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FLORIDA DEPARTMENT of ECONOMIC OPPORTUNITY

STATE OF FLORIDA ★ REEMPLOYMENT ASSISTANCE APPEALS COMMISSION ★ RAAC

APPEALS QUARTERLY

Analyzing Sexual Harassment in RA Law

Sexual harassment is the most common equal employment opportunity ("EEO") law issue that appeals referees and the Commission must address. Sexual harassment is a form of sex discrimination that violates Title VII of the Civil Rights Acts of 1964 and the Florida Civil Rights Act. EEO laws cover several other forms of harassment, such as harassment based on race, national origin, religion, age, disability, and marital status, and while these forms are less common, the analysis for sexual harassment law provides a framework for addressing these issues as well.

The Equal Employment Opportunity Commission has defined sexual harassment as "unwelcome sexual advances, requests for sexual favors, and other verbal or physical conduct of a sexual nature . . . when (1) submission to such conduct is made either explicitly or implicitly a term or condition of an individual's employment, (2) submission to or rejection of such conduct by an individual is used as the basis for employment decisions affecting such individual, or (3) such conduct has the purpose or effect of unreasonably interfering with an individual's work performance or creating an intimidating, hostile, or offensive working environment." Traditionally, the first two forms of harassment were labeled as "quid pro quo" harassment, with the third type called "hostile environment" harassment. In *Faragher v. City of Boca Raton,* the U.S. Supreme Court focused on whether the harassment resulted in tangible employment action. It held that if no tangible action resulted, the employer may establish a defense that it adopted and distributed a policy prohibiting harassment to its employees, which could have provided a remedy, and that the employee unreasonably failed to utilize the remedy.

Sexual harassment issues arise in two contexts in reemployment assistance appeals cases. First, an employee who engages in sexual harassment, or similar prohibited behavior, may be disqualified from benefits for misconduct. Second, an employee who is subjected to sexual harassment may have good cause to voluntarily quit attributable to the employer. While EEO laws generally only cover employers with 15 or more employees, reemployment assistance law does not limit the analysis of harassment to covered employers.

In analyzing either type of case, the employer's sexual harassment and similar policies are a crucial starting point. Such policies tell employees what behavior is prohibited, and how they may seek assistance when they are subjected to such behavior. If submitted in adjudication by either party, these policies should be attached to the notice of hearing. Otherwise the referee should determine whether either party submitted the policies as documentary evidence. In misconduct cases in particular, the referee must closely examine the employer's policy to determine whether the claimant's conduct actually violated it. The legal definition of sexual harassment only prohibits "*unwelcome*" conduct. Consensual conduct that does not affect any unwilling individual is not a *per se* violation of EEO law. However, employers can and often do prohibit consensual behavior in their policies in order to ensure a professional and fair workplace, through provisions such as "non-fraternization," "obscene or vulgar language," or other workplace conduct policies. In cases involving consensual behavior, the referee must examine the claimant's conduct in light of the employer's policy, or any prior counseling or warnings. Additionally, if the claimant's conduct *is* unwelcome, the conduct need not reach the high threshold necessary to establish an EEO law violation to be misconduct. To the contrary, employers are encouraged to stop such behavior *before* it reaches that level.

Cases involving voluntary resignations typically raise two issues. First, was the claimant subjected to harassment sufficiently serious to compel a reasonable employee to cease working? While the Commission has not held that the harassment must necessarily be "severe and pervasive" as required for liability under EEO laws, the harassment must still be more than isolated and minor instances of verbal conduct. Second, did the claimant take reasonable steps to preserve his or her employment by following the employer's policy, or in the absence of a policy, attempting to address the conduct with some higher ranking official of the employer? The referee must also consider whether any attempts to remedy the harassment would be futile.

In this Issue:

Misconduct Cases Involving Harassment or Policy Violations by the Claimant

Lockheed Martin Corp. v. Unemployment Appeals Commission, 876 So. 2d 31 (Fla 5th DCA 2004): The male claimant and two co-workers, one male and one female, engaged in consensual physical horseplay, occasionally of a sexual nature, over a period of several years. When the female co-worker eventually asked the claimant to cease his behavior, he did so with no future incidents. The final incident was witnessed by another female co-worker who did not report the conduct at the time. When she made an internal sexual harassment complaint two years later, she mentioned the incident she witnessed involving the claimant, as well as an occasion in which the claimant had touched her hair. The employer conducted an investigation and found that the claimant and the two co-workers had violated the employer's policy which prohibited "all immoral or indecent conduct … including sexual harassment." The claimant was discharged, but was reinstated 37 days later. The two co-workers were also suspended without pay for 37 days to equalize the punishment.

