

# CLIENT ALERT

## Employment & Labor

May 2006

Volume VIII No. 1

### Sex, Lies, Gossip and The Red Rover Witness

In *Fitzgerald v. Stanley Roberts, Inc.*, the New Jersey Supreme Court recently ruled on a number of interesting evidentiary questions. In particular, the Court allowed witnesses to present “gossip testimony” about the company president’s prior sexual relationship with a former employee, allowed character witnesses testimony as to the reputation and truthfulness of a plaintiff claiming sexual harassment, permitted female employees to testify that the president sexually harassed them as well, and allowed the expert psychiatrist originally retained by the plaintiff to be called as a witness for the defense.

#### The Facts

In 1996, plaintiff Jennifer Fitzgerald began working for Stanley Roberts, Inc., an importing and distributing company. Fitzgerald claimed that from the time she was hired and continuing throughout her employment, Edward Pomeranz, the company president, sexually harassed her. In 1998, plaintiff was terminated two weeks after she allegedly reported an incident of sexual harassment to the company’s controller. She filed a lawsuit in 1999, in which she claimed that she was subjected to a hostile work environment, *quid pro quo* sexual harassment and retaliatory discharge under the New Jersey Law Against Discrimination.

#### Gossip Testimony

Plaintiff sought to introduce gossip testimony, or more specifically testimony regarding statements made outside of the courtroom about the personal or private affairs of others. The gossip testimony was intended to show that defendant Pomeranz had a sexual relationship with another employee. The Supreme Court held that this gossip about defendant Pomeranz was hearsay evidence and thus was not

admissible for the purpose of proving that he did, in fact, have a sexual relationship with another employee.

The Court did admit the testimony, however, for a limited purpose on the basis that it was “relevant to establishing the general character of the workplace, to the effectiveness of the sexual harassment policy, and to rebutting witness testimony offered by defendants that the atmosphere of the office was subdued.” The Court stated that in order to ensure that jurors use gossip evidence for the correct purpose, the trial judge must give a clear instruction to the jury so the jurors understand the appropriate use of the gossip testimony.

#### Reputation and Opinion Testimony

Next, defendants proposed to call plaintiff’s co-workers to testify that, based on their opinions and her reputation, plaintiff was untruthful. According to plaintiff, the individual incidents about which defendants proposed to offer testimony that she was a liar were inconsequential exaggerations that were “petty and inflammatory.” Relying on the limitations in *N.J.R.E.* 608 and 405 on the introduction of character evidence and on proving a character trait by specific instances of conduct, the trial court barred co-workers from testifying about their opinions and plaintiff’s reputation for truthfulness. The Appellate Division affirmed. The Supreme Court reversed, holding that “[i]n this case in which credibility was pivotal, defendants should have been permitted to present both opinion and reputation evidence regarding plaintiff’s character for truthfulness without reference to specific instances of conduct ...It fell to plaintiff to impeach that testimony by attacking, for example, the character witnesses’ bias or interest in the case, or by offering character witnesses of her own.”

#### Harassment of Other Female Employees

Evidence that other female employees were subjected to sexual harassment at Stanley

Roberts was also admitted. The Supreme Court held that plaintiff's co-workers could testify that Pomeranz sexually harassed them, but that the jury could only consider this evidence if plaintiff personally witnessed the conduct. The Court reasoned that the testimony was relevant both as to the effectiveness of Stanley Roberts' sexual harassment policy as well as to refute evidence that sexual harassment was not a problem at the company. Moreover, the Court held that the evidence may be relevant to show Pomeranz's motive or intention regarding plaintiff's retaliation and *quid pro quo* harassment claims.

