Hot Topics in Labor and Employment Law

2018 SWBA CONFERENCE

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Sexual Harassment in the #MeToo Era

The Court of Public Opinion
vs.
The Court of Legal Opinion

Introduction

- Allegations of sexual harassment in the workplace continue to dominate headlines
- Prominent executives and public figures outed for apparent patterns of inappropriate behavior, effectively ending their careers
- Negative publicity, as well as damage to careers and brands not just limited to national companies, thanks to social media

Sexual Harassment

- Ongoing accusations coming out of Hollywood and Washington DC are shocking; not just because of what the harassers allegedly did, but also because of how long they allegedly did it before being caught.
- In some cases, the allegations date back decades.

The Weinstein effect

- Whistleblowers have brought down powerful public figures, which has empowered others to tell their own stories
  - #MeToo
  - #TimesUp
- Two possible risks for employers
  - Heightened sensitivity to potentially offensive behavior at all levels
  - Long-overdue report of an individual that may have a history of bad behavior, but was protected

Not business as usual

- Many claims being tried in the Court of Public Opinion, usually through social media
  - Even if claim is stale from a legal point of view
  - Even if a previous settlement/waiver/confidentiality agreement is in effect

Not business as usual *(cont'd)*

- Employees and the public are expecting immediate action, especially if the organization is in the public eye
- Bottom lines are being threatened
  - Business partners, vendors and customers are being subjected to public pressure to cease doing business with entities that are facing a public accusation of sexual harassment

Not business as usual *(cont'd)*

- Executive-level employees no longer seen as "untouchable"
- Companies no longer finding protection behind settlement and confidentiality agreements
  - Agreements criticized, at a minimum
  - Social media users treating them as affirmative evidence of guilt
  - The 2018 Tax Cuts and Jobs Act includes a little-noticed provision regarding deductions related to the settlement of sexual harassment claims.

Have things changed ?

- Just over a year since *The New Yorker* expose on Harvey Weinstein's behavior unleashed a national media storm and a the #MeToo movement

- This October, SHRM released the results of its research into workplace conditions and behaviors and the level of workplace harassment claims in the wake of this movement

SHRM #MeToo SURVEY

- Nearly a third of the executives surveyed said they have changed their behaviors to a moderate, great or very great extent to avoid behavior that could be perceived as sexual harassment
- Reported changes included
  - Being careful about language
  - Avoiding specific topics/jokes
  - No touching
  - Policy changes/new training

SHRM #MeToo SURVEY

- Survey also revealed some executives reacting in ways that might have a negative impact on women in the workplace.
  - "Don't talk to women."
  - "Scared to say anything."
  - "[Avoid] any indirect or direct contact with others, any conversation one-on-one, asking permission to enter into 3 foot personal space and NEVER closer than 3 foot of another."

SHRM #MeToo SURVEY

- The SHRM Survey results indicated that 72% of employees were happy with their employers efforts to stop sexual harassment
- However, general surveys indicate that more than 1/3 of Americans still believe that the workplace fosters sexual harassment

SHRM #MeToo SURVEY

- SHRM also reported that the number of sex discrimination claims and sexual harassment complaints filed with the Equal Employment Opportunity Commission (EEOC) has risen.

- And, that the number of suits filed by the EEOC that involved claims of sex discrimination or sexual harassment had increased by almost 25%

Legislative Reactions

- In 2018, 32 states brought forth more than 125 pieces of legislation—some relating to legislators' behavior and some affecting employers.
- As of October, New York City has mandated that employers in that city provide sexual-harassment prevention training to all employees.
- California’s legislature passed a series of bills designed to help harassment suits reach juries.
- Maryland now requires employers with over 50 employees to complete a survey disclosing the number of sexual-harassment settlements into which the employer has entered

Implications for Employers

- **More difficult to investigate**
- **More difficult to resolve**
- **As much a Public Relations Issue as a Legal Issue**
  - **Manage press and social media**
  - **Decide appropriate use of confidentiality provisions**

How should you respond?

- From a legal standpoint
  - Standard responses to allegations of harassment and discrimination may need to be re-examined
  - Case-by-case analysis required
- From a public relations standpoint
  - What if the allegations become public?
  - Social media makes everyone a target for publicity – both fair and unfair – without the protections of professional journalism

Ways Employers Can Combat Harassment

- Encourage Whistleblowing
- Search for Problems (Don’t burry your head in the sand)
- Set the Tone from the Top Down
- Train the Right Way

Is it Time to Rethink Your Sexual Harassment Training?

