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Employment Law Outlook

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THIRD-PARTY HARASSMENT CLAIMS AGAINST EMPLOYER REVIVED; FOURTH CIRCUIT ADOPTS NEGLIGENCE STANDARD

William E. Rachels, Jr.

The U.S. Court of Appeals for the Fourth Circuit concluded that an employer knew, or certainly had reason to know, of the ongoing sexually and racially based harassment that an employee suffered at the hands of its customer. It reversed the district court's denial of the employee's hostile work environment claims against the company. In so doing, the appeals court adopted a negligence standard for third-party harassment claims in line with the approach taken by other circuits. (*Freeman v. Dal-Tile Corporation*, April 29, 2014).

The harasser in this case worked as a sales representative for VoStone, a company that had a "significant part" of its business with Dal-Tile, the defendant employer. VoStone's sales representative was a frequent visitor to Dal-Tile, much to the displeasure of the plaintiff and her coworkers, who suffered years of racial slurs, sexist language, and other hostile behavior.

Objectively severe and pervasive. Among other comments, the harasser routinely used racial slurs directly to and about African-American female employees. He frequently told the employee and her coworkers about his sexual encounters with women, showed them naked pictures on his phone, and made other lewd and racial comments.

The employee complained to her supervisor, to Human Resources (HR), and to the harasser himself, telling him repeatedly to stop making "crude and demeaning" comments. She cried in the presence of the harasser and her supervisor, and was treated for depression and anxiety because of the harassment, even taking a two-month medical leave due to the stress of the work environment. The court held that a reasonable jury could find that the harassment was unwelcome and also that it was based on the employee's sex or race. Also, a jury could find the harassment was sufficiently severe or pervasive as to constitute a hostile work environment. While the district court had found that the employee subjectively perceived her work environment

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NO GOOD DEED GOES UNPUNISHED – PRACTICE POINTER

Cher E. Wynkoop and Corina V. San-Marina

We find in our practice that many in-house benefit plan administrators informally, gratuitously or inadvertently offer continuing health and welfare plan coverage to employees who have a long-term change in status, such as a transition from full-time to an extended leave of absence, long-term disability, workers' compensation or reduced schedule of employment. It is often the case that the written terms of an employer's health and welfare plan do not extend eligibility to these non-full-time status employees. Unfortunately, the insurers who fund these benefits will follow the exact terms of the plans and often deny coverage claims if they become aware that the claimant is no longer in a full-time eligible status. In this case, the employer may have to pay the promised benefit out of pocket. This can include significant health/stop-loss and life insurance claims.

An excellent example is a recent Virginia case in which the employer was held liable for the life insurance claim of one of its employees who died while on long-term disability and working part-time. *Lewis v. Kratos Defense & Sec. Solutions, Inc.*, 950 F. Supp. 2d 851 (E.D. Va. 2013). The employer failed to follow the terms of its life insurance policy by enrolling the employee in the life insurance plan and paying premiums on his behalf, despite the fact that he did not satisfy the eligibility requirements. While the insurer had no obligation to verify that the employees enrolled in coverage met the eligibility requirements

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In This Issue...

THE IMPORTANCE OF ACCURATELY TRACKING AND PROVIDING FMLA NOTICE TO EMPLOYEES

Phillip H. Hucles

On May 2, 2014, the Seventh Circuit Court of Appeals reminded employers why accurately tracking and notifying employees of their FMLA leave may prevent a litany of problems. In *Holder v. Illinois Department of Corrections*, the Seventh Circuit affirmed the district court's ruling barring the Department from denying an employee's eligibility for FMLA leave, and entitlement to FMLA leave, when the Department approved the employee's FMLA leave only to retroactively revoke the leave eight months later.

The plaintiff, Zane Holder, worked at the Illinois Department of Corrections as a correctional officer. Shortly after commencing employment with the Department, Holder's wife was diagnosed with a mental health problem stemming from a drug dependency. Holder informed the Department that he needed to take intermittent FMLA leave to care for his wife. Holder provided a medical certificate from his wife's psychiatrist reiterating the necessity of his intermittent leave. The only documentation Holder provided to the Department was this initial certification. Based on the psychiatrist's certificate, the Department approved the intermittent leave. Between October 3, 2007 (when it first approved of the leave) to April 18, 2008, the Department never requested additional certification.

From October 2007 through April 2008, Holder took 130 FMLA days, well above the 12 work-weeks guaranteed under the FMLA. On April 18, 2008, the Department's Human Resources Coordinator informed Holder that he had extinguished his FMLA leave and if he needed additional leave Holder needed to apply for leave under a separate state statute. The state statute allows employees to take 12 months of leave, but relinquishes the employer's obligation to pay health benefits. From April 20 to June 9, 2008, Holder took leave under the state statute.

Over eight months later, in February 2009, the Department notified Holder that it mistakenly paid for his health benefits, beginning January 1, 2008, when he in fact had used up his FMLA entitlement. Accordingly, the Department soon began garnishing 25% of his wages to recoup benefits, approximately $8,000 in health care premiums, it provided to Holder.

Holder subsequently filed suit against the Department claiming that he should not be required to pay for his health benefits while on FMLA leave because: (i) the Department failed to notify him that his leave expired on January 1, 2008 and (ii) the Department approved the FMLA leave for those days, and therefore was barred from arguing, many months later, that it was improper.

