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A LITTLER MENDELSON REPORT

OCTOBER 2005

An Analysis of Recent Developments & Trends

LITTLER MENDELSON, P.C.
THE NATIONAL EMPLOYMENT & LABOR LAW FIRM

North Country: An All-Too Familiar Territory for America's Employers

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An iron mine, the U.S. Treasury Department, an insurance company, a car manufacturer, a restaurant chain and an investment bank — these seemingly disparate workplaces all have something in common... All have been the targets of sexual harassment class action lawsuits. As the above illustrates, sexual harassment lawsuits are not new and have long impacted businesses of all sizes in every industry. And in today's litigious culture, employers can only expect to see more of these suits in the future.

With the blockbuster release of the new Hollywood movie *North Country,* the popular media has once again focused its collective lens on sexual harassment in the workplace. However, workplace harassment (including not only sexual harassment but also an increasing number of claims of racial, religious, disability and age-based harassment) is an issue that America's employers have been focusing on for years. Ever since the televised and much-publicized days of the Clarence Thomas Senate confirmation hearings and the Anita Hill controversy, employers have realized that they have a responsibility to maintain a harassment-free work environment. The release and subsequent popularity of *Erin Brockovich* resulted in a heightened public awareness of whistleblower claims and, consequently, an increase in such lawsuits; it is reasonable to anticipate that *North Country* will have a similar effect.

The Familiar Landscape and the Lessons Learned

The Clarence Thomas/Anita Hill controversy spawned a 20-year growth spurt in harassment litigation, and the first major class action sexual harassment lawsuit, filed in 1988, now is the basis for the film *North Country.* In *North Country,* Charlize Theron plays a character who is intended to embody and represent the group of women who were plaintiffs in the lawsuit and, more importantly, among the first to be hired to work at the EVTAC iron mine in Eveleth, Minnesota in 1975. Pursuant to a consent decree between the Equal Employment Opportunity Commission (EEOC) and the country's largest steel companies, the Eveleth mine was required to provide 20% of its new jobs to women and minorities. Up until then, the mining industry had traditionally been a male-dominated industry and it may be an understatement to say that many of the men resented the introduction of women into the already shrinking workforce.

In October of 1984, after enduring almost a decade of both verbal and physical harassment including graphic talk, posters, phallic items, stalking and threats of rape, one of the women depicted in this film, Lois Jenson, filed a complaint with the Minnesota Human Rights Department. After the mine rejected the State's conciliation efforts regarding Jenson's allegations (including a reported proposal to settle for $11,000), Jenson pursued her case in federal court. In 1991 three years after she initially filed her lawsuit, Jenson's request for class action status was granted, and Jenson was joined by a group of female coworkers in alleging sexual discrimination and harassment. The liability trial regarding the class action claims began by the end of the next year (in December of 1992), but the damages trial did not occur until mid-1995, when the women's claims for damages were tried before a Special Master.

The damages trial included detailed discussion and references to lengthy deposition testimony probing the women's medical histories, childhood experiences,

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domestic abuse, abortions, and sexual relationships, that were referenced in an attempt to address and prevail on causation theories. The Special Master's rulings and use of this testimony were reviewed and reversed and criticized, in large part, by the Eighth Circuit Court of Appeals, which ordered a new jury trial. (*Jenson v. Eveleth Taconite Co.*, 130 F.3d 1287 (8th Cir. 1997) available at http://laws.lp.findlaw.com/getcase/8th/case/971147p.html) The case was finally settled as 1998 came to a close, and on the verge of that new trial – some fourteen years after Jenson first complained to the State. With the settlement, fifteen female class members received a reported $3.5 million.

While the facts in *North Country* are particularly egregious, most employers have been dealing, in one way or another, with harassment complaints over the past two decades. In fact, since the *Jenson* case was first filed in 1988, the very landscape of harassment claims has changed. While sexual harassment as a cause of action is well-established, the classic male harassing a female scenario is becoming less prevalent among the complaints that are being pursued: that is, while approximately 15,000 sexual harassment cases are brought to the EEOC each year, this makes up only 22% of all harassment claims. The remaining 78% of the claims involve harassment based on one of the other proscribed protected categories (race, religion, age, national origin, etc). Further, the number of harassment claims filed *by men* has more than tripled in the last few years, and approximately 11% of claims involve men filing complaints against female supervisors. The increase in the number of claims has also been paralleled by an increase in the cost of resolving such claims.

Employers have known for a long time that sexual harassment is problematic, but they had no legal guidance as to what could or should (or must) be done to defend against or curb it. However, following the United States Supreme Court decisions in *Burlington Industries, Inc. v. Ellerth*, 524 U.S. 742(1998) and *Faragher v. City of Boca Raton*, 524 U.S. 775 (1998), employers finally were provided with some guidance from the courts as to appropriate responses to sexual harassment complaints.