### The "Red Rover" Witness

Finally, after filing her lawsuit, plaintiff retained psychiatrist Dr. William Nadel to testify as an expert witness on her behalf. Dr. Nadel

wrote an expert report in 2001 after reviewing plaintiff's deposition testimony, interviewing plaintiff, and reviewing statements from plaintiff's examining physician and co-workers. Dr. Nadel concluded that plaintiff suffered from a "major depressive disorder" and post-traumatic stress disorder due to the sexual harassment she endured. Dr. Nadel reviewed additional evidence after drafting his 2001 expert report, including plaintiff's claims in another lawsuit against her landlord where she alleged very similar injuries. Thereafter, Dr. Nadel withdrew his diagnosis because he no longer believed that plaintiff's conditions resulted from a hostile work environment.

Both the trial court and the Appellate Division ruled that defendants could not call Dr. Nadel as their testifying

expert because he was originally retained by plaintiff. The Supreme Court reversed, ruling that defendants could call this "Red Rover" witness to testify as a defense expert. Because the substantive opinion of the expert was relevant, and not his previous relationship with a party, the Court held that evidence about the expert's original retention was barred unless the original retaining party opened the door by questioning the expert's qualifications.

### Conclusion

The *Fitzgerald* decision emphasizes the importance of anticipating testimony about the actions and comments of employees other than the plaintiff, as this testimony may be admissible to show the general character of the workplace. As always, an essential way for an employer to protect itself is to adopt anti-harassment policies and to adhere to the procedures identified therein to show to a court that the procedures were followed and the policies are effective. In addition, it is a prudent reminder of the need to fully disclose the facts to a testifying expert witness. An employer who shields essential facts from its testifying expert is exposing itself to the possibility of a "Red Rover" witness.

*We send these Alerts to our clients and friends to provide information on recent developments in the law. The Alerts, however, should not be relied on for legal advice in any particular matter.*

### Subjective Evaluations To Be Used with Caution in a RIF

In *Tomasso v. Boeing Co.*, the Third Circuit reversed a grant of summary judgment against plaintiff on his claim that he was selected for layoff in a reduction in force ("RIF") because of his age. After almost forty years of service, Boeing laid off plaintiff, along with six other employees, all of whom were over the age of forty. Plaintiff claimed that the reasons advanced by Boeing for his selection were pretextual.

For at least ten year prior to the RIF, Boeing had used a retention rating system under which employees who had worked for Boeing the longest would be the least likely to be laid off during a RIF. Just prior to the RIF, Boeing eliminated that system and instead relied on subjective managerial evaluations to decide which employees to lay off in the RIF. Under the new system, those employees who received the latest rating were laid off first. All seven workers who received the lowest scores were over the age of forty.

Plaintiff received the lowest ranking in his department. Although plaintiff's manager considered all evaluated employees to be "good performing employee[s]," Boeing argued that it decided to lay off plaintiff because his manager found that he was disinterested in a particular method of product inspection, unwilling to share his technical knowledge with co-workers, and needed improvement in organization and communication.

After reviewing the evidence, the Third Circuit held that plaintiff had put forth evidence contradicting some, but not all, of the core facts upon which Boeing claimed to have relied in its selections for the RIF. Accordingly, plaintiff was permitted to proceed on his claim that he was selected for layoff based on his age. The lesson is that rejection of some of an employer's rationales may sufficiently undermine an employer's credibility that the factfinder will disbelieve the remaining rationales, even though the employee does not produce evidence to contradict them.

For further Employment & Labor information, please contact:

David W. Garland, Co-Chair  
Employment & Labor  
973-643-6390  
[dgarland@sillscummis.com](mailto:dgarland@sillscummis.com)

Lester Aron, Co-Chair  
Employment & Labor  
973-643-5795  
[laron@sillscummis.com](mailto:laron@sillscummis.com)

### New Jersey

One Riverfront Plaza  
Newark, NJ 07102  
Tel: 973-643-7000  
Fax: 973-643-6500

[www.sillscummis.com](http://www.sillscummis.com)

### New York

30 Rockefeller Plaza  
New York, NY 10112  
Tel: 212-643-7000  
Fax: 212-643-6500