



LABOR & EMPLOYMENT DEPARTMENT

ALERT

ONE OFFENSIVE COMMENT SUFFICIENT TO PRECLUDE DISMISSAL OF HOMOSEXUAL EMPLOYEE'S HARASSMENT CLAIM

By Ian W. Siminoff

On August 13, 2008, the New Jersey Appellate Division issued a significant decision, permitting a homosexual employee's claims of wrongful termination, harassment, and intentional infliction of emotional distress to go to trial based upon a single comment – "stupid fag" – allegedly made by the employee's immediate supervisor.

The case appears to be the first reported decision by a New Jersey court that has permitted a plaintiff, other than an African-American asserting race bias, to get to a jury on a harassment claim based solely upon a single alleged harassing comment. In essence, this case establishes a zero-tolerance threshold for offensive supervisory comments directed at gay subordinates in the workplace.

The court also appears to have adopted the controversial "cat's paw" theory of liability, which holds a company accountable for a non-decisionmaker's alleged discriminatory bias where that bias contributed to the ultimate decision to

terminate because the unbiased decisionmaker relied upon the observations or judgments of the biased non-decisionmaker.

We recommend that employers immediately discuss this decision with their supervisors so that they are clear regarding the strict level of scrutiny applied to anti-gay comments in the workplace and the "cat's paw" theory of liability.

It is possible that this decision will have a ripple effect with other New Jersey courts, making them more inclined to find a single offensive comment sufficient to withstand summary judgment and go to trial in other protected contexts, i.e., gender, age, religion, national origin, etc. We will have to wait and see. Stay tuned.

For more information about this topic, contact the author at 973.994.7507 or isiminoff@foxrothschild.com, or a member of the Labor & Employment Department. Visit us on the Web at www.foxrothschild.com

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