HONIGMAN MILLER SCHWARTZ AND COHN LLP

SUMMARY OF ELEZOVIC V. FORD MOTOR CO.

This Summary discusses the background of the Elezovic case and the Michigan Supreme Court's holdings regarding individual liability and notice.

Background

Elezovic involved a hostile environmental sexual harassment claim brought under the Elliott-Larsen Civil Rights Act ("ELCRA"). The plaintiff filed a lawsuit in 1999 against Ford Motor Company ("Ford") and Daniel Bennett ("Bennett"), a supervisor at Ford's Wixom facility, whom she claimed sexually harassed her. Specifically, the plaintiff alleged that Bennett exposed himself and requested she perform oral sex and that he continued harassing her by grabbing, rubbing, and touching his groin, licking his lips, and making sexually-related comments. The plaintiff never filed a formal sexual harassment written complaint pursuant to Ford's anti-harassment policy. Instead, she claimed that Ford had notice of the harassment when she confided in two low-level supervisors, whom she pledged to secrecy, that Bennett had exposed himself to her. Moreover, the plaintiff claimed that notice was provided when her psychologist and son-in-law sent letters to Ford mentioning "harassment" and "hostile environment," though neither letter referred to or used the term "sexual harassment."

Following a three-week jury trial, the trial court granted a directed verdict in the defendants' favor, and the Michigan Court of Appeals affirmed. Both courts found that Ford could not be liable for any alleged harassment because it had no notice of such behavior. Regarding Bennett, the appellate court reluctantly followed Jager v. Nationwide Truck Brokers, Inc., 252 Mich. App. 464, 652 N.W.2d 503 (2002), which held that "a supervisor engaging in activity prohibited by the ELCRA may not be held individually liable for violating a plaintiff's civil rights."

The Individual Liability Holding

The Michigan Supreme Court reversed the decision concerning Bennett and overruled Jager, holding that the plain language of the ELCRA permits a supervisor to be held individually liable. The ELCRA makes an "employer" liable for sexual harassment. According to the Act, the term "employer" "means a person who has 1 or more employees, and includes an agent of

that person." MCL 37.2201(a).[1] The Michigan Supreme Court held that the statute "must, if the words are going to be read sensibly, mean that the Legislature intended to make the agent tantamount to the employer so that the agent unmistakably is also subject to suit along with the employer." Accordingly, it rejected the argument that the inclusion of "agent" within the definition of "employer" only provides for liability against Bennett's employer. Instead, the Michigan Supreme Court concluded that this language also creates individual liability for Bennett.

The Jager decision relied on federal precedent interpreting Title VII, the federal analogue to the ELCRA. Similar to the ELCRA, Title VII defines "employer" to mean " a person engaged in an industry affecting commerce who has fifteen or more employees . . . and any agent of such a person . . . ." 42 USC 2000e(b). On the basis of policy, federal courts have interpreted the statute to preclude individual liability. See Wathen v. Gen. Electric Co., 115 F.3d 400, 405 (CA 6, 1997). The Michigan Supreme Court found the federal precedent unavailing because, in Michigan, "the policy behind a statute cannot prevail over what the text actually says. The text must prevail."[2] As a result of the decision in Elezovic, the inconsistent views can result in supervisor liability under ELCRA, but not under federal law, for the very same conduct.

The Notice Holding

The Michigan Supreme Court affirmed the directed verdict for Ford because the plaintiff failed to provide sufficient notice that she was being harassed. Generally, an employer's responsibility for sexual harassment can be established only if the employer had reasonable notice of the harassment and failed to take appropriate corrective action. The test for notice is whether the employer knew or should have known of the harassment. The Michigan Supreme Court found that telling two front-line supervisors whom she pledged to secrecy about one instance of improper conduct did not constitute notice because "when an employee requests confidentiality in discussing workplace harassment, and the request for confidentiality is honored, such a request is properly considered a waiver of the right to give notice." This is

[1] A "person" is defined in MCL 37.2103(g) to include a corporation.

[2] The Court similarly rejected the defendants' argument that, based on the amendment history of the statute, the Legislature did not intend to impose individual liability. The Court held: "The Legislature is held to what it said. It is not for us to rework the statute. Our duty is to interpret the statute as written."

because "the victim of harassment 'owns the right' whether to notify the company and start the process of investigation. Until the employee takes the appropriate steps to start the process, it is not started." Regarding the letters from the plaintiff's psychologist and son-in-law, the Court held that mentioning the words "harassment" and "hostile environment" was insufficient to give Ford notice that sexual harassment was being claimed, especially where the plaintiff had filed numerous grievances and labor relations complaints over the years that were unrelated to sexual harassment.

CONCLUSION

The Elezovic decision can significantly impact current and future employment litigation. Please contact one of the Honigman attorneys listed below if you have any questions or concerns.[3]

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[3] The information contained in this Summary is not legal advice. This Summary is provided by Honigman Miller Schwartz and Cohn LLP to advise employers of a current development in the law. Every situation calls for unique legal analysis.