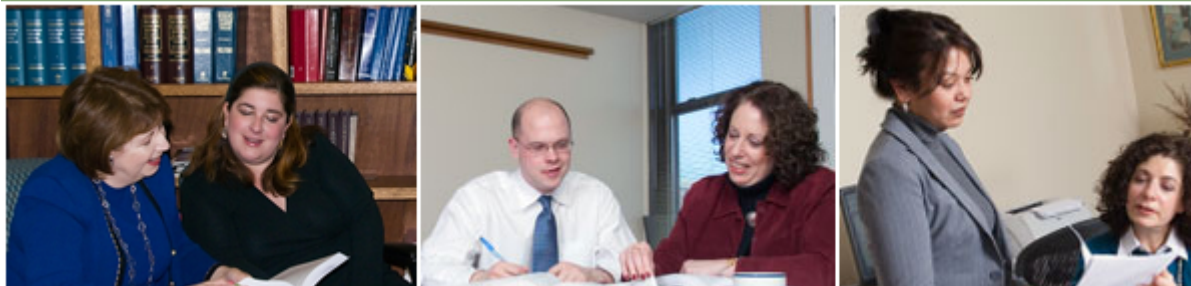


SPRING 2009 *UPDATE*

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Schoeman, Updike & Kaufman, LLP, with offices in New York and Chicago, is a women-owned firm concentrating in litigation, real estate and business counseling. Our clients range in size from Fortune 50 companies to small privately held businesses. We focus on achieving the business results our clients seek. We welcome opportunities to partner with other law firms. Our quarterly newsletter presents news about the Firm and original articles about legal issues. In this issue, our commentary focuses on employment litigation.

Firm Wins Jury Defense Verdict for Client

On March 2, 2009, [Stephanie A. Scharf](#), [Sarah R. Marmor](#) and [Gayle A. Stein](#) won a complete defense verdict after six days of trial in an age discrimination case in federal court in Chicago. Plaintiff, a sales representative who had been terminated by the Firm's pharmaceutical company client after a physician complained about her inappropriate marketing techniques, sued the company alleging that the stated basis for her termination was pretextual and that she was a victim of age discrimination. The defense was especially effective in presenting data about employee hiring and promotion at all levels of the company, and in focusing on the employment policies that were repeatedly conveyed to the plaintiff, which she failed to follow. The 8-person jury deliberated for an hour rendering a unanimous defense verdict.

Partner Mary L. Smith Nominated for a Department of Justice Position

On April 8, 2009, [Mary L. Smith](#), partner in the Chicago office, was nominated by President Obama to be Assistant Attorney General, Tax Division, Department of Justice.

Ms. Smith specializes in [complex litigation](#), regulatory practice, and government investigations. Before entering private practice, she served in the Clinton White House as an Associate Counsel to the President and Associate Director of Policy Planning.

To view the complete White House Announcement (PDF), please [click here](#).

News About the Firm

[Firm Confirms Arbitration Award and Secures Judgment for Full Award, Plus Legal Fees, for One of the Nation's Largest Producers of Poultry Products](#)

Nancy A. Connery
Published in The Practical Real Estate Lawyer's Manual

Mindy H. Stern Elected a Fellow of the American College of Real Estate Lawyers (ACREL)

[Beth L. Kaufman Elected 2009-2010 Treasurer Of the National Association of Women Lawyers](#)

Update on the Law: Illinois Imposes Strict Liability for Sexual Harassment by any Supervisor

by: [Stephanie A. Scharf](#) and [Sarah R. Marmor](#)

Stephanie A. Scharf and Sarah R. Marmor, resident in the Chicago office, represent corporations in complex litigation, including commercial, tort and employment defense. Here they describe the Illinois Supreme Court's new decision about sexual harassment, which presents challenges for any employer based in Illinois or with Illinois employees.

In an unusual departure from federal law, and from virtually every other state's law, the Illinois Supreme Court decided on April 16, 2009, that an employer can be strictly liable for "hostile environment" sexual harassment committed by a supervisor, even one who has no supervisory authority over the plaintiff and no ability to influence the plaintiff's terms and conditions of employment. *Sangamon County Sheriff's Department v. Illinois Human Rights Commission*, _N.E. 2d_ (2009 WL 1011986).

