ARE YOU IN THE CROSSHAIRS?
(Your Personal Liability in Employment Cases)

Bob Gregg
Boardman & Clark Law Firm
One South Pinckney Street, 4th Floor
P. O. Box 927
Madison, WI 53701-0927
Telephone (608) 283-1751
rgregg@boardmanclark.com

Two supervisors were held personally responsible to pay $450,000 each as part of a $12 million award to a fired employee. The jury found that the plaintiff had been discharged in violation of FMLA rights. In addition, the jury decided there had been an intentional violation by both supervisors who had made statements that they "intended to find grounds for dismissing the employee." *Schultz v. Health & Hospice Corp.* (N.D. Ill., 2002).

The U.S. courts have held that managers can be personally liable for wrongs committed in the scope of their employment. Discrimination cases against Employers are increasingly accompanied by personal tort actions against individual co-workers or managers. Third parties harmed by employees are also suing managers for negligent supervision. The Equal Pay Act and several other laws allow suit of managers in their personal capacity. Recently, female attorneys sued a New York law firm and its managing partners for sex discrimination in pay. More such cases are anticipated.

What Is Personal Liability?

Personal liability means that legal damages are collected from the individual's personal bank account, retirement fund and/or sale of personal property (car, home, collectibles, etc). Though there has always been some degree of personal liability in employment situations, the general rule was organizational liability. The employer paid; individuals did not. That's changing. . .

Usually the Employer is sued as an entity (The Employer). In a growing number of cases plaintiffs are naming both the employer as well as the individual(s) accused of actually committing the violation. In these cases the court may award damages against both the organization and the individual manager. In some cases the plaintiff can elect to collect from either, or both.

Bob Gregg, a partner at the Boardman & Clark Law Firm in Madison, Wisconsin, has been professionally involved in Employment Relations and Civil Rights work for more than 30 years. He has designed the workplace policies and procedures of numerous employers. He litigates and serves as an expert witness in employment cases. A recognized educator and trainer, Bob has conducted over 3,000 seminars throughout the United States and authored numerous articles on practical employment issues.

Under ERISA, there is personal liability for breach of fiduciary duty. Anyone exercising discretion can be a fiduciary, including owners, clinic directors, board members, HR staff and office managers. Watch for much closer benefit plan scrutiny and more legal cases as a result of the Enron benefit plan collapse, and the Sarbanes-Oxley Act.

A trial court has allowed damages to be collected personally from a manager who was responsible for payment of wages and willfully failed to follow the Fair Labor Standards Act's overtime provisions. *Afanassov v. Vor Broker* (N.D. Ill., 2002).

Individuals, especially supervisors are now frequent targets. Companies should warn and train their supervisors in order to avoid such liability.

Why Would Someone Sue You?

1. Adding a personal "tort" action can increase damages. (*i.e.*, exceeding the "caps" in the federal discrimination laws)

2. The company may be shaky. If the company goes bankrupt, the individual sued is a back-up source of payment in an award of damages.

3. Taxes. Damages collected from the individual are tax free (at least at the time of payment) since it triggers no "employer" withholding. This gives plaintiffs powerful incentive to sue management staff in their personal capacity. In fact, it may now be potential malpractice for a plaintiff's attorney not to name you personally and seek the tax advantage for their client. In *Longstreth v. Copple* (N.D. Iowa, 2000), a federal district court ruled that a plaintiff could collect $40,000 in damages for an FMLA violation from the individual HR Director in addition to damages the employer must pay. This is not the first case stating that individuals can be held liable under the FMLA.

4. Revenge. Some plaintiffs feel harmed and want to seek retribution from those they believe are responsible for their situation.

The Old Rules Are Changing

Anti-Discrimination Laws. The majority of employment litigation is discrimination cases. Under Title VII of the Civil Rights Act of 1964, the Age Discrimination in Employment Act and the Americans with Disabilities Act, only the employer has liability. The perceived individual wrongdoer cannot be sued and is not liable for any damages under these laws, even if they behaved with intentional malice. However, the previous "protections" from personal liability are now being eclipsed by a variety of personal liability causes of action.

Adding a Tort Case. Adding a tort claim (civil suit) to another form of employment case is a growing plaintiffs' practice to exceed the statutory damages "caps." The most common torts appended to employment cases are invasion of privacy, defamation, assault, conspiracy to harm employment, intentional interference with employment contracts and negligent supervision. Tort actions can carry both organizational and personal liability.