Common Problems with harassment training programs

Employees Do Not Fully Understand What Sexual Harassment Is

- Employees need to know and understand that sexual harassment does not always include an unwelcome sexual advance
- It may include other verbal or physical harassment of a sexual nature or even offensive remarks about a person's sex.
- The gender of the harasser can be either male or female, and the same applies to the gender of the victim.
- Also, the gender of the harasser and the victim can be the same.

Common Problems with harassment training programs

Only Lower-level Employees are Receiving Training

- Many employers provide sexual harassment training to lower-level employees but excuse management, especially upper-level management, from the training.
- The message this sends to the workforce is that anti-harassment training really isn't that important.
- Limiting who is trained also conveys that the employer is going through the motions .

Common Problems with harassment training programs

The Harassment Training is Boring

- Too often, training is treated as a routine, nothing-new-here, waste-of-time, yearly requirement.
- With careful thought and preparation, training sessions can be impactful, focused, short and informative. The trainer should be positive, encouraging and engaging.
- If your organization lacks that skill set, then consider retaining an outside attorney or professional trainer.

Transgender Employees and Claims of Discrimination

Transgender Employees and Discrimination Claims

- **Last November, a jury in federal court in Oklahoma City awarded $1.1 Million to a transgendered professor who was denied tenure and promotion by Southeastern Oklahoma State University.**

Tudor v. Southeastern State

- *Tudor v. Southeastern State University of Oklahoma et al.*
- Dr. Rachel Tudor, a male-to-female English professor, worked for Southeastern in Durant, Oklahoma, as a tenure track assistant professor from 2004 to 2011.

Tudor v. Southeastern State

- She filed a charge of discrimination with the U.S. Department of Education Office for Civil Rights, who referred her complaint to the EEOC for investigation.
- The EEOC found Dr. Tudor was the victim of sex discrimination and retaliation and referred the charges to the U.S. Department of Justice for litigation.

Tudor v. Southeastern State

- The University sought summary judgement on the grounds that Tudor was not entitled to protection under Title VII because her status as a transgender person is not a protected class.
- The district court recognized The Tenth Circuit's holding was that "transsexuals may not claim protection under Title VII from discrimination based solely on their status as a transsexual."
- However . . .

Tudor v. Southeastern State

- The court went on to hold that Tudor could present her claims to a jury because:

> "Sex stereotyping based on a person's gender non-conforming behavior is impermissible discrimination, irrespective of the cause of that behavior a label, such as 'transsexual,' is not fatal to a sex discrimination claim where the victim has suffered discrimination because of his or her gender non-conformity."

Sexual Orientation Discrimination

Sexual Orientation Discrimination

- Title VII prohibits employment discrimination because of "sex," but does not expressly define that word.

- Nor does the act expressly mention sexual orientation.

Sexual Orientation Discrimination

- Employees have often argued that the word "sex" should be interpreted as including sexual orientation, but most courts that have examined that argument have held that Congress did not intend for the distinct concept of sexual orientation to be included in Title VII.

Sexual Orientation Discrimination

- A few courts have recognized claims under Title VII for stereotyping individuals into traditional gender roles (as the Tudor court did with respect to transgender employees), but the courts have not gone so far as to apply Title VII to sexual orientation directly.

Sexual Orientation Discrimination

- In 2016, the EEOC took the position that the courts have been wrong.

- The agency announced that in all future cases, the EEOC would argue that "sexual orientation" discrimination is prohibited by Title VII via its ban on "sex" discrimination, and no amendment to Title VII is necessary to make those claims actionable.

Hively v. Ivy Tech Community College

- In 2017, one appellate court finally embraced that trend and reexamined the legal theory.
- In *Hively v. Ivy Tech Community College*, the Seventh Circuit held, for the first time, that a claim of discrimination by an employee based solely on his or her sexual orientation could be maintained under Title VII.

Hively v. Ivy Tech Community College

- Essentially, the appellate court reinterpreted the word "sex" in Title VII and decided that changing moral beliefs of the country justified a different interpretation of Title VII, now more than 50 years old.

