MASSACHUSETTS LAWYERS WEEKLY
www.masslawyersweekly.com
June 23, 2014
THE DOLAN COMPANY

Ruling significantly expands employer liability for bias

By David C. Henderson

On May 23, the 1st U.S. Circuit Court of Appeals released an opinion explaining in detail yet another way in which an employer can be held liable when sexual discrimination is allowed to infect the workplace.

The lessons from the opinion are significant. Perhaps the most obvious is one we have experienced before: Unlawful discrimination can show up and do harm in unexpected ways.

Also apparent is that preventive training for employees and supervisors alike about the pernicious effects of unlawful discrimination should be seen as an essential part of employer risk management.

And finally, the case provides yet another cautionary note for employers about problems that can occur when romantic relationships between co-workers end and one of the employees allows dissatisfaction with that result to become a factor in his or her actions at work.

The appellate opinion at issue is *Velázquez-Pérez v. Developers Diversified Realty Corp., et al.* The employer in the case had fired an employee, indeed a regional general manager, based largely on negative information provided by a human resources representative whose responsibilities included advising higher-level managers on employee discipline.

In response, the general manager sued the employer in federal District Court for, among other things, sex discrimination in violation of Title VII of the Civil Rights Act of 1964.

One of his arguments was that the discharge was unlawful because the employer wrongfully based it on the sexually discriminatory reports and advice that the HR representative had provided to the general manager's higher-level managers.

Two aspects of the evidence framed the dispute being litigated. On one hand, there was no evidence that the higher-level managers who made the discharge decision acted with any type of unlawful motive, much less a motive tied to the general manager's sex.

On the other hand, there was evidence showing that, prior to the general manager's discharge, (1) the HR representative expressed to the general manager her romantic interest in him; (2) after a brief flirtatious period, the general manager rebuffed that romantic interest; (3) the HR representative thereafter conveyed the threat that she would undercut the general manager at work and ultimately get him fired if he would not engage in a romantic and sexual relationship with her; and (4) the HR representative actually did convey negative information and advice about the general manager to the higher-level managers who ultimately decided to discharge him.

> The lessons from the opinion are significant.

The U.S. District Court ruled for the defense and against the plaintiff general manager by awarding summary judgment to the employer. The 1st Circuit, however, disagreed with the lower court, vacated the summary judgment award, and remanded the case for trial.

The 1st Circuit's four-part analysis is instructive. First, the court found that the necessary causation was present. Just as the plaintiff had argued, a reasonable jury could find that the HR representative's sexually discriminatory efforts were the proximate cause of his firing.

Second, the 1st Circuit found that, as the defendant employer had argued, a reasonable jury would not be able to conclude from the evidence that the HR representative was the general manager's supervisor. That initially seemed to be a significant victory for the defense.

According to the U.S. Supreme Court, an employer is vicariously liable for damages to an employee whenever they

David C. Henderson is a partner in the litigation department of Nutter, McClennen & Fish in Boston and a member of the firm's labor, employment and benefits practice group.

are caused by the unlawful discrimination of a supervisor. See *Staub v. Proctor Hosp.*, 131 S. Ct. 1186, 1195 (2011); *Vance v. Ball State Univ.*, 133 S. Ct. 2434, 2439 (2013).

But in this case the HR representative was not a supervisor because she was not "empowered ... to take tangible employment actions against a victim, i.e., to effect a significant change in employment status, such as hiring, firing, failing to promote, reassignment with significantly different responsibilities, or a decision causing a significant change in benefits." Quoting *Vance*, 133 S. Ct. at 2443.

Third, however, the 1st Circuit determined that the non-supervisory status of the sexually discriminating HR representative was not fatal to the general manager's wrongful discharge claim. According to the court, even though the HR representative was not a supervisor, a plaintiff employee in the general manager's situation "nevertheless [could] prevail under Title VII on a claim for discriminatory termination under a so-called quid pro quo theory" because his termination resulted from rejecting the sexual advances of the HR representative.

The court thus furrowed new ground. Quid pro quo sexual discrimination usually involves a supervisory relationship. (The 1st Circuit acknowledged this point by citing and quoting *Lipsett v. Univ. of Puerto Rico*, 864 F.2d 881, 897 (1st Cir. 1988) (quid pro quo harassment occurs "when a supervisor conditions the granting of an economic or other job benefit upon the receipt of sexual favors from a subordinate, or punishes that subordinate for refusing to comply").)

Finally, the court ruled that, even though the HR representative was not a supervisor, the employer nevertheless could be liable under Title VII for negligently allowing the representative's discriminatory acts to cause the wrongful discharge of the general manager.

That ruling based on negligence likewise extended precedent. As the 1st Circuit noted, the Supreme Court has not yet ruled on the issue of whether an employer can be liable for a discriminatory termination under Title VII because of its negligence.

And while the Supreme Court did hold in *Staub*, in somewhat analogous circumstances, that a violation of the Uniformed Services Employment and Reemployment Rights Act, or USERRA, occurred when an employee's military status unlawfully served as a motivating factor in the decision to discharge him, *Staub* was not a Title VII case, and *Staub* had involved unlawful animus by supervisors, not discriminatory animus or misconduct by a mere co-worker. (In *Staub*, the Supreme Court expressly declined to express a "view as to whether the employer would be liable if a co-worker, rather than a supervisor, committed a discriminatory act that influenced the ultimate employment decision." See 131 S.Ct. at 1194 n.4.)

Thus, the 1st Circuit ruling in *Velázquez-Pérez* is worthy of the attention of all employers subject to Title VII (those with 15 or more employees). It now is clear, at least in the 1st Circuit, that an employer can be liable under Title VII if the following occurs:

(1) the employee's co-worker makes statements maligning the employee for discriminatory reasons and with the intent to cause his firing;

(2) the co-worker's discriminatory acts proximately cause the employee to be fired; and

(3) the employer acts negligently by allowing the co-worker's acts to achieve their desired effect even though it knows (or reasonably should know) of the discriminatory motivation.

MLW