Workers' Compensation laws protect individuals (co-workers and supervisors) from liability for most workplace injuries. In a number of states, the definition of "injury" includes many sorts of non-physical harms arising in the workplace, including defamation, negligent harm to profession or reputation, infliction of emotional distress and other "tort" actions. However, injury caused by intentional acts of the employer or co-workers may not be barred by the Workers' Compensation exclusivity provisions.

Laws Which Allow Personal Liability

One may name individuals personally as defendants and collect damages from them under several laws. The most common are:

Equal Pay Act (sex discrimination in pay), 29 U.S. Code §201, et seq.

Family and Medical Leave Act, 29 U.S. Code §2601, et seq.

Civil Rights Act of 1866, 42 U.S. Code §1981 (Race Discrimination). This federal race discrimination statute is being used to challenge more workplace issues, including probationary or at-will discharge, *Lauture v. International Business Machines Corp.* (2nd Cir., 2000), and discrimination against leased employees, *Wal-Mart Stores, Inc. v. Danco* (1st Cir., 1999); cert. denied 2000). Section 1981 does not have the Title VII $300,000 liability "cap." The sky is the limit! So, it is becoming the "preferable" law for race discrimination plaintiffs. Section 1981 defines "race" broadly, including certain ethnic and religious groups.

42 U.S. Code §1983 covers acts of state and local governments. This federal law provides that "no person" acting under this government authority may violate the constitutional or legal rights of others. Those accused may be sued in their "official" or "individual" capacity.

Americans With Disabilities Act - Title II Public Services - Retaliation. Generally only "entities" are liable under the ADA. However, the Title II Anti-Retaliation Section has been held to impose personal liability for (and only for) retaliation under the Public Services provisions. *Schotz v. City of Plantation* (11th Cir., 2003).

U.S. Fair Labor Standards Act (wages and hours, overtime pay), 29 U.S. Code §201, et seq.

Wage Claims: Individual owners, officers and stockholders may be personally liable for unpaid wages if the organization cannot pay.

Safe Place Acts: Individual employees and owners of facilities may be liable for causation for having unsafe facilities (owners); for removal of safety devices or failure to report unsafe conditions (employees).

Employment Retirement Income Security Act (ERISA), 29 U.S. Code §301, et seq. Imposes personal liability for breach of fiduciary duty.

Health Insurance, Portability and Accountability Act (HIPAA), 42 U.S. Code §263. Breach of privacy of medical information can result in personal liability.

Omnibus Crime Control Act (Electronic Communication Privacy Act), 18 U.S. Code §2501, et seq. Wiretaps and improper investigation of electronic communication (includes criminal penalties as well as civil liability).

Sarbanes-Oxley Act and other securities laws hold managers and support staff personally liable for breach of fiduciary or ethical duties in financial, securities and benefits issues.

Federal False Claims Act allows suits of any person for "defrauding the government" ("person" can also include corporations and government entities). The law has anti-retaliation provisions allowing any employee who was fired for reporting or objecting to fraudulent practices to sue the person(s) responsible. The Act allows "triple damages" in civil suits, as well as criminal penalties.

Contribution By The Wrongdoer

(The Backdoor Approach to Personal Liability in Discrimination Cases)

Though the federal discrimination laws, Title VII, ADA and ADEA, do not allow a plaintiff to sue an individual, some employers have tried to implead the manager who caused all the trouble. The employer seeks "contribution," meaning if the company had to pay damages, it wants to get the money back from the individual who committed the discrimination. Some employers have been successful.

Not Under Federal Title VII. The U.S. Supreme Court in *Northwest Airlines, Inc. v. Transport Workers Union 541*, 451U.S. 77(1981) ruled that allowing employers to recoup damages from individual managers in Title VII discrimination cases would defeat the purpose of the Act, which was to hold employers responsible. Employers would have less incentive to have comprehensive anti-discriminatory practices if they could pass the buck.

State Laws Differ. Some states have allowed employers to sue the individual managers for contribution under their state discrimination laws (Michigan, Kentucky, Main, New York, Oklahoma).