The *Ellerth* and *Faragher* decisions imposed strict liability on employers where supervisors are claimed to have engaged in harassment that results in a "tangible employment action" — i.e., a demotion, termination, denial of benefits, and the like. Where supervisory behavior constitutes a hostile work environment, but does not result in a tangible employment action, generally speaking, employers have an affirmative defense to liability if they exercise reasonable care in attempting to prevent, and promptly correct, workplace harassment, and the employee unreasonably failed to take advantage of such opportunities — all things the Eveleth mine was shown in the *Jenson* case to have failed to do.

Not only do class actions carry greater risk of high punitive damage awards; they are significantly more expensive to defend, more disruptive of the workplace, and can be a public relations nightmare. Although many of the sex harassment lawsuits brought by individual plaintiffs devolve into disputes about whether just a few incidents of workplace conduct were "unwelcome" or sufficiently "pervasive" to be actionable. These defense strategies are often significantly more complicated where the multiple incidents are alleged by numerous class-member witnesses, some of whom may have witnessed different conduct.

Unquestionably, employer liability for sexually harassing acts by supervisors has been expanded over the years. However, even more importantly, an employer's actions in generating, disseminating and enforcing an appropriate anti-harassment and retaliation policy and procedure have been identified by the Supreme Court as critical elements of an employer's affirmative defense to claims of all types of unlawful harassment.

The Next Step to Further Curbing Harassment in the Workplace

Throughout the 1980's and 90's, employers often found themselves reacting to harassment complaints. Now employers are finally starting to be proactive in preventing harassment from occurring in the first place. Perhaps one of the more disturbing aspects of the story behind *North Country* is the reminder of just how recently the concept of a hostile work environment conduct has been tolerated, if not desired, as "coming with the territory." While employers responded to the Clarence Thomas/Anita Hill controversy and EEOC Guidance, and have now had harassment policies in place for some time, many are now taking steps to make sure that the policies are well-publicized and enforced. As the legal challenges probe deeper into corporate awareness and managerial training on such policies, employers are implementing broader programs to train their managers on appropriate workplace behavior, and making sure managers know their responsibilities for monitoring the workplace and dealing with harassment once it first manifests itself.

Recognizing that the best way to prevent harassment is to provide manager training, state legislatures are also beginning to encourage if not require such training. For example, in 2004, California mandated that all supervisory employees receive 2 hours of interactive sexual harassment training in companies with more than 50 employees. Draft regulations of the California law (still in the early stages of the approval process), will require such training of any organization doing business in California and with 50 or more employees located anywhere in the U.S. Thus, the extraterritorial effect of this California law could be massive. California is the largest, but certainly not the only, state to mandate such training. Maine has required training since 1991 and Connecticut since 1992, but neither law specifically mandates the specifics —

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including length of time or manner of training — in the manner that California does. Other states (Colorado, Illinois, Massachusetts, Michigan, Pennsylvania, Rhode Island, and Vermont) strongly "encourage" private employers to provide harassment training to employees.

How Companies Can Continue to Operate in this Familiar Territory

While the behavior that the class members in *North Country* experienced may make for a disturbingly entertaining and perhaps Oscar-winning movie, employers in America have plenty of drama in their workplaces everyday. *North Country* puts on the big screen a striking demonstration of how-not-to respond to harassment complaints. With that in mind, we offer below some steps for employers to minimize the drama and promote respectful and productive workplaces.

- Check the states where you do business to make sure you are in compliance with any mandatory training requirements. To the extent you are located in a state where training is "encouraged," consider implementing some type of training program for your managers and employees.
- Review your harassment policy to make sure that it does not focus exclusively on sexual harassment but also includes the other unlawful types of harassment, including harassment based on someone's age, race, religion, national origin, color or disability and retaliation, as well as any other category protected by state or local law.
- Make sure the harassment policy contains a clear and effective complaint procedure for employees to follow when bringing harassment issues to management's attention. The complaint procedure should provide different channels for reporting harassment (*i.e.* direct manager, other manager, HR, general counsel, 800 number, etc.). Audit that complaint process and procedure annually, to make sure it works. Appoint someone from outside the process (internally or externally, as need be) to determine its efficacy.
- To limit class action exposure, direct that complaints of harassment be reported to a central source (usually HR, Corporate HR or an 800 number) and monitor complaints for the emergence of any patterns or widespread attitudes that could be the basis for a class action.
- The investigation of harassment complaints often brings forward sensitive information regarding the complainant and the accused. Although an employer cannot guarantee confidentiality in all circumstances, make sure that during the course of investigation, sensitive and personal information is treated in as confidential a manner as possible.

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