The Sangamon County Opinion

The case arose from sexual harassment claims brought by a female records clerk employed by a county sheriff's department. The harasser was a male supervisor who did not supervise the plaintiff and worked in a separate division of the sheriff's department. The initial harassment consisted of an invitation to a bar, supposedly along with many other employees although it turns out they were not invited; a forced kiss on the drive home from the bar; an uninvited visit to the plaintiff's home; and an invitation to go to a motel for the night.

The plaintiff at the time did not report these events to the sheriff's department or any of her supervisors. A few months later, the plaintiff received a harassing letter that was traced to the same supervisor. The sheriff advised the supervisor not to have any contact with the plaintiff, gave the supervisor a 4-day suspension, and warned that any further actions would result in a harsher penalty including possible termination.

The plaintiff later filed charges of sexual harassment against the sheriff's department in the Illinois Human Rights Commission. The Commission concluded that there had been sexual harassment based on a hostile work environment and found as a matter of statutory law that the Sheriff's Department was strictly liable for the misconduct because the harasser was a supervisory employee. 775 ILCS 5/2-102(D) (West 1998). The Illinois Court of Appeals reversed, finding that the employer was not liable because a supervisor with no oversight of the plaintiff was simply a co-employee for purposes of sexual harassment claims and the employer took reasonable corrective measures upon learning of the harassment.

The Illinois Supreme Court reversed, and reinstated the finding of liability against the employer. Limiting language in the Act -- that an employer shall be responsible for sexual harassment by nonemployees or nonsupervisory employees only if the employer is aware of the conduct and fails to take reasonable corrective measures -- did not apply because the harassing supervisor was "neither a 'nonemployee' nor a 'nonmanagerial or nonsupervisory employee.'" The court also grounded its decision in public policy, noting that there is sufficient identity between employer and supervisor to presume that an employer has notice of sexual harassment by a supervisor and, since such managerial personnel are the "public face" of the employer, to hold an employer strictly liable for sexual harassment by its supervisory employees. The court also indicated that a liberal reading of the statute "insures that victims have full incentive to report harassment," especially when confronted with supervisors who are "better connected and have greater job security."

Implications for Employers

Sangamon County greatly broadens the type of sexual harassment claim for which companies

[Firm Wins Dismissal of Lawsuit Arising from Alleged Radiation Exposure](#)

[Nancy A. Connery Speaker at Practising Law Institute Program](#)

[Norman L. Greene Attends American Bar Association Rule of Law Initiative \(ABA ROLI\) Conference](#)

[Mindy H. Stern Chairs New York City Bar Association Program](#)

[Mary L. Smith Testifies at "State of Diversity in the Legal Profession" Hearing at ABA](#)

[William J. Lippman, Author, "Condominium and Co-op Desk Book - A Practical Guide to Commercial and Residential Properties"](#)

[Barbara A. Wald Joins Chicago Bar Association Judicial Evaluation Committee](#)

[Stephanie A. Scharf, Speaker at Counsel to Counsel Summit](#)

may be found liable. Companies that are either headquartered in Illinois or have Illinois operations are within the reach of the Illinois Human Rights Act. On that basis, *Sangamon County* invites more sexual harassment filings under the Illinois Human Rights Act, either in tandem with or in place of claims under Title VII. We also expect that plaintiffs will try to broaden the reach of *Sangamon County* to encompass other forms of discrimination, not just sexual harassment. Another possible consequence is that plaintiffs may more frequently choose to file sexual harassment claims under the Illinois State Court, where a judge may be expected to adhere more assiduously to an Illinois Supreme Court decision construing an Illinois statute.

As a practical matter, training against sexual harassment should now expressly encompass the *Sangamon County* lesson. When a supervisor harasses *any* employee - whether the harassed employee is a direct supervisee or not - the employer may be held liable for sexual harassment even though it acted promptly and properly to sanction the offending supervisor and prevent any other misconduct.

Members of the Firm's [Employment Practice](#) are available to answer your questions and to assist in developing appropriate training programs.

For further information, please contact [Stephanie A. Scharf](#), [Sarah R. Marmor](#) or [Beth L. Kaufman](#).

Update on the Law: The Supreme Court Upholds Union-Negotiated Mandatory Arbitration of Statutory Discrimination Claims

by: [Erin D'Angelo](#)

Erin D' Angelo, resident in the New York office, concentrates her practice in employment and labor law. She has significant experience defending employers in federal and state courts, administrative agencies and self-regulatory organizations in cases involving all aspects of labor and employment law.

