

Amicus Curiae Briefs Employment Issues

Employment Sexual Harassment/Title VII

Case: *Newsday, Inc. v. Long Island Typographical Union, No. 915*

Court: United States Court of Appeals for the Second Circuit

Amicus Brief: NOW Legal Defense and Education Fund

Case: Waters, a member of the union, was first discharged in 1983 for sexually harassing female employees. He was reinstated through arbitration proceedings, and the arbitrator's opinion explicitly provided that any further action qualifying as sexually harassment on the part of Waters would serve as grounds for his immediate discharge. Pursuant to this opinion, Waters was discharged again in 1988 for sexually harassing female editors. The Union argues that the three incidents of sexual harassment did not occur, though the arbitrator found for Newsday on the facts. However, the arbitrator ordered Waters reinstated and provided with progressive discipline as opposed to discharge. Newsday appealed the arbitrator's decision to the District Court. The District Court found for Newsday on summary judgment, stating that the award of reinstatement offended the strong public policy condemning sexual harassment in the workplace. The Union appealed to the Second Circuit.

Amicus Brief: The brief argues that the District Court's overturning of the arbitration award should be affirmed. The brief argues that the arbitration award should not be awarded its usual finality because the award is a clear violation of a public policy against permitting sexual harassment in the workplace. Furthermore, granting the arbitrator a final say in this matter effectively denies individuals their rights under Title VII. This is in contradiction to the clear Congressional intent to have discrimination issues handled by the courts and not by arbitrators and to give the aggrieved a forum in which to be heard.

CWEALF: CWEALF joined the brief because of its belief that women have the right to feel safe in their work environments that is free from sexual harassment. CWEALF believes that an order reinstating a repeat harasser only perpetuates the harassment and subjugation of women and implicitly condones such action.

Holding: The Second Circuit upheld the District Court's decision to vacate the reinstatement award. The court held that the public policy against sexual harassment in the workplace is well recognized under Title VII, the EEOC guidelines, New York Law, and extensive case law. The Second Circuit found that the arbitrator's award of reinstatement was in direct contradiction to this public policy, making the District Court's vacating of the award appropriate.

Case: *Comments to Proposed Guidelines on Harassment Based on Race, Color, Religion, Gender, National Origin, Age, and Disability*

Agency: Equal Employment Opportunity Commission

Comments: National Women's Law Center

Background: The EEOC published proposed guidelines meant to provide a framework for identifying and analyzing discriminatory conduct. The EEOC had stated that the new guidelines were meant to complement, not replace, the existing guidelines on sexual harassment. However, the EEOC did not include in its proposed guidelines for employer liability for gender-based discrimination perpetrated by a supervisor acting under authority granted him/her by the employer. The EEOC guidelines did provide that employers could be liable for the harassment perpetrated by non-employees where the employer knew or should have known of the harassment.

Comments: The comments request that the EEOC provide clarity regarding the distinction between sexual harassment and gender-based discrimination, and should further specify that in circumstances where both sexual harassment and gender-based discrimination are present, the EEOC will apply both sets of guidelines, as opposed to focusing on only one type of action. The comments also suggest that the EEOC make it clear that even though a reasonable person standard can be used to measure the discriminatory or harassing nature of any conduct, this “reasonable person” must take into consideration the victim’s gender and should not consider any harassment “reasonable” simply because there is a history of harassment or discrimination in a particular workplace. Neither should the harassment be considered “reasonable” merely because the employer can show that other similarly situated employees were not offended nor because the fact finder would not be offended by such conduct. The comments also suggest that the EEOC make it clear that an employer who grants a supervisor supervisory authority which is then used to perpetuate harassment or discrimination should be liable even without actual notice. The comments request that, in addition to holding employers responsible for the harassment of non-employees where the employer knew or should have known of the harassment, the guidelines should clarify that an employer structures an office so that an employee is supervised by a non-employee, the non-employee’s failure to respond to the sexual harassment or to report it to the employer should impose liability on the employer for the harassment.

