

# CARLILE PATCHEN & MURPHY LLP

## Attorneys at Law

*Leadership through Understanding and Insight*

FALL 2002

### TRAINING ESSENTIAL TO LIMIT SEXUAL HARASSMENT LIABILITY

This newsletter has frequently addressed sexual harassment issues in the past. But this area continues to pose serious risks for employers, risks which can be minimized through an understanding of the issues, proactive planning, and adequate management training.

Title VII of the Civil Rights Act of 1964 ("Title VII") prohibits workplace discrimination based on race, color, religion, national origin, or sex, which includes sexual harassment in the workplace. Harassing behavior which has been reviewed in the courts includes same-sex harassment, harassment of employees or subordinates, and harassment by peer co-workers. Employers may, in some instances, be legally answerable for harassment, if the employer knew or should have known about the harassment but failed to act on it. In all cases, employers are strictly liable where an employee proves sexual harassment by a supervisor and that the harassment resulted in a tangible employment action (*i.e.*, being fired, demoted, reassigned, etc.). Ohio law also imposes further burdens in the form of personal liability against supervisors and managers involved in personnel decisions that have an adverse employment effect.

In *Burlington Indus., Inc. v. Ellerth* and *Faragher v. City of Boca Raton*, the United States Supreme Court held that, unless tangible employment action is taken, employers can escape liability for sexual harassment perpetrated by supervisors if: (1) the employer exercised reasonable care to prevent and correct promptly any sexually harassing behavior, and (2) the employee unreasonably failed to take advantage of any preventative or corrective opportunities provided by the employer or to otherwise avoid harm. An employer can use evidence of sexual harassment training to show that it acted reasonably to advise employees of their rights and prevent harassment.

The critical step in reducing legal liability is to implement an effective employee sexual harassment policy and a corresponding training program which incorporates an effective complaint mechanism. All com-

panies should utilize a written, well-developed policy against workplace harassment and complaint procedure. A successful complaint procedure usually has at least two reporting channels. At least one Ohio court has gone so far as to determine that it was reasonable for a plaintiff not to report her supervisor's harassment where she would have had to report the harassment to the same supervisor.

Then, companies should educate employees about how to use their policy, and should provide additional training to management regarding their legal obligations. Finally, if harassment occurs, employers must take prompt corrective action. This should be a well-considered plan of action, not simply a reaction.

The *Ellerth/Faragher* decisions support the notion that training programs do limit employer liability for harassment. To minimize the risk of vicarious liability for acts of sexual harassment for the conduct of employees, an employer should consider these steps:

- ✓ Adopt a strong sexual harassment policy with a plain definition of sexual harassment and examples of prohibited acts of harassment;
- ✓ Institute a complaint procedure in the policy that encourages employees to come forward to designated individuals with any concerns without the fear of reprisal, and which assures employees of an investigation and effective remedies;
- ✓ Distribute a copy of the anti-harassment policy to all employees with frequent reminders;
- ✓ Post the policy prominently in the workplace;
- ✓ Keep records documenting the distribution of the materials and training programs;
- ✓ Respond promptly to allegations with a thorough investigation and take prompt corrective action when necessary.

A written policy alone will not provide a defense to employers. Rather, affirmative steps must be taken to limit and redress sexual harassment in the workplace. While

a policy and effective training is no guarantee against liability, it is the best defense.

*For information on effective workplace training, please contact Joëlle Khouzam, Kristine Hayes or your CPM attorney.*

### ADA UPDATE

Since its passage in 1990, the Americans with Disabilities Act ("ADA") has floundered in a sea of uncertainty. While the ADA provides employers little guidance on how to comply with its requirements, the U.S. Supreme Court has issued three decisions offering some direction.

Generally speaking, the ADA requires employers to provide a reasonable accommodation to "qualified persons with a disability" when they are able to perform the essential functions of their job with or without such accommodation. A disability generally implicates the *substantial* limitation of one or more major life activities, such as walking, breathing, or working. An employer must consider the unique, fact-driven circumstances in each employee's case when deciding if the ADA applies, whether an accommodation is in order, and what the accommodation should be.

