SPRING 2025

Gislason & Hunter, LLP

eLAW
LABOR & EMPLOYMENT

Dating Employees: How Employers Can Minimize Liability for Sexual Harassment Claims

by Brittany R. King-Asamoa

Employees can spend thousands of hours working with their coworkers annually. Thus, it is no surprise that the workplace has become a dating pool for some employees. Unfortunately, this can create problems for employers. Obvious issues include decreased productivity and indecent public displays of affection at work amongst dating employees. Safety concerns may also arise when employees are in an abusive relationship, or a jealous partner confronts a customer or coworker about interactions with their partner. But employers must also be cognizant about the potential liability exposure to unlawful sex discrimination and sexual harassment claims in the workplace.

LIABILITY EXPOSURE EXPLAINED.

Federal and Minnesota law prohibit discrimination on the basis of sex. Sexual harassment based on one's sex is a form of unlawful discrimination. Sexual harassment occurs in the workplace when an employee is subjected to unwelcome sexual advances, requests for sexual favors, or other verbal or physical conduct of a sexual nature whereby:

- Submission to or rejection of such conduct is made either explicitly or implicitly a term or condition of employment or basis of employment decisions; or
- Such conduct has the purpose or effect of unreasonably interfering with an individual's work performance or creating an intimidating, hostile, or offensive work environment.

Dating Employees continued on page 2

INSIDE

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Cory A. Genelin
Brittany R. King-Asamoa
Adam N. Froehlich
Devin R. Miller

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DATING EMPLOYEES

continued from page 1

Fundamental to a sexual harassment claim is that the conduct is unwelcome. When the relationship is great, couples may be flirtatious and engage in conduct of a sexual nature at work (e.g. butt slaps, simulating sex, discussing sex, kissing, etc.). This inappropriate conduct can make coworkers uncomfortable. Employers can minimize liability exposure by banning this conduct in the workplace entirely, regardless of whether the individuals are in a relationship or not.

Problems can also arise when the romantic relationship involves a supervisor. A supervisor engaging in behavior with sexual connotations or undertones at work, even if the behavior is only directed to the person whom they are romantically involved with, can unintentionally foster an environment permeated by sexual harassment. Consider the following examples:

- Supervisor Lax on Anti-Discrimination and Harassment Policy: A supervisor may be less likely to address and discipline employees for engaging in conduct that violates the employer's anti-discrimination and harassment policy (e.g. making sexual jokes, sexual gestures, and discussing sex) when the supervisor engages in the same behavior with their girlfriend or boyfriend at work.

- Acquiesce to Relationship; Fear Discipline: Claims can arise when the supervisor treats an employee with whom they are romantically involved with more favorably than others under their supervision. These situations can place employer at risk for quid pro sexual harassment claims, such as when an employee maintains a romantic relationship solely out of fear that rejecting the supervisor's advances would result in termination or other discipline. Conversely, other employees could perceive the supervisor's conduct as fostering a work environment that requires acquiescence to conduct of a sexual nature is a necessary term or condition of employment.

WAYS TO MINIMIZE LIABILITY EXPOSURE.

Establish and Enforce Clear Policies. In addition to anti-discrimination and harassment policies, employers may implement anti-fraternization policies. These policies may minimize employer's liability exposure for sexual harassment claims, when enforced, by accomplishing the following:

- Prohibit all employees from engaging in public displays of affection or inappropriate touching, discussing sexual matters, and engaging in any conduct of a sexual nature while working on the employer's behalf. The employer maintains a zero-tolerance policy prohibiting this conduct, regardless of whether the employee's perform work on or off the employer's premises.

- Clarify in the anti-discrimination and harassment policy that the prohibited conduct will not be tolerated in the workplace, regardless of whether the employees are or were in a relationship.

- Forbid supervisors from engaging in romantic relationships with (1) a subordinate; or (2) any individual the supervisor manages, supervises, or the supervisor has the ability to influence or impact the terms, wages, or conditions of that individual's employment.

