

Employment Law Update

David B. Rubin, Esq.

David B. Rubin, P.C.

Metuchen, NJ

www.rubinlaw.net

WARNING

This program is intended for mature audiences, and may contain profanity, nudity and adult situations. Viewer discretion is advised.



Sexual Harassment

- Title VII of the Civil Rights Act
- New Jersey Law Against Discrimination

Title VII

- Sex
- Race
- Color
- National Origin
- Religion

New Jersey LAD

Race, creed, color, national origin, nationality, ancestry, age, sex (including pregnancy and sexual harassment), marital status, domestic partnership or civil union status, affectional or sexual orientation, gender identity or expression, atypical hereditary cellular or blood trait, genetic information liability for military service, or mental or physical disability, including AIDS and HIV related illnesses

Sexual Harassment

- “Unwelcome” Sexually-Charged Behavior
- *Quid Pro Quo* vs. “Hostile Environment”
- General Rule: Employers are vicariously liable for sexual harassment by supervisory personnel

The Reasonable Victim

- “Men are from Mars, Women are from Venus”
- Is it reasonably foreseeable that conduct may be perceived as harassment by a reasonable victim

- Malicious intent not required
- A single comment can create a hostile environment
- Even if direct participants aren't offended, others may be

The “Office Romance”

- Consensual relationships are not sexual harassment.
- Employers may regulate romantic relationships for legitimate operational reasons

What is Consent?

- Evolving concept in the #MeToo Era
- Even if no coercion by perpetrator or objection by victim, can imbalance of power itself negate consent?

Sexual Harassment Policies

- **Must have one!**
- **Must be effectively communicated to staff and enforced!**
- **Must have appropriate procedures for investigation and remediation!**

Defenses

- Employer exercised reasonable care to prevent and correct promptly any sexually harassing behavior *and*
- Employee unreasonably failed to take advantage of any preventive or corrective opportunities provided by the employer or to avoid harm otherwise

LGBT+ Issues

- Federal employment discrimination laws use the term “sex”
- NJLAD has included “gender identity or expression” as protected class since 2007
- Gender Dysphoria as “disability”

PAID
SICK DAYS

Earned Sick Leave Law

- One hour of paid sick leave for every 30 hours worked
- Employers exempt only to the extent they are required to provide sick leave with full pay under any other law or regulation.

- Must establish a single benefit year for all employees
- Applies to part-time and seasonal employees
- Supervisors and managers are covered

- The 30 hours of work necessary to earn one hour of paid sick leave may be spread out over more than one week
- Employees who leave and return within a six month period are entitled to retain their sick leave accrued earlier in the benefit year

- May limit total accrual of sick leave to 40 hours in any benefit year
- Employers may either: (a) track number of hours actually worked; or (b) presume a 40-hour work week for sick leave accrual purposes

- 120-day waiting period
- No requirement to pay out unused sick leave to employees who resign or are terminated

Permissible Uses

- Diagnosis, care, or treatment of an employee's mental or physical illness, injury, or other adverse health condition, or for preventative medical care for the employee
- Absence necessary due to circumstances resulting from the employee, or a family member of the employee, being the victim of domestic or sexual violence

- Time needed for the employee to aid or care for a family member of the employee during diagnosis, care or treatment of, or recovery from, the family member's mental or physical illness, injury, or other adverse health condition, or during preventative medical care for the family member

- Time during which the employee is not able to work because of a closure of the employee's workplace, or the school or place of care of a child of the employee, due to a public health emergency

- Time needed by the employee in connection with a child of the employee to attend a school related conference, meeting, function, or other event requested or required by the school, or to attend a meeting regarding care provided to the child in connection with the child's condition or disability

- An employer may choose the increments in which its employees may use earned sick leave, provided that the largest increment of earned sick leave that an employer may be required by the employer to use for each shift for which earned sick leave is used shall be the number of hours the employee was scheduled to work during that shift.

- An employer may require an employee to provide advance notice of the need to use earned sick leave that is foreseeable. Such notice is not to exceed seven calendar days prior to the date the earned sick leave is to begin and must include notice of the intention to use the leave and its expected duration.

- If the reason for the leave is not foreseeable an employer may require an employee to give notice of the intention to use the leave as soon as practicable, but the employer may require such notice from the employee only if the employer has notified the employee of this requirement.

- Where the employee's need to use earned sick leave is foreseeable, the employer may prohibit the employee from using earned sick leave on certain dates, limited to 12 verifiable high-volume periods or special events, during which permitting the use of foreseeable earned sick leave would unduly disrupt the operations of the employer

- The employer may not be required to permit an employee to carry over more than 40 hours of unused earned sick leave from one benefit year to the next
- An employer may choose—but is not required—to pay an employee for unused earned sick leave at the end of the calendar year



Equal Pay

- **Federal Equal Pay Act of 1963**
- **NJ's Diane B. Allen Equal Pay Act of 2018**
- **Gov. Murphy: “The most sweeping equal pay legislation in America”**

Federal Equal Pay Act

Prohibits discrimination between employees on the basis of sex by paying wages to employees at a rate less than the rate at which he pays wages to employees of the opposite sex in such establishment for equal work on jobs the performance of which requires equal skill, effort, and responsibility, and which are performed under similar working conditions . .

.

Diane B. Allen Equal Pay Act

- Must pay a “member of a protected class,” at least the same rate of compensation “for substantially similar work” as an employee who is not a member of that protected class

“Protected Class”

Race, creed, color, national origin, nationality, ancestry, age, sex (including pregnancy and sexual harassment), marital status, domestic partnership or civil union status, affectional or sexual orientation, gender identity or expression, atypical hereditary cellular or blood trait, genetic information liability for military service, or mental or physical disability, including AIDS and HIV related illnesses

Elements of a Claim

- Employee is a member of a protected class
- Employee is paid less than an employee who is not a member of the same protected class; and
- Employee is doing work that is substantially similar to the other employee

“Paid Less”

- Covers not only salary but all types of compensation and benefits employees may receive

“Substantially Similar Work”

- Broader than “Equal Pay for Equal Work”
- Fact-sensitive analysis of job duties, and subjective value judgments about comparability of work functions

Defenses

- Seniority system
- Merit system
- Multi-part test.

Multi-Part Test

- Pay differential is based on “legitimate bona fide factors” (e.g., training, education, experience or productivity)

- **Factors cannot be based on or perpetuate a differential in compensation based on a characteristic of a protected class**

- Factors must be applied reasonably, must account for the entire wage differential, and must be related to the job and based on legitimate business necessity.

Statute of Limitations

- Extended from two years to six years
- New claim created with every “discriminatory” paycheck.

Relief Available

- Back pay, front pay, compensatory damages and punitive damages.
- Treble damages – no proof of malice required

Thanks for Coming!

David B. Rubin, Esq.

David B. Rubin, P.C.

Metuchen, NJ

www.rubinlaw.net