

New York Law Journal

SERVING THE BENCH AND BAR SINCE 1886

NEW YORK, TUESDAY, AUGUST 3, 1999

OUTSIDE COUNSEL

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Workplace Abuse: Unlawful or Simply Unfair?

BENJAMIN Franklin once observed that "when men are employed they are best contented." One has to wonder what wisdom Mr. Franklin would have derived from the fact that almost 80,000 charges of employment discrimination were filed with the Equal Employment Opportunity Commission in fiscal year 1998, and that we live in an age where it is commonplace for disgruntled employees to sue their employers, alleging millions of dollars in damages.

These days, where every wrong seems to spawn a lawsuit, it is no surprise that discontented employees increasingly utilize the courts to seek restitution for workplace abuse. The harsh news for employees in New York, however, is that employees are still very much "at will" and are generally unprotected against workplace unfairness, absent statutorily proscribed discrimination, a constitutionally impermissible purpose, or an express

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limitation in a contract of employment.¹

The "ultimate issue" in an employment discrimination case is whether the employee meets its burden of proving that an adverse employment decision was motivated by discriminatory intent.² In the absence of an "impermissible reason" for an adverse employment decision,

courts have had little trouble dismissing cases where a boss exhibited abusive behavior which was unaccompanied by a discriminatory animus.

The U.S. Court of Appeals for the Second Circuit has explained, in the context of an age discrimination case, that the discrimination laws do "not make employers liable for doing stupid or even wicked things; it makes them liable for discriminating."³

In a similar vein, the U.S. Court of Appeals for the Tenth Circuit has observed that "favoritism, unfair treatment and unwise business decisions do not violate Title VII unless based on a prohibited classification."⁴ And, as recently noted by Judge Jed Rakoff, even though an employee might feel "ill-used," it is "an ill use of the federal discrimination laws to treat them as sharpening stones on which to grind personal axes."⁵

The theme that business judgment, whether right or wrong, is a valid defense to discrimination claims is becoming a familiar refrain in courts throughout the country. The Second Circuit's in banc decision in *Fisher v. Vassar College*⁶ observed: Individual decision-makers may intentionally dissemble in order to hide a reason that is nondiscriminatory but unbecoming or small-minded, such as back-scratching, log-rolling, horse-trading, institutional politics, envy, nepotism, spite or personal hostility.

In an often-quoted passage, which has become a favorite proposal for defendant's jury instructions, the U.S.

Court of Appeals for the Seventh Circuit cautioned that it is simply inappropriate for a court to act "as a super-personnel department that reexamines an entity's business decisions."⁷

Sexual Harassment

There is public perception that the subject of sex is now a forbidden topic in the workplace. But as Justice Ruth Ginsburg emphasized in her concurring opinion in the Supreme Court's landmark decision *Harris v. Forklift Systems Inc.*,⁸ the "critical issue" in a hostile work environment case is whether members of one sex are exposed to disadvantageous terms or conditions of employment to which members of the opposite sex are not exposed. The Supreme Court recently clarified in *Oncale v. Sundowner Offshore Svcs. Inc.*⁹ that the discrimination laws should not be expanded into "a general civility code" and cautioned that harassment is not "automatically discrimination because of sex merely because the words used have sexual content or connotations."

In *Oncale*,¹⁰ the Supreme Court suggested that "common sense, and an appropriate sensitivity to social context" would enable courts and juries to distinguish between simple teasing and conduct which a reasonable person in the plaintiff's position would find severely hostile or abusive. In the wake of *Oncale*, courts have held that merely because a supervisor's abusive comments had sexual connotations does not, without more, support the conclusion that they resulted from sexual animus or gender bias.¹¹ For example, in *Hopes v. City of Cleveland*,¹² the U.S. Court of Appeals for the Sixth Circuit recently dismissed a hostile work-environment claim even though plaintiff's supervisor told her, "stroke me," while making a gesture of simulated masturbation. According to the court, the sexual content of this remark did not automatically qualify the supervisor's conduct on this particular occasion as sexual harassment rather than a crude rebuke. Plaintiff's supervisor made the same offensive comment and gesture to male employees. This led the court to muse that the supervisor's conduct may have been due to personal animosity rather than "because of sex."

