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# WHAT'S NEWS IN EMPLOYMENT LAW?

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## Employer Liability for Sexual Harassment by Co-Workers

*By Robert A. Tandy, Esq.*

Employers may be liable for sexual harassment committed by non-supervisory employees against co-workers even where the employer is unaware of the alleged conduct.

In a recent decision, Cerdeira v. Martindale-Hubbell, Docket No. A-5855-06T1, the New Jersey Appellate Division held an employer may be liable under the New Jersey Law Against Discrimination ("NJLAD") for the harassing conduct committed by a non-supervisory employee against another rank-and-file employee if the employer fails to establish and enforce effective policies against sexual harassment in the workplace.

In early 2001, Ms. Cerdeira, an employee of Martindale-Hubbell, began experiencing sexual harassment by a non-supervisory co-worker in the

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## Isolated Comment about Employee's Sexual Orientation May Create A Hostile Work Environment

*By Robert A. Tandy, Esq.*

The Appellate Division in Kwiatowski v. Merrill Lynch, A-2270-06T1, found a single anti-gay comment by a supervisor to a subordinate may be sufficient to create a hostile work environment under the New Jersey Law Against Discrimination.

The Appellate Division likened the phrase "stupid fag" allegedly uttered by plaintiff's supervisor in Kwiatowski to the phrase "jungle bunny", an isolated comment held to be sufficient to create a hostile work environment in Taylor v. Metzger, 152 N.J. 490 (1998).

The decision also recognized the theory of "subordinate bias," commonly referred to as "Cat's Paw", which holds that an employer may be liable for a supervisor, who has a bias against a protected class, if the supervisor has input in an employment decision even where the ultimate decision maker does not share the beliefs and/or is not aware of the supervisor's bias.

## NJ Offer of Judgment Rule Does Not Apply to CEPA and NJLAD Cases

*By Robert A. Tandy, Esq.*

The New Jersey Appellate Division recently held in Best v. C&M Door Controls, Inc., that the Offer of Judgment Rule does not apply to CEPA and NJLAD cases. The Offer of Judgment Rule allows a defendant to make a settlement offer having the same weight as a Judgment. If the plaintiff rejects the settlement offer and fails to recover at least 80% of the offer at trial, the plaintiff would be responsible for the defendants' attorneys' fees from the date of the rejection of the offer up through trial. To hold otherwise, the Court reasoned, would be inconsistent with the clear purposes of the State's discrimination and whistleblower statutes to permit a prevailing plaintiff to recover attorneys' fees and costs of suit.

### **Employer Liability** from page 1

form of sexually explicit photographs; inappropriate, offensive and sexually charged language; and was the recipient of offensive items including a bra and thong underwear. Although she advised another co-worker of the incidents, Ms. Cerdeira did not complain to a supervisor until 2003, approximately 2 years after the harassment began.

Although the Company's Human Resources Department immediately investigated the complaints and the harasser was subsequently terminated, Ms. Cerdeira filed an action for hostile work environment sexual harassment in violation of the "NJLAD." The trial court granted summary judgment to Martindale-Hubbell and Ms. Cerdeira appealed contending Martindale-Hubbell demonstrated it negligence in failing to have an effective sexual harassment policy in place.

The Appellate Division held the trial court should have determined whether Martindale-Hubbell's policy provided a 'reasonable avenue' through which plaintiff could have complained. If the Company did not have such 'reasonable avenues,' the Appellate Division opined the trial court should determine whether the absence of a reasonable policy was causally related to any harm alleged by the plaintiff. The Appellate Division held the trial court erred in its decision by deciding plaintiff's claims lacked legal merit because a co-worker committed the harassing conduct, not a supervisor.

To permit offending co-workers to engage in this conduct, the Appellate Division cautioned could "discourage employers from adopting proactive sexual harassment policies that are well-publicized and directed to all employees."

Because of the widespread impact of this decision, employers are urged to revisit their own policies and provide mandatory training for all employees, not just supervisors and managers so that all employees are aware of the procedure for filing a complaint and supervisors are aware of their obligations if a complaint is filed.

For more information or to inquire about providing training to your Company's employees contact Robert A. Tandy, Esq. at (201) 599-2000.

## NJ Legislature Refuses to Increase Minimum Wages

*By Robert A. Tandy, Esq.*

Despite strong recommendation and pressure from the New Jersey Minimum Wage Advisory Commission, the New Jersey Legislature refused to increase NJ minimum wage from \$7.15 per hour. However, The federal minimum increased from \$5.85 to \$6.55. This was the second increase of three increases provided by the Federal Minimum Wage Act of 2007. The third increase becomes effective in July 2009. The third increase will be above New Jersey's minimum wage if the state legislature does not increase the minimum by that date.

## NJ Supreme Court Finds No Sexual Harassment for Repeated Requests for Dates

*By Robert A. Tandy, Esq.*

Despite the recent trend of pro-employee sexual harassment hostile work environment decisions, the NJ Supreme Court held, in Godfrey v. Princeton Theological Seminary, 2008 WL 2951891, two female seminary students were not subjected to sexual harassment hostile work environment where a 60 year old resident made repeated requests to both women for a date. Importantly, the alleged harasser's conduct involved no sexual language, no touching, no inappropriate or offensive comments, and no lewd suggestions.

In its ruling, the Court held "Persons who are socially tone deaf are not, by that characteristic, necessarily the equivalent of sexual harassers. It is important in that regard that neither of these women used her own authority to tell Miller [the alleged harasser] to 'go away.' They cannot rely on the prospect of a money damages award from the Seminary to replace their own obligation to simply tell Miller that they had no interest in him romantically or even as a casual acquaintance."

This case marks a significant victory for employers and re-establishes the factors necessary to prove a claim of sexual harassment under the New Jersey Law Against Discrimination. It also reaffirms an employee's obligations to report the allaged harassment and allow the employer an opportunity to remedy the alleged claims.

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