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Circuit Finds Claim of Sex Harassment Anything but 'Minor'

Redd v. New York State Division of Parole, 10-14100-cv

The Second Circuit Court of Appeals recently reinstated a hostile work environment claim of a parole officer who contended that her breasts were touched three times by a female supervisor in her agency. The employee claimed that her supervisor brushed up against her breasts with her hand, rubbed against her breasts while in a hallway of a Division of Parole office in Queens and felt her breasts while she was seated at a computer.

Eastern District Judge Nicholas Garaufis originally granted summary judgment to the defendant, the New York State Davison of Parole, finding that the alleged conduct was "relatively minor." The Circuit Court unanimously reversed the decision holding that "the repeated touching of intimate parts of an unconsenting employee's body is by its nature severely intrusive and cannot properly be characterized as abuse that is 'minor.'" The court also disputed Judge Garaufis' characterizations of the alleged touching incidents as "incidental" and "episodic."

The Court of Appeals further reasoned that the matter should not summarily be dismissed simply because the supervisor was a non-homosexual woman or because she never made any suggestive or sexual remarks to the employee. The Court decided that a jury can draw inferences from the touching regardless of whether words were exchanged. Thus, summary judgment was not appropriate and the matter should be brought to trial.

Second Circuit Rejects En Banc Rehearing of Child Removal Case

Southerland v. City of New York, et al., 07-4449 cv

The U.S. Court of Appeals for the Second Circuit has voted against having the entire Second Circuit panel of judges rehear a decision finding that a New York City caseworker who removed abused children from their home based on incorrect information is not protected by qualified immunity.

The case dates to 1997 when a child welfare worker facilitated the removal of six children from their father, plaintiff Sonny Southerland. The case worker received complaints that the father was sexually abusing one of her daughters and that the daughter had swallowed a can of paint. When the caseworker went to the daughter's home, he did not find her, but rather found six other children living in substandard conditions; the caseworker removed the children from Southerland's home. In 1999, the father sued the caseworker, the City of New York and others for unlawfully entering his home and effectuating an unconstitutional removal of the children into state custody. In 2007, a district court judge in Brooklyn held that the welfare worker had immunity from the claims.

But in 2011, two years after hearing oral arguments in the case, the circuit judges reversed the district court. The panel ruled that Administration for Children Services caseworker had wrongly filled out paperwork to obtain the order of removal he needed to separate Southerland from his children. As such, the caseworker was not entitled to qualified immunity, the panel held.

In an unusual move, an unnamed circuit judge requested the entire appeals court be polled to rehear the case en banc, or before the entire panel. The rehearing was denied. En banc hearings are very rare because a majority of active judges on the circuit must agree to rehear a case.

Several judges issued sharply worded dissents to the denial to rehear the appeal. The dissenters felt that failure to offer caseworkers immunity "endangers future abuse victims by unnecessarily deterring caseworkers from promptly intervening for fear of being liable for money damages."

Park Warning Signs Spare State of Liability in Fatal Rock Slide

Arsenault v. State, 513130

In a recent decision, the Appellate Division, Third Department dismissed a lawsuit brought by the family of a woman who was killed by falling rocks while hiking in a state park. Taughannock Falls State Park in Trumansburg, New York, which features hiking trails and a waterfall with a longer vertical drop than Niagara Falls, has been the site of numerous accidents over the past decades.

The standard adopted by the Court of Appeals in 2001 is that the State cannot be held liable if the dangers are so open and obvious that no one could miss seeing the potential peril. In reaching its decision, the Third Department addressed three main questions: whether the state had a duty to warn; if so, whether the warnings were sufficient; and whether the park was maintained in a reasonably safe manner.

The Court determined that, despite the clear dangers associated with hiking trails and large waterfalls, the hazards were not so obvious as to relieve the state of its duty to warn.

However, the Court found that there were at least five signs that sufficiently warned the claimants and decedent of the peril at issue. The signs were also found to be adequate in terms of size and placement, despite the plaintiff's claims that they did not see any of the signs. Finally, on the duty to maintain, the Court noted that the standard is not whether the landowner could have done more, but whether it did enough. Applying this standard, the Court found that the State undertook the necessary precautions to maintain its property in a reasonably safe condition.

Pre-Meeting Prayers Found to Wrongly Favor Christians

Galloway v. Town of Greece, 10-3635-cv

The Second Circuit, Court of Appeals found that the Town of Greece's practice of praying prior to Town Board meetings "impermissibly affiliated the Town with a single creed, Christianity." Specifically, the Court found that the prayer policy aligned the Town with Christianity in violation of the Establishment Clause, which prevents the government from favoring one religion over another. In its decision the Second Circuit reversed the district court's grant of summary judgment to the defendant Town.

The Town of Greece never adopted a formal policy regarding the permissible content of prayers, the process for inviting prayer-givers or any other aspect of its prayer practice. The Town claimed that anyone could ask to give an invocation, including atheists, and that the Town never rejected such a request. However, from 1999-2007, every prayer-giver who gave an invocation was Christian. In 2008, after the plaintiffs complained about the prayer practice, non-Christians delivered the prayer at 4 of the next 12 Town Board meetings. In total, approximately two-thirds of the invocations had uniquely Christian language.