The appeals referee held that the claimant could not be disqualified because his conduct, while in violation of the stated policy, occurred more than two years prior to the discharge and routinely occurred in view of his superiors, who consistently failed to enforce that policy. The Court reversed. The Court reasoned that the lack of enforcement by direct supervisors did not constitute a defense. The Court noted that a key reason an employer implements an express policy is to make clear that such behavior is misconduct. The Court further reasoned that while the misconduct occurred long before the termination, upper management became aware of it only just before the claimant's discharge, and acted promptly at that time.

Sears, Roebuck & Co. v. Unemployment Appeals Commission, 463 So. 2d 465 (Fla. 2d DCA 1985): The claimant was employed as a supervisor by the employer. During a routine exit interview, a resigning female employee alleged that the claimant had made a number of passes at her and that he had also sexually approached another female co-worker who was a minor. The employer undertook an investigation and obtained written statements from both employees who alleged that the claimant had made advances to them. Following the investigation, the claimant admitted that he kissed the minor female co-worker on the cheek during working hours and on company property. The employer consequently discharged the claimant for misconduct. The employer had a policy prohibiting the conduct engaged in by the claimant. The Court held the claimant was discharged for misconduct and, therefore, disqualified from receipt of benefits. The Court reasoned that the claimant's admitted actions that he kissed a young female co-worker, who was at times under his supervision, constituted a violation of the employer's express policy.

Ramirez v. Prado Enterprises, Inc., R.A.A.C. Order No. 14-00065 (May 29, 2014): The claimant, a general manager, was forced to resign after the employer investigated allegations that she had a relationship with a subordinate employee. The claimant and the subordinate employee had sent each other text messages for approximately three months before the subordinate employee notified the regional manager. The subordinate employee reported to the manager that the text messages became increasingly more personal and that he felt uncomfortable with the claimant's text messages.

The Commission held that an employee's behavior could violate an employer's conduct policies without constituting "sexual harassment" as the term is defined by law, noting that employer policies can properly prohibit even completely consensual conduct which would not otherwise be considered sexual harassment. The Commission further held that in addition to possibly constituting misconduct under subparagraph (e), romantic overtures that continue after an individual has been rebuffed or explicit overtures from a manager to a subordinate could constitute misconduct under subparagraph (a).

PGT Industries, Inc. v. Cook, R.A.A.C. Order No. 13-08892 (May 28, 2014): The claimant told two female co-workers that he was having a party in his home which included mud wrestling and asked them if they mud wrestled. The employer gave the claimant a written warning about this incident and advised the claimant that the employer considered his comment to the female co-workers to be sexual harassment. A month later, the claimant asked a younger male co-worker about his mother's age and asked for her phone number. The employer discharged the claimant after the second incident.

The referee held the claimant was entitled to benefits because he was discharged for reasons other than misconduct. The referee reasoned, in part, that the claimant's comments were intended to be jocular and delivered in a jovial manner. The Commission remanded the referee's decision noting that the referee's analysis failed to properly apply the law that addresses harassment in the workplace. The Commission held that under the applicable law, harassment is not measured primarily by the intent of the actor; rather, it is measured by whether the individuals exposed to the conduct subjectively perceived it as harassing and whether this subjective perception is objectively reasonable.

American Medical (Central), Inc. v. Reed, R.A.A.C. Order No. 14-00645 (September 9, 2014): The employer issued the claimant a warning for making an inappropriate comment to a co-worker over the employer's intercom system. Two months later, in response to a political joke, the claimant told a co-worker she "should have been a blow job." The female co-worker was counseled because of the incident, but the

Misconduct Cases Involving Harassment or Policy Violations by the Claimant
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claimant was discharged because he had been previously warned regarding this type of behavior.

The appeals referee held the claimant was discharged for reasons other than misconduct. The Commission reversed, holding that the claimant's behavior constituted misconduct as defined under subparagraph (a). The Commission reasoned that although the claimant's actions did not violate the specific terms of any employer policies, the claimant had previously been warned regarding conduct of a similar nature and the claimant acknowledged that he knew his statements were inappropriate. The Commission further reasoned that the claimant's co-worker's involvement in the unprofessional conversation does not ameliorate the claimant's own misconduct, particularly since the co-worker was also disciplined.