Contract To Pay. Even in States which do not recognize a general right to seek contribution in a discrimination case, the Courts might recognize a separate contract right. In deciding against allowing general contribution, the Massachusetts Court stated that a company could protect its interests "by contracting with employees for indemnification." Then, if the employer has to pay for an employee's discriminatory acts, it can sue that employee later in a separate suit under the contract for indemnification. *Thomas v. EDI Specialist, Inc.* (Mass.S.Ct., 2002). If this theory catches on, we may see managers having to sign agreements for non-competition, confidentiality and indemnity.

PROTECTING YOURSELF AND YOUR MANAGERS

Good Faith. Many of the laws on personal liability require a finding of "intention" before there can be a finding against an individual. Evidence of your good faith and fair dealing can be a powerful defense. Always take extra steps to show you were not "out to get" the employee or in a "rush to judge." Intent can either be found from overt evidence or can be inferred from a manager's preferential practices, negligent practices or failure to follow standard procedures. Honesty is a crucial part of good faith. It is important not to overlook details or fill in gaps to try to strengthen a discharge decision. Be honest about the gaps in information when making employment decisions. An honest but mistaken belief is a defense against intentionality.

Training. Managers are falling into liability due to ignorance. Courts are inferring intentionality against companies for their failure to train managers on basic employment issues. Managers are making mistakes and getting named in suits due to their lack of knowledge.

My Lawyer Made Me Do It! A recognized defense against an allegation of personal or corporate intentionality is "Reliance on Advice of Counsel." This interjects another party between you and the liability. Taking the advice of another professional means that the decision was advised by the attorney and not a result of the manager's intent to do harm. This helps insulate the manager from charges of personal intentionality. This means you should get legal counsel involved well before critical employment decisions are made. Last minute or "*post facto*" consultations will not suffice. You need to provide full details; advice of counsel is not a protection if managers hide information or overlook things in order to get the attorney to agree with their position or "side" with them. In fact, this could be additional evidence of intentional deceptiveness.

Follow Rules and Policies. If there are organization policies or procedures, they should be followed. "Short cuts" create liability and lack of documentation. Learn the state and federal laws and follow them, especially in highly technical areas such as FMLA and FLSA. Make certain that all required notices are given and time frames are followed.

Document. Your proof of good faith, and just cause for decisions is worth the paper its documented on. A jury's finding of "pretext" or intentionality is often based on a lack of contemporaneous documentation ("after the fact" documentation looks like a cover up). [Also, request the article entitled, "We Have the Straw that Broke the Camel's Back, but Where is the Rest of the Camel?" by Bob Gregg at rgregg@boardmanlawfirm.com.]

Monitor/Control Functions. Establish a control function to review all significant employment decisions (hire, fire, exempt status) before they are final to ensure they abide by standard procedures and possess sufficient foundation. Monitor the patterns of pay and employment decisions to assure non-discrimination over time and consistency between different managers. Require managers to follow procedures and submit proper documentation. Review personnel files to be sure inappropriate information does not creep in.

Confidentiality/Professionalism. Loose talk about employment decisions becomes "evidence." Managers' angry expressions of frustration or "flip" sarcastic comments about poor performers often come back as evidence of bad faith. Keep employment issues confidential. Stay professional and do not openly vent frustration or sarcasm about employees.

Ethics Committees. Establish ethics policies, a mechanism for review of financial information, and a process for employees to safely bring their ethics concerns to the attention of the organization for an objective review.

INSURANCE MAY NOT COVER YOUR PERSONAL LIABILITY

Employment cases have been the fastest growing category of litigation during the past decade. Employment Practices Liability (EPL) insurance policies have likewise increased in popularity to cover these risks.

EPL policies generally cover the organization's liability. They may not necessarily cover individuals who are also named in a case. There is a wide range of coverage available and organizations are turning to more comprehensive policies. The most common are "Directors and Officers" policies which personally cover board members and key executives.

"Directors and Officers" policies may not cover the lower level managers who are most often accused of being the "direct actors" and named in cases.

"Executive Protection" policies offer personal coverage for more levels of management.

"EPL-Plus" policies can cover the whole array of directors, officers, partners, stockholders and all employees.

However, who is supposedly covered is just the beginning. The "coverage" listing does not guarantee that the insurance will actually work in a given situation. Insurance policies contain numerous "exclusions" or "exceptions." For example, personal liability is often based on a finding of "intentional" actions. Many insurance policies do not cover "intentional" actions by the insured. Liability can also be based on violation of employment laws. Many insurance policies do not cover individuals for "violations of law." These exclusions are used by insurance companies to deny coverage, leaving the person stuck with legal defense bills and paying the plaintiff's damages.

