FIREHOUSE LAWYER

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Washington Discrimination Regulations Amended

The Washington State Human Rights Commission has amended certain guidelines in response to a 1998 Court of Appeals Case. In that case last year, the Court of Appeals adopted a "payroll method" for calculating the number of employees necessary to subject an employer to the laws against discrimination. *See* RCW 49.60, the Washington Law Against Discrimination. The threshold requirement remains at eight employees; employers with less than eight employees are not subject to the Washington Law Against Discrimination.

Using the payroll method, basically the employer calculates the threshold requirement by counting the number of persons on the payroll for the pay period during which the alleged discrimination occurred. The court also held that part time employees count. The court ruling rejected the former Human Rights Commission Guideline for calculating the employee count for purposes of jurisdiction.

The Human Rights Commission has amended its guidelines to conform to the court's ruling. Now, the employer may use one of two tests: (1) Did you have an employment relationship with eight or more persons for any part of the day on which the unfair practice allegedly occurred? or (2) Did you have an employment relationship with an average of eight or more persons over a representative period of time, typically 20 weeks before the unfair practice?

What is an employment relationship? That can be determined by whether the person appears on the payroll. Part time employees count the same as full time employees. Volunteer firefighters would be considered on-call workers and therefore are employed whenever they are subject to being called. Even unpaid workers are counted if they are generally treated in the same manner as other employees. If a person is selected by management for work, assigned work hours, disciplined, or provided employment benefits of any kind, they should be counted as an employee. Therefore, the safe approach is to count volunteer firefighters as employees for purposes of the eight employee jurisdictional limit.

Since payroll status is the key, employees on any type of paid leave status do count but employees on unpaid leave or laid off employees with recall rights do not count. Independent contractors are not counted as employees, but as usual the employer had better have good proof that they are truly

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independent contractors and not employees.

Washington Discrimination Regulations Amended (Continued)

In another section of the guidelines, the Human Rights Commission amended other regulations. The revised regulation on bona fide occupational qualifications (BFOQs) provides examples of acceptable BFOQs. For example, where it is necessary for the purpose of authenticity or genuineness, (*e.g.,* a model or actor or actress) or when necessary to maintain conventional standards of sexual privacy (*e.g.,* locker room attendant).

The WSHRC repealed the existing regulations on marital status discrimination, also in response to a 1998 court decision. The new regulation, in compliance with the Supreme Court's ruling, recognizes a narrow exception to the law against marital status discrimination. If the employer is enforcing a documented conflict of interest policy, limiting employment opportunities on the basis of marital status, the employer may not be discriminating. This exception, however, is limited to the following situations: (1) Where one spouse would have authority or practical power to supervise, appoint, remove, or discipline the other spouse; (2) where one spouse would be responsible to audit the other spouse's work; (3) where circumstances would place spouses in a situation of actual or reasonably foreseeable conflict between the employer's interest and their own interest; and (4) where necessary to avoid the reality or appearance of improper influence or to protect confidentiality it is necessary to limit the employment of close relatives of policy level officers, of customers, competitors, regulatory agencies, or others with whom you deal.

All of these regulatory guidelines should help in clarifying some difficult areas pointed up by the court decisions.

Sexual Harassment in Washington

Last year, the U.S. Supreme Court decided two cases that we discussed in the Firehouse Lawyer. Both cases were very significant developments in the law of sexual harassment in the federal sector. In *Burlington Industries v. Ellerth* and *Faragher v. City of Boca Raton*, the U.S. Supreme Court seemingly made sexual harassment an even more difficult sea for employers to navigate successfully. Especially with regard to sexual harassment by supervisors, the Court seemed headed for a strict liability finding.

Now, the first case in the State of Washington to apply the law after *Ellerth* and *Faragher* has been decided by the Court of Appeals. A female detective sued the Seattle Police Department for sexual harassment. From 1979 to 1982 she had been harassed and had filed an EEO complaint about that. The Department conducted an investigation and disciplined the offending officer. In 1983, the plaintiff was moved to a different unit and experienced no problems. More than four years later, however, she was transferred to another position. She alleged that her new supervisor started harassing her in late 1988 after rejection of his sexual advances. However, she didn't report it or complain about it. In April 1989 she was transferred to another assignment.

Apparently she was free of harassment until 1993 when she began working under a particular sergeant. She claimed that he harassed her in 1993 and 1994 but after she complained in July 1994, the Department transferred the sergeant out of her unit and started an investigation. The employer found her complaint was true, but the sergeant wasn't disciplined as he had already

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retired. The detective then sued the Department for sexual harassment and other claims.

Upon her appeal to the Court of Appeals, the Court held the detective could not rely on harassment that occurred between 1979 to 1982 and from 1988 to 1989 as those events were barred by the three-year statute of limitations. The Court found the detective well aware of her rights to complain about illegal harassment. The Court found she had no excuse to delay complaining about it until years later. The Court also noted that she did not prove the employer had a systemic policy of discrimination, as compared to the acts of individual officers.