Best Buy Stores, L.P. v. Munday, R.A.A.C. Order No. 14-03206 (November 20, 2014): The employer discharged the claimant after investigating a report that the claimant sent an inappropriate text message to a subordinate employee. The Commission affirmed the referee's decision which held the claimant qualified for receipt of benefits. The Commission concluded the evidence failed to show that the claimant made *unwelcome* advances or sexual comments to the employee and, therefore, the claimant's actions did not constitute sexual harassment as defined by law. The Commission further concluded the employer failed to present sufficient evidence of a policy which prohibited the claimant's behavior, noting that an employer's policy may prohibit a wider range of conduct than the traditional legal definition of sexual harassment.

Good Cause for Claimant Quitting Based on Discrimination or Harassment

Sufficiency of the Harassment

Fowler v. Unemployment Appeals Commission, 670 So. 2d 1202 (Fla. 4th DCA 1996): The claimant quit her job because the employer engaged in a continuing pattern of harassment, retaliation and discrimination, which the Court interpreted to mean "sexual harassment and invidious discrimination against her in the terms and conditions of her employment." The Court reversed the appeals referee and held that the claimant had good cause to terminate her employment attributable to her employer.

Planes v. Antonio Oteros DDS PA, R.A.A.C. Order No. 13-05345 (August 20, 2013): The claimant quit, alleging she was verbally abused by the business owner who made "hurtful comments" but without clarifying specifically what he said. The Commission affirmed the claimant's disqualification noting that the claimant's testimony as to the owner's verbally harassing comments lacked sufficient specificity for the Commission to conclude she had good cause attributable to the employer, even if the referee had accepted some or all of her testimony. "Conclusory allegations of harassment or mistreatment are insufficient to establish good cause. . . Since good cause is measured under an objective standard, the fact that claimant subjectively found the employer's conduct hostile or offensive is not determinative. Instead, specific testimony elucidating the complained-of behavior, or demonstrating examples of such behavior, must be provided so that the referee can determine whether good cause exists under the objective standard."

Lanter v. CIC Investors #15, Ltd., R.A.A.C. Order No. 13-05581 (January 28, 2014): The claimant worked as a bartender and server for the employer, a restaurant. A customer of the restaurant asked the claimant to sit on his lap while she told him the daily specials. About ten minutes later, the claimant reported the incident to her manager who told the claimant that she did not have to take that behavior, but she should have reported the incident sooner. On a later occasion, the claimant overheard the same customer say, "what is wrong with you bitches, can't you take a joke?" The claimant told the manager about the customer's comments. The manager immediately confronted the customer and told him that if he continued to talk to the staff that way, he would be asked to leave. The claimant quit her position, in part, due to harassment by the customer.

The Commission affirmed the referee's order which held the claimant disqualified from receipt of benefits for quitting without good cause attributable to the employer. The Commission noted that while sexual harassment can constitute good cause attributable to the employer to resign, there is no per se rule that an employee who experiences any form of sexual harassment has good cause to quit. Instead, the circumstances must be evaluated under the statutory version of the *Uniweld Products* test. Additionally, courts look at the actions of the employer to determine whether it properly addressed any harassment brought to its attention.

The Commission held that under the circumstances of this case, the harassing conduct was insufficient to establish a hostile environment under Title VII and the Florida Civil Rights Act (FCRA) and was also insufficient to establish good cause for quitting under the reemployment assistance law. The Commission concluded that the harassing conduct does not necessarily need to reach a level sufficient to implicate Title VII or FCRA liability to show that the quitting was for good cause, but that this body of law is relevant to the issue of whether the claimant established good cause under the reemployment assistance law.

In addition, the Commission rejected the claimant's argument that the employer failed to take reasonable action to stop the harassment. After the second incident, the employer told the customer to cease the conduct or be barred from the restaurant. Although the employer did not react to the prior incident, the Commission concluded the employer did not act unreasonably by failing to speak to the customer about a minor incident that had already ended after the claimant did not respond positively to the behavior, noting that the reasonableness of the employer's actions depends upon the

seriousness of the harassment. The fact that the employer eventually barred the customer from the restaurant did not suggest its actions were ineffectual; Florida courts have approved the use of escalating steps in response to harassment where appropriate.

Cook v. AlliedBarton Security Svcs. LLC., R.A.A.C. Order No. 14-04590 (February 26, 2015): The claimant originally quit her job with the employer because her supervisor sexually harassed her. After the supervisor was discharged for his behavior, the claimant returned to her job with the same employer. During her second period of employment, the claimant twice observed her former supervisor's truck at the worksite. The claimant did not report her observations to the employer. Two months later, the claimant received a write-up from the employer regarding her work performance. The claimant voluntarily quit after receiving the write-up.

