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'Inexcusable and Offensive' Behavior Not Harassing as a Matter of Law

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Special to the Legal

Three female sales representatives working for the same manager at Eli Lilly & Co. brought suit against the company for sexual harassment and other types of discrimination. The series of decisions, all under the caption *Tourtellotte v. Eli Lilly & Co.*, 2013 U.S. Dist. LEXIS 54218 (E.D. Pa. April 15, 2013) (plaintiff Ashley Hiser), 54219 (Margaret Tourtellotte), and 54392 (E.D. Pa. April 16, 2013) (Ana Reyes), discuss the parameters of sexual harassment law, as well as an employer's accommodation obligations and scope of a charge of discrimination.

BARBIE DOLLS

The common thread in the cases is that from January 2007 through the end of their tenures with the company, the women worked for Tim Rowland. Each alleged that she was subjected to various levels and types of inappropriate comments by Rowland, beginning with a comment at his first district meeting, when Rowland allegedly announced that he "loved being around women" and referred to the "Barbie dolls" now working in the pharmaceutical industry, according to the opinion. Each woman, however, had distinct allegations of comments by Rowland that each claimed to be sexually harassing.

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For example, Tourtellotte was a new mother who was, at times, allowed to travel with her child, leave meetings to nurse her son and to stay home when her child was sick (there was no Family and Medical Leave Act issue raised). Tourtellotte alleged that Rowland referred to her as the "pretty redhead," gestured toward her when he discussed an article about "suckling on the breast of corporate America" and, when he gave her a poor review, told her that she should discuss with her husband whether she wanted to continue her career as a sales representative, according to the opinion. Tourtellotte also claimed that Rowland asked her whether she was going to be "ditsy-witsy Maggie" or "professional Maggie," the opinion said.

In addition to the "Barbie doll" comment, Reyes complained that Rowland mocked her Hispanic accent, referred to her as a "poor Hispanic woman" and excluded her from a "guy night," according to the opinion. Reyes also complained about Rowland's treatment of Tourtellotte.

Hiser also complained about the "Barbie doll" comment and alleged that Rowland referred to her as "honey" after she had asked him not to, and that he had told her that she needed to get clients to see past her "pretty face," the opinion said.

NO SEXUALLY HOSTILE ENVIRONMENT

The U.S. District Court for the Eastern District of Pennsylvania rejected each separate claim that Rowland had created a hostile work environment on the basis of gender and, for Reyes, with respect to her national origin. For each, the court found that Rowland's behavior, while "inexcusable and offensive," did not rise to the level of "severe or pervasive conduct" sufficient to state a viable claim as a matter of law.

In each of the decisions, the court observed that Rowland's comments "were neither physically threatening nor humiliating" and in each case "fall far short of the level required

to establish the kind of severe, gender- or race-based harassment that is legally actionable." "Discourtesy or rudeness should not be confused with racial or sexual harassment and a lack of racial or gender sensitivity does not, alone, amount to actionable harassment," the opinion said. In Tourtellotte's case, the court also noted that Rowland was alleged to have made inappropriate comments on average about once per month — which "however much they bothered [Tourtellotte] personally, appear to be sporadic, isolated incidents that did not unreasonably interfere with her ability to perform her job."

LEAVES OF ABSENCE

Each of the women eventually took medical leaves of absence due to the alleged stress and anxiety of working with Rowland and each of these leaves led to distinct issues of note.

Tourtellotte initially sought four weeks of medical leave "due to extreme stress and anxiety," which was granted. While on leave, she requested approximately seven months of additional leave. Lilly rejected this request and approved a total of 12 weeks of leave. When Tourtellotte returned to work, she was placed on "medical reassignment" and was given 16 weeks paid time to find another job in the company, as her position had been filled due to business reasons during her absence (as noted, there was no FMLA issue raised). Tourtellotte requested a position in which she would have no contact with Rowland — which the company could not guarantee, although Lilly did identify various sales positions for Tourtellotte to consider. When Tourtellotte failed to apply for another position in the 16-week period, her employment was terminated.

INTERACTIVE PROCESS

Tourtellotte claimed that the company had failed to accommodate her alleged disability (stress and anxiety). The court rejected this claim, finding that Lilly had, in good faith, given her sufficient time to look for another job, but Tourtellotte had "simply made demands about what she wanted and refused to act once her demands were not met." Thus, Tourtellotte failed to engage in her part of the interactive process.

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NO CONSTRUCTIVE DISCHARGE

Hiser claimed that her resignation while on medical leave was a constructive discharge, which provided the adverse action on which she based her sex-discrimination claim. This claim failed, as Hiser failed "to allege conduct that rises to a level that would force a reasonable person to resign." Hiser was not "assigned menial tasks and was not threatened with discharge or demotion," the opinion said. While she did receive a poor performance evaluation, such was "not adverse enough to make a reasonable person walk away from employment." Summary judgment was, therefore, granted.

FAILURE TO EXHAUST

Finally, at the time Reyes filed her charge of discrimination with the U.S. Equal Employment Opportunity Commission, she checked the boxes for race, sex, national origin and retaliation. The "disability" box was left empty. However, Reyes declared in the body of her charge that "due to Mr. Rowland's behavior, I have suffered mental and physical distress and loss of pay. I am currently on medical leave and am taking medication for anxiety as a result of this treatment," according to the opinion. Reyes' complaint included a claim for disability discrimination in violation of the Americans with Disabilities Act. The court found that she had failed to exhaust her administrative remedies with respect to this claim, observing that "it is quite common ... for employees to cite some mental distress or absences which result from alleged discriminatory conduct. If an investigation into disability discrimination is expected to arise [in each of these instances], the EEOC would find itself overburdened." In this light, the allegations did not "reasonably suggest that [Reyes] intended to assert a claim for disability discrimination."

It should be noted that summary judgment was denied on Reyes' claim that she was retaliated against for having filed her charge with the EEOC. However, the significance of the *Tourtellotte* decisions is in the guidance to counsel and clients as to the severity and pervasiveness of (admittedly inappropriate) behavior that will rise to actionable harassment. In this way, the court drew a bright line between the oft-referred to "civility code" and conduct that violates the law.