

THE LAW &

Business

August 2005

In this issue

- Hot Summer For Civil Rights Cases Pg. 1
- Supreme Court Issues Water-Front Rights Opinion Pg. 3
- Fraser Law Firm Activities of Note Pg. 3

HOT SUMMER FOR CIVIL RIGHTS CASES

By John J. Loose

It has been a busy summer for the Michigan Supreme Court, particularly with respect to Civil Rights cases affecting the employment relationship. In June and July, the Court decided two cases touching on an employer's obligations under the Elliott-Larsen Civil Rights Act, MCL 37.2101, *et seq.* ("Civil Rights Act"). Each of these creates some new bright lines for employers and supervisors acting on their behalf.

First, in the case of Elezovic v. Ford Motor Company, the Court looked at the question of whether an individual agent of the company could have personal liability for violations of the Civil Rights Act. Daniel Bennett, a supervisor at Ford's Wixom assembly plant, allegedly exposed himself to a female employee and otherwise harassed her by making sexually suggestive gestures in front of her and by making sexually related comments. Elezovic never filed a written formal complaint of sexual harassment pursuant to Ford's anti-harassment policy. She did tell two first-line supervisors who were friends of hers about Bennett's conduct, but pledged each of them to

secrecy. As you know, one of the issues as to whether the employer is liable for violations of the Civil Rights Act is whether it was on notice that the conduct was occurring. In dismissing Ford Motor Company as a Defendant, the Court held that "when an employee requests confidentiality in discussing workplace harassment, and the request for confidentiality is honored, such request is properly considered a waiver of the right to give notice." Thus, Ford Motor Company was not officially on notice, even though two of its supervisors had been told of the offending conduct by the Plaintiff, since the Plaintiff specifically asked them to keep that information confidential.

Of greater interest to employers is the second holding in the case. The Michigan Supreme Court held that under the language of the Civil Rights Act, an agent of an employer has personal liability for harassing conduct. Under federal law, only the employer and not its supervisor or agent has liability for civil rights violations. Now the standard under state law is that an agent of the employer will have personal liability under the Civil Rights Act if that agent sexually harasses another employee in the workplace.

This is an important tool for employers. Often supervisors and other agents of the employer do not take anti-harassment training seriously. This is for a variety of reasons, but may in no small part be due to the fact that historically they have not had personal liability for their actions under the Civil Rights Act. Now this has changed.

We suggest that all employers make their supervisors aware of the fact that in every case of supervisor harassment, the

Continued on page 2

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HOT SUMMER FOR CIVIL RIGHTS CASES. Continued...

supervisor will be personally liable, whether or not the employer has a defense itself. This should get the attention of supervisors. Your anti-harassment training materials should be modified to include a discussion of this case and to review a supervisor's personal liability for harassment in the workplace.

The second case of interest is the case of McClements v. Ford Motor Company. In McClements, an employee of AVI Food Systems, a subcontractor which provided cafeteria service at various Ford plants, was allegedly harassed in Ford's Wixom plant by supervisor Daniel Bennett, the same supervisor sued in the Elezovic case, above. Mr. Bennett apparently had a busy year. The alleged harassment included grabbing the employee and kissing her, and verbally soliciting her for sex.

The Plaintiff, having learned that Bennett had an alleged history with harassing other women employees as well as a prior conviction for exposing himself to teenage girls, brought an action against Ford alleging that his actions with respect to her constituted a violation under the Civil Rights Act.

McClements argued that the Act forbids any entity classified as an employer from discriminating against any individual, including non-employees. The Supreme Court disagreed.

In finding that Ford had no liability for the actions of Bennett where he allegedly harassed an employee for a subcontractor of Ford, the Court said that:

"The language of the statute is . . . clear in requiring some form of nexus or connection between the employer and the status of the non-employee. . . . In other words, an employer is liable under the CRA [Civil Rights Act] when it utilizes a prohibited characteristic in order to adversely affect or control an individual's employment or potential employment. . . . Accordingly, an employer can be held liable under CRA for discriminatory acts against a non-employee if the non-employee can demonstrate that the employer affected or controlled the terms, conditions, or privileges of the non-employee's employment."

The Court held that a worker can only bring a civil rights claim against a non-employer Defendant if the worker could establish the Defendant affected or controlled a term, condition, or privilege of the worker's employment. Thus, an applicant could bring a claim since the employer, in deciding not to hire the applicant, was affecting a term, condition, or privilege of the applicant's employment. Similarly, a prior employee, such as a retiree or former employee, might have such a connection. Here the Plaintiff was hired, paid, and subject to discipline by AVI, the subcontractor. The Plaintiff's sole connection with Ford was that AVI chose to place her in the cafeteria in a Ford plant. This does not demonstrate that Ford exercised any control over the terms and conditions of her employment. Consequently, Ford had no liability for Bennett's acts.

Notwithstanding these decisions, claims for sexual harassment will continue to be a source of liability for Michigan employers. Good policies and practices, recurring employee and supervisor training, and prompt and effective investigation and remediation are the keys to avoiding liability.



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SUPREME COURT ISSUES WATER-FRONT RIGHTS OPINION

By Todd D. Chamberlain

On July 26, 2005, the Michigan Supreme Court issued its much anticipated opinion in the case of Glass v Goeckel. This case dealt with a waterfront rights issue, specifically the right of non-property owners to utilize any portion of beachfront property above the existing waterline.

The Court in this matter held that the lakeshore is held in "public trust" by the State and that the State was obliged to defend public rights to usage of the shoreline. Accordingly, a sharply divided Court held that while property owners continue to hold ownership rights to the water's edge, they do not have the right to completely exclude non-property owners. Members of the public may utilize the area below the "ordinary high water mark" for traditional activities such as fishing, swimming and walking. The Court adopted a definition of this area as being where "the presence and action of the water is so continuous as to leave a distinct mark either by erosion, destruction of terrestrial vegetation, or other easily recognized characteristic."

No doubt this opinion will generate further debate. A group of interested property owners has already announced its intention to seek clarification of the Court's ruling. Further litigation evolving from this case may seek to establish other uses as being within the definition of "traditional activities" and it appears likely that actions may present issues as to what constitutes the "ordinary high water mark" in specific situations. In the event that this holding may impact of your personal or business interests, we encourage you to contact our office to further discuss this case and its potential application.



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FRASER LAW FIRM ACTIVITIES OF NOTE

- David Waddell will be speaking at the Global Gaming Expo on the topic of "Managing Health Care Costs" on September 12, 2005 in Las Vegas, Nevada.
- Fraser Trebilcock Davis & Dunlap, P.C. attorneys Ed Castellani, Graham Crabtree and Michael Perry represented Betten Auto Centers in a case before the Court of Claims. Court of Claims Judge Collette issued an opinion and order granting Fraser Trebilcock Davis & Dunlap, P.C.'s motion for summary disposition in the case of Betten Auto Centers v. Michigan Department of Treasury. The court held that the Firm's client, Betten Auto Centers, was entitled to refunds of its use taxes paid to the Department. The Department had charged use tax on all vehicles which Betten had purchased for resale and then resold. The Department argued that Betten had "converted" the vehicles from exempt (statute exempts vehicles purchased for resale) to nonexempt (and taxable) vehicles because the dealership's customers, sales representatives and executives used the vehicles as demonstrators or otherwise used them (to/from work, etc). The Judge agreeing with Fraser Trebilcock Davis & Dunlap, P.C.'s analysis, found that no such conversion had occurred, enforced the clear and unambiguous terms of the use tax statute and found in Betten Auto Centers' favor.

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