Just as there are a wide variety of policies, each company may have different exclusions. The consumer must carefully review them to see if the policy will actually accomplish the protection they expect.

Buyer beware -- insurance policy did not cover intentional acts. An employer purchased employment practice liability insurance. The insurance policy had an exclusion for any allegation of dishonest, fraudulent, criminal or intentional acts. When an employee sued, alleging intentional racial discrimination under Title VII, 42 USC §1981 and 42 USC §1983, the insurance company refused to defend the claim. The employer sued the insurer demanding coverage, but the court ruled that the policy language was clear. The policy covered "disparate impact"

discrimination but not "disparate treatment" (individual and intentional) discrimination. *Coleman v. School Bd. of Richland Parish* (5th Cir., 2005), citing as authority *Solo Cup v. Federal Ins. Co.* (7th Cir., 1970)).

The message: *Read your policy carefully before you purchase.* "Disparate treatment" is the allegation in the vast majority of discrimination cases. All harassment cases, all individual discipline or discharge cases, most failure-to-hire cases, and most disability cases have disparate treatment allegations. So, in this case, the employer paid a lot of premiums for virtually useless coverage. Generally, a plaintiff cannot get extra punitive damages without an allegation of "intent," so it could be malpractice if the plaintiff's attorney doesn't throw in an allegation of intentionality. This case is a good reminder for employers to review their policy NOW!

Possible Employment Liability Policy Exclusions or Exceptions:

- ERISA or any other law covering fiduciaries of any pension, 401(k) or profit sharing, health, welfare or other employment benefit plan or trust
- Claims for bodily injury, mental or emotional distress, sickness, disease or death of any person, or destruction of any tangible property, including loss
- Claims arising from "discharge or release of pollutants"
- Any deliberately fraudulent act or omission
- Any willful violation of any statute or regulation ("deliberate" and "willful" are standard "pro forma" allegations in many employment cases)
- Failure to comply with a law (a major problem, since most cases are brought alleging violation of employment laws)
- The Fair Labor Standards Act
- The National Labor Relations Act
- The Workers Adjustment and Retraining Notification Act
- Consolidated Omnibus Budget Reconciliation Act - COBRA
- Occupational Safety and Health Administration - OSHA
- Violation of any law relating to securities
- Liabilities arising from or in consequence of liability of others assessed by the insured under any contract or agreement (*i.e.*, independent contractors; leased employees from a staffing agency)
- Contractual obligations
- Fines, penalties or taxes
- Damages resulting from anything the insurer has given loss control advice about, and the insured failed to follow those recommendations

All policies have some exceptions; they vary from company to company. While some policies fully cover what others excluded, no policy had all of the above. One reviewed policy had five single-spaced pages of exceptions; others had only a few key exceptions. Some policies also have special extra coverage features such as "spousal" coverage. This provides coverage in the event a plaintiff seeks marital property in order to satisfy a judgment and tries to collect from the spouse of the person who was an officer or manager in the employment case.

THE UNDEFENDABLE
(Top Managers are "Undefendable" -
Your Harassment Policy is not Enough)

by
Bob Gregg
Boardman & Clark Law Firm
One South Pinckney Street, 4th Floor
P. O. Box 927
Madison, WI 53701-0927
Telephone (608) 283-1751
rgregg@boardmanclark.com

Most organizations understand that good anti-discrimination and anti-harassment policies are the defense against "hostile environment" suits. Unfortunately, the courts have ruled that the "*Faragher/Ellerth* defense" to these cases is NOT available to executive-level managers. CEOs, board members, stockholders, University Deans, and even vice-presidents of HR are the organization's "*alter ego*." Their improper acts can bind the liability, and there is NO defense which can be asserted in court. Most companies are unaware of this part of law. Top managers may be "undefendable" and create strict liability.

