

Employer Update

Next month's topic:

Attorney fees and workplace violence are issues all employers like to avoid. Next month we will discuss differences between state and federal law when it comes to awarding attorney fees in discrimination cases, and steps employers may take to avoid potentially violent situations after termination of the employment relationship.

Sexual Relations In Your Workplace: Why You Could Be Liable

By Jill M. Twedt

Not too long ago, we attended a meet-and-greet session through the Idaho State Bar Employment Law Section with the United States Equal Employment Opportunity Commission's (EEOC) Regional Attorney for the region including Idaho, William R. Tamayo. Among other topics, Mr. Tamayo discussed his agenda for the near future as well as the immediate concerns of the EEOC. Specifically, Mr. Tamayo informed us that the EEOC is concerned with sexual harassment against teenagers in the workplace and that he himself is especially interested in pursuing cases on behalf of teenagers with claims of sexual harassment against their employers.

Since the meeting with Mr. Tamayo, we have seen signs that the EEOC is, in fact, following through on Mr. Tamayo's agenda for this region, as well as the EEOC's concern about sexual harassment against teenagers in the workplace. Provided in this article are summaries of some of the EEOC and judicial cases involving teenagers, filed outside of Idaho. We also take a look at how successful coercion of sexual acts by a supervisor against a subordinate of any age may



eliminate the employer's *Faragher/ Ellerth* affirmative defense and impute liability.

Recent EEOC Action on Behalf of Teenagers in the Workplace

On March 22, 2007, the EEOC announced the settlement of a discrimination lawsuit it had pursued against GLC Restaurants, Inc. ("GLC"), a franchisee doing business as McDonald's Restaurants in Arizona and California. The suit settled for \$550,000 and substantial remedial relief on behalf of a class of teenage workers who the EEOC contended were sexually harassed by a middle-aged male supervisor. Their allegations against the supervisor included unwanted touching and lewd comments.

The EEOC maintained in the suit that the male supervisor was a repeat offender who subjected eight young



women, all part-time crew members, to a sexually hostile workplace at one of GLC's restaurants. Previously, the same male manager allegedly harassed female teens at a GLC-owned McDonald's Restaurant in a different town. The EEOC claimed that GLC knew of this manager's earlier conduct, but failed to take appropriate action to prevent him from repeating the unlawful behavior at another of its restaurants. The EEOC also alleged that the working conditions for one teenager were so intolerable that she was forced to resign.

The EEOC's Trial Attorney on the case stated: "No one should have to endure sexual harassment to earn a paycheck. Employers must be extra vigilant in protecting teen workers, who are one of the most vulnerable segments of the labor force."

In addition to paying \$550,000 to the eight young women, GLC agreed to provide training and other relief aimed at educating its employees about sexual harassment and their rights under Title VII. GLC also agreed to an injunction prohibiting the company from discriminating based on sex. To prevent discrimination in the future, the company will provide sexual harassment training to employees; review and revise its policy and procedures for reporting harassment; take complaints about unlawful conduct seriously; investigate complaints promptly; and ensure that there will be no retaliation against employees who complain.

Teenager Who Was Uncooperative With EEOC Investigation Into Her Consensual Relationship with a 25-Year Old Supervisor Still Allowed to Proceed

A teenager who refused to answer questions during an EEOC investigation into her allegations of sexual harassment against her 25-year-old supervisor was allowed to proceed in federal district court in Illinois. *Doe v. Oberweis*

Dairy, 456 F.3d 704 (7th Cir. 2006). The EEOC issued a notice of right to sue even though the teenager refused to be interviewed by the EEOC, relying on her psychologist's recommendation that an interview would be damaging. The defendant employer argued that the teenager's failure to cooperate should preclude her from pursuing a claim, and that because the relationship was consensual and took place outside of the workplace, the claim lacked merit.

In holding that the teenager could proceed, the Seventh Circuit ruled that, if cooperation with the EEOC became a requirement before satisfying the procedural requirements, it would open up a whole new set of questions about the level of cooperation and whether there was a good-faith effort. Further, with regard to the defendant's argument on the merits (that the relationship was consensual) the Seventh Circuit ruled that the alleged consensual nature of the relationship was overshadowed by the Illinois statutory rape provisions, which deem such a relationship nonconsensual because of the claimant's age. However, the Court ruled that, if the teenager was sneaking around behind her mother's back to have sex with her supervisor, her Title VII damages might be minimal. The issue of consent is, therefore, an issue for damages.