CWEALF: CWEALF joined the comments because it believes that strong and clear legal protections on the job for female employees help to end discrimination and harassment in the workplace.

Outcome: The proposed guidelines were withdrawn from consideration because they did not achieve the stated goal of “consolidating, clarifying and explicating” existing law pertaining to harassment on these bases. This resulted in the 1990 guidelines remaining intact.

Case: *Harris v. Forklift Systems, Inc.*

Court: Supreme Court of the United States, 1993

Amicus Brief: Now Legal Defense and Education Fund

Case: Teresa Harris sued her former boss, Forklift Systems, alleging that the president of Forklift had, in violation of Title VII of the Civil Rights Act of 1964, harassed her because of her gender. The District Court had described the case as “close” but had ultimately decided that the conduct (which included gender-motivated insults and unwanted sexual innuendoes) did not

create an abusive environment because they were not “so severe to . . . seriously affect [Harris’] psychological well-being” or lead her to “suffer injury.” The Court of Appeals affirmed.

Amicus Brief: This brief argues that the correct test was stated in *Meritor Savings Bank v. Vinson*, 477 U.S. 57 (1986), which stated that to establish liability for hostile work environment sexual harassment a plaintiff must prove that unwelcome sex-based conduct altered the “terms, conditions, or privileges of employment.” *Meritor* instructs that a plaintiff has established actionable sexual harassment when the conduct (1) was so severe or pervasive as to alter the conditions of employment, creating an abusive working environment, or (2) had the purpose or effect of unreasonably interfering with her work performance, or (3) had the purpose or effect of creating an intimidating, hostile, or offensive working environment. The brief argues that the Sixth Circuit deviated from this standard, thwarted the goals of Title VII, and violated the standards the court set in *Meritor*.

CWEALF: CWEALF joined this brief because it believes that the court’s deviation from the correct test shows a significant misunderstanding of sexual harassment. A test, which requires a victim to prove the extent of her injury improperly, places the focus on the plaintiff’s conduct rather than the defendant’s conduct. CWEALF hopes to bring understanding of the true nature of sexual harassment and hopes to promote a test that places the concentration on the offending party.

Holding: The Supreme Court held that the lower courts incorrectly applied the *Meritor* standard. The District Court erred in relying on whether the conduct “seriously affected plaintiff’s psychological well-being” or led her to “suffer injury.” The Supreme Court held that such an inquiry may focus attention on concrete psychological harm, which is not an element required by Title VII. As long as the environment would reasonably be perceived, and is perceived, as hostile or abusive, there is no need for it to be psychologically injurious. The Court reversed the judgment of the Court of Appeals, and remanded the case for further proceedings.

Case: *Gary v. Long*

Court: United States Supreme Court (petition for writ of certiorari), 1995

Amicus Brief: National Women’s Law Center

Case: Gary claimed that her supervisor, Long, subjected her to verbal and physical sexual harassment, both quid pro quo sexual harassment and a hostile work environment. The harassment took the form of threats of adverse job consequences if Gary would not have sex with Long, unwanted touching, and, eventually, rape. Gary was never fired. She eventually complained to the employer, who gave her leave to sue and transferred her out of Long’s area. Gary brought suit in District Court, suing her employer for sex discrimination under Title VII. Her claim was dismissed by both the District Court and the DC Circuit. The DC Circuit held that no agency principles could impute liability to an employer for employee actions of which the employer knew nothing when that employer had policies and measures in place to handle sexual harassment claims and when the employee harassed should have known that the harasser was acting outside the scope of his employment. The DC Circuit also held that there existed no quid pro quo claim where the threats of adverse job consequences were never carried out.

Amicus Brief: No brief on file.

CWEALF: CWEALF joined the brief because of its belief that only by making employers responsible for sexual harassment perpetrated by its employees would employers have the motivation to create effective processes by which individuals could register complaints of sexual harassment and by which individuals would be penalized for harassing other employees. CWEALF believes that employers need to take these actions in order to create safe working environments for all employees, and these safe working environments will help in equalizing employment opportunities for women.