- Require employees to report suspected violations of the anti-discrimination and harassment policy they are subjected to or witnessed.

- Identify clear reporting procedures, including alternate points for reporting when the suspected individual engaging in discrimination and harassment is a supervisor. Further, explicitly state that employees shall not be retaliated against for reporting suspected discrimination, harassment, or retaliation.

Dating Employees continued on page 3

DATING EMPLOYEES

continued from page 3

Anti-discrimination and harassment policies and anti-fraternization policies are not foolproof. Nevertheless, these policies are helpful in reinforcing an employer's policy that verbal and physical conduct of a sexual nature in the workplace will not be tolerated even between partners in a consensual relationship. That prohibition alone can minimize sexual harassment claims.

Encourage Disclosure of Romantic Relationships. Despite maintaining an anti-fraternization policy that may forbid relationships amongst employees, employers must recognize that employees may still engage in these relationships. Employers can still monitor potential risk exposure by encouraging employees to disclose their workplace romances to human resources. This disclosure can help the employer avoid placing the couple in a supervisor-subordinate reporting relationship and minimize potential claims of quid pro quo sexual harassment. The disclosure also memorializes the interaction between the employees and relationship are consensual at the time the relationship is disclosed. The effectiveness of this policy is limited to employees' willingness to disclose their relationships.

Consensual Relationship Contracts. Another tool utilized by employers are consensual relationship acknowledgments, which are affectionately called "love contracts." Employers may ask (not require) employees to complete love contracts to notify employers of consensual romantic and intimate workplace relationships. Love contacts are not absolute defenses to sexual harassment claims. However, in the face of an employee's claim of sexual harassment (complainant) against and individual they previously identified they were in a relationship with, the love contract can constitute evidence that, at least at the time complainant voluntarily disclosed the relationship to the employer, complainant was in a voluntary and consensual relationship with the alleged harasser and that such relationship was not the result of sexual harassment. In other words, this could support an argument that the alleged unlawful conduct of a sexual nature was not unwelcome. The love contract further serves as evidence that the complainant knew they could report discrimination or harassment to the employer at any time.

At minimum, love contracts should contain the following information and acknowledgments:

- Employees' voluntarily disclosure of their consensual romantic or intimate relationship.
- Acknowledgments that the employees understand that neither their employment nor any terms or conditions of employment are dependent upon the existence of the relationship.
- Remind employees that they are prohibited from engaging in public displays of affection at work and should not engage in inappropriate touching, discussions of sexual matters, or bring their personal matters into the workplace.
- Reiterate the employer's policy against discrimination and harassment, including the reporting procedures and employees' obligation to report violations of the policy if they feel they are subjected to or witnessed discrimination or harassment.
- Acknowledgment that employment remains at-will (if accurate) and that the love contract does not alter the employment status of the employees, which is and remains at-will.

Employers should consult with their attorneys about anti-fraternization policies and/or love contracts and how these tools can minimize their liability exposure for sexual harassment claims. ■

U.S. Supreme Court Solidifies Standard of Proof for FLSA Exemptions

by Adam N. Froehlich

When employers classify an employee as exempt from the Fair Labor Standards Act's (FLSA) overtime-pay and minimum-wage requirements, the employer must demonstrate that the employee qualifies for an exemption.[1] In litigation, it would be said that the employer "bears the burden of proof." But how high is the bar for proof? In criminal cases, the prosecution must prove the elements of a crime "beyond a reasonable doubt." In civil cases, the default burden of proof is a "preponderance of the evidence," which means that the party with the burden of proof shows a greater than 50% chance that the claim is true, or that it is more likely true than not. In some civil cases, courts apply a heightened "clear and convincing evidence" standard which requires the party with the burden of proof to show that its claim is "highly probable".[2] In its recent decision in *E.M.D. Sales, Inc. v. Carrera*, 604 U.S. 45 (2025), the U.S. Supreme Court clarified the standard applicable when an employer tries to prove an employee is exempt under the FLSA.

