Employer's Sexual Harassment Investigation Trumps Emotional Distress Claim

The U. S. Court of Appeals for the Second Circuit recently dismissed an employee's claim for negligent infliction of emotional distress arising from an employer's sexual harassment investigation. The Second Circuit ruled that courts must examine an employer's investigation from the viewpoint of the employer considering the “worst case scenarios” at the time of the alleged harassment. The threat of negligence claims arising from a sexual harassment investigation cannot deter employers from carrying out their obligations under the law when investigating such alleged misconduct. *Malik v. Carrier Corp.*

While the plaintiff participated in a leadership training program for new business school graduates, the employer received complaints that the plaintiff had made sexually explicit comments to two female employees and was arrogant toward female employees. Company representatives met with the plaintiff's supervisor, interviewed the complainants, and then met with the plaintiff who admitted that he made one sexually explicit remark but denied the other allegations. Based on its investigation, the company determined that the plaintiff had engaged in unacceptable workplace conduct and noted this in the plaintiff's personnel file. Thereafter, the employer terminated his employment.

The plaintiff sued the company for, among other things, negligent infliction of emotional distress, alleging the company acted negligently in investigating the allegations of sexual harassment and in documenting the incident in his personnel file. After a trial, the jury returned a verdict of $400,000 in favor of the plaintiff. The company appealed to the Second Circuit and argued that it had not acted negligently because federal law required it to investigate the sexual harassment allegations.

The Second Circuit agreed with the company, saying “corrective actions that a risk-averse employer might take to comply with federal law may not give rise to a negligence action.” In so holding, the court said it must view an employer's actions at the time of the events when “worst-case scenarios must govern its conduct.” An employer cannot stop investigating simply because the accused denies the allegations.

A court must evaluate an employer's actions “when worst-case scenarios must govern its conduct.”

The court held the company was within its rights in documenting the incident in the plaintiff's personnel file because, under a worst-case scenario, the company’s failure to do so could lead to liability under federal law. Finally, the court rejected the plaintiff’s argument that the company was careless in addressing the issue with his supervisor. "An employer simply cannot be diligent in carrying out an investigation if it must weigh every sentence or question with an eye to whether a jury might later conclude that it unreasonably injured an alleged harasser’s psyche.” As a result, the court dismissed the plaintiff's negligent infliction of emotional distress claim.
Courts Disagree On Reach Of Negligent Infliction Of Emotional Distress Claims

While the Malik case (discussed above) involved the employer’s conduct during an investigation of a sexual harassment complaint, the legal issue of emotional distress caused by the actions of an employer during the course of the employment relationship comes up frequently. In 1997, in Parsons v. United Technologies Corp., the Connecticut Supreme Court recognized a claim for negligent infliction of emotional distress for actions associated with “the termination process.” However, a growing number of courts are expanding the reach of such claims beyond the “termination process.”

For example, in Karanda v. Pratt & Whitney Aircraft, the Connecticut Superior Court ruled that negligent infliction of emotional distress claims should be allowed at any time during employment. The court reasoned that, because the legislature changed the worker’s compensation law in 1993 to exclude emotional distress injuries, plaintiffs may pursue claims for such injuries in a lawsuit.

In Mackay v. Rayonier (The Connecticut Employer, Winter 2000), a federal court followed Karanda and held that allegations of pre-termination misconduct could serve as a basis for a negligent infliction of emotional distress claim. By contrast, in Hanson v. Cytec Indus., a federal court recently disagreed with Karanda and ruled that negligent infliction of emotional distress claims are limited to claims arising out of the termination process. Similarly, a different Connecticut Superior Court judge disagreed with Karanda and dismissed the negligent infliction of emotional distress claim in Dorlette v. Harborside Healthcare.

Negligent infliction of emotional distress claims are popular with plaintiffs because typically they increase the potential for money damages well beyond discrimination or contract claims. We can expect to see more of these claims tacked onto requests for make-whole relief and compensatory damages in employment disputes. Ultimately, the Connecticut Supreme Court will need to resolve the controversy over the reach of these claims.

Workers’ Comp Law Bars Injury Claim Based On Employer’s Absenteeism Policy

The Connecticut Appellate Court has dismissed a plaintiff’s claim for personal injuries that he alleged were caused by his employer’s intentional conduct in enforcing its absenteeism policy. Scheirer v. Frenish, Inc. The court found the personal injury claim was barred by the exclusivity provision of the Workers’ Compensation Act.

While at work, the plaintiff’s foreman noticed the plaintiff was acting strangely and asked the company nurse to examine him. After evaluating the plaintiff, the nurse called an ambulance to take the plaintiff to a hospital. The plaintiff alleged that the employer had a policy to minimize employee absenteeism related to workplace injuries and that, in furtherance of that policy, the employer had directed the nurse to withhold treatment from him. As a result of the delayed treatment, the plaintiff claimed he suffered severe injuries, including a fractured cranium and permanent brain damage.

Because the plaintiff claimed the employer intentionally had caused his injuries, he attempted to avoid the Workers’ Compensation Act and litigate his claim for damages in state court. However, the Appellate Court rejected that argument as too speculative. In affirming the judgment for the employer, the court said the plaintiff’s argument was not effective in avoiding the well-established exclusivity provision of the Workers’ Compensation Act.

