

DEVELOPMENTS IN HARASSMENT LAW:

UPDATE FOR 2002-2003

for

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DEVELOPMENTS IN SEXUAL HARASSMENT LAW: UPDATE FOR 2002-2003

I. The Basics of Sexual Harassment Law

A. Title VII Prohibits Sexual Harassment

Title VII of the Civil Rights Act of 1964, 42 U.S.C. §§ 2000e et seq., “forbids actions taken on the basis of sex that ‘discriminate against any individual with respect to his compensation, terms, conditions, or privileges of employment.’” Clark County School Dist. v. Breeden, 532 U.S. 268, 270, 121 S.Ct. 1508, 1509 (2001). Sexual harassment constitutes such discrimination when it is “so severe or pervasive as to alter the conditions of [the victim’s] employment and create an abusive working environment.” Id. (internal quotation marks removed).

To prevail on a claim of sexual harassment, a plaintiff must establish that: (1) she was subjected to unwelcome sexual harassment; (2) the conduct was severe or pervasive enough to create a hostile work environment; (3) the conduct was directed at her because of her sex; and (4) there is a basis for employer liability. The standard for employer liability depends on whether the harasser was a co-worker or a supervisor of the victim. If the former, the employer is liable only if it was negligent; if the latter, the employer is strictly liable, subject to the affirmative defenses discussed below.

B. Oncale Applies Title VII to Same-Sex Harassment

In Oncale v. Sundowner Offshore Servs., Inc., 523 U.S. 75, 118 S.Ct. 998 (1998), the Supreme Court held that Title VII bars harassment because of the victim’s sex, even if the victim is of the same sex as the harasser. The Court established that the fundamental inquiry is whether the harassment occurred because of the victim’s sex, noting that harassment “need not be motivated by sexual desire” to violate Title VII. Id. at 80.

C. Faragher and Ellerth Establish an Affirmative Defense to Liability

In Faragher v. City of Boca Raton, 524 U.S. 775, 118 S.Ct. 2275, and Burlington Industries v. Ellerth, 524 U.S. 742, 118 S.Ct. 2257, both decided on June 26, 1998, the United States Supreme Court addressed the circumstances under which an employer can be held liable for sexual harassment perpetrated by one of its supervisors.

The Supreme Court observed that Title VII was enacted not only to provide redress for unlawful discrimination, but also to prevent such discrimination. The goal of preventing discrimination would be promoted, the Court held, by imposing on employers strict liability for the conduct of their supervisors under certain circumstances, because, as between employers and employees, the employers are better able to prevent discrimination by such supervisors. Specifically, the Court held that an employer is

strictly liable for a supervisor's sexually harassing behavior whenever the supervisor is the employer's "alter ego" or the supervisor has taken a "tangible employment action" against the employee; examples of such actions include "hiring, firing, failing to promote, reassignment with significantly different responsibilities, or a decision causing a significant change in benefits." Ellerth at 761. The Court found that the occurrence of a tangible employment action justified holding an employer liable for its supervisor's harassment because the action could not have been taken absent the agency relation.

The Court further held that, even in the absence of alter ego status or any tangible employment action, an employer will be held strictly liable for the sexually harassing conduct of a supervisor unless it can prove, as an affirmative defense, both: "(a) that the employer exercised reasonable care to prevent and correct promptly any sexually harassing behavior, and (b) that the plaintiff employee unreasonably failed to take advantage of any preventive or corrective opportunities provided by the employer or to avoid harm otherwise."

Even if an employer's attempt to invoke the Faragher-Ellerth defense fails, the employer may be able to protect itself from punitive damages under Kolstad v. Amer. Dental Ass'n, 527 U.S. 526, 119 S.Ct. 2118, 144 L.Ed.2d 494 (1999). The Supreme Court ruled in Kolstad that "in the punitive damages context, an employer may not be vicariously liable for the discriminatory employment decisions of managerial agents where these decisions are contrary to the employer's good-faith efforts to comply with Title VII." Id. at 545. Good-faith efforts may include adopting and publicizing an anti-harassment policy, creating a grievance procedure, and investigating complaints.