E.M.D. Sales, Inc. (EMD) is an international food products distributor operating in the Washington D.C. area which employs sales representatives to "manage inventory and take orders...."[3] A number of sales representatives sued EMD alleging that they were not paid for overtime in violation of the FLSA.[4] EMD argued that the employees were exempt from the FLSA's overtime-pay requirement because they were outside salesmen.[5] After a trial, the U.S. District Court for the District of Maryland found that EMD failed to prove "by clear and convincing evidence" that the employees were exempt and ordered EMD to pay overtime wages and liquidated damages.[6] The Fourth Circuit court of appeals affirmed the judgment of the District Court.[7]

In a 9-0 decision, the Supreme Court reversed the Fourth Circuit, finding that the lower, default, preponderance-of-the-evidence standard applies to when demonstrating an employee is exempt under the FLSA.[8] The Court noted that the FLSA does not specify a standard of proof, and thus applied the default rule because none of the three narrow exceptions for deviating from the default applied.[9] The employees made a number of policy-related arguments as to why the heightened clear and convincing evidence standard should apply, but the Court was ultimately not convinced, and pointed in part to the fact that the preponderance standard also applies in Title VII cases.[10]

Using the preponderance-of-the-evidence in FLSA exemption claims is not new for most of the country. In fact, of the federal courts of appeals that addressed the issue, only the Fourth Circuit had applied the clear and convincing evidence standard.[11] The Eighth Circuit Court of Appeals had not previously addressed the issue, however, and thus the standard sat as somewhat of an open question for Minnesota Employers before the ruling in *E.M.D. Sales*. The Supreme Court's decision ensures uniformity of the standard of proof in FLSA exemption cases across the country.

When classifying employees as exempt, employers should keep the burden of proof in mind. While you probably are not involved in litigation at the time of classification, you may find yourself defending a lawsuit in the future. Knowing that you have the facts necessary to carry your burden of proof will allow you to carry on the litigation with greater confidence and may help bring an early resolution to the case. As always, documentation is important, and employers should regularly review exemptions, keep job descriptions up-to-date, and ensure compliance with any applicable state wage and hour laws, in addition to the FLSA. ■

[1] *See Corning Glass Works v. Brennan, 417 U.S. 188, 196–97 (1974).*

[2] *Colorado v. New Mexico, 467 U.S. 310, 316 (1984) (explaining that clear and convincing evidence requires that the truth of factual contentions be "highly probable").*

[3] *E.M.D. Sales, Inc., 604 U.S. at 48.*

[4] *Id.*

[5] *Id.*

[6] *Id. at 48–49.*

[7] *Id. at 49.*

[8] *Id. at 49–52.*

[9] *Id.*

[10] *Id. at 52–54.*

[11] *Id. at 49 (collecting cases).*

I Received a Minnesota Department of Human Rights Charge...Now What?

by Devin R. Miller

Receiving a charge from the Minnesota Department of Human Rights can feel like a complex and time-consuming process for employers. However, understanding the Minnesota Department of Human Rights procedure for investigating reports of discrimination can ensure you are equipped to manage a Minnesota Department of Human Rights charge if one comes your way.

WHAT IS THE MINNESOTA DEPARTMENT OF HUMAN RIGHTS AND THE MINNESOTA HUMAN RIGHTS ACT?

The Minnesota Department of Human Rights (MDHR) is Minnesota's state agency responsible for enforcing the Minnesota Human Rights Act. The agency investigates complaints of discrimination in areas such as employment, housing, public accommodation, education, and other areas covered by the Minnesota Human Rights Act.

Minn. Stat. §363A, also known as The Minnesota Human Rights Act, is Minnesota's primary civil rights law that prohibits discrimination in many aspects of public life. The act protects individuals from discrimination based on race, color, creed, religion, national origin, sex, marital status, disability, age, and other protected characteristics. The law applies to housing, public accommodation, education, public services, and employment.

