

**“DISCLOSURE”:
THE PLAINTIFF’S PERSPECTIVE**

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MEMORANDUM

From: Elizabeth S. Bair

To: File

Re: Sanders v. DigiCom, Meredith Johnson – The Plaintiff's Perspective

From the plaintiff's perspective, in this and the vast majority of cases, the importance of mediation cannot be stressed enough. Mediation is a tool utilized by employment lawyers on an ever-increasing basis as a cost-effective way to resolve disputes. Mediation is especially important for plaintiffs given the fee-shifting nature of state and federal anti-discrimination statutes. The longer a case goes on, the more difficult it becomes to settle in that the attorney's fees increase dramatically and are an ongoing element of plaintiff's damages. Early alternative dispute resolution (in this case, mediation) is an effective way of preventing cases from spiraling out of control and becoming more about attorneys' fees than the client's damages. Luckily, because of the embarrassing nature of this incident and the upcoming merger, together with the fact that the defendants know it would be virtually impossible to obtain summary judgment given the fact-sensitive nature of this dispute, mediation was not a hard sell.

The EPLI insurance should be a driving force in this mediation. We have advised Mr. Sanders that while there are no guarantees, it has been our experience that insurance carriers are somewhat uneasy about he said/she said sexual harassment cases where the allegations are as graphic as they are in the instant matter. We

understand the adjuster will be at the mediation, and will no doubt have some authority, which is also a positive sign that the carrier is taking the matter seriously.

Going into the mediation, there are some things in our favor and some areas that are of concern. We have advised our client that because of the allegations of physical assault/touching, the parties can potentially structure the settlement in such a way that it will be characterized as settlement of intentional tort claims and/or bodily injury, therefore, providing a more favorable tax situation for him. This structure will also benefit the carrier because the settlement will not have to be "grossed up" to account for adverse tax consequences.

The other factor in our favor is the fact that the company obviously seeks to keep our client's allegations quiet given the pending merger. We have also advised Tom that from the conversations with DigiCom's attorneys, it seems that there is some hostility between Ms. Johnson and the company regarding Ms. Johnson's alleged behavior. We have advised our client that this hostility between DigiCom and Ms. Johnson is helpful because we would like to create as much chaos as possible in furtherance of pressuring all involved for a settlement.

The case, however, is not without its concerns. Liability against the company for the October incident could be problematic under Title VII under the employer-friendly Faragher and Ellerth standards.¹ If the company has a complaint procedure and prevention training, the company will make the argument that the complaint procedure

¹ Many states, like New Jersey, have more favorable laws dealing with sexual harassment in that they do not impose the affirmative defense analysis set forth in Faragher and Ellerth. Moreover, states like New Jersey do not have damages caps. Obviously, if your state law has more favorable law, a Title VII claim should be avoided.

and prevention training absolves them from liability. Plaintiff will have to push the quid pro quo theory of liability, because where advancement (or survival) in the company is tied to succumbing to sexual favors, the employer cannot use its preventative measures as an affirmative defense. Moreover, although we have claims of assault and battery against Ms. Johnson, our client will be unable to sustain Title VII claims against her because there is no individual liability under said law.

Factually, we have advised our client that it will be difficult to convince a mediator and/or a jury that he was harassed by Ms. Johnson, especially given the romantic history between the two. Despite our efforts to get more information from him, Mr. Sanders has been very vague about his relationship with Ms. Johnson in the past; we hope to gather more information at the mediation concerning the nature of this relationship (i.e., how long it lasted, whether the two lived together, etc.). We are also concerned because Mr. Sanders has admitted to us that during brief periods during the incident in question, he participated in sexual conduct with Ms. Johnson and may have given her the impression that he was interested in escalating the activities. Obviously, this is not something we are going to stress at the mediation. We have advised Mr. Sanders that despite the fact we will have some leverage against the company, the case is in no way a "slam dunk" given the factually sensitive details of what happened in Ms. Johnson's office. Mr. Sanders is also very interested in bringing this matter to a quick resolution given the toll this has taken on his psychological health and his marriage. We expect that his wife will come with him to the mediation for moral support.

We have attached as Exhibit A is a sample mediation statement we plan on forwarding the mediator prior to this case, which is based on a limited information we have before us. It has been our experience that by giving the mediator as much factual detail as possible, he/she can appropriately evaluate the case in a more efficient fashion. The mediation statement assumes that Mr. Sanders had been employed the company since 1990 and that the incident in question occurred on October 6, 2003. Also, it assumes that Mr. Sanders has suffered psychological injury based on the events in Ms. Johnson's office.