

DISCOVERY OF OTHER ACTS OF DISCRIMINATION - A LOGICAL PROGRESSION OF THE LAW

by Alan H. Schorr

In the previous issue of Labor and Employment Law Quarterly, an article entitled *Discovery of Prior Complaints of Harassment*,¹ chided the Appellate Division for issuing its opinion in *Connolly v. Burger King Corp.*² The article characterized the opinion as a plaintiff-based ruling, brought about by the Appellate Division's lack of understanding of prior case law. The views set forth in that article overlooked the logic and history upon which the *Connolly* decision was based. Far from being a myopic anomaly by the Appellate Division, the *Connolly* case was an insightful decision which properly set forth the law regarding discovery and admissibility of other acts of discrimination, based on the inescapable logic of prior case law.

Here is the syllogism: **Premise #1** - Evidence of other acts of discrimination is relevant in discrimination cases.³ **Premise #2** - If evidence is relevant, then it is discoverable, subject to claims of privilege.⁴ **Conclusion** - Therefore the logical conclusion is that evidence of other acts of discrimination is discoverable, subject to claims of privilege.

Both Federal and State Courts have consistently ruled during the past decade that evidence of other acts of discrimination by the employer are relevant to the plaintiff's claim of discrimination. The New Jersey Supreme Court, in the sexual harassment case of *Lehmann v. Toys 'R' Us, Inc.*,⁵ expressly held that plaintiffs may use evidence that other women in the workplace were sexually harassed. The Court stated, with regard to proving a hostile working environment:

In making that showing, the Plaintiff may use evidence that other women in the workplace were sexually harassed. The Plaintiff's work environment was affected not only by conduct directed at herself but also by the treatment of others.⁶

The Supreme Court, in *Payton v. New Jersey Turnpike Auth.*,⁷ held that an employer can be held responsible for the discriminatory acts of its employees, if the employer failed to take effective remedial measures against a harassing employee.⁸ The *Connolly* Court properly relied upon *Payton*, which properly relied upon *Lehmann*, in determining that evidence relating to the employer's effective remedial measures were relevant, and therefore discoverable, in sexual harassment cases.

The key issue in *Payton* was not whether the evidence was relevant, because its relevance had been clearly established by the *Lehmann* decision. The key issue in *Payton* was whether the relevant evidence was discoverable or whether it was protected by attorney-client, work-product or self-critical analysis privileges. The Court ruled that the evidence of the employer's investigation of the Plaintiff's sexual harassment complaint was not protected by these privileges, and practically eliminated the self-critical analysis privilege completely.⁹ Regarding the relevance issue, the Court concluded:

The court should begin with the presumption that all of the documents sought by the plaintiff are discoverable, given their relevance to plaintiff's claim that defendant did not effectively remediate the alleged harassment and to defendant's affirmative defense that it did. The court should then provide defendant with the opportunity to make particularized assertions of privilege or confidentiality regarding *specific* documents. (Emphasis as in the original)¹⁰

In the *Connolly* case, the Appellate Division was not asked to address to the issues of privilege. The trial court had denied the discovery based upon the trial court's erroneous reasoning that since the plaintiff was unaware of the other acts of sexual harassment in the workplace, they could not have created a hostile working environment for her. Therefore, the trial court reasoned, the evidence was not relevant, and therefore, not discoverable. The Appellate Division disagreed, finding evidence of other acts of discrimination to be both relevant and discoverable.

Other acts of discrimination are relevant for numerous reasons: Among those reasons are that (1) it is necessary to determine whether the employer has effective remedial measures to prevent further discrimination;¹¹ (2) it can be used to demonstrate the employer's negligence in its hiring/retention/management practices with regard to employees who have shown themselves to be a known risk;¹² (3) it can be used to demonstrate that a defendant harbors discriminatory intent towards a particular group;¹³ (4) it can be used to help establish an employer's motive in a wrongful termination scenario;¹⁴ and (5) it can be used to establish that the defendant exhibited the type of willful indifference that is the predicate for the award of punitive damages.¹⁵

