Employment Law Advisory for 8/17/2011

Discrimination Verdict For Defendant Reversed Based On Exclusion Of "Me Too" Evidence

In any employment discrimination trial, employers correctly fear the introduction of so-called "me too" evidence. Me too evidence typically consists of a parade of employees or former employees who testify to their own experience of allegedly discriminatory acts at the hands of the defendant employer. Me too evidence is essentially "character evidence" through which the plaintiff seeks to prove the employer is a "bad employer" and therefore should be punished. Employers rightfully worry that a jury will be unduly influenced by this testimony and may not focus on what actually happened to the plaintiff in the case at hand. The unstated inference is always that if it happened to others it must have happened to the plaintiff. In addition to the potential for unfairly influencing the jury, "me too" evidence also creates an evidentiary burden in that the defense must not only address each of the plaintiff's allegations of discriminatory treatment, it must also respond to the allegations of each of the "me too" testifiers.

Defense lawyers regularly seek to exclude "me too" evidence in discrimination cases arguing that any probative value is far outweighed by the confusion and unfair prejudicial effect created by such evidence. The appellate court's opinion in *Pantoja v. Anton et al*, demonstrates what happens when the trial court goes too far in excluding evidence about alleged discrimination against employees or former employees other than the plaintiff. Pantoja was a legal secretary for Thomas Anton and his law firm. Pantoja alleged that Anton sexually harassed her during her employment and ultimately fired her for discriminatory reasons based on her race and gender. Ironically, Anton testified that he was highly knowledgeable about EEO law and that he conducted sexual harassment training for other employers. Anton also denied all of Pantoja's allegations of harassment and discrimination. The trial court ruled that Pantoja could offer evidence about Anton's allegedly discriminatory and harassing behavior only if the behavior occurred during the period she was employed or if she knew about it while she was employed by Anton and it therefore affected her experience of the work environment. Under this theory, the court excluded evidence from a variety of current and former employees that not only impeached Anton's own denials of sexual harassment and gender and race discrimination, but also, tended to support Pantoja's testimony that Anton was given to bouts of extreme profanity and name calling and also engaged in unwanted touching of female employees.

The appellate court reversed the jury verdict in favor of the defendant and concluded that the trial court had abused its discretion in excluding the "me too" evidence offered by Pantoja's counsel to prove Anton's discriminatory motive or intent. The appellate court concluded that the "me too" evidence Pantoja's counsel attempted to offer at trial was admissible to show discriminatory intent and to impeach Anton's own credibility as a witness in light of his denials of any harassing or discriminatory behavior.

While no employer can maintain a perfect working environment at all times, the *Pantoja* opinion serves as a good reminder that regular training regarding equal employment opportunity laws, including sexual harassment laws, as well as, a robust complaint reporting procedure are key elements to effective employment practices. An appropriate complaint reporting procedure not only

allows employers to become aware of complaints by employees and thus to take any necessary corrective action promptly, it serves as one piece of any defense to a lawsuit alleging unlawful discrimination or harassment. If you have any questions about equal employment policies or training and effective complaint reporting procedures, or any other issue relating to employment law, please contact one of our attorneys:

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