The Court concluded that although it was not ascribing any religious animus to the Town or its leaders, an objective, reasonable person would have perceived the Town's practice regarding prayer as affiliating the Town with Christianity, or at least endorsing the religion over another, in clear violation of the Establishment Clause.

According to the Court, Greece can continue its legislative prayer policy as long as the prayers do not convey an official affiliation with a particular religion or give the impression of official affiliation.

First Department Dismisses Suit Over School Mishap

Hunter v. New York City Department of Education, 6600

The Appellate Division, First Department dismissed an action brought by a student who was accidently injured by a classmate while in the defendant's school. In doing so, it rejected the plaintiff's contention that the school crated a hazardous condition.

Seven-year-old Summer Hunter was playing cards on a rug in her classroom when a classmate who was writing on a nearby chalkboard stepped backward and broke Hunter's arm. The plaintiff argued that the school is under a duty to adequately supervise the students in their charge and are liable for foreseeable injuries proximately related to the absence of adequate supervision.

The Appellate Division determined that the schools "are not insurers of safety" and that a child stepping backwards and falling on the plaintiff is an example of a thoughtless or careless act that could not have been prevented by reasonable and adequate supervision.

FIRST DEPARTMENT REINSTATES RESEARCHER'S RETALIATION SUIT AGAINST N.Y.U.

O'Neill v. NY University, 651322/10

The Appellate Division, First Department, recently restored a lawsuit brought by a non-tenured scientist, David O'Neill, who charges he was fired from New York University in retaliation for reporting suspected research misconduct. Specifically, Mr. O'Neill, claims that his supervisor downplayed the negative results of a clinical study for a new skin cancer vaccine because the supervisor was a co-inventor and patent holder of the vaccine. In response, Mr. O'Neill emailed the co-authors of the study and a different supervisor saying that the results of the study were "flawed and misleading." Mr. O'Neill was later terminated for his "unprofessional behavior" and for becoming "argumentative" in a phone call with his supervisor.

Mr. O'Neill sued NYU claiming that they could only fire him for cause. Judge Alice Schlesinger of the Supreme Court of New York County dismissed his claim after NYU argued that O'Neill did not characterize his complaints about his supervisor's research misconduct until after he filed the lawsuit. Judge Schlesinger held that NYU appointed Mr. O'Neill as a non-tenured faculty member with an unspecified employment period, and, thus, he was an at-will employee.

On appeal, Mr. O'Neill argued that his employment renewal letter and the NYU Faculty Handbook stated that non-tenured appointments "shall be for a definite period of time, not

exceeding one academic year," and this created employment for one year with termination only for cause.

Justice Markowitz, writing the opinion for the First Department, agreed with Mr. O'Neill and reinstated the case. The Appellate Divisoion held that the plaintiff was not an at-will employee because his contract was for a specific period of time. Additionally, the Court determined that the NYU Non-Retaliation Policy and the Research Misconduct Policies include NYU's express promise that it will protect employees from reprisal for reporting suspected research misconduct. The cause of action was therefore reinstated because plaintiff was not an at-will employee and the allegations that he was dismissed in retaliation for his critical statements of the study are plausible enough to warrant a cause of action.

CIRCUIT REJECTS RETALIATION LAWSUIT FROM INTERNAL PROBE

Townsend v. Benjamin Enterprises, 09-0197-cv

The Circuit Court of Appeals recently held that a fired employee has no viable claim for retaliation under Title VII of the Civil Rights Law of 1964 for participating in an internal investigation prior to any proceeding before the Equal Employment Opportunity Commission (EEOC). Furthermore, it held that an affirmative defense to an employer's vicarious liability for a hostile work environment created by a plaintiff's supervisor is not available where the supervisor has enough authority and control so as to be the "proxy" or "alter ego" of the employer.

The case involved two plaintiffs: the harassment victim, Townsend, and the human resources director, Grey-Allen, who investigated Townsend's complaint and was later fired for her findings. Townsend alleged that she was harassed by Hugh Benjamin, the sole vice president of the company, husband of the president of the company, and one-time major shareholder. The harassment allegedly included sexually offensive comments, propositioning, touching and sexual assault.

Townsend and Grey-Allen filed their complaint in the Southern District of New York; Townsend alleged she was the victim of sexual harassment under Title VII, and Grey-Allen alleged that the company retaliated against her, in violation of Title VII, for participating in an internal investigation of discrimination.

The Southern Distrcit dismissed Grey-Allen's claims and the Second Circuit Court of Appeals affirmed. In doing so, it held that Title VII does not protect against retaliation arising from an internal investigation that occurred before any proceedings were initiated. Therefore, Grey-Allen did not participate in protected activity under the "participation clause" of Title VII's anti-retaliation provision. Such protection is only triggered once an EEOC proceeding is initiated.