In a similar vein, the U.S. Court of Appeals for the Seventh Circuit has observed that "vulgar, insensitive, and offensive comments" do not necessarily equate to sex discrimination because "an unpleasant environment is actionable only if the hostility adds up to 'discrimination' as Title VII uses that term."¹³ As such, the fact that a supervisor is not "a paragon of political correctness" does not necessitate that he is a harasser.¹⁴

Ironically, under the framework set forth in *Oncala*, evidence that sex-based comments and vulgarity were directed at male as well as female employees may be utilized to support the conclusion that no gender bias exists in the workplace. For example, in *Butler v. Ysleta Indep. School Dist.*,¹⁵ the U.S. Court of Appeals for the Fifth Circuit reasoned that the "sending of offensive materials to both men and women is evidence that the workplace itself, while perhaps more sexually charged than necessary, was not sexually charged in a way that made it a hostile environment for either men or women."

Determining whether there is a sex-based nexus to the abusive conduct has led to some interesting decisions. For example, the term "dumb" and the statement "get your ass back in the truck,"¹⁶ a supervisor's comment to an employee that he "would put his foot up her ass,"¹⁷ and a supervisor's statement to plaintiff to "go f**k herself"¹⁸ were all found to be gender-neutral. As summarized by the court in *Phillips v. Merchants Ins. Group*,¹⁹ "behavior that is immature, nasty, or annoying, without more, is not actionable as sexual harassment."²⁰

In *Reyes v. McDonald Pontiac GMC Truck Inc.*,²¹ the court observed that "[n]ame calling and loud arguments do not constitute a sexual harassment claim," and discounted plaintiff's supervisor's reference to plaintiff on two occasions as a "bitch" or "Miss F***** Queen Bee." The court explained that "Title VII does not prohibit all verbal or physical harassment in the workplace; it prohibits discrimination because of sex."²²

Tort Theories

Traditional tort theory has been of little assistance to employees in New York who suffer abusive treatment.

In *Murphy v. American Home Products Corp.*,²³ the New York Court of Appeals unequivocally held, "This court has not and does not now recognize a cause of action in tort for abusive or wrongful discharge of an employee."

Under New York law, the tort of intentional infliction of emotional distress is comprised of four elements:

- (1) extreme and outrageous conduct;
- (2) intent to cause – or reckless disregard of a substantial probability of causing – severe emotional dis-

stress;

(3) a causal connection between the conduct and plaintiff's injury; and

(4) severe emotional distress.

Run-of-the-mill abuse by a supervisor will not meet this rigid standard for establishing intentional infliction of emotional distress.²⁴

In *Guzman v. ARC XVI Inwood Inc.*,²⁵ a manager who was characterized by the court as "unduly demanding, insensitive, and petty" was deemed by the court not to be extreme or outrageous. Rather, the court ruled that "for better or worse, it is not uncommon in the workplace for employees to encounter supervisors who are rigid and demanding."²⁶

Similarly, in *Hagie v. General Motors*,²⁷ plaintiff claimed he was repeatedly intimidated, harassed and threatened by his co-workers, was required to do unnecessary work, and had to work 75 hours, seven days, a week. Although this alleged abuse made the plaintiff tense, nervous, irritable, anxious, and allegedly caused him to suffer great mental anguish and physical suffering, the court found that the conduct was not "extreme and outrageous" as a matter of law.

Extreme and outrageous conduct has been recognized by the New York courts as conduct that is "so outrageous in character, and so extreme in degree, as to go beyond all possible bounds of decency, and to be regarded as atrocious, and utterly intolerable in a civilized community."²⁸ One court recently noted that even sexual harassment cases "rarely meet this standard unless they occur in an unrelenting and continuous fashion, are extraordinarily abusive, and possibly accompanied by physical threats."²⁹

In *Thanning v. Gulotta*,³⁰ the rigorous standard for establishing intentional infliction of emotional distress was met where a supervisor fondled an employee and asked about her sex life, called her a lesbian after she had rebuffed his advances, told her co-workers that she was a lesbian, and repeatedly used homophobic slurs about her in the presence of co-workers. A viable claim for intentional infliction of emotional distress was also found in *Valenza v. Emmelle Coutier Inc.*³¹ when a supervisor repeated intentionally false post-termination representations to both the unemployment office and plaintiff's prospective employers, saying that the plaintiff had never been employed by them.

Prima facie tort also has been an unavailing remedy for employees who believe they have been subjected to workplace abuse. The four elements required to support a claim for prima facie tort in New York are:

- (1) intentional infliction of harm;
- (2) causing special damages;
- (3) without excuse or justification; and
- (4) by an act or series of acts that would otherwise be lawful.³²

Where behavior is motivated by profit, self-interest or business advantage, there is no recovery under a prima facie tort; rather, the defendant has to have malicious intention to injure plaintiff or a "disinterested malevolence."³³ This threshold has seemed to be impenetrable for plaintiffs in employment cases.