II. "Severe or Pervasive"

Sexual harassment is actionable under Title VII only if it is "so severe or pervasive as to alter the conditions of [the victim's] employment and create an abusive working environment." Breedon, 532 U.S. at 270 (internal quotation marks removed). Several recent cases have explored the meaning of "severe or pervasive."

A. Duncan v. General Motors Corp., 300 F.3d 928 (8th Cir. 2002)

The Eighth Circuit applied a very narrow definition of "severe or pervasive" and reversed a jury award of more than \$1 million. Duncan's supervisor, Booth, propositioned her two weeks after she began work. After she turned him down, he became more hostile towards her and more critical of her work. He required her to create a document on his computer, which had a picture of a naked woman as the screen saver. He would touch her hand unnecessarily, and would show her a penis-shaped pacifier that he kept in his office. When Duncan told Booth that she wanted to be considered for an illustrator's position, he required her to draw a planter in his office that was shaped like a man with a hole in the front of his pants from which a cactus protruded, though previous applicants

had been required to draw automotive parts. Booth created and posted a “recruitment” poster portraying Duncan as

the president and CEO of the Man Hater’s Club of America. It listed the club’s membership qualifications as: “Must always be in control of: (1) Checking, Savings, all loose change, etc.; (2)(Ugh) Sex; (3) Raising children our way!; (4) Men must always do household chores; (5) Consider T.V. Dinners a gourmet meal.”

Id. at 932. On another occasion,

Booth asked Duncan to type a draft of the beliefs of the “He-Men Women Hater’s Club.” The beliefs included the following:

- Constitutional Amendment, the 19th, giving women [the] right to vote should be repealed.
- Real He-Men indulge in a lifestyle of cursing, using tools, handling guns, driving trucks, hunting and of course, drinking beer.
- Women really do have coodies [sic] and they can spread.
- Women [are] the cause of 99.9 per cent of stress in men.
- Sperm has a right to live.
- All great chiefs of the world are men.
- Prostitution should be legalized.

Id. Duncan resigned two days later.

The Eighth Circuit found that “the alleged harassment was not so severe or pervasive as to alter a term, condition, or privilege of Duncan’s employment,” because Duncan “failed to show that these occurrences in the aggregate were so severe and extreme that a reasonable person would find that the terms or conditions of Duncan’s employment had been altered.” Id. at 934. The court dismissed the poster and the “He-Men Women Hater’s Club” as “teasing.” Id. at 935.

B. Quantock v. Shared Marketing Servs., Inc., 312 F.3d 899 (7th Cir. 2002)

The Seventh Circuit found that one conversation could constitute actionable harassment even though it was “an isolated occurrence, short in duration, and ... involved no physical touching.” Id. at 904. The president of Quantock’s division propositioned her three times in one conversation, asking first for oral sex, then for a “threesome,” and finally for “phone sex.” The Court held that a reasonable jury could find these “sexual propositions sufficiently ‘severe,’ as an objective matter, to alter the terms of Quantock’s employment,” both because the president “made his repeated requests for sex *directly* to Quantock, ... and in light of Lattanzio’s significant position of authority at the company and the close working quarters within which he and Quantock worked.” Id.

C. Patt v. Family Health Sys., Inc., 280 F.3d 749 (7th Cir. 2002)

The Seventh Circuit affirmed a grant of summary judgment for the employer by the Eastern District of Wisconsin, finding that a male physician's "eight gender-related comments" were neither severe nor pervasive enough to alter the conditions of employment of the plaintiff, a female physician. Id. at 754. While acknowledging that the comments were offensive, the court observed that the male physician "only made two of the comments directly to Patt; the remainder were conveyed to Patt by other Family Health employees. Although these comments are relevant to Patt's claim, the impact of such 'second-hand' harassment is obviously not as great as harassment directed toward Patt herself." Id. Furthermore, because the eight comments were made over the course of seven years, they were "too isolated and sporadic to constitute severe or pervasive harassment." Id.