The Standard Defense

In 1998 the U.S. Supreme Court decided two "companion" cases regarding harassment under the Equal Employment Opportunity laws, *Faragher v. City of Boca Raton* and *Burlington Industries v. Ellerth.* In what has become known as the "*Faragher/Ellerth defense*" the Supreme Court set forth standards for an employer to make a viable defense of a harassment case:

> To defeat the charges the employer must show that it "exercised reasonable care to prevent and correct promptly any sexually harassing behavior, and . . . that the plaintiff employee unreasonably failed to take advantage of any preventive or corrective opportunities provided by the employer or to avoid harm otherwise." *Faragher v. Boca Raton*, 524 U.S. 775, (1998); *Burlington Industries v. Ellerth*, 524 U.S. at 765 (1998).

Bob Gregg, a partner at the Boardman & Clark Law Firm in Madison, Wisconsin, has been professionally involved in Employment Relations and Civil Rights work for more than 30 years. He has designed the workplace policies and procedures of numerous employers. He litigates and serves as an expert witness in employment cases. A recognized educator and trainer, Bob has conducted over 3,000 seminars throughout the United States and authored numerous articles on practical employment issues.

Based upon this language all knowledgeable employers have implemented Anti-Harassment and Respectful Workplace Policies. In addition, they have implemented other proactive practices such as anti-harassment training, and continuing education and vigilance.

However, that was not the whole quotation

The Supreme Court also stated:

> Vicarious liability automatically applies when the harassing supervisor is either: (1) "indisputably within that class of an employer organization's officials who may treated as the organization's proxy" *Faragher*, 524 U.S. at 789, 118 S.Ct. 2275, or (2) "when the supervisor's harassment culminates in a tangible employment action, such as discharge, demotion, or undesirable reassignment." *Id.* at 808, 118 S.Ct. 2275.

This *limited* the *Faragher/Ellerth* defense. There are two exceptions. The second in the quote is for "*quid pro quo*" harassment, in which there is a tangible employment action such as hiring, firing, or discipline. This creates automatic liability in which the victim may skip the employer's harassment policy, go straight to the EEOC, and the organization gets no "first chance" to know of and correct the issue prior to being liable.

The other exception is in this quote about direct, no defense liability is for "Hostile Environment," harassment by those at the top of the organization. They are the organization. They have so much control that they are deemed to be the "*alter ego*" of the organization and their acts are a "*proxy*" for the organization's acts.

In *Acked v. National Communications*, 339 F.3d 376, 383 (5th Cir. 2003), a Federal Circuit Court, citing *Faragher*, ruled:

> [A] corporation is vicariously liable for the harassment of its President "who was indisputably within that class of an employer organization's officials who may be treated as the organization's proxy."

The Court further suggested that an owner or key person holding a sufficiently high position in the management hierarchy, a proprietor, partner, executive or corporate officer may also be treated as the organization's proxy. Citing *Faragher* at 789-790, 118 S.Ct. 2275; see also *Johnson v. West*, 18 F.3d 725, 730 (7th Cir. 2000).

Other cases which hold that no defense is available when harassment is committed by an employers' *proxy* or *alter-ego* are *Mallinson-Montague v. Pocrnick*, 224 F.3d 1224 (10th Cir. 2000) (where offender was Senior Vice President) and *EEOC v. Reeves*, 2003 WL 22999369 (C.C. Cal.) (offender was founder and CEO).[1]

---

[1] State laws can expand the undefendability to even lower levels. Some state's anti-harassment laws make employers strictly liable for harassment by low level managers, including line supervisors. For example, decisions under the Wisconsin Fair Employment Act have firmly stated that the WFEA is not Title VII. It has different language, and the federal

Adding Insult To Injury - Extra Punitive Damages

In addition to "no defense automatic liability," owners, key executives, officers, Board members or family owners can generate extra punitive damages due to their own lack of attention or noninvolvement in the anti-discrimination process. An all too frequent phenomenon is that executives *excuse themselves* from anti-harassment and other employment relations training. Everyone else is required to go, but those at the top are "just too busy" to attend. This lack of attention looks "*arrogant*" to a jury.

The courts have found that inattention to training is an "extraordinary mistake" and "amounts to reckless indifference" which justifies substantial extra punitive damages. *Anders v. GDC Inc.* (4th Cir., 2002); *Miller v. Kenworth of Dothan* (11th Cir. 2002); *Griffin v. City of Opa-Locka, et al.* (11th Cir. 2001).

So, the very individuals who have the most at risk for their actions, tend to be the least informed and the least involved in the anti-harassment process. This guarantees larger punitive awards in addition to the automatic liability.