Townsend's claims of a hostile work environment went to trial under Title VII and New York law. The jury awarded $5,200 against the company and an additional $25,200 against Hugh Benjamin for a tort claim under state law; another $141,308 was awarded in attorney's fees and costs. Mr. Benjamin and the company appealed and the Court of Appeals affirmed the jury's verdict. The company tried to assert the Faragher-Ellerth defense, claiming that they were only vicariously liable for the harassment. The Court rejected this claim and held that the defense is unavailable when the supervisor is the employer's proxy or alter-ego, as in this case where Mr. Benjamin is the sole vice president of the company, husband of the president of the company, and one-time major shareholder. Since Mr. Benjamin was an alter-ego of the company, the company is liable in its own right for wrongful harassing conduct of an agent or employee, rather than merely vicariously liable.

Religious Bias Suit Proceeds over Planned Cemetery

Roman Catholic Diocese of Rockville Centre v. Incorporated Village of Old Westbury, 09 cv 5195

The Roman Catholic Diocese of Rockville Centre has been given permission to pursue claims of religious discrimination against the Village of Old Westbury over the right to build a cemetery with more than 90,000 burial plots. Eastern District Judge Denis Hurley recently granted the Diocese's motion to amend its complaint against the Village and held that claims under the Religious Land Use and Institutionalized Persons Act (RLUIPA) were now ripe.

RLUIPA, a federal statute, states that no government shall impose or implement a land use regulation in a manner that imposes a substantial burden on the religious exercise of a person, including a religious assembly or institution, unless the government can demonstrate that imposition of the burden on that person, assembly or institution (a) is in furtherance of a compelling governmental interest; and (b) is the least restrictive means of furthering that compelling governmental interest.

In 1993 the Diocese purchased 97 acres within the Village and set out to establish a cemetery; the Village denied its application to develop the land. The Diocese commenced litigation in 1996 after its application was denied and won a declaratory judgment that the cemetery was for a religious purpose and an order that the Village grant the permit. After much litigation, the village eventually adopted a resolution in 2010 granting a special exception permit for the cemetery to be built. However, the resolution included so many restrictions that it allows only 43 percent of the available land for the cemetery to be used for burial plots.

Judge Hurley recently allowed the Diocese to file a motion to amend the complaint and found that many of its claims were now ripe for adjudication. He held that that the conditions imposed in the resolution constitute a 'substantial burden' within the meaning of the RLUIPA because they would significantly restrict the Diocese's use of their property for religious burial

purposes. Furthermore, Judge Hurley explained that the Diocese properly alleged that the resolution's requirements regarding rigorous groundwater testing and landscaping maintenance were imposed on the Diocese "arbitrarily, capriciously, or unlawfully."

Filing a Complaint about a School Teacher may not be an "Absolute Privilege"

Posner v. Lewis, 2012 NY Slip Op 01323

The New York Court of Appeals affirmed the First Department's decision and held that a former teacher can proceed with a lawsuit charging that his in-laws maliciously engineered the loss of his job by instigating complaints against the school board.

In a scandalous set of facts, the teacher and plaintiff, Mr. Posner, was allegedly having an affair with a substitute teacher at his school. When his wife learned of the affair, she told her father, a former CEO of The New York Times, and her brother, a high-powered attorney. They allegedly tried to bribe and blackmail the plaintiff to sign away his parental rights, but when the plaintiff refused, the brother and father then wrote letters to the State Department of Education, the superintendent of the local board of education, and to each member of the local board of education truthfully stating, and attaching materials documenting, that Mr. Posner was sexually involved with another teacher and called for the revocation of his teaching license. Thereafter, the local department of education informed the plaintiff that it intended to deny his application for tenure. The plaintiff sued the father and brother-in-law for $13.5 million for tortuous interference of his contractual rights.

The defendants argued that the case should be dismissed because their comments were shielded from civil liability by an absolute privilege because the complaints involved a matter of public interest and their personal motives were irrelevant.

The Court of Appeals rejected defendants' contentions and allowed the action to continue. Pursuant to prior decisions, it affirmed that people are immune from civil liability for instigating official action, regardless of whether they possess a malicious intent. However, this action is distinguishable because it "does not merely allege a malicious motive; rather, it asserts what is in essence a blackmail scheme."

PANEL REJECTS STUDENT'S SUIT OF BADMINTON INJURY

Gibbons v. Pine Central School District, 2012-01244

The Appellate Division, Second Department has held that a high school student cannot recover for injuries he allegedly sustained when he was struck in the eye by a shuttlecock while playing badminton during his high school physical education class.

The Supreme Court, Orange County, initially denied the defendant school district's summary judgment motion; however, the Appellate Division reversed on appeal. Plaintiff claimed that there was a lack of supervision by school personnel. In opposition, defendants established that the shot that injured the plaintiff was an errant shot. Furthermore, since the errant shot occurred in such a short period of time, any alleged lack of supervision could not have proximately caused the plaintiff's injuries.

The plaintiff's expert also attempted to raise a triable issue of fact as to whether the school was negligent in not offering protective eye wear to the plaintiff. The Court rejected this claim holding that there was no evidence on the record to show that a recommendation to use such gear reflected a generally accepted standard or practice in high school.