



McKENNA EMPLOYMENT BULLETIN

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QUID PRO QUO SEXUAL HARASSMENT CLAIM VALID WHERE SUPERVISOR SAID REFUSAL TO ENGAGE WOULD NOT AFFECT EMPLOYMENT STATUS

A plaintiff can maintain a sexual harassment suit even though her supervisor stated that a refusal to engage in sexual conduct with him would not affect her employment status, according to an Illinois District Court in Aguilera v. Matty's West Family Restaurant, Inc., 2011 WL 4442826.

The plaintiff in the case was a waitress at Matty's West Family Restaurant. She filed a sexual harassment claim after the owner, who was her direct supervisor, made performing certain sexual acts a condition of her employment. At the time he made the initial sexual demand, he allegedly told her, "Don't worry, you will never lose your job." After initially saying no, she unwillingly assented to the demands. Thereafter, her employer told her, "...she would be able to continue working for [the restaurant]."

The employer moved to dismiss the quid pro quo allegations claiming that the plaintiff failed to plead facts to show that submission to sexual demands was a condition of her employment. The district court disagreed. The court reasoned that the employee pled sufficient facts to establish a quid pro quo claim by pleading that when she rejected and then acquiesced to the employer's sexual demands, he told her she would be able to continue working.

SINGLE INCIDENT OF HARASSMENT IS SEVERE AND PERVASIVE IF THERE IS PHYSICAL CONDUCT

The employer in Aguilera v. Matty's West Family Restaurant, Inc., 2011 WL 4442826, also moved to dismiss the Title VII hostile environment claim, claiming that the Plaintiff only identified a single incident, which it claimed was insufficient to satisfy the requirement that in order to sustain a "hostile environment" claim, the harassment be "severe and pervasive." The district court also disagreed with this argument. The allegations involved inappropriate physical contact. A single incident of inappropriate touching can rise to the level of harassment that is sufficiently severe or pervasive to state a claim for hostile work environment.

UNFOUNDED COMPLAINT OF HARASSMENT DOES NOT SUPPORT RETALIATION

In O'Leary v. Accretive Health, Inc., 2011 WL 4375684 (7th Cir. 2011), a female employee at a dinner boasted about sexual relationships with co-workers and told a male co-worker that men

his age were more her speed. Another employee reported the female employee's conduct. The reporting employee was terminated and alleged retaliation for reporting the female employee's conduct.

The Court held that the reporting of the female employee's conduct as sexual harassment was not a protected activity as required to support the employee's action alleging retaliation in violation of Title VII. The Court held that the co-worker's conduct could not reasonably be understood to constitute sexual harassment that would be actionable under Title VII. The Court found the conduct was a single instance. The reporting employee had been told that the male co-worker had not felt harassed. Therefore, the Court found that the reporting employee had no reason to think anyone at the dinner was bothered by the conversation.

IF YOU BACK DATE TERMINATION PAPERS, THIS CAN SHOW AN FMLA VIOLATION

In Shaffer v. American Medical Association, No. 10-2117, October 18, 2011, the Seventh Circuit held that whether the employer terminated the plaintiff in retaliation for requesting FMLA leave was a question of fact and summary judgment could not be entered for the employer. The employer contended that operational needs was the basis for the plaintiff's termination. However, the record contained evidence that the employer's management had originally identified another co-worker for termination, but then selected the plaintiff shortly after he announced intention to take FMLA leave. In addition, a member of the employer's management backdated a memorandum to make it appear that the termination decision was not influenced by the leave request. Finally, the employer gave an inconsistent explanation regarding the plaintiff's job performance as a factor in the termination decision. The employer's management had made statements that the plaintiff's performance was the reason and that the plaintiff's performance was not the reason for the termination.

CHICAGO HUMAN RIGHTS ORDINANCE PROTECTS SEXUAL ORIENTATION

In 1212 Restaurant Group v. Alexander, 2011 IllApp (1st) 100797, the Illinois Appellate Court heard an appeal from a case before the Chicago Commission on Human Relations. The Appellate Court found that the record supported the Commission's finding that the employee was discriminated against on the basis of perceived sexual orientation. The Illinois Human Rights Act did not prohibit discrimination based on sexual orientation until 2006. Prior to that, people living in Chicago could bring a sexual orientation discrimination claim under the Chicago Human Rights Ordinance.

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