WHAT EMPLOYERS SHOULD EXPECT AFTER RECEIVING A MDHR CHARGE.

Workplace discrimination complaints are among the many areas the MDHR investigates. When an employee believes they have been discriminated against by an employer or in the workplace they can file a report with the MDHR. The employee has one year to file a report of the alleged act of discrimination. After an employee files a report, the MDHR will review and determine whether the complaint is covered under the Minnesota Human Rights Act. If the agency determines the complaint is covered, then a charge is filed and sent to the employer.

If you, as an employer, receive an MDHR charge of discrimination that simply means the MDHR determined the employee's complaint is covered under the Minnesota Human Rights Act. It is not a determination on the merits of the claim. However, if you receive a charge, you should not hesitate to act. You will need to submit an answer in response to the employee's allegations. From the date you receive the charge of discrimination you have 30 days to submit a response.

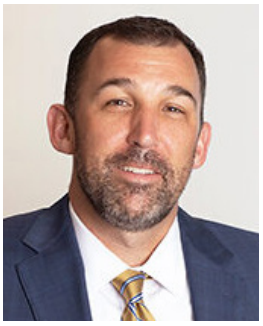
Your answer to the MDHR charge is your opportunity to tell your side of the story. A strong response should refute or clarify any allegations by using facts and documentation. Include your legitimate, non-discriminatory reasons for termination or taking an adverse employment action. Additionally, you may want to provide supporting documentation such as policies, training records, or other witness statements that demonstrate your commitment to compliance with the Minnesota Human Rights Act and workplace laws.

After you submit your response, an investigator from the MDHR will be assigned to the case. The investigator may seek additional documents or interviews with employees. Ensure you are responsive and cooperative with these requests and be aware of the deadlines associated with these requests. The MDHR will investigate to determine whether there is probable cause that the alleged act of discrimination occurred. If the MDHR finds probable cause, the agency will then work with you and the employee to attempt to reach a settlement agreement. If a settlement is unsuccessful, the MDHR will either refer the case to the Minnesota Attorney General's Office or allow the employee to pursue private legal action. If the agency does not find probable cause, then the case is closed.

If you receive an MDHR charge, review the details of the charge; gather any relevant documents including personnel files, company policies and procedures, performance evaluations, attendance records, and disciplinary actions or warnings; and conduct interviews with any individuals who were involved or witnessed the alleged incidents. This will allow you to prepare a strong answer in response to the charge. While you do not need an attorney to represent you, an attorney can help craft a well-structured answer, manage documents and investigations, and help protect you against any further legal risks. ■

Dealing with Sick Calls Under ESST

by Cory A. Genelin



Editor's Note: This article was written on March 12, 2025. The statutes at issue are currently being debated by the legislature. Future legislation and caselaw may alter the decisions discussed herein.

When the Minnesota Legislature rolled out Earned Sick and Safe Time (ESST) in 2023, most employers and HR professionals focused on the benefits the amount of benefits required, the accrual rates, and the broad reason for using ESST. Now that ESST is in full effect, most of the calls I'm receiving from employers are about the mundane details of implementation. In particular: What is to be done when an employee's notice of intent to take sick leave (both in terms of advance notice, and evidence of the need for leave) is lacking. This article will discuss some common situations and what to do about them.

"IF AN EMPLOYEE DOESN'T CALL IN SICK UNTIL 10 MINUTES AFTER THE START OF HER SHIFT, DO I HAVE TO PAY HER ESST?"

Well, that depends. If you're one of the few employers who doesn't have any written sick time policies at all, then yes, you need to pay it. But if that's you, you probably haven't heard of ESST and you're probably not reading this article, so...best of luck to you.

