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COLE, SCHOTZ, MEISEL, FORMAN & LEONARD, P.A.

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Employment Alert

Spring 2007

Court Holds That Anti-Semitic Remarks in Police Department Do Not Create Hostile Work Environment

In a case that highlights the fact-sensitive nature of harassment claims, in *Cutler v. Dorn*, decided on February 2, 2007, the New Jersey Appellate Division held that the Haddonfield, New Jersey Police Department did not create a hostile work environment where a police officer used the phrase “those dirty Jews” and engaged in other acts hostile to Jewish people. The court examined the totality of the circumstances and determined that the remarks, combined with comments by supervisors about the plaintiff’s “Jew nose” and that “Jews make all the money,” were part of an overall joking, but not harassing, environment. In making its decision, the Court also noted that the plaintiff participated in the joking, and that the “dirty Jews” comment was isolated and not made by a supervisor. The Court thus distinguished this case from *Taylor v. Metzger*, where a supervisor’s single reference to a subordinate as a “jungle bunny” was sufficient to create a triable issue of fact as to whether the work environment was hostile.

Should you have any questions, contact Michael Morea at (201) 525.6274, or mmorea@coleschotz.com.

Human Resources Professional Awarded \$9.1 Million on Her Sex Discrimination and Retaliation Claims

On February 13, 2007, a New Jersey jury awarded Joyce Quinlain \$9.1 million in compensatory and punitive damages after finding that Curtiss-Wright Corp. denied her promotion based on her gender and then retaliated against her by terminating her employment after she filed suit. In awarding compensatory damages of \$4,565,479, the jury found that the company engaged in gender discrimination in violation of the New Jersey Law Against Discrimination. The jury also found that the company acted intentionally and egregiously, thus supporting its award of the same amount in punitive damages.

Should you have any questions concerning sex discrimination and retaliation claims, contact Randi Kochman at (201) 525.6309, or rkochman@coleschotz.com.

Equal Employment Opportunity Commission Shifts Focus From Individual to Systemic Cases of Discrimination

The Equal Employment Opportunity Commission (“EEOC” or “Commission”) recently launched an initiative shifting the Commission’s focus from individual cases of discrimination to systemic cases of class-wide discrimination. The EEOC has defined “systemic discrimination” as cases in which there is a “pattern or practice, policy and/or class cases where the alleged discrimination has a broad impact on an industry, profession, company, or geographic location.” Due to the unanimously-endorsed comprehensive program, employers can now expect the EEOC to more closely examine, identify and investigate systemic cases.

Should you have any questions concerning the EEOC, contact Steven Adler at (201) 525.6273, or sadler@coleschotz.com.

Unqualified Applicant May Proceed With Gender Discrimination Claim Where Employer Hires Equally Unqualified Male

On December 19, 2006, in *Scheidemantle v. Slippery Rock Univ.*, the Third Circuit held that an employer may not defend itself against discrimination charges by arguing that a female applicant failed to meet the objective criteria for a locksmith position where the company hired a male who also failed to meet the objective criteria. In other words, the *Scheidemantle* Court ruled that an employer that departs from the objective criteria in a job posting establishes different qualifications against which an employee or applicant should be considered, and the new qualifications must be applied equally. This case further demonstrates the importance of establishing accurate job postings and properly analyzing applicant criteria before hiring.

Should you have any questions concerning unemployment, contact Randi Kochman at (201) 525.6309, or rkochman@coleschotz.com.

Third Circuit Holds That Employee Must Establish Constructive Discharge to Recover Back Pay

Following the First, Seventh, Eighth and Tenth Circuits, in *Spencer v. Wal Mart Stores, Inc.*, decided November 22, 2006, the Third Circuit held that an employee must establish that he/she was constructively discharged (such that no reasonable person would have continued to work under those circumstances) as a result of a harassing work environment, before the employee may recover back pay. According to the *Spencer* Court, an employee must establish more than a hostile work environment to recover back-pay damages. In so holding, the Court stated, "if a hostile work environment does not rise to the level where one is forced to abandon the job, loss of pay is not an issue." Although other types of damages may still be available, this decision highlights the importance of demonstrating that the employee acted unreasonably when quitting.

Should you have any questions concerning constructive discharge, contact Steven Adler at (201) 525.6273, or sadler@coleschotz.com.