Holding: The Supreme Court denied certiorari.

Case: *CHRO ex. Rel. Bilodeau v. United Technologies, Pratt & Whitney*

Court: Commission on Human Rights and Opportunities (CHRO), 1996

Amicus Brief: CWEALF (as intervener)

Case: Bilodeau worked for Pratt & Whitney. In her department, there were displayed several calendars advertising Snap-On Tools by using scantily clad female models. Several male employees also carried and displayed nude pictures of women in their personal toolboxes. In addition, there were numerous incidents of other employees engaging in mock sexual activity. Bilodeau did not report these activities to the union, but she did report them to her supervisor. The supervisor investigated her allegations, ordered the removal of the calendars, and reaffirmed the company's anti-sexual harassment policy. Bilodeau brought a complaint through the CHRO. During the proceedings, the hearing officer made a ruling permitting Pratt & Whitney to cross-examine Bilodeau on details of abuse during her childhood and to delve into communications made during the course of therapeutic relationships. CWEALF intervened on Bilodeau's behalf.

Memorandum: The memo argues that, since psychological injury is not an element of a sexual harassment claim, there is no need to delve into the psychologist-patient relationship. This is in direct contrast to the common law negligence cases on which the respondent relies, where actual harm is an element of the cause of action. Rather, the proper focus of a sexual harassment inquiry is the discriminatory conduct and whether that conduct unreasonably interfered with the terms and conditions of the complainant's job. In addition to be irrelevant to sexual harassment analysis, such an inquiry violates the statutory privilege of psychologist-patient confidences. This privilege cannot be effectively waived merely because the respondent wishes to use such confidences to impeach the claimant's character.

The memo urges that if, by requesting damages for pain and suffering which resulted from the respondent's sexual harassment, the claimant has put her mental health at issue, the hearing officer should implement procedures which would ensure that disclosure of otherwise privileged confides is narrowly tailored so that the victim need not suffer additional injury for choosing to bring a claim before the CHRO. The memo suggests that the hearing officer first conclude whether pain and suffering damages are available under the act; if such damages are not available, there is no reason to delve into psychologist-patient confidences in order to determine

complainant's mental condition. The memo also suggests that the hearing officer bifurcate the proceedings into a liability phase and a damages phase so that the complainant's mental health only becomes an issue during the damages phase of the proceedings. During the damages phase, the complainant's confidences should be maintained unless there is no other less intrusive means of obtaining the requisite information. The memo notes that permitting cross-examination of complainants on past abuses which they may have discussed with therapists severely chills such victims' access to services and the exercise of their rights to redress for sexual harassment.

CWEALF: CWEALF intervened in this case because it believes that the hearing officer's ruling would undermine the legal avenues open to complainants of sexual harassment by re-victimizing them as opposed to permitting them to freely exercise their rights without the fear of further harm. If victims of sexual harassment are afraid to come forward, the move toward eradicating such harassment and other forms of sex discrimination will be stilted.

Outcome: The hearing officer bifurcated the hearing into a liability hearing and a hearing on damages if liability were found. The hearing officer found no showing of liability because (1) the complainant was unable to show that the conduct was so severe and pervasive so as to change the terms and conditions of her job and (2) the complainant was unable to establish respondent superior liability because the respondent took reasonable and appropriate steps to address the complainant's concerns.