The most period of harassment was within the statute of limitations and the issue became whether she had presented sufficient facts to hold the Department liable for the sergeant's actions. The Court analyzed the claim as a "hostile work environment" case, but not a "*quid pro quo*" case. In Washington, the elements required for proof are that the plaintiff must show the offensive conduct: (1) occurred because of sex or gender; (2) affected the terms or conditions of employment; and (3) could be imputed to the employer. It was the third element that the court discussed here, and which was so critical in *Ellerth* and *Faragher*. The Court of Appeals held that to impute liability to the employer for the hostile work environment created by the supervisor, the plaintiff had to show that the Department authorized, knew, or should have known of the harassment and that it failed to take reasonably prompt and adequate corrective action. The plaintiff could not establish those elements because the Seattle Police Department did take prompt and effective remedial action as soon as notified of the misconduct.

However, the Court also considered *Ellerth* and *Faragher* and then analyzed the case in light of those developments. By way of review, those cases mean that the employer may be automatically liable for a supervisor's harassing conduct unless no tangible employment action has been taken against the employee by the supervisor. If that is the case, the employer may be able to prove an affirmative defense. To prove the affirmative defense, the employer must show it took reasonable care to prevent and correct promptly any unlawful harassment and that the employee unreasonably failed to take advantage of preventive or corrective opportunities provided by the employer.

Applying these tests the Court of Appeals noted that the Department had disseminated an effective anti-harassment policy and presented compelling proof of its efforts to prevent harassment. The Department had taken prompt and effective remedial action and the detective was aware of avenues for complaining about the conduct (since she had availed herself of those avenues before) but chose not to use them until after she had suffered two years of harassment. Therefore, the Court held the employer not liable.

Once again, this Court of Appeals decision demonstrates to employers the importance of having a well-publicized policy against sexual harassment; the policy must include grievance procedures or ways to report harassment. Obviously, the employer must promptly investigate and take remedial action if a harassment claim is filed. If all of these things are done, in our opinion the employer can still defend sexual harassment claims, whether brought in state or federal court.

Notification of FMLA Rights is Critical

The Colorado Court of Appeals has ruled that the

Notification of FMLA Rights is Critical (continued)

employer must notify the employee of all of the substantive FMLA rights and the procedural FMLA obligations of the employee, or else the employee will be given benefits. This particular employee was fired after taking approximately eight months of leave under FMLA in less than a year and a half. The employer never informed the worker of his FMLA obligations or provided him with any guidance concerning the law.

Robert Trujillo worked for the Denver Department of Aviation. He took three leaves of absence between November 1993 and March 1995 to care for seriously ill parents.

At one point, the supervisor sent Trujillo a leave request form and a memo describing the general requirements for obtaining FMLA leave. However, neither the form nor the memo stated when the form should be returned or the consequences of failing to submit adequate medical certification. The FMLA regulations are extremely strict and literally construed in that regard. This case points up the absolute necessity of providing such explicit notification to the employee.

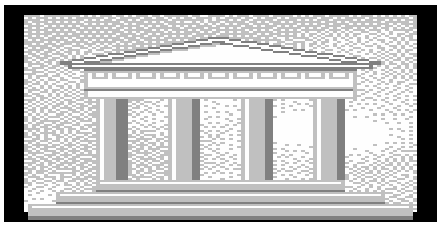
Sector Boss

Disclaimer

We need to clarify the purpose of this question and answer column. Like the Q&A column in any newspaper, the purpose of the Sector Boss column, and indeed the purpose of the Firehouse Lawyer newsletter, is to educate with respect to the law, but not to give legal advice to any particular client. There is no attorney-client relationship, simply because an agency or person has sent in a question to the newsletter editor. The Sector Boss column is not a free legal clinic for those submitting questions, even if they happen to be clients of Joseph F. Quinn. In other words, the purpose of this column is to answer short legal questions if there is room in the newsletter. A question may or may not be selected for publication. There may simply not be room. Joseph F. Quinn is not practicing law in any state except Washington, and therefore materials in the Firehouse Lawyer are not a substitute for obtaining legal advice for a particular situation. Therefore, readers are advised to consult with a qualified and competent attorney in their state or with respect to the federal questions sometimes discussed here.

Q: I have a professor who told me that city police can still sue in federal court for overtime compensation under the Fair Labor Standards Act. Given the Court's ruling in *Alden v. Maine,* is he right? Are there any rulings that would limit or prohibit a city police officer's right to sue in federal court.

A: Your professor is right, in my opinion. As mentioned previously in The Firehouse Lawyer, the case of *Alden v. Maine* related only to the rights of state employees to bring such an action in federal court. The Supreme Court decision does not immunize other employers of a public nature, such as cities. I am aware of no other court rulings that would absolutely prohibit a municipal police officer from suing in federal court to enforce their FLSA rights. Please remember that the reasoning of *Alden v. Maine* related to concepts of federalism, *i.e.*, the battle of sovereignty between the several states and the federal government.



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