New York Court of Appeals To Decide Privilege of Form U5

In *Rosenberg v. Metlife, Inc.*, the New York Court of Appeals will decide whether an employer's statements on a National Association of Securities Dealers' ("NASD") Form U5 is entitled to an absolute or qualified privilege. A Form U5 is filed with the NASD by member firms whenever a registered employee is terminated. There have been many disputes between registered employees and their former employers regarding the statements made in a Form U5. Although New York Courts have indicated that statements on Form U5's are entitled to an absolute privilege, and thus are not actionable as defamation, the issue has remained undecided. The alternative is that a Form U5 is entitled to only a qualified privilege, which can be pierced in appropriate circumstances, such as malice.

Rosenberg began as a federal court action involving a claim of alleged defamation in the filing of Form U5. On appeal the Second Circuit Court of Appeals held that the nature of the privilege attributable to a Form U5 remains undecided. Accordingly, the Second Circuit certified the issue to the New York Court of Appeals, which accepted certification. Briefs were recently filed by the parties and amicus. The decision will impact the way employers complete Form U5s and the often competing interests of brokers, brokerage firms and investors.

Should you have any questions concerning OSHA, contact Steven Adler at (201) 525-6273, or sadler@coleschotz.com.

New Jersey Enacts Civil Union Legislation

New Jersey's Civil Union law became effective on February 19, 2007. The Civil Union law is more far-reaching than New Jersey's Domestic Partnership Act, which was enacted in January 2004. The Civil Union Law will extend all rights and privileges enjoyed by married couples to all New Jersey same-sex couples who are joined by a civil union. Significantly, civil unions will benefit from the state's laws relating to insurance, health, and pension benefits among other laws.

Federal Government Updates Personnel Forms

Employers are required to have the most recent version of the W-4 form available to employees. In addition, the Department of Homeland Security recently updated the mandatory I-9 form and employers are required to use the updated form in assessing employees. Employers who are unable to present the form to government officials upon request, may be subject to a fine. Forms may be obtained online at [www.irs.gov \(W-4\)](http://www.irs.gov/W-4) and [www.uscis.gov \(I-9\)](http://www.uscis.gov/I-9).

New York Enacts Workplace Violence Prevention Act

On October 5, 2006, the New York State Workplace Violence Prevention Act (the "Act") became effective. The Act amends Section 27(b) of the New York Labor Law and requires certain public employers to proactively prevent workplace violence through safety evaluations, prevention programs and training. Although the Act applies only to certain public employees, the principles embodied in the Act (i.e., evaluation, preparation and training) are critical for all employers to prevent workplace violence.

IN THE TRENCHES

On behalf of its client, a manufacturer of embellishments for the apparel industry, Cole Schotz successfully convinced the Superior Court of the State of New Jersey to dismiss a former employee's gender discrimination claim. In this case, the employee claimed that the company unlawfully terminated her because of her gender and pregnancy when she failed to return to work following the expiration of her maternity leave. Citing a comprehensive arbitration policy drafted by the firm, the Court ruled that the employee had agreed to bring all claims regarding her termination in arbitration, rather than in court, and summarily dismissed the lawsuit. (*Attorney involved: Randi Kochman.*)

"An ounce of prevention . . ." A technician accused a radiologist of offensive touching and sexual harassment while they worked together at our client, a radiology group. The group promptly retained Cole Schotz to investigate the allegations, which led to the group terminating the radiologist who had been employed there for eleven years. The technician sued both the radiologist and the group, and the radiologist also sued the group for breach of his employment agreement, claiming hundreds of thousands of dollars in damages. Prior to trial, we were successful in obtaining the dismissal of the doctor's claims against the group. With regard to the sexual harassment claim, after a two-week jury trial in Bergen County, on February 16, 2007 the jury awarded plaintiff \$335,000 against the radiologist but found in favor of the group. Department chair Steven Adler handled the trial along with associate, Michael Morea. Randi Kochman conducted the sexual harassment investigation and testified at trial. The decision was highlighted in the *Suits & Deals* section of the *New Jersey Law Journal* and in the *New Jersey Lawyer*.

Would you like to receive future issues of the
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If so, please send your email address to alevine@coleschotz.com

FOR THE RECORD

Department Chair Steven I. Adler was again selected by his peers for inclusion in The Best Lawyers in America in the Employment Law area for 2007.

On September 14, Randi Kochman spoke before the New Jersey General Counsels regarding "How to Prepare Your Business for an Avian Flu Epidemic."

On November 7, Steven Adler and Randi Kochman, spoke at the Society for Human Resource Management New Jersey State Conference regarding financial aspects of employment decisions.

Co-Editors: Randi W. Kochman and Michael N. Morea

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