D. Rogers v. City of Chicago, 320 F.3d 748 (7th Cir. 2003)

The Seventh Circuit affirmed a grant of summary judgment to the employer of a female police officer who claimed sexual harassment and retaliation. Rogers alleged ten incidents of harassment by her supervisor over the course of three months, including his comment that her breasts looked nice in a particular shirt, his comment that he would like to be a book in her pocket, and his "ordering Rogers to put a document in a box at the end of the room, stating, 'Put this in the bin so I can watch you walk over and put it in.'" Id. at 750.

The court ruled that Rogers had not shown that her workplace was "objectively offensive," finding that "[t]he [only] workplace that is actionable is the one that is hellish." Id. at 752. The court noted that only four of the incidents Rogers alleged were "sexual in nature." Id. at 753. The Seventh Circuit concluded that "Rogers can prove little more than that she encountered a number of offensive comments over a period of several months." Id.

E. Alfano v. Costello, 294 F.3d 365 (2nd Cir. 2002)

The Second Circuit ruled that Alfano had not demonstrated that the harassment she suffered was severe and pervasive and overturned a jury award of \$150,000. Alfano presented 12 incidents of alleged harassment, four of which had an "overtly sexual overtone," id. at 371, while the remaining eight incidents were "facially sex-neutral," id. at 375. The court noted that "facially sex-neutral" incidents can be considered as part of the totality of the circumstances that courts evaluate in deciding sexual harassment claims, but that there must be some "basis for inferring" that those incidents were based on the victim's sex and therefore discriminatory. Id. at 378.

The court found that three of the "facially sex-neutral" incidents that Alfano alleged were not based on her sex, noting that they were committed by an individual who was not involved in any overtly sexual incidents and who gave no other indication that he was motivated by discriminatory animus. Four more of the "facially sex-neutral" incidents were "of no weight whatsoever," id. at 377, leaving five incidents of allegedly sex-based harassment. The Second Circuit held that these five incidents, occurring over the course

of four years, “were too few, too separate in time, and too mild ... to create an abusive working environment.” Id. at 380. The court noted that the outcome would be different if any one of these incidents were “of such severity and character as to itself subvert the plaintiff’s ability to function in the workplace.” Id.

F. Woods v. Champion Chevrolet, 35 Fed. Appx. 453, 2002 WL 848003, 2002 U.S.App. Lexis 8600 (9th Cir., May 2, 2002)

The Ninth Circuit reversed a grant of summary judgment to the employer, finding a genuine issue of material fact as to whether the alleged conduct was “severe or pervasive” enough to create a hostile working environment. During the 22 months of Woods’s employment with Champion Chevrolet, three male co-workers made up to 41 sexual comments to her, including remarks about her appearance and sexual propositions. In addition, one of her male supervisors “frequently called her ‘babe,’ and ... [another male co-worker] referred to her as a ‘lot whore.’” Id. at 456. Woods complained to her supervisors, who said there was nothing they could do or told her to “toughen up.” Id. at 455.

The Ninth Circuit held that based on Woods’s deposition testimony alone, the alleged “conduct was both subjectively and objectively abusive.” Id. Furthermore, Champion’s own policy “defined ‘harassment’ as including ‘sexual advances [and] requests for sexual favors,” which Woods had alleged. Id. at 457.

III. “On the Basis of Sex”

Only conduct that is based on the victim’s sex is actionable as sexual harassment under Title VII. How to determine whether conduct is based on the victim’s sex has been a hot topic of late in the courts of appeals.