Case: *Angelsea Productions v. Commission on Human Rights and Opportunities*

Court: Supreme Court of the State of Connecticut, 1996

Amicus Brief: University of Connecticut School of Law Civil Rights Clinic

Case: Hyde had been employed with Angelsea Productions. Several months after tendering her resignation, she filed a complaint against Angelsea with the CHRO. Twenty three months after Hyde filed her complaint, Angelsea sought for the complaint to be dismissed due to the Commission's failure to issue an assessment of the complaint within the statutory nine-month period. This motion was eventually denied. Several weeks later, the Commission issued a finding of reasonable cause for Hyde's complaint. Eight months following the finding of reasonable cause, Angelsea filed another motion to dismiss due to the Commission's failure to hold a hearing within the statutorily prescribed ninety-day period. The Commission denied this motion as well, finding the statutorily prescribed periods to be directory rather than mandatory and thus finding that the Commission retained jurisdiction over the issues. The decision was appealed and the Connecticut Supreme Court found the statutory language, which included the word "shall," to be mandatory and not discretionary since the mandate regarded a substantive matter, namely the relief afforded each party while the Commission's investigation of the complaint is pending. Finding the Commission in violation of the statutorily mandated time period in which to issue its findings, the court found that the Commission no longer had jurisdiction over the claim. Defendants petitioned for re-argument en banc.

Amicus Brief: The brief argues that the court's earlier decision effectively closes off relief to many claimants who are not well-equipped to mount judicial proceedings against discriminatory employment practices. While the Connecticut Supreme Court found that ample alternative in the

manner of civil suits remained open to potential claimants, those ample alternatives dissipate in the face of real economic hardship. Furthermore, individuals like Hyde are barred by statute from bringing their actions in court; the statute of limitations in which such a private cause of action could be brought expired while Hyde believed the CHRO to have retained jurisdiction. By finding that the CHRO lost such jurisdiction by missing the statutorily prescribed deadlines, the court effectively denies victims of employment discrimination of any remedy.

CWEALF: CWEALF joins the brief because of its belief in ending employment discrimination and making those harmed by such discrimination as whole as possible via available remedies. CWEALF recognizes that the court's decision leaves many victims without such a remedy and, as such, worsens the effects of the discrimination.

Holding: In May 1996, amici filed this brief in support of defendants' motion for re-argument en banc. In June 1996, the Connecticut State Legislature enacted a statute granting the CHRO continuing jurisdiction over claims on which it had lost such jurisdiction due to its lack of adherence to time constraints. The same day the statute was enacted, the Connecticut Supreme Court denied the motion for re-argument. Subsequently, Angelsea filed a motion for judgment in Superior Court, claiming that the Act did not apply retroactively. The Superior Court found that the Act did apply retroactively, thereby denying the motion and permitting the original claim to be adjudicated by the CHRO. On appeal, the Connecticut Supreme Court affirmed.

Case: *Jenson v. Eleventh Taconite Co.*

Court: United States Court of Appeals for the Eighth Circuit, 1997

Amicus Brief: NOW Legal Defense and Education Fund

Case: This was a class action brought by all women who have been employed at Eleventh Mines since December 30, 1983. The class included sixteen women. The District Court found the defendant liable for sex discrimination in promotion practices and sexual harassment. The District Court appointed a Special Master to consider compensatory and punitive damages. The Special Master allowed extensive discovery into private areas of the plaintiffs' lives, eventually returning with a minimal award of damages. The District Court affirmed and the plaintiffs appealed to the Eighth Circuit.

Amicus Brief: The brief raises amici's independent argument on appeal – reversing the Special Masters' decision because of pervasive gender bias. This bias was apparent in the judge's obvious lack of regard for sexual harassment cases and his minimization of events that traumatized the women and the way in which those events affected them. This bias was further evidenced by the Special Masters' refusal to recognize as reasonable the fear felt by the plaintiffs and his refusal to recognize as sexual harassment events that occurred between individuals at the workplace, instead calling such events "private." The brief argues that this gender bias is also evidenced by the Special Masters' discovery and admission of evidence which pried into the most personal areas of the plaintiffs' lives, evidence that was completely irrelevant to the issues at hand. Furthermore, the Special Master refused to admit expert testimony regarding the cause of the plaintiffs' mental anguish.