The referee held the claimant disqualified because she quit without good cause attributable to the employer. On appeal to the Commission, the claimant argued that she was constructively discharged because of the hostile work environment. The issue on appeal to the Commission was limited to the claimant's second period of employment with the employer. Consequently, the claimant's contention that her former supervisor was present at the facility was her only support of a hostile work environment due to harassment. The Commission affirmed the referee's decision and held that the claimant failed to demonstrate the work conditions during her second period of employment were sufficient to constitute a hostile work environment.

Failure to Expend Reasonable Efforts to Preserve Employment

Craven v. Unemployment Appeals Commission, 55 So. 3d 650 (Fla. 1st DCA 2011): The Court accepted the principle that a claimant's failure to provide sufficient opportunity for the employer to address harassment could be grounds for disqualification and remanded the case for additional fact-finding as to that issue.

Brown v. Unemployment Appeals Commission, 633 So. 2d 36 (Fla. 5th DCA 1994)(en banc): The claimant was sexually harassed by a male co-worker over a period of roughly five months. She did not report this to her employer (a law firm), who learned about the harassment from another employee. The employer placed the claimant on paid administrative leave. Several days later, the employer contacted the claimant and told her that they wanted her to return to work and that they would change her work location to the firm's main building. The harasser's wife worked in the main building, however, and the claimant refused to return to work for this reason. The firm asked the claimant to participate in its investigation into the incident but the claimant refused to do so. She quit her job when her leave of absence expired. The Court held that the claimant did not show her quitting was with good cause attributable to the employer, noting that the claimant refused to cooperate in an investigation of her complaint and refused to return to work after the employer had arranged a transfer away from the harasser.

Rivera v. Unemployment Appeals Commission, 99 So. 3d 505 (Fla. 3d DCA 2011): The claimant quit her employment approximately one week after she accused an assistant manager of touching her buttocks. After the incident, the claimant complained to the general manager. When he failed to take any action against the assistant manager, she complained to the district manager. The claimant also told the district manager that she believed the assistant manager was stealing money from her cash register. After investigating the claimant's allegations, the manager of the Human Resources Department informed the claimant that her allegations could not be corroborated. The manager did not clarify that she was referring only to the sexual harassment allegation and that the theft allegation was still under investigation. The claimant then asked to transfer to another location, but her request was denied. Not realizing that her allegation of theft was still being investigated and believing that the same management team would remain, the claimant quit her job. Approximately two weeks after the claimant left her employment, the assistant manager was discharged following the theft investigation and the general manager was discharged for poor performance.

The Commission affirmed the referee's decision to disqualify the claimant from receipt of benefits and held that the claimant did not make a reasonable effort to preserve the employment relationship prior to leaving. The Court reversed. The Court noted that the claimant immediately reported the sexual harassment to the general manager and after he failed to take any action, she reported the incident to the district manager. The Court further noted that when the manager informed the claimant that her allegations could not be corroborated, and the claimant believed that the employer was not taking further action, the claimant requested a transfer, which was denied. Based on these facts, the Court held that the claimant had appropriately attempted to preserve her employment before quitting.

Lovett v. WBParts, Inc., R.A.A.C. Order No. 13-05313 (February 18, 2014): During the claimant's employment, the claimant's supervisor and a co-worker made numerous comments of a sexual nature or sexually suggestive gestures to the claimant. The claimant reported the behavior to the employer's human resources department. The human resources manager asked the claimant for a statement describing the behavior and for a list of witnesses who were aware of the harassment. The claimant told the manager that she was unsure how she wanted to proceed and asked the manager not to say anything at that time. The claimant advised the manager that she would think about how she wanted to proceed over the weekend. On Monday, the claimant informed the manager that she did not want to file a formal sexual harassment complaint. The manager informed the claimant that she was obligated to report the situation to the corporate president. The manager notified the president without disclosing the claimant's identity. Upon learning of the complaint, the president warned the two employees that any future harassment would result in termination of their employment. The following day the claimant quit her employment. The two employees accused of sexual harassment

were later discharged after the president was made aware of the details of the claimant's allegations.