A. Schobert v. Illinois Dep’t of Transp., 304 F.3d 725 (7th Cir. 2002)

The Seventh Circuit upheld a jury ruling from the Southern District of Illinois dismissing a sex discrimination suit filed by two male employees. The plaintiffs claimed that the sole female employee in their department received preferential treatment because of her sexual relationship with the supervisor, and that this constituted sexual harassment against them. The court ruled that this conduct was not based on the victims’ sex. “Title VII does not ... prevent employers from favoring employees because of personal relationships. Whether the employer grants employment perks to an employee because she is a protégé, an old friend, a close relative or a love interest, that special treatment is permissible as long as it is not based on an impermissible classification.” Id. at 733.

B. Rene v. MGM Grand Hotel, Inc., 305 F.3d 1061 (9th Cir. 2002)

In a splintered 7-4 ruling, the Ninth Circuit reversed a grant of summary judgment to the employer on a male employee’s allegations that his male co-workers harassed him

because of his sexual orientation. Two of the seven judges in the majority found that the alleged harassment was based on the victim's sex because the harassers were motivated by the victim's failure to confirm to their stereotyped expectations of males. The other five judges in the majority, however, found the alleged conduct actionable even if it was not based on sex, because the conduct had a sexual component. "That the harasser is, or may be, motivated by hostility based on sexual orientation is ... irrelevant, and neither provides nor precludes a cause of action. It is enough that the harasser have engaged in severe or pervasive unwelcome physical conduct of a sexual nature." *Id.* at 1063-64.

C. Ocheltree v. Scollon Productions, 308 F.3d 351 (4th Cir. 2002)

The Fourth Circuit overturned a jury verdict for the plaintiff and an award of \$50,000 because the plaintiff "would have been exposed to the same atmosphere had she been male," and therefore the alleged harassment was not based on her sex. *Id.* at 356. The court found that only three incidents of offensive conduct were directed exclusively at Ocheltree, while the vast majority of the allegedly harassing conduct "occurred in group settings as part of the male workers' daily bantering toward one another and was overheard or witnessed by Ocheltree," who was the only woman in the shop. *Id.* at 357. Furthermore, "even if the alleged harassers were intending to bother Ocheltree, there is no evidence that those participating in the offensive conduct were attempting to bother her because of her gender." *Id.* at 358.

The Fourth Circuit considered it significant that there was "no evidence demonstrating that [most of] the offensive behavior that occurred in Ocheltree's presence was gender-related. The discussions certainly were sexually explicit, ... and while they were generally degrading, humiliating, and even insulting, they were not aimed solely at females in any way." *Id.* at 357-58. The also court noted that "there was never any suggestion that she engage in sexual relations with anyone at the plant, that she was not frightened by any of the behavior, that nobody touched her in a sexual or threatening manner, and that none of the comments were related in any manner to her appearance," and that the offensive comments did not include "unambiguous gender epithets." *Id.* at 358.

The Fourth Circuit granted a rehearing en banc and vacated the opinion in this case on December 16, 2002.

D. Costa v. Desert Palace, Inc., 299 F.3d 838 (9th Cir. 2002)

The Ninth Circuit upheld a jury verdict and an award of nearly \$265,000 to a plaintiff who was the only woman working in the Caesar's Casino warehouse in Las Vegas. Costa alleged numerous incidents of disparate treatment, including supervisors withholding overtime opportunities from her and disciplining her more severely than her male colleagues. She also "presented evidence of sexual language and epithets directed to her," including a supervisor who several times referred to her as a "bitch." *Id.* at 861. The Ninth Circuit ruled that "[w]hether this term is part of the everyday give-and-take of a warehouse environment or is inherently offensive is not for us to say. Instead, we

simply conclude that the jury could interpret it here to be one piece of evidence among many, a derogatory term indicating sex-based hostility.” Id. at 861-62.