CWEALF: CWEALF joined this brief because it found the Special Masters' decision an affront, both to women and the law. When judges make decisions based on their individual biases, they revictimize the very people the law was enacted to protect. This action then further victimizes women as a class because it conveys to women the idea that if they speak out about being victims of sexual harassment, they will be met only with disbelief and ridicule. As such, decisions such as this one frustrates rather than furthers CWEALF's goal of helping to end gender discrimination.

Holding: The Eighth Circuit did not reach the issue of reversal based on the Special Masters' gender bias, holding that this claim was not raised by the plaintiffs but by amici. The court found that the Special Maser applied an erroneous standard of proof for causation of the plaintiffs' mental anguish and erroneously excluded the plaintiffs' expert witness testimony. The court reversed the Special Masters' decision and remanded the case to the District Court for an expedited new trial. The case settled in January 1999, shortly before this new trial was to begin, for an undisclosed amount.

Case: *Keslar v. Bartu*

Court: United States Court of Appeals for the Eighth Circuit, 1999

Amicus Brief: Now Legal Defense and Education Fund

Case: Keslar worked as a court reporter in the Nebraska Superior Court. While employed there, she was repeatedly exposed to sexual harassment perpetuated by Judge Bartu. She did not file a complaint against him via the normal channels, because she could not be promised job protection against retaliatory discharge. After searching for some time, Keslar finally found an attorney to represent her. After more than two years of costly litigation, the case finally settled, with Keslar receiving a small monetary award as well as a significant change in reporting practices and the naming of the plaintiff as the prevailing party with leave to recover attorney's fees. Keslar's attorney, Ms. Comstock, sought fees of \$423,797.50 for 3400 hours of work and costs of \$34,017.88. The District Court judge granted \$35,875 in fees and only \$17,009 in costs. This appeal followed.

Amicus Brief: The brief argues that gender bias must be eradicated from the judicial system because it is contrary to the very underpinnings of the judicial system. Therefore, gender bias should be considered an impermissible factor upon which to base judicial decisions and the use of such a factor should amount to reversible error. The brief argues that the District Court judge's gender bias was discernible through its trivializing of the harassment suffered at the hands of the judiciary, the courage it took counsel to represent Keslar considering the power wielded by the judge, and the weight the judge gave to gender-biased affidavits from other attorneys concerning Ms. Comstock's previous casework.

CWEALF: CWEALF joined the brief because of its belief that all individuals who sexually harass women need to be held accountable, regardless of his/her station in life. CWEALF believes that if attorneys who represent women against harassers occupying positions of power are left unable to collect attorney's fees and thereby are left monetarily impotent, cases against

such harassers will not be pursued. By not pursuing cases of sexual harassment, gender discrimination is silently permitted rather than condemned.

Holding: The court held that the District Court did not abuse its discretion in its award of attorney's fees and costs. A dissenting judge noted his belief that the district judge abused his discretion by giving too little weight to certain factors (specifically the courage it took to pursue the defendants and the importance of the injunctive relief obtained through settlement). However, the judge stated that he did not believe the district judge's actions were motivated by gender bias.

Case: *Brittell v. State of Connecticut Department of Corrections*

Court: Connecticut Supreme Court, 1998

Amicus Brief: Connecticut Women's Education and Legal Fund

Case: The plaintiff was hired as a correctional officer. Throughout her employment with the defendant, including during her six weeks of training, the plaintiff was the object of numerous comments regarding her sexual orientation, sex, and gender identity. These comments circulated amongst both the staff and the inmates, creating an uncomfortable and possibly dangerous environment for the plaintiff. At several times during her employment, she reported some of the comments to her superiors. Follow-up by those superiors appeared to be minimal and fruitless. One of the plaintiff's supervisors met with a representative of the employee assistance program who told her that, due to the plaintiff's psychological condition, she should not return to work. The plaintiff was placed on medical leave and, upon her return, was given a job away from the inmate population. The plaintiff was offered a transfer to any correctional institution of her choice, but she refused this offer as a way to ameliorate the situation. Eventually, the plaintiff went on medical leave again, which continued for almost two years before she was considered to have resigned. The plaintiff filed suit claiming that the defendant violated the Fair Employment Practices Act by creating a hostile working environment and that she was constructively discharged from her employment as a correctional officer. The trial court found that, although the defendant had notice of the hostile work environment, the plaintiff had not shown that the defendant had failed to take adequate remedial action so as to incur liability for creating or supporting a hostile work environment.

