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# EMPLOYMENT PRACTICES UPDATE

FALL 2011

## MANAGER AND CO-WORKER'S CRUDE, 'BOORISH' LANGUAGE NOT ACTIONABLE UNDER NEW JERSEY'S LAW AGAINST DISCRIMINATION BECAUSE IT WAS NOT MOTIVATED BY GENDER

In *Miceli v. Lakeland Automotive Corporation*, No. A-3207-10T2 (decided October 19, 2011), a New Jersey Appellate Court concluded that Miceli, the only female car salesperson at Lakeland Automotive Corporation, failed to establish a prima facie case of a hostile work environment under the Law Against Discrimination (LAD), N.J.S.A. 10:5-1 to -49. The reason? Miceli failed to show that the conduct constructing the allegedly hostile work environment was motivated by or based on her sex.

Miceli's lawsuit arose out of the conduct of two other male employees during the last few months of her approximately 11 months of employment with Lakeland. She alleged in her complaint that on three occasions, a male co-worker abused, belittled, and harassed her. She also alleged that her male sales manager permitted this hostile work environment and abused her by speaking to her in an angry, belittling, and condescending manner.

On March 2, 2007, Miceli argued with her co-worker because she had assisted two customers in a row, which was against company policy. The male co-worker yelled at Miceli that she was "going to get hers" and that her "day is coming." When Miceli complained about the incident to her sales manager, he immediately issued the co-worker a warning. On March 14, 2007, Miceli learned that on her day off the co-worker had serviced one of her existing customers. Miceli also reported this incident to her sales manager, who returned the customer to Miceli.

On May 18, 2007, Miceli again argued with the male co-worker over car keys that had been removed from her desk. She asked him, "Why are you acting like an animal?" During Miceli's deposition, she testified that he replied, "Kiss my ass . . . I'll act

### *IN THIS ISSUE...*



like an animal and show you how animals act, so you better be very afraid." Miceli reported this incident to her sales manager, who again warned her co-worker and told him that any further incidents or threat would result in the termination of his employment.

At the end of June 2007, Miceli stopped working for Lakeland, notifying them that she could not longer sell cars because of injuries she had sustained in a February 2007 accident. She filed her hostile work environment complaint against Lakeland in June 2009.

During oral arguments, Miceli told the trial court judge that her sales manager would "be very abusive" toward her. When the judge asked her for examples, she stated " . . . if I had done something wrong, he didn't take me into his office and – and speak to me about it. He would just openly blow off steam right in front of everyone else." When Miceli was asked if the sales manager treated the other salespeople this way, she responded that he "might have" but that she didn't know.

The trial court judge commented that "the conduct . . ., while it is impolite, while it is boorish, while it is probably reflective of lack of human kindness, does not seem to be predicated upon . . . sexist conduct." The judge denied Lakeland's initial motion for summary judgment, ordering that discovery needed to be taken to determine whether the complained-of conduct occurred because of Miceli's gender. At the close of discovery, Lakeland renewed its motion for summary judgment and the judge dismissed the case because Miceli did not present any additional proof that the conduct toward her was based on her gender.

On appeal, the New Jersey Superior Court, Appellate Division, affirmed the dismissal of Miceli's case. Although the court referred to her co-worker's conduct as "rude and obnoxious," it remarked that there was no evidence to suggest that the conduct was motivated by Miceli's gender. Similarly, the sales manager's conduct was directed at all of the salespeople, males included. During Miceli's deposition, she stated that "everyone," including her male co-workers, complained about the manager and further testified that he had "anger" and "rage" issues. Additionally, the court found that there was no genuine issue of material fact as to whether a reasonable person would consider the conduct in question to be sufficiently severe or pervasive to alter the conditions of employment and create a hostile work environment.

### Advice

This is also a good example of what can happen when one of your employees is an "equal opportunity harasser." Although personality conflicts, albeit severe, do not equate to hostile work environment claims simply because the conflict is between a male and a female employee, employees who feel threatened and harassed may not make this distinction, leaving you defending a lawsuit. Promoting a workplace that values respect and civility can keep both employers and employees happy and out of court.

## PENNSYLVANIA'S CRIME VICTIMS' EMPLOYMENT PROTECTION ACT PROTECTS EMPLOYEES WHO REPORT CRIMES TO THE POLICE

The Superior Court of Pennsylvania recently held that a victimized worker who was terminated after he informed his employer that he was pursuing legal action against a co-worker may maintain an action against the employer under Pennsylvania's Crime Victims' Employment Protection Act.

In *Rodgers v. Lorenz*, 25 A.3d 1299, 2011 PA Super. 154 (Pa. Super. Ct. 2011), Rodgers, a Train Conductor employed by Carload Express, alleged that Lorenz, another Train Conductor, threatened to violently assault him. Rodgers reported this to the Vice President of Operations, and was transferred to a different jobsite. Thereafter, Rodgers again found himself working at the same job site as Lorenz. Although Rodgers worked the night shift while Lorenz worked the day shift, they interacted during shift changes, at which time Lorenz continued to harass Rodgers.

Specifically, Lorenz threatened to "kick the @%$& out of" Rodgers and "kill him" (expletive edited). As Rodgers backed out of the room, Lorenz spit in his face and stated, "I know where you live, and I won't hesitate to come there and kill you." The following day, Rodgers reported the incident to the Vice President of Operations and informed him that he was going to call the police. Despite the VP asking Rodgers not to do so, Rodgers told "everyone" that he was going to call the police and called them two days after he had reported the incident to the VP. Rodgers' employment was terminated later on the day he placed the phone call to the police.

