CLM CLAIMS & LITIGATION MANAGEMENT ALLIANCE™

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2014 CLM Annual Conference

April 9, 2014 – April 11, 2014

Boca Raton Resort
501 E. Camino Real
Boca Raton, FL 33432

Roundtable 2: Thursday, April 10, 2014 (11:30 am – 12:30 pm)

Recent Developments In Employment Practices Liability Claims Management

Social Media

NLRB Decisions – Applicable to union and non-union employers:

- *Design Technology Group, LLC*, April 19, 2013 – Employees' Facebook postings complaining about conduct of their supervisor constituted protected concerted activity.
- *Hispanics United of Buffalo*, December 14, 2012 – The NLRB deemed the termination of five employees wrongful; these five were terminated after making "concerted" critical comments about another employee on Facebook. Delicate line for employers to walk -- preventing workplace harassment while allowing protected concerted activity.
- *Karl Knauz Motors, Inc.*, September 28, 2012 – Employer ordered to cease and desist from maintaining its rule in its employee handbook that requires employees to be courteous to fellow employees. Distinction from *Hispanics United of Buffalo* decision.

Legislation Protecting Employee and Job Applicant Passwords:

- Seven states have banned employers from requesting employees' passwords.
- In total, 35 states have introduced or have pending legislation preventing employers from requesting passwords to personal internet accounts to get or keep a job. See Massachusetts Bill H. 1707; Rhode Island H.B. 5255.

The Mixed-Motive Cause of Action

The mixed motive theory is a claim plaintiffs raise in discrimination cases in which an adverse employment action was based on both unlawful and lawful considerations.

Rule

To prevail on a mixed motive claim, a plaintiff must prove by a preponderance of the evidence that he was: Terminated, constructively discharged, demoted, not hired, and/or not promoted by the employer; and plaintiff's protected status was a motivating factor in the employer's decision.

Elements of the "A Motivating Factor" Theory of Liability

1. Plaintiff is member of protected group and suffered some sort of adverse employment action.

2. Protected status was "a motivating factor" in the decision.

Plaintiff need not [theoretically] address the employer's stated reasons (pretext) and need not establish "but for" causation.

Defense

The defendant has an opportunity to mitigate the plaintiff's remedies if it shows that it would have made the same decision regardless of any discriminatory motive (known as the "same decision" defense).

Employer demonstrates other neutral motivating factors (a) drove/caused the decision and (b) would have led to same outcome even absent the discriminatory motivating factor.

Burden of Proof

Plaintiff has the burden of persuasion to prove the mixed motive claim.

Defendant has the burden of persuasion to prove the "same decision" defense.

Liability and Relief

Under the Civil Rights Act of 1991 (42 U.S.C. 2000 *et seq*), the "same decision" defense does not insulate the defendant from liability; defendant can invoke the "same decision" defense only to limit the plaintiff's remedies.

What if Employer Fails to Make or Prove Same Decision Defense

Damages, including punitive and full injunctive relief such as being placed in the job sought and full award of attorney's fees.

Proving Retaliation Under Title VII

What standard of proof applies to retaliation claims: (1) the "but for" cause of his termination (or other adverse employment action), the standard the Court adopted for age discrimination claims; (2) simply a "motivating factor" in the employment decision, a lesser standard of proof Congress adopted for race and sex discrimination claims under a 1991 amendment specific to Title VII; or (3) a "motivating factor" under a similar test the Supreme Court had applied to race and sex discrimination claims, prior to the enactment of the 1991 amendment?

University of Texas Southweatern Medical Center v. Nassar: the "motivating factor" provision only applies to claims of "discrimination" – which, in this context, means only claims of discrimination based on, for example, race, sex, and religion, rather than retaliation.

The question before the Supreme Court was what standard of proof applies in such cases – must the plaintiff prove only that retaliation was a "motivating factor" in the decision or must he prove that he would have gotten the job except for the retaliatory intent?

Tort law generally, the proper standard for causation is "but for" causation – the plaintiff must show that "but for" the illegal act. Her injury could not have occurred. So, in an employment discrimination case, under ordinary rules, the plaintiff would have to show that she would have gotten the job if the employer had not taken her race into account. The Court presumes that congress intends to use this standard, unless it indicates a different intent in the statute. The question in this case was whether Congress had indicated such an intent with regards to retaliation claims. The Court found no such intent by Congress.

Supervisor Liability Under Title VII

The Supreme Court has held that under Title VII, an employer is vicariously liable for severe or pervasive workplace harassment by a supervisor of the victim. *Faragher v. City of Boca Raton*, 524 U.S. 775 (1998), and *Burlington Industries, Inc. v. Ellerth*, 524 U.S. 742 (1998). If the harasser was the victim's co-employee, however, the employer is not liable absent proof of negligence.

To win a lawsuit for co-worker harassment under Title VII of the Civil Rights Act of 1964, it is necessary to show that the employer is negligent in responding to complaints about harassment; however, to win a lawsuit for harassment by a supervisor, the employer does not have to be negligent because Title VII imputes the supervisor's acts to the employer.

In *Vance v. Ball State:* the Court held that only those employees empowered to take tangible employment action would be supervisors. Other employees with some supervisory authority are "merely" co-employees even if they are labeled supervisors by the employer. And an employer is liable for harassment by coworkers only if the employer is negligent in allowing the harassment to happen. The negligence inquiry must take into account the degree of authority and control the harasser had, and the greater the amount, the more likely the employer may be found negligent, as long as it also had constructive notice of that harassment. Thus, the Court reaffirmed the agency principles it had adopted in *Farragher* and *Ellerth*.

If the harasser is a supervisor, however, liability may be imputed directly to the employer for the supervisor's actions. The employer may then only avoid such vicarious liability if the harassing behavior did not result in a tangible employment +action such as firing, demotion, or reduction in pay.

In such cases, an employer may assert a two-pronged affirmative defense to defeat vicarious liability: (1) that the employer exercised reasonable care to prevent and promptly correct the harassing behavior; and (2) that the employee unreasonably failed to take advantage of preventive or corrective measures put in place by the employer or otherwise failed to avoid the harm.

The Court's decision adopted a bright-line practical standard easily applied by employers and employees, as well as courts. Indeed, the issue of supervisory status now is one that will likely be resolved *as a matter of law* before trial. The standard will avoid juror confusion and allow for clear jury instructions in trials of harassment claims without the need to instruct on alternative theories of liability.

The decision is in line with the Court's earlier opinions where it drew from agency principles to determine when an employer must stand in the shoes of a supervisor who harasses employees. Where an employee has not been given the authority to take tangible employment actions against other employees, the employer must be afforded an opportunity to correct and eradicate harassment before being found liable.

Workplace Violence

OSHA Directive No. CPL 02-01-052 (September 8, 2011) - Discusses enforcement procedures for investigating or inspecting workplace violence incidents:

- Under the General Duty Clause, Section 5(a)(1) of the Occupational Safety & Health Act, OSHA can issue citations and fines for failure to protect workers from assaults or other forms of physical violence at the workplace.

Third-party exposure for employee violence:

- *Jerner v. Allstate Ins. Co.*
- *Brown v. All-Tech Investment Group, Inc.*
- *Cook v. Micro Craft, Inc.*

Balancing workplace violence concerns with gun rights legislation:

- States such as Georgia, Kansas, Tennessee and South Dakota are enacting legislation augmenting the rights of individuals to carry concealed weapons. Employers must balance the individual rights afforded by these statutes with the duty to provide a safe workplace.