It is wrong for employers to settle with victims, acquire a confidentiality agreement, and keep discriminatory managers in place, confident that their prior acts will not be discovered. Concealing this evidence only makes that working environment more hostile. Hence, the test of hostile working environment should be measured by the knowledge of the employer rather than the employee. After all, if a zoo, for example, knows that certain animals are attacking visitors, but covers up the attacks, does it make the zoo a safer place, simply because the public is unaware of the danger? Of course not. It makes it a more dangerous place, because the persons in charge of keeping the environment safe are hiding rather than remediating the problem. The same standard should and must apply in the workplace. Employees must be able to discover if management was aware of other claims of discrimination, and must be able to determine if management is following a policy of remediation or acquiescence or concealment.

Negligence is another basis for requiring the discovery of other acts discrimination in the workplace. It is a recognized tort to negligently hire or retain an incompetent, unfit or dangerous employee, and employers who knowingly do so may be liable for injuries caused by such negligence.¹⁶ In the context of sexual harassment, negligence on the part of an employer may be determined based upon the employer's failure to take effective remedial measures to protect against future harassment.¹⁷ If the employer acts unreasonably or if it delays the action it does take, it is not reasonably likely to prevent the misconduct from recurring, or from occurring to someone else.

One of the cornerstones of negligence law is foreseeability.¹⁸ Isn't it foreseeable that if an employer permits a supervisor to sexually harass with impunity, that it will send a message to other potential harassers that such behavior is tolerated? It is this foreseeability that creates the duty upon the employer to effectively enforce a sexual harassment policy that protects its employees. This is precisely why the Supreme Court held in *Lehmann*, that:

An employer may also be held vicariously liable for compensatory damages for supervisory sexual harassment that occurs outside the scope of the supervisor's authority, if the employer had actual or constructive notice of the harassment, or even if the employer did not have actual or constructive notice, if the employer negligently or recklessly failed to have an explicit policy that bans sexual harassment and that provides an effective procedure for the prompt investigation and remediation of such claims.¹⁹

The *Connolly* decision is not only well-supported by State law, but is supported by Federal Law decisions from all over the country. The New Jersey District Court, in *Hurley v. The Atlantic City Police Dept.*,²⁰ expressly followed *Lehmann*, and held that evidence of other acts of discrimination in the workplace is admissible, among other bases, under *Fed. R. Evid. 404*, to prove that the defendant harbors discriminatory intent towards a particular group.²¹ The court cited a long list of federal cases supporting the court's holding.²²

The New Jersey law regarding the relevancy of other acts of discrimination was set forth in the New Jersey Appellate Division decision in *Rendine v. Pantzer*,²³ a pregnancy discrimination case which expressly held that other acts of discrimination are admissible to prove an employer's motive or intent to discriminate.²⁴ The *Rendine* court based its conclusion upon a long string of Federal cases that had made similar rulings, including cases involving age discrimination,²⁵ race discrimination,²⁶ and sex discrimination.²⁷

A final reason given by the *Connolly* court for the discoverability of other claims of harassment is that the absence of effective responses to sexual harassment claims in general may foster an atmosphere of tolerance thereby contributing to a sexually hostile atmosphere, and may constitute the willful indifference which is a predicate for the award of punitive damages.²⁸ Discrimination, in and of itself is outrageous conduct, justifying the imposition of punitive damages.²⁹ If the employer knows of other claims of discrimination, but is permitted to conceal that evidence under the guise of irrelevance, the plaintiff employee will have no possible way to discover, and subsequently produce that evidence to the Court in order to show the intent or willful indifference necessary to establish a claim for punitive damages.

The *Connolly* decision was not a scattershot attempt by the Appellate Division to create a less than even playing for all of the parties. To the contrary, it was a well-reasoned and logical recitation of the existing law. Hopefully the decision will mean that Plaintiffs will finally have access to the extremely relevant information that they need in order to determine whether an employer had effective remedial measure in place to prevent or correct discriminatory practices. Employers who do have effective remedial measure can use this opportunity to prove, by use of the same evidence, that their policies *are*

effective. Employers will no longer, however, be able to sweep discrimination under the rug, without risking later discovery.

