



### **EIGHTH CIRCUIT UPDATE: WINTER 2006**

*This bulletin provides an update of recent employment laws for employers in states served by the United States Court of Appeals for the Eighth Circuit including Arkansas, Iowa, Minnesota, Missouri, Nebraska, North Dakota and South Dakota. Please contact us if you have any questions about these decisions or about their effects on your organization.*

#### **Do You Have A Well Stocked Arsenal?**

We mean your arsenal of defenses to employment claims, of course. Although you've surely heard how important it is to have a comprehensive anti-harassment policy and employ reporting and investigation procedures, this message bears repeating. A case out of the Eight Circuit, *Williams v. Missouri Dep't of Mental Health*, 407 F.3d 972 (8<sup>th</sup> Cir. 2005), which the United States Supreme Court recently declined to review, illustrates this point.

Suzette Williams and Angela Conner worked for the Missouri Department of Mental Health ("MDMH"). For a while in 2000, they had a temporary supervisor, Ronald Dale Miller. Miller subjected them to some pretty disgusting conduct while he was their temporary supervisor, including repeatedly exposing himself to them and touching them inappropriately at work.

Being a responsible employer, MDMH had a policy prohibiting sexual harassment. Its policy required employees who have been harassed or perceive that they have been harassed to report the incident to a supervisor or other administrative or management employee. Williams admitted having read the policy. Conner denied having read it, but had attended training on sexual harassment during her orientation and knew about the reporting procedures. Despite being aware of the reporting procedures and having been subjected to this conduct, neither woman complained to MDMH about the conduct.

At some point when Miller was no longer their supervisor, Williams made some comments in another context which prompted another supervisor to inquire about Miller's conduct. Only after this prompting did Williams tell anyone about Miller's

conduct. Miller was immediately placed on administrative leave pending a full investigation, but he resigned before any action could be taken. Connor never reported any harassment.

Both women later sued MDMH making hostile environment sexual harassment claims. Claims where the alleged harasser is/was the plaintiff's supervisor are particularly dangerous because there may be strict liability for the employer. Only if no tangible employment action has been taken against the plaintiff is the *Faragher/Ellerth* affirmative defense even available to the employer in such a situation. Luckily, in this case, no tangible employment actions had been taken against Williams and Conner, so MDMH was able to argue that it had taken reasonable efforts to prevent and promptly correct harassing behavior and that Williams and Conner had unreasonably failed to take advantage of corrective opportunities (the *Faragher/Ellerth* affirmative defense).

MDMH was able to establish the first prong of the *Faragher/Ellerth* defense – i.e. that it took reasonable action to prevent harassment – because it had a “zero-tolerance” anti-harassment policy with a reporting procedure, and it trained its employees on harassment and its policy. MDMH was able to establish the second prong of the *Faragher/Ellerth* defense – i.e. that the plaintiffs unreasonably failed to take advantage of corrective measures or avoid harm otherwise – because Williams and Connor failed to report the harassment and allow MDMH an opportunity to remedy the situation. Because MDMH was able to establish both prongs of the *Faragher/Ellerth* defense, the Eight Circuit affirmed judgment in its favor on Williams's and Connor's claims and the United States Supreme Court refused to reconsider that judgment - even though MDMH never disputed that Miller committed the acts with which he was charged!

Although adopting an anti-harassment policy and training your employees on the policy and its reporting procedures is itself designed to prevent harassment, there is no guarantee that it will dissuade all employees so inclined. But equally important, it sets up a defense so that the employer may escape liability when it can show that it did all it could to prevent such harassment but, despite its best efforts, it still occurred. Although in this case, MDMH prevailed because the plaintiffs didn't complain, the defense is also available where a company takes appropriate steps to stop harassment when a

complaint is made. So, start the year off by making sure your arsenal is full: get a policy; train your employees; and take corrective action when necessary.

### **Is Considering Whether An Old Dog Can Learn New Tricks Age Discrimination?**

The Age Discrimination in Employment Act prohibits an employer from failing or refusing to hire an individual over 40 years of age because of his or her age. But there are a lot of factors of genuine interest to an employer which have an uncomfortable correlation to age. It is sometimes difficult to determine where the line is drawn between considering legitimate business concerns that relate to age and age discrimination. A recent Eight Circuit decision in the case of *Lee v. Rheem Mfg. Co.* (8<sup>th</sup> Cir. December 28, 2005), is instructive.

George Roger Lee worked for Rheem for over 25 years in its Human Resources department. He was the department manager when he decided to retire for health related reasons in 1996. When he retired, Lee took his retirement in a lump sum and invested it in the stock market. After Lee retired, Rheem underwent some significant changes in its manufacturing processes and, because of these changes, its relationship with the union representing its employees deteriorated significantly. Finally, in 2002, a Labor Relations Administrator position came open when an employee in the HR department died unexpectedly. Lee became aware of the position when Rheem advertised the job in the newspaper and he submitted an application.

Lee, who was 63 years old at the time, was interested in the job because his retirement money had dwindled due to the unpredictable stock market. Donald Raines, who was 39 years old at the time, was the successful candidate. Lee sued alleging age discrimination. Lee believed that Rheem's decision was motivated by his age because of certain questions and comments made during the interview process. For example, Lee was told during the interview that "things had changed a lot," and he was asked if he could "grasp the new processes." He was also told that Rheem had to "plan for the future," and he was asked more than once how long he intended to work if he was hired. Rheem even explained that its decision to select Raines was influenced by the fact that they wanted someone in the position who would work for more than a few years and who had the potential to succeed the 56-year-old HR manager. The Rheem

search committee believed that Lee's plan was merely to earn some short term money necessitated by his problems in the stock market.

Although these considerations are related to Lee's age, the Eighth Circuit held as a matter of law that they were not evidence of age discrimination. "Factors other than age, but which may be correlative with age" are not evidence of age discrimination. Here, Rheem's desire to hire a candidate interested in a long-term career and promotions was a legitimate business reason for its hiring decision and was determined not to be an indicator of underlying age bias. Therefore, Lee's claim against Rheem was dismissed.

Making decisions which are influenced by factors which correlate with age is a tricky business because those factors could be used as a sort of proxy for age discrimination. However, certain legitimate concerns are necessarily related to age – such as the desire to hire a candidate who plans a long term career with the company. If these factors are to enter into any decision making process, the employer should be very careful. Where such characteristics are deemed desirable for a position, make sure that all of the candidates are evaluated on all of the same characteristics. In this case, Lee was unable to establish that these factors were a pretext for age discrimination because the factors were applied consistently across the range of candidates.

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