired her for its training program. So the court ruled for the bank as a matter of law.

What We Can Learn

This case demonstrates how designating an introductory period for new employees can be useful. Employees who

aren't deemed qualified for Title VII purposes until they complete an introductory period can't establish a prima facie discrimination case.

But employers must be aware that designating an introductory period doesn't give them license to dismiss new hires without regard to discrimination statutes. Here the bank was able to show that it had legitimately dismissed the clerk for incompetence.

Nevertheless, remember that Title VII protects all employees even if they have worked only one day.

Reasonable Accommodation For Quadriplegic Employee

What constitutes a hardship for an employer in accommodating a quadriplegic worker? That was the issue before a Wisconsin appellate court.

Let's see how it decided *Crystal Lake Cheese Factory v. Labor & Industry Review Commission and Susan Catlin*.

Background

Soon after an employee began working at a cheese factory in 1995, the factory promoted her to department head. Her primary duties consisted of gathering store orders and listing sizes and types of cheese for the cheese cutter to cut that day.

The following year, an auto accident left her a quadriplegic. The company president told the department head while hospitalized that her job would be available "no matter what." After nearly a year of rehabilitation, she told the company that she was ready to return to work.

The company consulted with its insurance provider and analyzed the workplace to see if a person in a wheelchair could perform her job. The review concluded that she couldn't perform all functions of all wholesale-department positions. Based on this review, the company discharged the department head without making any attempt to accommodate her disability.

The Employee's First Appeal

An administrative law judge (ALJ) held a hearing in accordance with the Wisconsin Fair Employment Act. It found that the department head was able to perform some — but not all — duties for each of her responsibilities.

But the ALJ made no specific findings regarding which of the duties of her own position she could or could not perform, except to note only that she could no longer retrieve cheese stored on high shelves. The ALJ concluded that to accommodate her, the company would have to modify her duties so that even when she was acting as the cutter, she wouldn't be required to retrieve the cheese. The ALJ concluded that this accommodation wouldn't be reasonable.

The Employee's Second Appeal

The department head appealed to the Wisconsin Labor & Industry Review Commission (LIRC). The company argued that a "reasonable accommodation" permits a disabled employee to perform all job responsibilities. It doesn't include creating a new job by modifying or eliminating predisability tasks.

> ***Employers should engage in an interactive process with disabled employees and thoroughly explore available options.***

The department head countered that she could still perform most of the duties in the department. And the ones she couldn't perform — lifting and cutting blocks of cheese and giving the packages a water bath — were duties primarily assigned to someone else. But some physical modifications to the factory would be required to facilitate performance of her duties.

The commission found that the company had denied the employee a reasonable accommodation by its refusal to:

- ***Alter her job responsibilities to exempt her from some tasks, and***
- ***Physically alter the workplace to accommodate her disability.***

The company filed an appeal.

The Appellate Court Has the Last Word

The Wisconsin Court of Appeals held that in a disability-discrimination suit, the complainant must show that:

1. ***He or she is handicapped within the meaning of the law, and***
2. ***The employer took adverse action based on that handicap.***

Not in dispute here was the fact that the department head was disabled or that the company dismissed her based on her disability. But the law doesn't require an employer to make a reasonable accommodation if the accommodation will impose a hardship on the employer. The court upheld the LIRC's verdict, deciding that the evidence suggested that the department head could perform most of her duties and that the suggested accommodation didn't constitute a hardship for the factory. Furthermore, because of lack of evidence of cross-training of employees, the court concluded that the company hadn't previously required all workers in all positions to perform all tasks.

The court did concede that costs of changing a physical plant may sometimes constitute a hardship, but said that the factory here hadn't shown that the cost of alterations would create a hardship.

An Interactive Process Is Best

Because Wisconsin law is similar to the Americans With Disabilities Act and the law in other states, the lessons from this case are universal.

Employers shouldn't make unilateral decisions about what constitutes reasonable accommodation. Instead, they should engage in an interactive process with disabled employees and thoroughly explore available options. An employer that ultimately relies on an undue-hardship defense bears the burden of establishing that defense and must be prepared to submit hard evidence on the extent of the hardship.

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We hope you enjoy this edition of the Employment Law Briefing. Our goal is to provide you with articles and information that will assist you in managing the employer/employee relationship, whether you are in the public or private sector. Should you have any questions regarding the topics in this newsletter, or any related employment matter, I would ask that you contact us.

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We welcome feedback from you about this newsletter. We believe it is important to continue to apprise our friends, colleagues and clients of legal issues and ongoing changes in this most volatile and important area of law. You may also visit our website, which has recently been modified to include several helpful employment-related pages and sites at **www.hl-law.com**.

If you have any questions or comments about this publication, or if you know someone who would like to be included in our mailing list, please call **Michael J. Rose** at 860-249-1361 or e-mail me at **mrose@hl-law.com**.

Very truly yours,

Michael J. Rose