In *Toyota Motor Mfg. v. Williams*, the Court set the standard for determining when an individual who is limited in the ability to perform certain manual tasks meets the definition of "disability" and is therefore protected under the ADA. Further, the Court acknowledged that not all work-related impairments are "disabilities" as defined by the ADA.

The case came before the Court when an assembly line worker developed carpal

*continued next page*

tunnel syndrome from gripping her work tools. She was reassigned to a simpler position, but eventually the job duties were increased and her problems with her hands made her unable to perform that work. She asked for an accommodation to only be required to perform the work she previously did, but Toyota refused her request and she was forced to resign. Williams argued that she was entitled to a disability accommodation under the ADA because her condition substantially limited the major life function of performing manual duties.

The Court disagreed, holding that an impairment must typically be permanent or long-term and must restrict an individual from doing activities that are of “central importance to most people’s daily lives” before rising to the level of “disability”. It is not enough to merely submit a medical diagnosis of an impairment. It is now required that evidence be offered that the extent of the limitation caused by the impairment, in terms of a worker’s own experience, is substantial.

The Court also considered the ADA in *US Airways v. Barnett*. The Court’s majority decision clarified the longstanding conflict between the ADA and a company’s seniority system. It held that in many cases, an employer’s seniority system will take precedence over a disabled employee’s right to a “reasonable accommodation,” if such a placement would disrupt the seniority system.

At issue was whether the ADA gave Barnett the right to retain his job even though more senior employees were entitled to the position under the airline’s seniority policy. Barnett, who had injured his back at work, claimed the ADA required US Airways to make an exception to its seniority policy to “accommodate” his disability. US Airways disagreed and terminated him.

The Court adopted a middle-of-the-road approach, ruling that an employer’s showing that a requested accommodation would conflict with a seniority system is “ordinarily sufficient” in the “run of cases” to demonstrate that the accommodation

is not reasonable. However, the Court recognized that an employee may prove that special circumstances make a departure from the policy “reasonable” in a particular case. Such circumstances might include a showing that the employer frequently changed the terms of the seniority policy or made exceptions in the past. This would suggest that employees do not have well-established expectations of “fair and uniform treatment,” and that an additional departure from the policy “will not likely make a difference.” This decision is beneficial to employers who consistently enforce seniority policies.

And in *Chevron v. Echazabal*, the Court unanimously ruled that employers do not have to hire a person with a disability if they believe that person’s health or safety would be at risk by performing the job. The decision upholds a regulation set by the Equal Employment Opportunity Commission (EEOC), the agency that enforces the ADA in the workplace. That regulation allows businesses to refuse to hire a worker if that worker would “pose a direct threat to the health or safety of other individuals” or of the individual.

The case involved a man employed for 17 years by Chevron’s maintenance contractors. Twice in the last 10 years, he applied for maintenance jobs with Chevron, which found him well-qualified for the positions. However, Chevron withdrew the offers after required physical examinations showed he had hepatitis C, a chronic liver disease. Chevron asked the maintenance contractor to fire or reassign Echazabal, saying he risked further liver damage by working around the chemicals and toxins at the plant. He was fired, and filed suit under the ADA. Chevron claimed employers should exclude applicants who can become injured or killed.

*Caveat:* Employers’ decisions under this standard must be based on a reasonable medical judgment – employers cannot enforce broad stereotypes about disabilities. In the end, it will be the employer’s responsibility to prove that the job actually posed a direct threat to the employee.

These decisions provide employers with some guidance and clarifications as to the application of the ADA in the workplace. However, as has always been the case where the ADA is implicated, each case must be analyzed individually in light of the facts and circumstances surrounding that individual situation.

*For assistance in addressing ADA and personnel issues, please contact Kristine Hayes, Joëlle Khouzam, or your CPM attorney.*

## **CORNERSTONE TITLE OFFERS FULL RANGE OF SERVICES**

CPM’s *Cornerstone Title Agency, LLC* provides full title insurance and closing services through its underwriters, Chicago Title Insurance Company and Commonwealth Land Title Insurance Company. In business for over 25 years, Cornerstone provides full title services statewide and nationally for all title work, closings, escrow services, 1031 tax-free exchanges, and all general title and search services. Please contact your CPM attorney for further details.