In conclusion, the Seventh Circuit held that the employer had a duty to its teenage workers and that it would be up to a jury to determine whether it breached that duty.

Loss of Employer's *Faragher/Ellerth* Defense

In addition to teenagers in the workplace, the EEOC is looking into allegations of sexual assault and sexual battery in the workplace. As we have reported in the past, employers have a defense under the *Faragher/Ellerth* line of cases to claims of sexual harassment where there is no tangible employment action, the employer exercised reasonable care to prevent and correct promptly any harassment, and the em-

employee unreasonably failed to take advantage of any preventive or corrective opportunities provided by the employer. However, if a supervisor, bringing to bear the authority of the employer, successfully coerces an unwelcome sexual act through conditioning the subordinate's employment on acquiescing (aka *quid pro quo* sexual harassment), this act may constitute a tangible employment action. When there is a tangible employment action, the employer is not entitled to this defense. In short, if a supervisor successfully coerces a subordinate into sexual acts, the employer will be left without a defense to liability because the successful coercion may be considered a tangible employment action.



In Holly D. v. Cal. Inst. of Tech., 339 F.3d 1158 (9th Cir. 2003), a female employee of California Institute of technology alleged that she was forced to engage in sexual relations with the professor for whom she worked. Holly D. alleged that the professor made sexual comments and showed her pornographic websites and, during this same period of time, criticized her work. When she received a poor performance evaluation, she drew a connection between her failure to respond to his sexual comments and the evaluation. Holly D. decided that if her supervisor requested sex, she would have to comply to keep her job. Thereafter, the two engaged in a sexual relationship, but Holly D. did not allege that the professor used force or threatened her job if she did not have sex with him.

The Ninth Circuit joined the Second Circuit in holding that a tangible employment action occurs when the supervisor threatens the employee with discharge and, in order to avoid the threatened action, the

employee complies with the supervisor's demands. "Successful coercion . . . depends on the same abuse of supervisorial authority- the power, for example, to hire and fire- that . . . renders a discharge or tangible employment action. In such cases, the supervisor successfully brings

to bear the weight of the employer's enterprise in order to achieve the unlawful purpose."

In this case, the Court found that the professor had not conditioned Holly D.'s employment on having sex with him, so there was no tangible employment action. However, Holly D. v. Cal. Inst. of Tech. is the current state of the law in the Ninth Circuit

and can mean that, where *quid pro quo* harassment occurs, the employer may be held vicariously liable for the supervisor's unlawful conduct and may not be allowed to claim the affirmative defense.

The Moral of the Story

These three cases show that employers need to practice extra caution when employing teenagers. Further, employers cannot bury their heads in the sand when they hear allegations that a supervisor and a subordinate (of any age) are engaged in a sexual relationship. Teenagers' curiosities paired with an environment susceptible to the desire to gain favor from a supervisor can result in extensive liability for the employer if sexual favors are exchanged or even where "consensual" sexual relationships are formed. If you need assistance in writing policies or providing training regarding these issues, please give us a call and we would be happy to provide you with the assistance you need.



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EEOC's Tips to Employers: Protecting Teens from Workplace Harassment

Do you employ teenage workers? If so, it's important to take a look at what you can do to ensure young people are safe from workplace harassment and know how to report problems that do occur. Here are some tips from the EEOC on preventing harassment and discrimination involving young workers:

1. Encourage open, positive and respectful interactions with young workers.
2. Remember that awareness, through early education and communication, is the key to prevention.
3. Establish a strong corporate policy for handling complaints.
4. Provide alternate avenues to report complaints and identify appropriate staff to contact.
5. Encourage young workers to come forward with concerns and protect employees who report problems or otherwise participate in EEO investigations from retaliation.
6. Post company policies on discrimination and complaint processing in visible locations, such as near the time clock or break area, or include the information in a young worker's first paycheck.
7. Clearly communicate, update, and reinforce discrimination policies and procedures in a language and manner young workers can understand.
8. Provide early training to managers and employees, especially front-line supervisors.
9. Consider hosting an information seminar for the parents or guardians of teens working for the organization.