Rodgers filed a complaint pursuant to 18 Pa.C.S.A. § 4957(a) ("Crime Victims' Employment Protection Act"), alleging that he had been wrongfully terminated for planning to attend criminal proceedings against Lorenz. The Act provides, in pertinent part, that:

An employer shall not deprive an employee of his employment, seniority position or benefits, or threaten or otherwise coerce him with respect thereto, because the employee attends court by reason of being a victim of, or a witness to, a crime or member of such victim's family. Nothing in this section shall be construed to require the employer to compensate the employee for employment time lost because of such court attendance.

The statute provides a civil remedy, which permits the recovery of lost wages and reinstatement. 18 Pa.C.S.A. § 4957(c). (Rodgers also brought claims against his employer for negligent supervision, breach of contract, and violation of the Pennsylvania Whistleblower Law, 43 P.S. § 1423, and a claim of assault and battery against Lorenz).

The trial court originally dismissed Rodgers' claim under the Crime Victims' Employment Protection Act for failure to state a claim based on the narrow interpretation that the Act only protects crime victims who have attended hearings from threats, coercion, and loss of employment. On appeal, the court reversed, agreeing with Rodgers that the language of the Act does not place a temporal limits on the protected conduct of court attendance. The court noted that "it would be absurd for the Legislature to prohibit an employer from terminating a crime victim's employment after he has attended court proceedings but to permit termination provided the employer acts preemptively."

Because Rodgers plead in his complaint that (1) he was an employee of Carload Express; (2) he was the victim of an assault; (3) he informed management of his intention to report the crime to police and, therefore, attend court proceedings; (4) he reported the crime to police; and (5) Carload Express terminated him, he stated a claim pursuant to the Crime Victims' Employment Protection Act.

### Advice

Be aware of state and local laws that protect employees. State laws often provide broader protections to employees than federal laws do, and they are not just limited to traditional protections against employment discrimination based on sex, race, age, disability, etc. Additionally, take employees' reports of workplace violence seriously and do not retaliate against employees who report workplace violence to law enforcement agencies.

## SOME PHILADELPHIA EMPLOYERS MAY SOON BE REQUIRED TO PROVIDE PAID SICK LEAVE TO EMPLOYEES

Earlier this year, Philadelphia's Mayor Nutter vetoed a sick leave bill that would have required large employers to provide paid sick leave to certain employees. On October 13, 2011, Philadelphia City Council voted 15-2 to OK a new version of the sick leave bill, introduced by Councilman Wilson Goode, Jr.

If the bill passes, the city and employers with city contracts, funding or leases must provide earned paid sick days to employees. Specifically, the following entities would be required to provide up to 7 sick days per year:

- Public agencies receiving contracts from the city after July 1, 2012, for $10,000 or more;
- City financial-aid recipients;
- Recipients of city leases;
- Concessions;
- Franchises;
- City subcontractors that employ more than 25 workers;
- Nonprofit service contractors receiving more than $100,000; and
- For-profit service contractors receiving $10,000 or more a year with annual gross receipts of more than $1 million.

It is not yet clear whether Mayor Nutter will veto the bill, and Council would need 12 votes to override the Mayor's veto. Without the bill, employees are only entitled to unpaid leave under the Family Medical Leave Act, subject to certain requirements and restrictions.

### Advice

Even if you are not within the city limits of Philadelphia, consider providing employees with paid sick leave. Most employers offer this as part of a comprehensive benefits package. And, if you are within the city limits of Philadelphia and fit into one of the categories listed above, keep an eye on whether the bill passes. You may need to take a look at your leave policy.

# EEOC PURSUES DISABILITY DISCRIMINATION CLAIM AGAINST CAPITAL HEALTHCARE SOLUTIONS FOR FAILURE TO HIRE AN INDIVIDUAL WITH HIV/AIDS

The EEOC has recently instituted an action in the U.S. District Court for the Western District of Pennsylvania against Capital Healthcare Solutions (CHS), a Pennsylvania-based Health Care Staffing Firm, Civil Action No. 2:11-cv-01249, alleging that CHS rescinded an offer of employment to a certified nursing assistant (CNA) because he was HIV-positive.

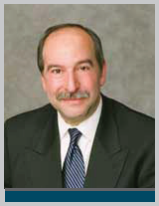
CHS allegedly extended a job offer to the experienced CNA, conditioned upon his passing a medical examination. In the CNA's medical form, his doctor noted that he was HIV-positive, but that he was not restricted from performing the relevant job tasks as long as "universal precautions" were taken, such as use of gloves and face masks. Essentially, he could perform the duties of a CNA despite his HIV-positive status. Regardless, CHS rescinded its job offer.

The EEOC's lawsuit alleges that CHS refused to hire the CNA because of his disability (his HIV-positive status) or because CHS regarded him as disabled. Refusing to hire a qualified individual because of the individual's disability, record of disability, or because the employer perceives the individual as being disabled is a violation of the Americans with Disabilities Act (ADA). The EEOC is seeking injunctive relief barring CHS from engaging in disability discrimination in hiring, as well as back pay, compensatory damages, and punitive damages on behalf of the CNA, who is also represented by the AIDS Law Project of Pennsylvania.

Debra Lawrence, Philadelphia regional attorney, noted that President Obama has charged federal agencies to implement the National HIV/AIDS strategy, which includes addressing and preventing employment discrimination against individuals with HIV. She advised that the EEOC is working to ensure that qualified individuals are not wrongfully deprived of the opportunity to earn a living because of their HIV status, and that this case is an example of the EEOC's dedication to enforcing federal laws that accomplish this goal.

## Advice

Although this case is pending and the outcome is not yet known, employers can take the advice of Spencer H. Lewis, Jr., District Director of the EEOC's Philadelphia District Office. He stated that this case should remind employers that they are required to "make employment decisions based on an individualized assessment of the person's ability to do the job, and not act out of speculative fears or biases against individuals with HIV."

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