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Insurance Coverage for Employers' Vicarious Liability:

Discrimination Claims Versus Sexual Harassment Claims—Is There A Double Standard?

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Two recent decisions by the same New York appellate court demonstrate that there appears to be a double standard regarding an employer's right to insurance coverage for vicarious liability arising from discrimination claims on the one hand and sexual harassment on the other. Often in a civil suit the person who has been the subject of the harassment or discrimination sues not only the alleged wrongdoer, but also the deep pockets of the employer. Such a lawsuit is often based on the grounds of vicarious liability, i.e., negligent hiring or supervision of the employee. The insurance company's refusal to pay such claims based on exclusions related to intentional acts or based on grounds of public policy are less compelling in the vicarious liability context. After all, companies buy insurance and pay substantial premiums to protect themselves from negligent conduct, such as failing to supervise employees who, by their own intentional acts, become a liability to the company.

Established Case Law

The New York Court of Appeals recently denied leave to appeal in the case of *Public Service Mutual Insurance Co. v. Camp Raleigh* (1st Dept. 1996) *motion for leave to appeal denied* (N.Y. June 5, 1997). The case established an insurance company's right to disclaim coverage for a host of "employer negligence" causes of action, which often accompany sexual molestation/harassment cases. The Appellate Division held that the insurance company had no duty to defend or indemnify the employer, because it found that the sexual molestation allegations in the underlying action did not constitute an accidental occurrence under the CGL policy.

In *Camp Raleigh*, counselors were sued for sexually molesting minor campers. The complaint stated causes of action for assault and battery for unwanted and voluntary touching in a sexual manner and intentional infliction of emotional distress against the counselors. In addition, the Camp itself, the employer, was sued for negligent infliction of emotional distress and for improper training and supervision of the staff. The First Department held that since the allegations of the complaint did not constitute an "occurrence" under the comprehensive general liability ("CGL") policy. There was no coverage for causes of action which related to negligent training. The court's decision was based solely on the definition of "occurrence" which is the standard definition in CGL policies. The policies at issue defined "occurrence" as "an accident, including continuous or repeated exposure to conditions which result in bodily injury or property damage *neither expected nor intended from the standpoint of the insured*." There was nothing in the record to indicate that from the Camp's standpoint the resulting bodily injury was neither expected nor intended by the Camp.

Walking a Thin Line

Sexual harassment claims can vary greatly. They can be asserted against the sexual harasser and third parties. They can involve conduct ranging from blatant physical touching to lewd comments to accidental touching, flirting or off-color jokes. They can involve an employer's actions of

condoning the bad acts or they can involve complete ignorance on the part of the employer.

The difficulty with the *Raleigh* opinion is twofold. It failed to recognize any differences among sexual harassment claims. The court held that the counselors and the employer were on equal footing. The court ignored the possibility of a factual issue as to whether the Camp had direct knowledge of the alleged conduct. Second, the parties in the case and the court did not address an administrative statement issued by New York's Insurance Department that provides that an employer may receive insurance coverage when it is vicariously liable for an intentionally discriminatory act committed by an employee. Circular Letter No. 6 (1994). The Insurance Department allows such coverage on the belief that an employer has not engaged in any intentional conduct when it: (1) played no active role in committing the act; (2) did nothing to aid or encourage its commission; and (3) may have done all that it possibly could to prevent it.

Proceeding at Risk of Peril

By denying the motion for leave to appeal, New York's highest court missed an opportunity to address the seemingly conflicting position taken by the First Department in the context of an age discrimination claim which applied the Administrative Statement in *American Management Ass'n. v. Atlantic Mutual Ins.* (1st Dept. 1996). (*See February 1997 AKO Policyholder Advisor.*) In that case, the First Department unanimously affirmed, in all respects, a trial court decision holding that insurance companies must defend policyholders against all claims alleging age discrimination. The Appellate Division also affirmed that if an insurance company wrongfully refuses to defend, the insurance company *must* indemnify the policyholder for any settlement or judgment in the underlying action. This means that if an insurance company leaves its policyholder to fend for itself, it does so at its *own* peril.

American Management Association involved Atlantic Mutual Insurance Company's duty to defend and indemnify American Management Association ("AMA") for a complaint alleging "willful" age discrimination under primary and umbrella liability insurance policies. Although AMA's umbrella policy specifically covered "racial, religious, sex or age discrimination," Atlantic Mutual refused to defend or indemnify AMA, asserting that the complaint alleged only intentional, and thus uncovered, discrimination. Atlantic Mutual also refused to defend under the "bodily injury" coverage in its primary policy, even though the underlying complaint alleged "mental anguish." AMA was forced to defend itself, and ultimately settled the claim in order to avoid the risk and expense of a trial.

Five Degrees of Separation

The trial court applied the general rule that if even one allegation of the complaint potentially is covered, the insurance company must defend all claims. The trial court found that included in every claim for *intentional* discrimination is an implied claim for *unintentional* discrimination. Thus, insurance companies have a duty to defend *all* discrimination claims, even if the complaint on its face alleges only intentional discrimination. In addition, the court held that Atlantic Mutual must "reimburse AMA for any reasonable sum paid in settlement" because of its wrongful refusal to defend AMA.

How many degrees of separation are there between discrimination claims on the one hand and sexual harassment claims on the other? What's an employer to do?

1. The best offense is a good defense. Preventing on the job physical and sexual abuse is not simply a matter of ethics anymore, it's a matter of economics. Reevaluate your hiring, supervision and evaluation procedures.
2. Examine your insurance policies. In response to gaps in coverage under CGL policies and the growing array of employment related claims, employers are resorting to recently developed Employment Practices Liability Insurance Polices ("EPLI"). EPLI policies are not standard and their terms, coverage and exclusions vary. Most EPLI policies exclude fines, penalties and punitive damages.
3. Notify CGL and EPLI insurance companies immediately. Don't wait for a summons and complaint to cross your desk.
4. If your employee is also alleging physical injuries, you should notify your workers' compensation/ employers' liability insurance company immediately.
5. Don't forget your umbrella policies. Umbrella policies may "drop down" to pro-

vide coverage in place of a primary policy that does not cover discrimination claims.

6. Fight the insurance company's denial of your claim. Don't take "NO" for an answer. ■

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