HEADLINE: Discovery in Sexual Harassment Case May Include Complaints by Others; (150 N.J.L.J. 689)
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BODY: Taking New Jersey's liberal discovery rules to a new level of largesse, an appeals panel has ruled that a company sued for "hostile workplace" sexual harassment can be forced to divulge information about other, similar complaints against it.

The unreported Nov. 14 ruling, in Connolly v. Burger King Corp. et al., A-6054-96, is the first expansion by an appeals court of the state Supreme Court's holding last March that an internal investigation of a plaintiff's harassment claim and remedial actions taken are discoverable.

Unlike the plaintiff in that case, Payton v. New Jersey Turnpike Authority, 148 N.J. 524 (1997), former Burger King employee Catherine Connolly wants information about other claimants for use in her harassment and retaliatory-discharge suit.

Connolly says in her complaint that Ron Solon, a Burger King quality assurance inspector, sexually harassed her "repeatedly and blatantly" starting in 1993, when he began inspecting the Cherry Hill franchise where she was a manager. Though Solon was terminated shortly after Connolly finally complained about him in October 1995, she alleges that Burger King had received complaints from other franchised stores about Solon's behavior but nevertheless allowed the activity to continue. Connolly herself was fired in December 1995.

Connolly moved to compel the company to produce " a ny and all documents which mention, evidence or refer to complaints made by anyone about inappropriate conduct of a sexual nature of Burger King Corp.'s employees in ... New Jersey, Pennsylvania or Delaware from 1992 until present."

Superior Court Judge John Fratto of Camden County denied the motion, saying that Connolly had not established that she was aware of complaints by other employees.

But on interlocutory appeal, Judges Thomas Shebell Jr., William D'Annunzio and Donald Coburn called that standard incorrect, observing that "material pertaining to the treatment of other female employees has a potential relevance for reasons beyond a plaintiff's personal perception that she is working in a sexually hostile environment."

Specifically, they found the information relevant to show whether Burger King enforced anti-harassment policies and whether it had in place "effective formal and informal

complaint structures, training and/or monitoring mechanisms," as prescribed in Lehmann v. Toys 'R' Us, 132 N.J. 587 (1993).

If Burger King was lax in responding to sexual harassment claims, thereby fostering an atmosphere of tolerance, that "may constitute the willful indifference which is a predicate for the award of punitive damages" under Lehmann, the judges wrote.

The requested discovery might also provide evidence that the employment of other complainants had been terminated, which could help Connolly assemble probative evidence for her retaliatory- discharge claim.

Privacy Problems

Connolly's attorney, Alan Schorr, a solo practitioner in Marlton, calls the decision a logical next step after Payton and Lehmann, but the judges were mindful that they were entering uncharted waters.

"Our determination that the material sought is discoverable must be implemented by the trial court with some sensitivity to the issues of privacy, confidentiality and privilege," they wrote, remanding the case for further proceedings.

While they cited Payton's holding that "the balance weighs in favor of disclosure with appropriate procedures to ensure justified confidentiality," they did not enunciate guidelines for the trial court to follow in these untested circumstances.

Burger King's attorney, Timothy Speedy, a partner with the Morristown office of New York's Jackson, Lewis, Schnitzler & Krupman, declined to comment, but management-side employment attorneys not involved in the case say the invasion of privacy permitted in Connolly goes beyond the level found tolerable in Payton.

"Disclosing an internal investigation to the individual being investigated is different from disclosing the same investigation to anyone," says Rosemary Alito, a partner at Newark's McCarter & English. "A lot of women are concerned about making claims of sexual harassment because they don't want everyone to know their business."

Michael Furey, who represented the New Jersey Turnpike Authority in Payton, says that this reluctance on the part of witnesses might stymie investigations. "An investigation might be completed and then, three or five years later, witnesses will get a call from an attorney asking about the incident," says Furey, a partner at Morristown's Riker, Danzig, Scherer, Hyland & Perretti. "Witnesses and potential plaintiffs will remember this for the next time and they won't want to get involved."

The appeals panel did say that the trial court might be required to place further chronological or geographical limits on the scope of the request, especially if the volume of complaints discovered turns out to be "substantial."

The full text of the decision is available on Counsel Connect in LIBRARY under "State Court Decisions." Reporter Matt Ackermann's e-mail address is mackermann@counsel.com.

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