You can and should have a written policy on sick time and that policy should include the strictest language allowed by the statute—Minnesota Statutes section 181.9447, Subdivision 2. Example language would be: "Employees must inform the Company of their need for ESST as soon as the need is foreseeable. Even for prior known needs for ESST, we do not require more than seven days notice; but the Company and your coworkers will appreciate the advance notice so we can plan for your absence. For absences with seven or fewer days advance notice, if an employee does not give notice of the need for ESST as soon as practicable, ESST will be denied"

So long as you have such a written policy, and your employees have written notice of the written policy, then you can deny ESST. That of course raises two more questions:

1. **"How do I know if the notice was 'as soon as practicable' or not?"**

Unfortunately, neither the statute nor case law help us answer this question. I recommend employers start by asking: "Why

didn't you call in until after the start of your shift?" Essentially, you are looking to find out if there was any time between (a) the employee concluding she could not come to work, and (b) her decision to inform you of that fact and (c) why (a) and (b) happened after start time. Real life is unpredictable but it's difficult to imagine a justifiable reason for calling in after shift start other than being so sick that one slept through her alarm, or being too sick to get to a phone.

Even more unfortunate, you really won't have much to go on other than the employee's word. If she tells an illogical story—"I didn't know I was too sick to work until 10 minutes after shift start," (and she has no explanation as to why she didn't show up on time, if she thought she could work)—then you are safe to deny ESST and treat this as an unexcused absence. If she gives you a logically coherent (even if unlikely story) such as "I woke up an hour before shift start, like always, but I was in the bathroom vomiting constantly, and could not have got to my phone until I called" well, I would accept such a story, once. If this is a repeat process, I think you're safe to judge that she could have practically called earlier.

Dealing with Sick Calls continued on page7

DEALING WITH SICK CALLS

continued from page 6

2. "What if I'm wrong, and 10 minutes after shift start was in fact 'as soon as practicable'?"

Again, neither the statute nor caselaw tells us where or how such a disagreement would be litigated. 181.9447 Subdivision 6 says "An employer shall not...retaliate or discriminate against a person because the person has...requested earned sick and safe time[.]" This is why in both our handbooks, and in our written discipline we draw clear distinctions between time off, and giving notice of time off.

If you wrote up this employee for calling in after shift start, you would want to make it clear that she is NOT being written up for asking for ESST. She's being written up for failing to call in before shift start. Separately, she's being denied ESST by operation of your notice policy, which the statute explicitly allows you to have and enforce.

"I HAVE AN EMPLOYEE WHO I KNOW PLAYS IN A BEER BALL SOFTBALL LEAGUE THURSDAY NIGHTS IN THE SUMMER. ABOUT HALF THE TIME, HE'S 'SICK' ON FRIDAYS. WHAT CAN I DO ABOUT THIS?"

If you're an employer looking to end the article on a positive note, you probably should have stopped reading at the end of the last section.

Unfortunately, an employer can't require a doctor's note unless the ESST is used for more than three consecutive scheduled work days. (Minn. Stat. § 181.9447 Subd. 3(a)) More unfortunately (I'm using that word a lot in this article) there is no definition of what constitutes a "mental or physical illness...or other health condition;" under Subdivision 1. A hangover is a "health condition" and there's no exception to ESST for avoidable health conditions. So, this is covered by ESST.

On top of that, Subdivision 6 makes it illegal to retaliate against this employee in any way for taking ESST, and you can't discipline him for off work imbibing.

The only thing an employer can do to minimize this behavior is to make sure it costs the employee in some way. This is why I recommend two optional provisions in your leave policy. First, you should have a "two-bucket" system of leave—one including sick time that is no more generous than what the statute requires; and another for vacation which includes longer required notice periods for taking vacation. Second, you should pay out ESST at the end of the year so that this employee is costing himself money by burning his sick time in this way.

Minnesota's Earned Sick and Safe Time forces employers and employees into a one-size fits all relationship in terms of sick time benefits offered. If abused, it also forces responsible employees to subsidize employees willing to exploit the system. As an employer, you owe it to your good employees to minimize this disruption and enforce what reasonable measures the law still allows. ■

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