Amicus Brief: The brief focuses first on the fact that the defendant employer did little, if anything, in the first year in which the plaintiff complained about the hostile environment. The brief argues that, under the Fair Employment Practices Act fashioned on Title VII, an employer has a duty to take reasonable steps to eliminate a hostile work environment and to prevent recurrence. The brief argues that the defendant employer's investigation of the plaintiff's complaint was neither prompt nor adequate. In fact, the employer did not even begin to investigate until eight months after the first complaint was made. Nor did it ever investigate the one person the plaintiff named as responsible. Furthermore, the employer's only attempt at ameliorating the hostile work environment was remove the plaintiff from that environment by transferring her to another job location.

CWEALF: CWEALF appeared as amicus curiae in order to highlight the importance of employer action in ending discrimination in the workplace. CWEALF believes that, especially in positions in law enforcement, where women traditionally have been excluded, it is of the utmost importance that employers do all that is possible to create a welcoming environment. When faced with sexual harassment, it is important for these employers to make it clear that they will not tolerate such behavior nor allow their female employees to be chased off the job by that type of behavior.

Holding: The court, reviewing the trial court's determinations under a clearly erroneous standard, held that there was enough evidence on the record to support the trial court's finding that the defendant took reasonable steps to ameliorate the hostile work environment. The court found that the offer of a transfer, in light of the fact that the defendant was dealing with uncooperative inmates and officers, was a reasonable response that accommodated the legitimate interests and concerns of the plaintiff. Given the reasonableness of this transfer offer, the court held that the plaintiff had no claim of constructive discharge for there was a way for her to remain in the defendant's employ without being in the hostile environment.

Case: *Oncale v. Sundowner*

Court: United States Supreme Court, 1998

Amicus Brief: Lambda Legal Defense and Education Fund

Case: Oncale was an oilrig worker with the offshore drilling company of Sundowner Offshore Services. He was part of an eight-man crew, employed on a drilling platform in the Gulf of Mexico. While secluded there, Oncale was subjected to various physical sexual assaults by his co-workers. Oncale complained to his supervisors, which resulted in no remedial action. Eventually, the fear of continuing sexual abuse and rape caused Oncale to quit. Oncale filed suit in the District Court, which dismissed the case for failure to state a claim upon which relief could be granted. The court found no actionable sexual harassment claim of a male worker against other males. The Fifth Circuit affirmed and the Supreme Court granted certiorari.

Amicus Brief: The brief argues that the ability to state a claim for sexual harassment should bear neither on the sex of the perpetrator and victim nor on the sexual orientation of either which might provide the harasser with an impetus for his/her actions. Rather, claims of sexual harassment need be based solely on the presence of unwelcome verbal or physical conduct of a sexual nature sufficiently severe to alter the workplace environment. The brief argues that conduct of a sexual nature is always based on "sex" regardless of the perpetrator and is therefore under the coverage of Title VII. That a harasser may be an "equal opportunity harasser in that s/he harasses both men and women does not negate the fact that the harassment is of a sexual nature and, as such, falls under Title VII's coverage of discrimination based on sex.

CWEALF: CWEALF joined the brief because of its belief that claims of sexual harassment should be based on the conduct complained of, not the actual or perceived sex or sexual orientation of harasser and victim. If the court takes into account sex and sexual orientation, the court is limiting Title VII in the exact manner that Title VII precludes—it discriminates, by refusing to hear claims, based on sex.

Holding: The Supreme Court held that harassing conduct did not need to be motivated by sexual desire in order to support a claim of sexual harassment. As such, it was unnecessary to limit Title VII's application to opposite-sex sexual harassment or to delve into and discover the sexual orientation of the harasser in order to state a claim for same-sex sexual harassment.