Executives should also be aware of the potential for personal liability in some sorts of harassment cases. For instance, 42 U.S. Code §1981 allows suit of individuals for racial or ethnic discrimination, and various state tort actions may also be added. It is not just a matter of the organization's coffers; the individual's own bank account can suffer the hit as well. If the executive is *undefendable* this can be a major personal problem. [For more information, request the article *Are You in the Cross Hairs? (Your Personal Liability in Employment Cases)* by emailing Bob Gregg at rgregg@boardmanlawfirm.com.

What Can Be Done To Diminish The Liability?

The "*alter ego*" liability cannot be eliminated. If a person in a "*proxy*" position engages in tangible discrimination or hostile environment harassment the automatic liability will attach. However, an organization can seek to diminish the chances of the liability.

Training and Involvement

Those at the top of the organization should not skip training. Instead, they should be the primary examples of pro-active behavior, attending training, and encouraging all others to do so.

---

defenses do not apply. The employer is liable "whether or not it addressed the matter and without regard to whether the complainant availed herself of opportunities to complain. There is no affirmative defense available to the employer where sexual harassment is perpetrated by its agent." *Sanderson v. Handi Gadgets Corp.*, ERD Case No. CR200201194 and 89 (Wis. Labor Ind. Rev. Comm., 2005); *Jim Walter Color Separations v. LIRC and Tobias*, 226 Wis.2d 334, 595 N.W. 2d 68 (Wis. Ct. App., 1999).

Executives, school administrators, key managers, and board members should be given information, such as this article, regarding their special status as an "undefendable *alter ego*" at the time they come into a potentially "*proxy position.*"

Appropriate Humor

Special emphasis should be given to humor. "Teasing" or "off the cuff" comments take on a heightened significance when done by someone at the top. The little incidents of racial, ethnic, religious humor or the small sexual innuendoes of an executive can become evidence in court, and can generate big legal expense and liability. Those in "*proxy position*" might read It Was Just a Joke (Boardman Law Firm) or other articles which illustrate the liability effects of what is uttered by executives.

Diminish the *Alter Ego* Status

In small organizations this may be impossible. The owner is the authority and there is little that can be done to balance or diffuse that fact. In larger organizations the division of authority can help protect executives and board members.

Off-Site Complaint Alternative. One does not have to be an officer of the company to be in a "*proxy position.*" The general manager of a standalone facility may in practicality have almost all personnel authority over that operation and be deemed an "*alter ego*" for that location. To diminish this status the organization's anti-harassment and other complaint policies should name both an on-site and a headquarter level, off-site, person to whom employees can raise concerns about harassment. Having only an on-site complaint process means the general managers at the top could block any investigations about themselves or their friends. The off-site alternative provides a way around the general manager and shows that higher levels of the organization are still "in charge," thus diminishing the chances for "*alter ego* liability."

Human Resources Final Approval for Tangible Employment Actions. Another way to diminish automatic, indefensible liability is by assuring that human resources has the final approval authority over all tangible employment decisions (hiring, firing, discipline, promotion, pay adjustments, transfers). This means that an executive or officer does not have absolute control, and employees who believe they are being discriminated against or harassed can raise concerns to HR before a tangible decision becomes effective.

The human resources final authority helps limited the "*alter ego*" status of the officers and executives regarding personnel matters. It helps prevent *quid pro quo* harassment through both a formal review of the validity of a decision and a complaint process to catch problems before they become indefensible. This final approval practice will not change the liability once a tangible employment decision has been implemented. It will not change the "*alter ego*" status of an officer or top executive who bullies or bamboozles human resources into approving a problematic action. The final approval can, if effectively used, be an important safeguard to diminish the chances of that liability.

Special Attention for Board Members or Family of Owners

Boards of Directors often include members who are not employees. The family of owners or of CEOs are not employees. They do not receive the organization's handbook or company policies, do not attend training, and do not get orientation regarding the rules of conduct. Yet they can wield very great authority, especially if they are major stockholders, contributors or family members of the chief executives. They are also frequently present on the organization's premises.

Even though the board members do not sign the employment documents, they can exercise influence. In some instances the key board members are seen as "all powerful" and their every action takes on significance. In the case of *Russell v. McKinny Hospital Venture* (5th Cir. 2000), the extraordinary influence of a shareholder/family member in a family-owned corporation influenced the decisions of all managers and created liability.

