LABOR AND EMPLOYMENT LAW UPDATE

TEXAS SUPREME COURT CONTINUES TO TIGHTEN CAPS ON DAMAGES FOR SEXUAL HARASSMENT!

Title VII of the Civil Rights Act of 1964 ("Title VII") allows a sexual harassment victim to recover compensatory and punitive damages but places caps on such damages. These caps vary according to the size of the employer; the largest cap is $300,000. A multi-million dollar award for compensatory and punitive damages is thus nothing more than a symbolic victory in a Title VII case since a claimant cannot recover above the applicable cap.

Frustrated by Title VII's damage caps, sexual harassment claimants in some jurisdictions have successfully avoided them by suing under (1) a state discrimination law, and/or (2) common law torts, such as intentional infliction of emotional distress, assault and battery, and negligent hiring, supervision and retention. This strategy has resulted in recoverable verdicts far in excess of the caps.

The Texas Supreme Court, however, has not been receptive to efforts to avoid the damage caps of Title VII or its state counterpart, the Texas Commission on Human Rights Act ("TCHRA"). Culminating in a June 11, 2010 opinion, the Court has drastically limited the common law tort claims which are available to sexual harassment claimants.

DAMAGE CAPS: The cumulative compensatory and punitive damages available under Title VII and the TCHRA, each of which is applicable to employers with 15 or more employees, are identical:

$50,000: 15 to 100 employees
$100,000: 101 to 200 employees
$200,000: 201 to 500 employees
$300,000: More than 500 employees

These caps are generally enforced by a trial court only if a jury verdict exceeds the authorized damages. The caps do not apply to other relief, such as back pay, front pay, attorney's fees, and costs.

INTENTIONAL INFLICTION OF EMOTIONAL DISTRESS: In *Hoffman-LaRoche, Inc. v. Zeltwanger*, a claimant sued her former employer for sexual harassment under the TCHRA and the tort of intentional infliction of emotional distress. A Corpus Christi jury awarded her damages on both claims but, to avoid the TCHRA's cap, the claimant elected to recover under her state tort claim for which she had been awarded $9 million for mental anguish and punitive damages.

On appeal, the Texas Supreme Court, on August 24, 2004, ruled that a sexual harassment claimant cannot bring a separate claim for intentional infliction of emotional distress to avoid the statutory cap of the TCHRA. For Ms. Zeltwenger, the ruling meant her recovery was trimmed by $8.7 million to $300,000.

NEGLIGENT HIRING, SUPERVISION & RETENTION: In *Waffle House, Inc. v. Williams*, a claimant sued her former employer for sexual harassment under the TCHRA and for the torts of negligent supervision and retention. A Fort Worth jury awarded damages on both claims, but again the claimant opted to recover under the state tort claims for which she was awarded $850,000.

On appeal, a majority opinion of the Texas Supreme Court on June 11, 2010 ruled that the TCHRA provided the exclusive remedy for the claimant's sexual harassment claim. Ms. Williams' recovery was thus cropped by $550,000 to the statutory cap of $300,000 dictated by the TCHRA.

ASSAULT AND BATTERY: In *Waffle House, Inc. v. Williams*, the claimant complained of unwanted assault and battery by a co-worker, Davis:

> "On several occasions, as Williams walked by Davis, he pushed her into counters and into the grill. Once, while Williams was helping customers, Davis came up behind her, held her arms with his body pressed against her, and said, 'Isn't she great, isn't she wonderful?' Davis cornered her on several other occasions. When she would reach up to put plates away, Davis would rub against her breasts with his arm. Once, when Williams was in a supply room, Davis, smirking, stood in front of her and blocked her exit. She had to duck under his arm to leave."

Although only negligent supervision and retention was alleged by Williams, a required element of these claims is an independent tort. She alleged this tort was shown by the assault and battery by her co-worker. An implicit holding of the majority opinion, which is echoed by the dissenting opinion, is that the TCHRA is the exclusive remedy against an employer for assault and battery by an employee which also constitutes sexual harassment.

IMPLICATIONS FOR TEXAS EMPLOYERS AND INSURERS: Even with the damage caps, potential liability for sexual harassment under Title VII and the TCHRA can be substantial. Still, the ability to avoid such caps has provided even greater downsides for employers and insurers, such as (1) runaway jury verdicts for emotionally-charged harassment cases, and (2) high settlement demands by overly zealous plaintiff's attorneys. The recent Texas Supreme Court opinions provide formidable ammunition for combating these risks.

The adoption of policies and procedures for preventing and correcting sexual harassment in the workplace also now takes on added significance. While such policies and procedures may not allow an employer to avoid liability under common law torts, they may help an employer avoid or mitigate liability under Title VII and the TCHRA. If a potential claimant's only remedies are Title VII and the TCHRA, liability, or the availability of punitive damages, in a sexual harassment case can turn on the effectiveness of the employer's efforts to curb such harassment.

EPILOGUE: There is support in Congress for legislation which would remove entirely the damage caps of Title VII and the Americans With Disabilities Act. Campbell & Chadwick, P.C. will advise of any significant developments in this regard.

QUESTIONS

Questions regarding sexual harassment law can be directed to Robert G. Chadwick, Jr. at Campbell & Chadwick, P.C.

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