Endnotes

1. Donna duBeth Gardiner, *New Jersey Labor and Employment Law Quarterly*, Vol.22, No.1, pp.13-15.
2. 306 N.J. Super. 344 (App. Div. 1997)
3. *Lehmann v. Toys 'R' Us* 132 N.J. 587, 611(1993); *Rendine v. Pantzer*, 276 N.J. Super. 398, 427-30 (App. Div. 1994); *Hurley v. The Atlantic City Police Dept.*, 933 F. Supp. 412, f.n.11 (D.N.J. 1996). Both the *Rendine* and *Hurley* decisions rely upon numerous precedential cases.
4. R.4:10-2(a); *See also Payton v. New Jersey Turnpike Auth.*, 148 N.J. 524, 535, 539 (1997); *Connolly v. Burger King Corp.*, *Supra.* at 348.
5. *Supra.*
6. *Id.* at 611.
7. *Supra.*
8. *Id.* at 538-9.
9. *Id.* at 545.
10. *Id.* 559-60.
11. *Id.* at 538-9; *Lehmann, supra.* at 621; *Connolly, supra.* at 349.
12. *Lehmann, supra.* at 622; *Connolly, supra.* at 349.
13. *Rendine, supra.* at 428.
14. *Id.*, quoting *Estes v. Dick Smith Ford, Inc.*, 856 F.2d 1097 (8th. Cir. 1988)
15. *Connolly, supra.* at 349; *Johnson v. Ryder Truck Rentals*, 256 N.J. Super. 312, 317 (Law Div. 1993); *Lehmann, supra.* at 624.
16. *DiCosala v. Kay*, 91 N.J. 159, 174 (1982).
17. *Payton, supra.* at 526; *Lehmann, supra.* at 621-3.
18. *Decker v. Princeton Packet*, 116 N.J. 418, 429, (1989)
19. *Lehmann, Id.* at 624.
20. *Supra.*
21. *Id.* at 411; *Garvey v. Dickinson College*, 763 F. Supp. 799 (M.D.Pa. 1991) *West v. Philadelphia Elec. Co.*, 45 F.3d 744, 757 (3d Cir. 1995).
22. *Hawkins v. Hennepin TechnicalCenter*, 900 F.2d 153, 155 (8th Cir. 1990); *Hunter v. Allis-Chalmers Corp.*, 797 F.2d 1417, 1421 (7th Cir. 1986); *Stair v. Lehigh Valley Carpenters Local 600*, 813 F. Supp. 1116, 1119 (E.D.Pa. 1993); *Hicks v. Gates Rubber Co.*, 833 F.2d 1406 (10th Cir. 1987); *Heyne v. Caruso*, 69 F.3d 1475 (9th Cir. 1995); *Vinson v. Taylor*, 243 U.S. App. D.C. 323, 753 F.2d 141 (D.C. Cir. 1985), *aff'd in part and rev'd in part sub nom, Meritor Svc. Bank v. Vinson*, 477 U.S. 57, 91 L. Ed. 2d 49, 106 S. Ct. 2399 (1986); *Hall v. Gus Const. Co. Inc.*, 842 F.2d 1010, 1015 (8th Cir. 1988); *Phillips v. Smalley Maintenance Services, Inc.*, 711 F.2d 1524, 1532 (11th Cir. 1983); *Webb v. Hyman*, 861 F. Supp. 1094, 1111 (D.D.C. 1994); *Bundy v. Jackson*, 205 U.S. App. D.C. 444, 641 F.2d 934 (D.C. Cir. 1981).
23. *Supra.*
24. *Id.* at 427-30.
25. *Spulak v. K Mart Corp.*, 894 F.2d 1150 (10th Cir. 1990); *Conway v. Electro Switch Corp.*, 825 F.2d 593 (1st. Cir. 1987).
26. *Hunter v. Allis-Chalmers Corp.*, *supra.*; *Estes v. Dick Smith Ford, supra.*
27. *Conway v. Electro Switch Corp.*, *supra.*
28. *Connolly, supra.* at 349.
29. *Johnson v. Ryder Truck Rentals, supra.* at 317.