The Seventh Circuit, in rejecting the Department's arguments, cautioned employers about failing to investigate employee leave. Distinguishing the Department's actions from other cases, the Court stated that "[i]n none of these cases has an employer granted scores and scores of leave days without any requests for more proof, only to deny the leave months and months after the fact." Accordingly, the Court held that because the Department approved the FMLA leave for approximately nine months, never once requesting additional information, the Department was prohibited from denying the FMLA leave.

The Court also rejected the Department's "convoluted and confusing" argument that a distinction exists within the FMLA between the threshold entitlement to take FMLA leave, in the first instance, and entitlement to take leave on any subsequent day. The Court found this argument wholly lacking support and distinguished the cases on the fact that none of the other employers "attempt[ed] to retroactively deny an FMLA leave long after the fact." The Court noted that the Department continued to approve Holder's FMLA leave without giving him any reason to suspect that he was accruing thousands of dollars in debt to the Department. Based on these facts, the Court concluded that the district court correctly ruled that the Department was barred from denying the validity of the FMLA leave and therefore Holder's entitlement to continued health benefits during the leave.

The Seventh Circuit, in rejecting the Department's arguments, cautioned employers about failing to investigate employee leave.

Unfortunately the Court left for another day the issue of how long after granting leave an employer has to question the veracity of a claim before the employer can no longer challenge the leave. The Court hinted that there must be some balance between allowing the employer time to investigate while allowing the "employee to rely on a grant of leave without risk of retroactive revocation months down the road."

This should be a cautionary tale that employers should always keep meticulous records of their employees' entitlement to FMLA leave. In so doing, it can ensure it provides its employees with accurate notification of FMLA leave entitlement. Further, if the employer has a suspicion that the employee is improperly using FMLA leave, it must act with reasonable prudence to either investigate or require additional certification. As the Seventh Circuit held, an employer cannot sit back while the employee relies on leave, only to subsequently deny the leave at a much later date.■

NEW MODEL COBRA AND CHIPRA NOTICES

Cher E. Wynkoop and Corina V. San-Marina

On May 2, 2014, the Department of Labor (DOL) issued new proposed regulations that revise the COBRA notice requirement and published new model COBRA notices. Until the proposed regulations are finalized and effective, the DOL has stated that it will consider use of the newly revised model notices as good faith compliance with any COBRA notice content requirements. Plan administrators should consider immediately implementing use of these revised model notices.

- **Updated Model General COBRA Notice:** includes new information regarding coverage available through the Exchanges and a link to the exchange website.
- **Updated Model COBRA Election Notice:** includes some significant new content. It provides a statement that coverage under the other options may cost less than COBRA coverage and that it may be difficult for an individual to switch to another coverage option once a coverage decision is made. It also includes three new questions describing the Exchanges, enrollment periods available on the Exchanges and events that allow an individual to switch between COBRA and Exchange coverage.

Both COBRA Notices are available on the DOL website at: **http://www.dol.gov/ebsa/cobra.html**.

Along with the updates to the COBRA model notices, the DOL issued an updated model notice that employers can use to comply with Children's Health Insurance Program Reauthorization Act of 2009 (CHIPRA). The revised notice includes language related to Exchange coverage, similar to the update to the COBRA model notices and is available on the DOL website at: **http://www.dol.gov/ebsa/pdf/chipmodelnotice.pdf**.

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as hostile but that she did not show it was objectively severe or pervasive, the appeals court disagreed. On these facts, it held that a reasonable jury could find both the sex and race-based harassment were objectively severe or pervasive.

Negligence standard for third-party harassment. For the first time in a published opinion, the Fourth Circuit adopted a negligence standard for analyzing an employer's liability for third-party harassment, noting that other circuits have used a similar standard. Citing the same reasoning used as a basis for imposing liability on employers for coworker harassment, the appeals court noted that an employer should not be able to skirt liability by adopting a "see no evil, hear no evil" approach. Thus, it held, an employer is liable under Title VII for a hostile work environment created by a third party if the employer knew or should have known of the harassment and failed to promptly take remedial action that was reasonably calculated to end the harassment.

Applying the standard here, the appeals court held a reasonable jury could find that the employer knew or should have known of the harassment perpetrated by the sales representative. The employee's immediate supervisor was well aware of the major incidents comprising the hostile work environment allegations, having been present during the incidents or been on the receiving end of the employee's frequent complaints about them. The supervisor's typical response, however, was to scoff, shake her head, roll her eyes—and then simply resume what she'd been doing.

Response inadequate. Moreover, the employee created at least a triable issue as to whether the employer's response to the third-party harassment was adequate. The appeals court noted that the employer did not take any action to remedy the problem until the harassment had been continuing unabated for three years—when the employee finally went up the chain of command and complained to HR.

After she complained to HR, the employer barred the harasser from communicating with the employee. The harassment eventually stopped once the communication ban was put into place. The court therefore said that *may* have been an adequate response to the harassment had it been put into effect sooner. But it clearly wasn't "prompt" remedial action, in the court's view. Therefore, the appeals court reversed summary judgment in the employer's favor on the employee's hostile work environment claims under Title VII, as well as her racial hostile work environment claim under Sec. 1981.■

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when it accepted premiums from the employer, the insurer also had no obligation to pay the claim when it determined that the employee did not meet the eligibility requirements. Even though the case was settled out of court, the employer most likely ended up paying a substantial amount that could have been avoided if the terms of the life insurance policy were followed.

This situation may be avoided in one of three ways: (1) terminate coverage per the terms of the plans and provide required termination notices; (2) amend the terms of the plans to cover the desired "inactive" or reduced schedule categories; or (3) add specific "inactive" or reduced schedule employees by name to the specific insurance policies as "additional insureds."■

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