On April 1, 2009, the United States Supreme Court issued its decision in *14 Penn Plaza LLC v. Pyett*, holding that a provision in a collective-bargaining agreement ("CBA") requiring arbitration of claims brought under the Age Discrimination in Employment Act ("ADEA") is enforceable under federal law. This decision is significant to all employers who have employees who are subject to CBAs, as it permits employers and unions to negotiate a requirement that employees subject to the CBA must arbitrate statutory employment discrimination claims.

In *14 Penn Plaza*, the plaintiff employees were employed pursuant to a CBA negotiated by the Service Employees International Union, Local 32BJ, the exclusive bargaining representative of building services industry employees in New York City, and the Realty Advisory Board, a multi-employer bargaining association for the New York City real estate industry that negotiated on behalf of 14 Penn Plaza. The CBA explicitly provided that statutory discrimination claims, including those arising under the ADEA, are subject to the CBAs grievance and arbitration provisions as the sole and exclusive remedy for violations.

After the employees were reassigned to different job duties when their employer entered into a new contract for security services, the Union, on behalf of the employees, filed grievances challenging the reassignments on the grounds of age discrimination and violations of the CBA. When the Union failed to obtain relief under the grievance procedure, it requested arbitration for the statutory and contractual claims. The Union, however, withdrew the age discrimination claim after determining that it could not legitimately object to the reassignments as discriminatory because it had consented to the contract that resulted in the reassignments.

The employees pursued their age discrimination claims in federal court. The employer moved to compel arbitration under the Federal Arbitration Act on the grounds that the CBA required the arbitration of all statutory claims, including ADEA claims. The District Court denied the employer's

motion to compel and the Second Circuit affirmed such denial on the ground that the Supreme Court's 1974 decision in *Alexander v. Gardner-Denver Co.* forbids the enforcement of CBA provisions requiring employees to arbitrate their statutory claims.

In *14 Penn Plaza*, the Supreme Court reversed the Second Circuit's decision and held that the National Labor Relations Act authorized the Union and the RAB, negotiating on behalf of 14 Penn Plaza, to negotiate in good faith and agree that employment-related discrimination claims must be resolved in arbitration. As a result, the Supreme Court explained, the CBAs mandatory arbitration provision must be enforced by the judiciary unless the ADEA itself precludes arbitration, which the Court concluded it did not.

The Supreme Court explained that it was not overruling *Gardner-Denver*, but that *Gardner-Denver's* holding was narrower than the interpretation relied upon by the Second Circuit. It did not prohibit the enforcement of provisions requiring arbitration of statutory claims in CBAs. Rather, *Gardner-Denver* held that the arbitration of contractual claims did not preclude subsequent judicial resolution of statutory claims where the CBA did not cover statutory claims. The Court also reiterated that mandatory arbitration provisions do not waive any substantive rights under the ADEA, but waive only the right to seek relief from a court in the first instance.

The Court further clarified that any language in its prior decisions suggesting that statutory employment claims were not appropriate for arbitration was based on misconceptions about arbitration that the Court has since abandoned. In addressing the Court's previously raised concern that a conflict-of-interest may arise when the Union weighs the collective interest of all employees against that of the individual, the Court concluded that it could not rely on judicial policy concern as a source of authority to introduce a qualification into the ADEA that is not found in its text. Further, the Court found that protections against this potential conflict-of-interest already exist through the Union's "duty of fair representation" and subjection to liability for discrimination under the ADEA itself, and the individual's right to file discrimination claims with the EEOC and the NLRB.

Assuming that Congress does not enact legislation exempting statutory discrimination claims from arbitration, it is now clear that a union-negotiated CBA may waive union members' right to a judicial forum for statutory claims. To that end, employers should review the arbitration provisions of their existing CBAs to determine if the provisions are enforceable under *14 Penn Plaza* for statutory claims. If not, employers may want to consider negotiating for revisions when the contracts are up for renegotiation. Remember, the mandatory arbitration clause must use clear and unmistakable language establishing that the statutory claims are subject to arbitration, must identify the specific statutory claims subject to arbitration, and must not waive any substantive statutory rights, including the right to all remedies available under the law.

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