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Alert

Employment & Labor Practice Group

Good News and Bad News for Employers Facing Harassment and Retaliation Charges

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The Second Circuit Court of Appeals, the federal court covering New York State, handed down a decision on May 9, 2012 in Townsend v. Benjamin Enterprises, providing answers to two questions involving employer liability in harassment and retaliation cases. The first question concerns the viability of a claim of unlawful retaliation based upon an employee's participation in an internal employer investigation not connected to any proceeding before the Equal Employment Opportunity Commission ("EEOC"). The Second Circuit determined that it did **not**, even though it was undisputed that the employee had participated in an internal company sexual harassment investigation. In doing so, the Court also rejected a plea from the EEOC to adopt a broad interpretation of statute.

At first blush, this decision is not only favorable to employers, but appears to contradict the decision made by the United States Supreme Court in Crawford v. Metropolitan Government of Nashville and Davidson County, 555 U.S. 271 (2009). (Bousquet Holstein reported on the Crawford case in an email alert dated March, 2010.) The Supreme Court in Crawford addressed the protections afforded to employees who "oppose" unlawful discriminatory practices. The Crawford court concluded that the definition of those who "opposed" unlawful discriminatory practice should be very broad, largely based on the statute's failure to limit its meaning and the broad intent of Title VII to protect such employees. As a result, Crawford protects any employee who engages in any act that might be deemed supportive of another's discrimination complaint. This clearly occurs whenever an employee provides information during a company internal investigation **and** is in support of the discrimination claim.

The Second Circuit, however, refused to provide a similar broad definition of what "participation" means under the anti-discrimination law, finding that the statutory use of the term "participation" was clearly tied to participation in EEOC proceedings, and was not designed to reach every type of harassment investigation. In Townsend, the plaintiff did not "oppose" discrimination and merely "participated" in the internal company investigation, acknowledging that she did not know if the complaint was true or false.

The ruling is certainly pro-employer, but is likely to have limited application. Most persons pursuing retaliation claims under anti-discrimination laws do so as employees who have "opposed" unlawful discriminatory practices, not merely as employees who have "participated" in an EEOC complaint process.

The second question considered by the Second Circuit concerns an employer's liability for hostile environment harassment by a senior executive who is deemed a "proxy or alter ego" for the employer. To understand this question, a review of the principles of liability in harassment cases is necessary.

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Those who follow Bousquet Holstein's email alerts know that an employer may be held strictly liable for the sexual harassment of an employee that results in an adverse employment consequence (traditional quid pro quo harassment). In hostile environment cases, however, an employer may assert an affirmative defense (and avoid liability) by proving that:

(1) It exercised reasonable care to prevent and correct promptly any sexually harassing behavior; and

(2) The complaining employee unreasonably failed to take advantage of any preventive or corrective opportunities provided by the employer or to avoid harm otherwise.

The affirmative defense has come to be known as the Faragher/Ellerth affirmative defense, because it was outlined by the United States Supreme Court in cases bearing these names in 1998. The Faragher/Ellerth affirmative defense is only available in hostile environment cases, typically occurring among co-workers or by supervisors when the employee does not suffer an adverse employment consequence.

The Second Circuit, however, ruled in Townsend that an employer may **not** use the Faragher/Ellerth defense in supervisor hostile work environment cases where the supervisor holds a sufficiently high position in the management hierarchy of the company that his actions might be imputed automatically to the employer. The basic argument is that someone who is a high level supervisor may also be the proxy or alter ego for the employer, and that notice to the employer is therefore not an issue (which is usually the case in hostile environment cases).

The Townsend decision is clearly bad for employers and a huge victory for employees. Most reported cases of harassment involve supervisor harassment, not co-worker harassment. As a result of Townsend, the employer's power to use the Faragher/Ellerth affirmative defense is essentially eliminated in hostile environment cases involving higher level management, even when the harassment does not result in a tangible adverse employment action.

The Labor and Employment Practice Group at **Bousquet Holstein PLLC** provides representation to employers, large and small, and to employees. Our attorneys make it a priority to become familiar with our clients' businesses. We emphasize addressing employment, discrimination, and labor issues before they become problems and we advise our clients in all areas of human relations and human resource practices to satisfy our clients' business objectives. If we can provide you with additional insight and information regarding employer liability issues, please contact **John L. Valentino**. John Valentino is a Managing Member of Bousquet Holstein PLLC, (www.BHlawPLLC.com) and concentrates his practice in the areas of Business Transactions and Employment Law. He can be reached directly at **315.701.6308** or **jvalentino@BHLAWPLLC.com.**