Zarda v Altitude Express

- Earlier this year, the Second Circuit joined the Seventh Circuit and added sexual orientation to the list of prohibited bases of discrimination in employment under Title VII.

- In a divided en banc decision, *Zarda v Altitude Express*, the plurality overruled its prior precedent and held sexual orientation discrimination constitutes a form of "sex" discrimination under Title VII.

Sexual Orientation Discrimination

- Other courts have stayed the course, ignoring the EEOC and the apparent societal trend.

- Those courts have noted that an early 1960's Congress clearly did not intend for sexual orientation to be covered by the law, and that the proper venue for changing an act of Congress is Congress itself.

Sexual Orientation Discrimination

- In December, 2017, the U.S. Supreme Court passed on an opportunity to provide some long-awaited clarity on the interplay between sexual orientation and Title VII and declined to review the decision in *Hively*.

DOJ , EEOC SPLIT OVER TRANSGENDER PROTECTIONS

- In late October, the DOJ argued to the Supreme Court that Title VII's ban on bias "because of … sex" does not cover gender identity because Congress did not mean to protect transgender workers when it passed the 1964 statute, and that firing transgender workers does not illegally penalize them for flouting sex-based stereotypes.

The Takeaway

- While Title VII does not explicitly prohibit discrimination against individuals based on sexual orientations or transgender status, courts recognize these cases as traditional gender discrimination cases – the so-called "stereotypical gender roles" theory.
- Also, employer should be mindful that a variety of state and local laws d provide protection based on orientation and transgender status, as do some contractual provisions.

CLASS ACTION

WAIVERS

Epic Systems Corporation v Lewis

- In May, the US Supreme Court held that employers do not violate the National Labor Relations Act if they force workers to forgo the ability to pursue class actions by including class waiver provisions in arbitration agreements that they must sign as a condition of employment
- Court stated that the "law is clear" that Congress in enacting the FAA instructed federal courts to enforce arbitration agreements as written — including terms that call for individualized proceedings

Pros and Cons of Arbitration Agreements

- Avoidance of juries
- Cost and time savings?
- Confidentiality
- "Split the Baby" mentality
- Enforcement – Plaintiffs resist arbitration, resulting in costly motions to compel but is this bad?
- Informality
- Potential increase in claims
- Loss of "pure legal" arguments
- Employer must bear costs
- Litigation deterrent/settlement leverage
- Class action waivers
- No appeal
- Selection of arbitrator becoming more and more difficult

New Developments Under the Fair Labor Standards Act

Encino Motorcars, LLC v. Navarro

- Held service writers at car dealerships are exempt under the FLSA
- More importantly, the US Supreme Court rejected 70+ year old practice of narrowly construing exemptions under the FLSA
  - Employers no longer required to demonstrate that an exemption "plainly and unmistakably" applies
  - Now, need only show that their reading of the exemption is more consistent with the statutory and regulatory text

Emotional Harm Damages Allowed In FLSA Retaliation Case

- The Fifth Circuit recently held that "an employee may recover for emotional injury resulting from retaliation" under the Fair Labor Standards Act (*Pineda, et al. v. JTCH Apartments LLC)*
- *The court relied on the following language* in the statute:
  - "[a]ny employer who violates the provisions … shall be liable for such legal or equitable relief as may be appropriate to effectuate the purpose of" the anti-retaliation section.

Wage & Hour Opinion Letters

- They're back
  - For over 70 years, the Wage and Hour Division of DOL provided attorneys and human resources professional with a very useful resource for determining how to comply with the laws and regulations that WHD enforces – opinion letters.
  - Unfortunately, the DOL ended this program in 2010 and instead began a new practice of issuing broad "Administrative Interpretations" that pronounced the DOL's views on a given issue.

Wage & Hour Opinion Letters

- Last Summer, the Secretary of Labor announced that the DOL is reinstating the practice of issuing opinion letters, noting that, "Reinstating opinion letters will benefit employees and employers as they provide a means by which both can develop a clearer understanding of the Fair Labor Standards Act and other statutes."
- https://www.dol.gov/whd/opinion/opinion-request-1.htm

DOL Still Planning to Update Overtime Rule

- Completed RFI
- Held listening Sessions in September
- Plan to Publish New Overtime Rule in October 2018

Questions?

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