### **Legal Fees may be Tax-deductible**

Legal fees incurred in pursuing or defending certain legal matters may be tax-deductible if they meet the IRS’ definition of ordinary and necessary business expenses. You should consult with a tax advisor, but generally, attorneys fees are deductible when they were expended to:

- negotiate an employment contract, severance pay or other post-termination benefits;
- obtain a tax ruling;
- defend against the enforcement of a non-compete agreement;
- file suit for unpaid compensation;
- defend a professional license suspension or revocation;
- secure services to help protect or increase taxable business income (such as defending inherited stock).

## AVOIDING PROBATE WITH LIVING TRUSTS?

In the last 35 or so years, a number of promoters have jumped on Norman F. Dacey's bandwagon after he wrote *How to Avoid Probate*, encouraging the use of "funded living trusts" to do so. However, most of their advice is based on old or inadequate information.

A funded living trust purports to create a trust to which one transfers all assets. The person who creates the trust would be both trustee and beneficiary. The trust could be amended or revoked and assets could be added or removed from the trust. Upon the death of the trust's creator, the assets would be distributed to the persons named in the trust.

Is this workable, and, if so, for whom? Promoters of such arrangements claim it will avoid probate, discourage litigation, facilitate plan changes, and protect persons who become incompetent. They also hint at tax avoidance. Let's review the claimed benefits:

*Reduced costs of administration.* While this is usually the big selling point for funded living trusts, our experience shows that funded living trusts yield no appreciable cost savings in substantial estates over normal planning techniques (which usually include the probate process). Whether one has a probate estate or not, it is necessary to prepare and file state and federal tax returns. Regardless of whether the assets are in a trust, they must be transferred and distributed to beneficiaries. And regardless of whether there is a probate estate, debts must be paid. In short, virtually all of the estate administration must be undertaken.

*Avoidance of multi-state probate.* Promoters frequently claim that funded living trusts avoid multiple-state probate proceedings and attendant costs. In reality, full-blown probate proceedings are not required in each state where real estate is located. The practice is to certify the probate proceedings from the state of domicile and transfer the real estate in the state

and location of the real estate. This is neither complex nor expensive.

*Privacy.* There is some merit to this point. Probate assets are public records, although rarely are they reported in the newspaper in a metropolitan county.

*Limited Litigation.* Litigation is initiated in an estate by people who know about the estate. Very rarely is litigation initiated by people who do not know what is occurring in the family.

*Ease of change of the plan.* Living trusts can be changed or revoked, but so can conventional wills and trusts used in estate planning. Irrevocable trusts are also used in conventional estate planning to minimize taxes, but these techniques have nothing to do with avoiding probate.

*Protection of a person who becomes incompetent.* In conventional estate planning, powers of attorney are typically given to family members, to administer assets in the case of incompetence without the need for a guardianship. The funded living trust may also avoid this, but the successor trustee may be called upon to prove that the creator of the trust is incompetent.

*Avoidance of taxes.* Estate taxes are not avoided by a funded living trust. While promoters will intimate that taxes may be avoided, a funded living trust does nothing to reduce the liability for estate taxes. Assets passing through a funded living trust are taxed like assets passing through a probate proceeding. While there are many planning techniques to minimize or even avoid estate taxes, the funded living trust is not among them.

It is difficult to conduct one's life with everything in a living trust, which is necessary to avoid probate. If a person dies with any substantial property in his or her name, such as real estate, a bank account, or the like, there will be a probate proceeding even if there was a funded living trust. Every time a person with a funded living trust wants to do something with his or her property, he or she must do so through the trust. All assets are owned

by the trust, so the trust is a party to all transactions. The person whose assets are in the living trust will frequently be called on to explain the trust to those with whom he or she does business. Such trusts are frequently misunderstood, leaving people speculate that the trust is everything from a provision for an incompetent person to a device to dodge creditors or taxes. All in all, the funded living trust is a complication for active persons with substantial assets.