The appeals referee held that the claimant did not give the employer an opportunity to remedy the situation and, therefore, failed to establish her quitting was for good cause. The Commission affirmed the referee's decision. The Commission rejected the claimant's argument that the referee applied an erroneous legal standard for good cause by concluding that the claimant failed to preserve her employment. The Commission held that the issue of whether a claimant brought the harassment to the attention of the employer and gave the employer a reasonable opportunity to engage in remedial action was relevant, either as part of the initial proof of good cause, or alternatively the requirement that a claimant make a reasonable effort to preserve his or her employment.

The Commission also rejected the claimant's argument that the employer was on notice of the harassment before the claimant went to the human resources department because her supervisor was one of the harassers and present on occasions when her co-worker harassed her. The Commission noted that courts and the EEOC have rejected such a contention either explicitly or implicitly. The Commission held that the employer in this case handled the complaint appropriately and reasonably utilizing recognized practices, which included taking into account the claimant's request to wait while she considered whether she would proceed and the claimant's request to not file a formal complaint. The Commission noted that any delay in addressing the harassment was due to the claimant's own choices on how to proceed, and while these initial choices were understandable, the claimant's abrupt decision to resign without giving the employer a full opportunity to address the work environment was unreasonable.

Henderson v. Florida Cash America, Inc., R.A.A.C. Order No. 14-02274 (December 2, 2014): The claimant reported to the employer that she had been subjected to sexually harassing behavior by her supervisor for approximately six months. During the employer's investigation, the human resources director interviewed the supervisor, who claimed to have had a consensual sexual relationship with the claimant and offered to provide text messages to support that assertion. Because he did not have his phone containing the messages during the interview, he was given permission to retrieve his phone. In the interim, the human resources director and market manager re-interviewed the claimant regarding the text messages, asking the claimant whether there were any other text messages she would like to show them, whether the supervisor's text messages would be the same as hers or different, and whether she had a sexual relationship with her supervisor. About ten minutes after that interview, the claimant told the market manager that she was quitting. The employer continued its investigation, and while it was not able to reach a definitive conclusion as to whether or not the claimant had been sexually harassed, the supervisor's admission that he engaged in a relationship with the claimant, a subordinate employee, violated the employer's anti-fraternization policy and he was discharged on those grounds.

The Commission affirmed the referee's order which held the claimant disqualified from benefits for quitting without good cause attributable to the employer. Under EEO laws, employers are required to take reasonable steps to prevent harassment, including investigating complaints, and taking remedial action where there are grounds to do so. The Commission reasoned that while the claimant may have been uncomfortable discussing the issue with the employer during the interview process, the evidence did not show any unreasonable action on the part of the employer, or that a reasonable employee would have resigned under the circumstances. Rather, the employer had a legitimate reason, if not a duty, to question the claimant regarding whether the harassment complained of was either in part, or related to, a consensual relationship with her supervisor.

Adequacy of the Employer's Response

Yaeger v. Fla. Unemployment Appeals Commission, 786 So. 2d 48 (Fla. 3d DCA 2011): The claimant was continuously subjected to unwanted sexual remarks and innuendo by a male co-worker. The claimant had complained about these incidents to her boss' son-in-law, who was left in charge when the boss was away from the office. The claimant submitted a letter to her boss informing him of the hostile and uncomfortable work environment. In her letter she explained that, although she had complained to his son-in-law about the incidents, he had done nothing to remedy the problems and the situation had worsened. She closed the letter by requesting that he give this matter his immediate attention. After submitting her letter, the claimant worked the next two days. The next day, a Friday, the claimant left work early, upset and in tears, after informing her boss that she was leaving. On Monday, the claimant called to talk to her boss, but he was not is the office. The claimant did not report to work on Monday. On Tuesday, the claimant called her boss and advised him that she was quitting.

The Court held that the employer's failure to intercede in this situation and take effective corrective measures before the claimant's quitting was sufficient to establish good cause. The Court noted that although the employer testified that he had not received actual notice of the situation until he received the claimant's letter, the employer had at least been on constructive notice of the situation prior to the claimant's letter.

Morgan v. Unemployment Appeals Commission, 842 So. 2d 222 (Fla 1st DCA 2003): The Court affirmed the Commission's order which held the claimant disqualified from benefits for quitting without good cause attributable to the employer. The Court reasoned that the employer appropriately addressed the sexual harassment complaint upon learning of it and offered a procedure in the event of future occurrences.

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For editorial issues, email amanda.neff@raac.myflorida.com. Contact the Commission at:

2740 Centerview Drive, Suite 101, Tallahassee, FL 32399-4151.

Phone: 850-487-2685, Fax: 850-488-2123