GONZALEZ SAGGIO HARLAN

The GSH 60-Second Memo

Sponsored by the GSH Employment Group

December 7, 2011

Aaron J. Graf, Esq.

www.gshllp.com

(414) 277-8500

Want more information on this topic?

CLICK HERE!

Join Our Mailing List!

Even Where Employer Avoids Liability, Lessons Can Be Learned

By Aaron J. Graf, Esq.

Employers can more effectively prevent liability in the present by learning from the collective mistakes of others that have come before them. Thus, while in a recent decision from the Seventh Circuit (covering Illinois, Indiana and Wisconsin), the court upheld summary judgment for the employer concerning claims of gender harassment, discrimination, and retaliation, the facts of the case serve as a poignant reminder of how *not* to deal with an employee.

For the most part, the decision in *Overly v. Keybank Nat'l Assoc*, 2011 WL 5505338 (7th Cir. Nov. 10, 2011) is largely an unremarkable gender discrimination claim. However, it was the behavior by the employer immediately after the employee resigned, and the court's treatment of that behavior, which is of particular interest. Krysten Overly, a female employee, was a financial advisor for the defendant who reported directly to her supervisor, the regional sales manager. Overly disclosed to her supervisor that she had a practice of using an electronic signature on forms and also of encouraging bankers to sell off-menu financial products to customers at the branches she worked with. The supervisor instructed Overly to cease such practices and reported the practice to the company's internal compliance officer, which triggered an investigation. As a result of the investigation, the compliance officer recommended terminating Overly for the two policy violations. However, Overly's supervisor challenged the recommendation, arguing that Overly should remain employed at the bank. Ultimately, Overly was given a written warning and fined $1000 for violations of the policies.

At the end of that same month, Overly complained to company's human resources department about the disciplinary action taken against her, as well as about allegedly sexist remarks by the same supervisor who defended her employment. Overly alleged that the

supervisor had called her "cutie" between five and ten times, though the supervisor stopped doing so after Overly told him to stop. Also, in an email, the supervisor stated it was better for Overly and another junior female employee to attend a golf outing because "your pretty faces are much better than my ugly mug." Overly also expressed concern that the discipline she had received would be marked on her license and hurt her chances for future employment. The human resources representative indicated to Overly that the company had put the matter behind them and that she should do the same. When Overly continued to inquire, the human resources representative advised Overly to keep her "head down and just go back to work and act as though everything's fine."

Just a few months later, the company began implementing a reorganization plan to nearly triple the number of financial advisors to lessen the number of branches that each financial advisor would serve. As a result of the reorganization Overly lost three of her old branches and gained two new branches. Overly was displeased because she believed all the good territories had been assigned to the new male financial advisor.

Overly filed a formal written internal complaint with defendant on August 7, 2007, alleging that she had been discriminated against based on her gender and retaliated against for her prior complaint to the human resources department. The company conducted an investigation but found no evidence of gender-based discrimination against Overly. Approximately one month after receiving the results of the investigation, Overly personally handed her resignation letter to her supervisor.

The supervisor, immediately upon receiving the resignation letter, began to applaud in front of Overly. He then grabbed Overly's arm to push her out of the door to his office over the shouted protests of Overly. If this were not enough, as Overly left the supervisor's office, he yelled a gender-based expletive at her.

Perhaps unsurprisingly, Overly soon filed a complaint with the EEOC alleging sexual harassment, discrimination, and retaliation. The court found that the "cutie" references and the single email regarding her "pretty face" simply did not rise to the level of severe or pervasive so as to constitute a hostile work environment. The court also held that there was no evidence of discrimination regarding the original discipline for the electronic signatures and selling off-menu products, as both actions had violated the company's written policies. Finally, the court held there was no evidence of discrimination in the reorganization because it was part of a nationwide reorganization and there was no evidence of gender-based discrimination in the branches she lost or gained.

Of particular interest, however, was how the court dealt with the rather outrageous events that occurred at Overly's resignation. As to the harassment claim, the court held that because the events occurred *after* Overly had already resigned, albeit by only a matter of seconds, the actions of the supervisor, while deplorable, could not serve as proof of objectively severe or pervasive gender discrimination *during* her employment. Similarly, as to the discrimination claim, the court found that the actions by the supervisor following her resignation were stray remarks and were neither proximate nor related to any adverse employment action as she had already resigned at the time. The court noted, however,

that had the remark occurred during Overly's employment and been shown connected to an adverse action, the result may have been much different.

Despite the fact the employer managed to avoid a finding of liability, this does not mean the defendant acted properly or appropriately. Rather, the defendant's actions provide several good reminders of how *not* to treat an employee. First, when an employee makes an internal complaint of discrimination, the appropriate response is not to tell the employee to "move on," "keep your head down," and "act like nothing happened." In fact, such a response almost invites a claim for retaliation, and it certainly would not play well in front of a jury. The best practice is, of course, to receive the complaint, reserve judgment, conduct an investigation, and issue a determination regarding the complaint.

Additionally, although the supervisor's egregious conduct occurred after Overly's resignation, he certainly did not help the company avoid litigation by parting with Overly amicably. And, of course, regardless of where or when the situation occurs, grabbing an employee's arm and subsequently yelling gender-based expletives is clearly unacceptable. While the employer was "fortunate" that the supervisor waited until after Overly's resignation to exercise such poor judgment, this does not mean such behavior should be tolerated in the workplace. After all, the court's decision was fact-intensive and relied heavily on what had transpired previously between the employee and employer, along with precisely what was said by the supervisor after the resignation. Had the court been able to link the comments of the supervisor to any of the previous adverse employment actions the result may well have been different.

GONZALEZ SAGGIO HARLAN

Office Locations:

Arizona
California
Connecticut
Florida
Georgia
Illinois
Indiana
Iowa
Massachusetts
New Jersey
New York
Ohio
Tennessee
Washington D.C.
Wisconsin

www.gshllp.com