The funded living trust to avoid probate has limited applications for elderly or terminally ill people with modest assets. For most clients, however, this technique is almost never appropriate.

*For more information on estate planning and probate matters, please contact Dick Patchen, Bryan Hogue, Bob Barnett, or your CPM attorney.*

### Creditor Rights Q&A

**Q: I install electrical systems, and my biggest contractor customer just filed bankruptcy, owing me a lot of money on several jobs. What can I do?**

**A:** Like most legal situations, the answer is "It depends!" In a Chapter 7 (liquidation) bankruptcy, the debtor is no longer in operation. In a chapter 11 (reorganization) case, the business is still viable. A chapter 13 bankruptcy means that the debtor is making efforts to adjust debts over time. In any case, there are many issues to address promptly, in and outside of bankruptcy. First, cease working for the contractor until you are satisfied that you will be paid for new work. The debt for work already done will likely be subject to the automatic stay of the Bankruptcy Code, and will be dealt with in the bankruptcy case. Also, you should protect any mechanic's lien rights you may have on each project, because perfecting this type of lien is one of the exceptions to the automatic stay of the Bankruptcy Code. Bankruptcy can be a confusing and frustrating area, so the rule of thumb is ask questions early. Please contact Leon Friedberg or your CPM attorney about insolvency issues.

## PEOPLE ON THE MOVE

Dave Onega was a speaker at the OSBA Annual Convention Estate Planning Seminar in May on the topic of Life Insurance Trusts, and also spoke on estate planning at the "Women & Money Conference" series sponsored by the Ohio State Treasurer's office in Columbus, Dayton and Cleveland.

Dave Jackson spoke on e-commerce issues at a recent meeting of the Mid-Ohio Association of Executive Search Professionals.

Leon Friedberg was honored for his volunteer efforts by the U.S. Southern District Court for service as a volunteer mediator. He was also reappointed as chairman of the Notaries Public Committee of the Franklin County Common Pleas Court for 2002-03.

Joëlle Khouzam recently spoke on Writing the Employee Handbook in Ohio, and will give a presentation on Payroll Basics on November 4. For more information or to receive a brochure, please contact Joëlle at (614) 628-0811.

### WOW!

Only 56.9 percent of 16- to 19-year olds worked or looked for a job last summer-the lowest percentage since 1964, according to the Labor Department's Bureau of Labor Statistics. -*Chicago Tribune, July 4, 2002*

## Our Legal Minute

Be sure to listen to *Our Legal Minute* weekday mornings and afternoons on WTVN 610am radio, and to read *Our Legal Minute* in *Business First*.

## FIRM PRACTICE AREAS

### BUSINESS

- Business Organization
- Contracts
- Employment
- Transportation
- Telecommunications
- Public Utility
- Government Relations
- Intellectual Property
- International
- Non-Profit Organizations
- Taxation
- Litigation

### REAL ESTATE & LAND DEVELOPMENT

- Affordable Housing
- Construction Law
- Leasing
- Title Insurance
- Purchase and Sales
- Taxation
- Litigation

### PERSONAL

- Estate Planning
- Probate Administration
- Family Law
- Taxation
- Litigation

### FINANCE

- Public Finance: Bond Counsel Services/Underwriter Representation
- Securities
- Banking
- Broker Dealer
- Taxation
- Litigation

### CREDITORS

- Loan Documentation
- Work-Outs
- Commercial Collections
- Bankruptcies & Foreclosures
- Retail Collections
- Bankruptcy Claims
- Taxation
- Litigation

*The Report is published four times a year as a service to business owners and professionals. The information contained in The Report is not intended to be and should not be construed as legal advice. Readers should consult their professional advisors to discuss specific issues and applicability*

## CARLILE PATCHEN & MURPHY LLP

Attorneys at Law

*Leadership through Understanding and Insight*

366 East Broad Street  
Columbus, Ohio 43215

Phone 614.228.6135

Fax 614.221.0216

[www.cpmlaw.com](http://www.cpmlaw.com)