Conclusion

In the workplace world, every wrong does not have a legal remedy and unfairness does not necessarily equate with unlawfulness. Even workplace practices, which can be characterized as medieval, may be lawful in the absence of a violation of a statutory proscription.³⁴

But the unfair acts of today may be the unlawful acts of tomorrow, and employers must always be cognizant that there is no better elixir for avoiding employee lawsuits than workplace fairness.

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(1) See, e.g., *Sabetay v. Sterling Drug, Inc.*, 69 NY2d 329 (1987); *Mulder v. Donaldson, Lufkin & Jenrette*, 208 A.D.2d 301, 305 (1st Dept. 1995).

(2) *Fields v. New York State Office of Mental Retardation and Dev. Disabilities*, 115 F3d 116, 119 (2d Cir. 1997).

(3) *Norton v. Sam's Club*, 145 F3d 114, 119 (2d Cir. 1998).

(4) *Taken v. Oklahoma Corp. Comm.*, 125 F3d 1366, 1370 (10th Cir. 1997).

(5) *Noyer v. Viacom Inc.*, 22 FSupp2d 301, 308 (SDNY 1998).

(6) 114 F3d 1332, 1337 (2d Cir. 1997).

(7) *Dale v. Chicago Tribune*, 797 F2d 464 (7th Cir. 1986), cert. denied, 479 US 1066 (1987).

(8) *Harris v. Forklift Systems Inc.*, 310 US 17, 25 (1993).

(9) *Oncala v. Sundowner Offshore Svcs. Inc.*, 523 US 75, 118 S.Ct. 998, 1002 (1998).

(10) 118 S.Ct. at 1003.

(11) *White v. Midwest Office Technology Inc.*, 5 FSupp2d 936, 947 (D. Kan. 1998).

(12) *Hopes v. City of Cleveland*, 1998 U.S. App. LEXIS 29572 (6th Cir. Nov. 16, 1998).

(13) *Bermudez v. TRC Holdings Inc.*, 138 F3d 1176, 1181 (7th Cir. 1998).

(14) *Pavao v. Ocean Ships Inc.*, 1998 U.S. Dist. LEXIS 20431 (N.D. Cal. Dec. 30, 1998).

(15) *Butler v. Ysleta Indep. School Dist.*, 161 F3d 263, 270 (5th Cir. 1998). See also *White v. Midwest Office Technology Inc.*, 5 FSupp2d 936, 947 (D. Kan. 1998) ("that many of the comments in this case were directed at male employees supports the conclusion that they did not result from gender bias").

(16) *Gross v. Burggraf Constr. Co.*, 53 F3d 1531, 1543 (10th Cir. 1995).

(17) *Boyce v. New York City Mission Soc'y*, 963 FSupp 290, 294 (S.D.N.Y. 1997).

(18) *EEOC v. A. Sam & Sons Produce Co. Inc.*, 872 FSupp 29, 34-35 (W.D.N.Y. 1994).

(19) *Phillips v. Merchants Ins. Group*, 3 FSupp2d 204, 208 (NDNY 1998).

(20) *Id.*

(21) *Reyes v. McDonald Pontiac GMC Truck Inc.*, 997 FSupp 614, 617 (DNJ 1998).

(22) *Id.* at 618.

(23) 58 NY2d 293 (1983).

(24) *Hagie v. General Motors Corp.*, 1999 U.S. Dist. LEXIS 5227 (W.D.N.Y. April 6, 1999).

(25) 1999 US Dist. LEXIS 3983 (S.D.N.Y. March 30, 1999).

(26) *Id.* at *41.

(27) *Hagie v. General Motors Corp.*, 1999 US Dist. LEXIS 5227 (WDNY April 6, 1999).

(28) *Seepersad v. D.A.O.R. Sec. Inc.*, 1998 US Dist. LEXIS 12465, at *18 (SDNY Aug. 12, 1998), (quoting *Howell v. New York Post Co.*, 81 NY2d 115, 121 (1993)).

(29) *Matute v. Hyatt Corp.*, 1999 LEXIS 2873 (SDNY March 11, 1999).

(30) *Thanning v. Gulotta*, 898 FSupp. 134 (EDNY 1995).

(31) 227 AD2d 133, 641 (1st Dept. 1996).

(32) *Ross v. Mitsui Fudosan Inc.*, 2 FSupp2d 522, 531 (SDNY 1998).

(33) *Carter v. Cornell Univ.*, 976 FSupp. 224, 233 (SDNY 1997).

(34) *Pollard v. Rea Magnet Wire Co.*, 824 F2d 557, 560 (7th Cir.), cert. denied, 484 US 977 (1987).