SEBRIS BUSTO JAMES Employment Law Note October 2012

Single Comment, Together with "Background Evidence," May Establish Hostile Work Environment

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In Washington, hostile work environment claims can be based on the cumulative effect of discrete acts. As a result, a hostile work environment can arise over a period of days or even years. When a claim involves several years of cumulative conduct, how do Washington courts address the situation where the conduct becomes unlawful in the middle of the series of acts?

Loeffelholz v. University of Washington

This issue was recently addressed by the Washington Supreme Court in *Loeffelholz v. University of Washington*, No. 86511-6, 2012 Wash. LEXIS 662 (Sept. 13, 2012). In *Loeffelholz*, Debra Loeffelholz, a former University of Washington (UW) employee, brought suit against UW and her former supervisor. Loeffelholz asserted a claim under the Washington Law Against Discrimination ("WLAD"), alleging that her former supervisor created a hostile work environment based upon sexual orientation discrimination. The discriminatory acts that supported Loeffelholz's claims allegedly occurred from 2003 to 2006. However, sexual orientation was not considered a "protected status" under the WLAD until it was amended on June 8, 2006.

As a result, Loeffelholz's hostile work environment claim was based on multiple alleged acts occurring pre-amendment and one alleged post-amendment act. Specifically, Loeffelholz alleged that the supervisor asked her about her sexual orientation; told her not to "flaunt" her sexual orientation around him; expressed hatred toward others and his desire to avenge perceived affronts; and made known that he had anger management issues. The supervisor also told Loeffelholz that he kept a gun in his vehicle, and that he was "proficient in using firearms, in killing people, in getting people, in using shock and awe, and in blood and gore." The supervisor also allegedly revoked Loeffelholz's flexible work schedule, denied her over-time and training opportunities, refused to give her employment evaluations, and told others that he disliked Loeffelholz because she was gay. Each of these alleged acts occurred prior to the amendment. The only alleged discriminatory act to occur post-amendment happened during a group meeting prior to the supervisor's deployment to Iraq. During the meeting, he told the group that he was "going to come back a very angry man" from Iraq.

The trial court held that all alleged discriminatory acts occurring before the amendment's effective date were not actionable. In granting summary judgment to defendants, the trial court found that it was unreasonable to say the "angry man" comment was motivated by Loeffelholz's sexual orientation. The Court of Appeals disagreed, holding that held that whether the "angry man" comment was a discriminatory act connected to the hostile work environment claim was a genuine issue of material fact precluding summary judgment.

The Washington Supreme Court granted review of two issues: (1) whether the alleged conduct that occurred prior to the effective date of the WLAD amendment was actionable; and (2) whether the "angry man" comment was a discriminatory act. The court first ruled that the amendment does not retroactively apply to conduct that allegedly occurred pre-amendment. The Court reached this holding on grounds that WLAD is not a remedial statute (which would support retroactive application), nor does WLAD's plain language or legislative history create an inference that it was intended to apply retroactively. Therefore, the Court held that any alleged acts that occurred prior to June 8, 2006, were not actionable.

Even though Loeffelholz could not recover damages for pre-amendment alleged acts, the Court held that she could rely on pre-amendment acts as "background evidence" of continuing harassment to establish her hostile work environment claim. Accordingly, the Court held that Loeffelholz may use the pre-amendment conduct to explain why the "angry man" comment constituted sexual-orientation based harassment. Finally, the court considered whether the "angry man" comment, in the context of the alleged pre-amendment conduct, could be sufficient to establish Loeffelholz's hostile work environment claim. The Court concluded that one could reasonably infer that the "angry man" comment was related to, and a natural extension of, the supervisor's earlier acts. The Court therefore reversed the grant of summary judgment to UW and remanded the case for further proceedings.

Practical Guidance for Employers

As the *Loeffelholz* decision recognizes, a supervisor's single comment will not usually be enough to establish that an employee was subjected to a hostile work environment. However, the Court did say that "the pre-amendment conduct establishes that the "angry man" comment could be severe enough, on its own, to alter the conditions of employment and establish a hostile work environment." In other words, where "background evidence" gives context to a single discriminatory act, a court could find that a *prima facie* hostile work environment claim has been established.

This case further serves as a reminder to employers that sexual orientation is a protected class in Washington. Anyone may bring a claim for sexual orientation discrimination. Although gay, lesbian, bisexual, and transgender individuals are statistically the most frequent sexual orientation discrimination claimants, WLAD equally protects heterosexual persons from discrimination on the basis of sexual orientation.

Finally, this case is a warning that employers can be exposed to liability based in part on conduct that is not yet protected. In *Loeffelholz*, the plaintiff was allowed to present pre-amendment conduct as evidence of a hostile work environment, even though the conduct was legal at the time it occurred. To minimize future liability risks, we encourage employers to take seriously all employee complaints of alleged improper conduct in the workplace. Although complaints often do not appear to be based on a protected status, all of the underlying bases of a complaint may not be readily apparent and, in some cases, the alleged conduct may be based on a status that is not presently protected by law. Therefore, it is important for employers to publish employee complaint procedures, to promptly and thoroughly investigate complaints, and to take appropriate action based on the outcome of the investigation.