Attorney-Client Privilege Protects Former Supervisor’s Communications With Former Employer’s Counsel

A federal court ruled that the attorney-client privilege applies to communications between the plaintiff’s former supervisor and the employer’s attorney where the communication is related to the former supervisor’s conduct and knowledge during her employment. Peralta v. Cendant Corporation.

The plaintiff subpoenaed his former supervisor for a deposition in a discrimination case. During the deposition, the plaintiff’s attorney asked the supervisor to identify those to whom she had spoken before the deposition. The supervisor stated that she had spoken to her husband and the employer’s attorney. The plaintiff’s attorney asked the supervisor about her conversations with the employer’s attorney, and the employer’s attorney objected to the questions, directed the supervisor not to answer and argued that the attorney-client privilege protected those conversations. The plaintiff’s attorney disagreed. Finding in favor of the employer, the court held that the conversations between the former supervisor and the employer’s attorney were privileged to the extent the conversations related to the supervisor’s knowledge of events that occurred during her employment.
The Connecticut Employer

Labor Beat

Union organizing efforts in Connecticut fell off slightly in 1999 compared with 1998. The Hartford Regional Office (Region 34) of the National Labor Relations Board held 66 Connecticut elections in 1999, down from 70 in 1998. However, Connecticut unions made up for this slight decline in elections with an increase in their success rate. In 1999, unions scored 43 wins in 66 elections, a success rate of 65%, up from 47% in 1998.

Winning 11 of 13 elections in 1999, the New England Healthcare Employees Union District 1199 was the most active and successful union. District 1199 continues to concentrate on selecting the right targets for its organizing efforts. Management soundly defeated District 1199 only once in 1999 at The Jewish Home for the Elderly where District 1199 only garnered 14 votes of the more than 325 ballots cast.

Technically Speaking

To encourage employees to remain with companies in their formative years, start-ups and tech companies often grant stock options to all levels of employees -- from senior executives to administrative assistants. This practice caught the attention of the U.S. Department of Labor, and early this year, the DOL issued an opinion on the application of the federal minimum wage and overtime law to employer stock option programs. In the opinion letter, the DOL stated that an employer must include the value of employee stock options in a nonexempt employee’s regular rate of pay when calculating overtime.

The business community responded quickly and heavily criticized the DOL’s position. Consequently, a bipartisan group of U.S. Senate and House of Representative members introduced the “Worker Economic Opportunity Act” to exclude the value of employee stock option from regular rates of pay from overtime calculations. The bill also provides retroactive protection from overtime liability for employers that, at the time of enactment, had outstanding stock option plans qualifying for the new exclusion and would shield employers from liability for one year from the proposed law’s effective date.

On May 18, 2000, President Clinton signed the bill after it passed both the Senate and the House by unanimous votes. For additional information concerning the Fair Labor Standards Act or stock option plans, please contact Shawn Kee in Stamford (keec@jacksonlewis.com).

Did You Know?

If an employer overlooks a bill for a health insurance premium, it may cause more than just a headache. Connecticut law requires all employers providing group health insurance to give employees 15 days’ prior written notice of cancellation or discontinuance. Employers who fail to provide the required notice not only are subject to a $1,000 fine per violation, but also are liable for benefits to the same extent as the group health insurer had the coverage not been canceled or discontinued. Conn. Gen. Stat. 38a-537.

Obscure Law Department

The portion of a job application form containing information about the applicant’s arrest record must not be made available to any employee interviewing the applicant, except members of the employer’s personnel department or the person in charge of employment if the company has no personnel department. Conn. Gen. Stat. 31-51i.

Facts In Stats

The federal Equal Employment Opportunity Commission had a record year in 1999 and obtained $307.3 million in benefits for complainants, a 23% increase from 1998. The total benefits included $58 million recovered through the EEOC’s voluntary mediation program.

Source: EEOC Charge and Litigation Statistics Through 1999
In 1999, the Connecticut Legislative Program Review and Investigation Committee directed its staff to study the discrimination complaint processes and enforcement policies of the CHRO. Here are some of the results of that study based on the CHRO’s responses:

<table>
<thead>
<tr>
<th>Statement</th>
<th>Strongly Agree</th>
<th>Agree</th>
<th>Disagree</th>
<th>Strongly Disagree</th>
</tr>
</thead>
<tbody>
<tr>
<td>CHRO provides relevant training to its enforcement staff.</td>
<td>7%</td>
<td>27%</td>
<td>53%</td>
<td>13%</td>
</tr>
<tr>
<td>CHRO investigators should be neutral factfinders rather than complainants’ advocates</td>
<td>57%</td>
<td>36%</td>
<td>7%</td>
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</tr>
<tr>
<td>Implementation of CHRO policies and procedures varies by region.</td>
<td>40%</td>
<td>47%</td>
<td>7%</td>
<td>7%</td>
</tr>
<tr>
<td>Complaints at the investigation stage are handled in a fair, professional and timely manner.</td>
<td>13%</td>
<td>53%</td>
<td>53%</td>
<td>--</td>
</tr>
</tbody>
</table>

*Source: Staff Findings & Recommendations: Commission on Human Rights & Opportunities Enforcement, December 16, 1999, Legislative Program Review & Investigations Committee*