Board members and the CEO's family need special attention to assure that they understand their ability to generate liability, and at least a rudimentary understanding of the employment discrimination laws. Board members who do not have this understanding can unwittingly create indefensible liability, often thinking that they are "just joking" or bantering. Since they are in such important positions, no one is going to tell them that they are offending, until the trap door is sprung with the filing of the undefendable case. Information for the board members is in their best interest, and is essential for the protection of the organization.

Conclusion

The standard *Faragher/Ellerth* defense for discrimination cases is not available for acts committed by those at the top. They are *undefendable* and the organization is *undefendable* if the acts constitute harassment or other discrimination.

Organizations can limit this liability through education; final HR review of employment decisions; and off-site alternative methods for complaints. The only way to really stop this indefensible liability is for those at the top, the organization *alter egos*, to be aware, understand the laws, and assure that their own behaviors are models of non-discrimination and a respectful workplace.

1/12/2011
F:\DOCS\WD\25211\149\A1126782.DOCX

ARE YOU IN THE CROSSHAIRS? YOUR PERSONAL LIABILITY IN THE WORKPLACE

Presented by
Bob Gregg
Boardman & Clark Law Firm

WHAT IS PERSONAL LIABILITY ?

WHY YOU?

- Adding a tort action exceeds the caps
- The company may be shaky
- Taxes
- Revenge

MAJOR LAWS WHICH ALLOW PERSONAL LIABILITY IN EMPLOYMENT

- Equal Pay Act
- Family and Medical Leave Act
- Civil Rights Act of 1866
- 42 U.S. Code §1981
- 42 U.S. Code §1983
- U.S. Fair Labor Standards Act

- Wage Claims
- Safe Place Acts
- Employment Retirement Income Security Act (ERISA)
- Health Insurance, Portability and Accountability Act (HIPAA)
- Omnibus Crime Control Act (Electronic Communication Privacy Act)
- Sarbanes – Oxley Act
- Federal False Claims Act

CIVIL SUITS ("TORT" CLAIMS)

- Assault
- Defamation
- Invasion of privacy and confidentiality
- False imprisonment
- Conspiracy to harm employee

<u>but</u>

- Workers Compensation defense if still employed

THE TOP LIABILITY AREAS

- FMLA
- Privacy
- FLSA
- 41 U.S. Code §1981
- Retaliation/Whistleblower Complaints

INSURANCE

- EPL is not enough
- D & O is not enough
- EPL – plus – covering all managers
- Spousal coverage
- Personal insurance

WATCH THE LOOPHOLES

- The fine print may take away the protection you thought you bought!

THE UNDEFENDABLE

- Key managers are the "alter ego" of the organization
- Their acts are binding for liability

THE UNDEFENDABLES INCLUDE:

- Corporate officers
- CEO, CFO, etc.
- HR managers
- Department heads
- Stand alone facility managers
- Board members

PROTECT YOURSELF AND YOUR MANAGERS

- Let them know!
- Adopt good practices and a monitoring system to assure compliance
- Training is the key
- Document
- Use the Qualified Privilege

LET MANAGERS KNOW ABOUT THE LAWS

- Ignorance is the worse defense
- After 60 years, the courts find "I didn't know" to be "extraordinarily unexusable"

ADOPT GOOD PRACTICES AND MONITORING

- Have good practices
- HR should be the advisor and the clearing house for final decisions
- Follow rules and policies (and limit their number)
- Don't let department priorities overcome the policies (*Quon v. City of Ontario*)
- HR is the oversight

TRAINING IS THE KEY

- All managers
- Include board members
- Lack of training is an "intentional disregard" of the law

DOCUMENT

- Contemporaneous documentation
- Document your good deeds
- But not loose emails (electronic discovery)

QUALIFIED PRIVILEGE

1. The information is reasonably necessary for the protection of the interests of one of the parties.
2. The scope of the inquiry is limited to what is reasonably necessary to protect the interest.
3. The information is communicated on a proper occasion.
4. The information is given to and confined to proper parties only.
5. The process is conducted in a proper manner.
6. The entire process is characterized by good faith.

MY LAWYER MADE ME DO IT

- Insulate key executives

CONFIDENTIALITY AND PROFESSIONALISM

A0436036.ppt