Case: *Rocque v. Freedom of Information Commission*

Court: Supreme Court of Connecticut, 2001

Amicus Brief: Permanent Commission on the Status of Women and CWEALF

Case: The Freedom of Information Commission ordered Rocque, the Commissioner of the Department of Environmental Protection, to supply the Hartford Courant with information relating to a sexual harassment complaint, including information as to the complainant's identity. The trial court found that such information was exempt from public disclosure as an invasion of personal privacy under the Freedom of Information Act. The defendants appealed and the Connecticut Supreme Court transferred the appeals from the Appellate Court.

Amicus Brief: The brief argues that, absent exceptional circumstances, the identity of a sexual harassment complainant must remain private; otherwise victims will feel compelled to stay silent due to fear of public humiliation. Because the effectiveness of laws prohibiting sexual harassment are dependent on victims coming forward, these laws will be frustrated if all sexual harassment victims risk public disclosure merely by making a complaint. The brief also argues, however, that information other than the complainant's identity should be available to the public so that the public may judge the manner in which a particular agency handles claims of sexual harassment. This can easily be accomplished without revealing the identity of the victim.

CWEALF: CWEALF co-authored the brief because of its belief that victims of sexual harassment need to be encouraged to come forward, not scared into silence. CWEALF believes that it is possible to expose a public agency's method of handling sexual harassment complaints without disclosing the names of complainants.

Holding: The court applied a two-prong test to determine when information could be excluded from public disclosure. The information must meet both of the following: (1) the information must not be a matter of legitimate public concern and (2) the information must be highly offensive to a reasonable person. Applying this test, the court determined that a sexual harassment complaint was open to public disclosure excepting information regarding the complainant's identity, sexually explicit information, and information about intimate personal relationships. The court determined, however, that this two-prong test must be applied on a case-by-case basis and should not be read to mean that a complainant's identity is always exempt from public disclosure.

Case: *Pollard v. DuPont*

Court: United States Supreme Court, 2001

Amicus Brief: National Employment Lawyers Association

Case: Sharon Pollard brought an action under Title VII against her former employer, alleging that she had been subjected to a hostile work environment based on her sex and that such harassment resulted in her taking a medical leave from her job. The District Court found for Pollard and awarded, among other damages, \$300,000 in compensatory damages, the maximum permitted under the statute, while noting that such award was insufficient to make her whole. The Sixth Circuit affirmed, and the Supreme Court granted certiorari to resolve a circuit split regarding whether front pay, money awarded during the period between judgment and reinstatement or in lieu of reinstatement, constitutes “compensatory damages” as defined under the statute and, thus, is limited to the \$300,000 cap.

Amicus Brief: The brief first points out that all Circuit Courts, other than the Sixth Circuit, have held that compensatory damages, within the meaning of the Act, do not include front pay. The brief argues that front pay is an equitable remedy, the purpose of which is to make the victim whole. This purpose is frustrated rather than furthered when a victim is unable to be made whole because the harm suffered exceeds the maximum amount of damages permitted by the cap.

CWEALF: CWEALF joined the brief because of its belief that front pay, when not subjected to the cap for compensatory damages, can help to make a victim of sexual harassment monetarily whole. Furthermore, CWEALF believes that such damages will not act as a deterrent to employers if the amount of damages awarded is not equal to the harm caused by the employer’s action or inaction.

Holding: The Court held that while the definition of compensatory damages could be read so as to include front pay, such a reading would not be in accord with Congress’s intentions. Congress allowed for front pay as additional damages after finding that such damages were needed to deter intentional discrimination and harassment in the workplace. The Court further found that it would be illogical to treat front pay awarded when the plaintiff is reinstated differently from front pay awarded when the plaintiff is not reinstated, thereby holding that front pay in either situation would not be subjected to the \$300,000 cap.