Northwest Ohio Human Resource Association

AFFILIATE OF SHRM SOCIETY FOR HUMAN RESOURCE MANAGEMENT

LEGISLATIVE UPDATE

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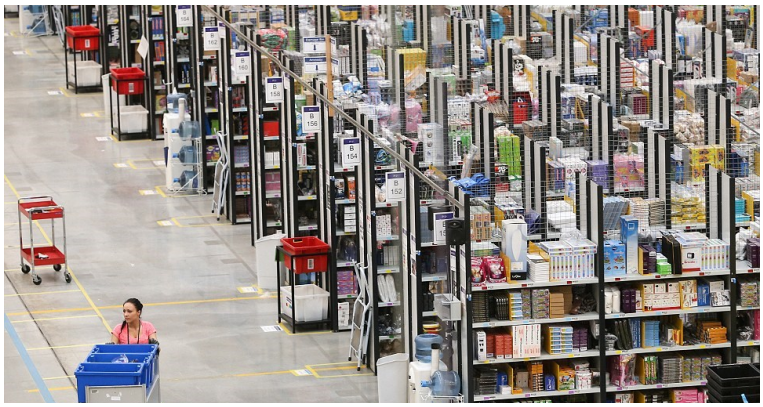
Sixth Circuit Upholds $1.4 million sexual harassment jury award



In *EEOC v. New Breed Lostistics*, Case No. 13-6250 (6th Cir. Apr. 22, 2015), the Court of Appeals was asked to rule on how much resistance to sexual harassment was "enough" to form the basis for a retaliatory discharge claim.

The plaintiffs in this case were comprised of three women and one man, all employees in a warehouse receiving department and under the supervision of the alleged harasser, Calhoun. The women alleged Calhoun sexually harassed them verbally and physically. Each of the women testified they told Calhoun to stop harassing them. Shortly after complaining to Calhoun, one of the women was terminated, and the other two were transferred to a new department where they were terminated soon thereafter based largely on the work reports given by Calhoun to the plaintiffs' new supervisor. The male plaintiff, Partee, observed some of the harassment committed by Calhoun and testified that he also told Calhoun to stop harassing women in the department. Partee was terminated soon after.

In order to bring a successful retaliation claim under Title VII, a claimant must show (1) they engaged in a protected activity, in the case of harassment that is generally opposition to the harassment; (2) the company knew about the protected activity; (3) the company took an adverse action against the individual; and (4) a causal connection exists between the protected activity and the action. Here, three of the plaintiffs never made a report of Calhoun's harassment to anyone other than Calhoun himself. The company argued reports to Calhoun alone were not "enough" to be considered a protected activity because it failed to show sufficient opposition. However, the trial court and the Court of Appeals each held that merely saying "stop" to the harasser is sufficient opposition to provide protection under Title VII.

The Court also found the employer had knowledge of the harassment because one of the plaintiffs made an anonymous report to the company's complaint line. Upon receipt of the complaint, the company dispatched an investigator to the worksite. However, the investigator only conducted one brief interview of Calhoun himself. The reporting plaintiff later supplied names of additional witnesses and victims, however, those individuals were similarly terminated prior to any further action by the investigator and were not interviewed. Based upon these facts, the court upheld the jury's finding that all four plaintiffs were the victims of retaliation. Moreover, because the employer knew about the harassment and failed to adequately respond to the complaint, in violation of its own anti-harassment policy, the court upheld the jury's award of punitive damages.

Following this ruling, employers should review their anti-harassment policy to ensure it provides adequate guidelines and procedures for supervisors and employees. Further, all complaints of harassment should be fully investigated, and all individuals in the area should be interviewed by a neutral third party.

The full opinion can be found here: http://www.ca6.uscourts.gov/opinions.pdf/15a0074p-06.pdf

Court throws *Ford* ruling into reverse

Last year, the Sixth Circuit issued a ruling in *EEOC v. Ford Motor Co.*, Case No. 12-2484 (Apr. 22, 2014), in which, in interpreting the ADA, ruled that physical attendance at work may not be an essential function In that case, the plaintiff suffered from irritable bowel disease so severe she said she was unable to physically work in the office. Instead, she stated she needed to work at home as an accommodation. The plaintiff was ultimately terminated for poor performance, but she argued it was in retaliation for her accommodation requests.

In its prior ruling, the Court of Appeals ruled that physical presence at work could not be presumed to be an essential function because technology provided a reasonable way for employees to telecommute.

Upon further rehearing with the full Sixth Circuit, the court reversed its prior ruling. In an opinion dated April 10, 2015, the Court acknowledged the burden its prior ruling would place upon employers. The Court also noted Ford had given the plaintiff three trials of telecommuting — all of which failed because the plaintiff could not maintain regular and predictable hours of employment with multiple accommodations. On the issue of physical attendance, the Court held the company may use its discretion to determine if it is an essential function, but warned employer opinions on the appropriateness of telecommuting would not go unchallenged.

The Court further held the plaintiff's termination was not in retaliation to her ADA requests. The Court listed the various steps Ford employed in an attempt to determine what kind of accommodation would reasonably address the plaintiff's needs and still retain the core functions of her job. Instead, the Court held that because Ford put so much effort into attempting to fix a reasonable accommodation, the only possible reason for her termination was her poor performance, which predated the initial request for accommodation.

The full opinion can be found here: http://www.ca6.uscourts.gov/opinions.pdf/15a0066p-06.pdf

Avoid blanket bans on applicants with criminal histories

Employers should be careful when formulating policies related to job applicants with criminal histories. The EEOC, in its enforcement guidelines published April 25, 2012, advises that blanket bans on hiring applicants or promoting employees with criminal histories or arrest records is a violation of federal law. The EEOC premised its Guidelines on the overwhelming majority courts that have ruled similarly on these kind of questions. The reasoning behind these rulings is the fact that exclusionary policies disproportionately impact minorities.

Under the Guidelines, an employer may exclude an applicant if an individualized assessment determines the exclusion of the particular applicant is due to a link between specific criminal conduct and the risks inherent in the duties of a particular position. The "individualized assessment" looks at three main factors:

(1) the nature of the crime;

(2) The time elapsed since the crime was committed; and

(3) The nature of the job involved in the discussion.

However, the Guidelines do not provide any definitive rules on what kinds of crimes might exclude an applicant from particular jobs, or guidance on the age of crimes that may be considered.

The full guidelines can be found here: http://www.eeoc.gov/laws/guidance/arrest_conviction.cfm

Mark S. Barnes
mbarnes@ bugbeelawyers.com

Carl E. Habekost
chabekost@bugbeelawyers.com

Dana R. Quick
dquick@bugbeelawyers.com

Tybo Alan Wilhelms
twilhelms@bugbeelawyers.com

BUGBEE & CONKLE

www.bugbeelawyers.com