E. Bryant v. Martinez, 46 Fed. Appx. 293, 2002 WL 31007870, 2002 U.S. App. LEXIS 18672 (6th Cir. 2002)

The Sixth Circuit upheld a grant of summary judgment to the employer, finding both that the alleged conduct was not severe or pervasive enough to create a hostile work environment and that there was no evidence that the conduct was based on the victim’s sex. Bryant, a branch chief at the U.S. Department of Housing and Urban Development, alleged that her supervisor, Davis, ignored her, met with her staff members without her knowledge, met “with two other branch chiefs to discuss office policy without inviting Bryant,” refused to return her phone calls, responded to her questions in meetings in a “disparaging manner,” humiliated her in front of her subordinates, and refused to respond to her “requests for guidance.” Id. at 294-95. The Sixth Circuit held that the “alleged conduct of Davis falls well short of establishing even a genuine issue of fact as to whether Bryant was subjected to a hostile work environment through discriminatory harassment.” Id. at 296.

The Sixth Circuit found “no evidence that the alleged conduct was undertaken ‘because’ of Bryant’s race or sex.” Id. Davis had once told Bryant that “in his experience, women, in general, did not do well in management positions,” but the court found that this statement had “diminished probative value” because Davis had not been referring to Bryant, though he was speaking to her. Id. at 297. Furthermore, though Bryant testified that Davis had referred to women in general, the Sixth Circuit held that the comment reflected only “Davis’s opinion that some women he has encountered have not been good managers.” Id. The court concluded that Davis’s statement did “not establish any gender-based animus.” Id.

F. La Day v. Catalyst Tech Inc., 302 F.3d 474 (5th Cir. 2002)

The Fifth Circuit reversed a grant of summary judgment to the employer, finding that there were genuine issues of material fact as to whether the male plaintiff was harassed by his male supervisor, Craft, on the basis of his sex. The court noted that in Oncale, the Supreme Court held that a plaintiff can “show that an incident of same-sex harassment constitutes sex discrimination” by showing “that the alleged harasser made ‘explicit or implicit proposals of sexual activity’ and provid[ing] ‘credible evidence that the harasser was homosexual.’” Id. at 478 (internal quotation marks and citation omitted). Addressing “an important issue of first impression for this court,” id. at 478, the Fifth Circuit ruled that

there are two types of evidence that are likely to be especially “credible” proof that the harasser may be a homosexual. The first is evidence suggesting that the harasser intended to have some kind of sexual contact with the plaintiff rather than merely to humiliate him for reasons unrelated

to sexual interest. The second is proof that the alleged harasser made same-sex sexual advances to others, especially to other employees.

Id. at 480.

The court found that La Day offered both types of evidence. As evidence that Craft intended to have sexual contact with La Day, the court described Craft's remark that he was 'jealous' of La Day's girlfriend and his poking of La Day's anus, as well as Craft's later hostility toward La Day, which "plausibly could be interpreted as anger over La Day's rejection of his sexual advances." Id. at 480. La Day offered proof that Craft made sexual advances to other male employees in the form of two male co-workers' credible claims "that Craft had made sexual overtures to them." Id. at 480-81.

G. Davis v. Coastal Int'l Sec., Inc., 275 F.3d 1119 (D.C. Cir. 2002)

The D.C. Circuit affirmed a grant of summary judgment to the employer, finding that none of the harassment a male employee alleged was based on his sex. The court found that the conduct appeared to be no more than a "workplace grudge match," as it began after Davis disciplined Smith and Allen for various infractions. Id. at 1121. Smith and Allen repeatedly slashed Davis's tires, taunted him, grabbed their crotches in front of him, made kissing gestures, and used a phrase describing oral sex. Davis had testified that he was not homosexual, that he did not believe his alleged harassers were homosexual, and that the offensive conduct was motivated by a grudge. The court concluded that Davis had not made any of the three showings Oncale suggested for same-sex harassment allegations: he failed to show that the alleged conduct constituted sexual propositions, or that Smith and Allen "treated *men* differently than women." Id. at 1124. Davis did not attempt to make the third Oncale showing, that the harasser is clearly "motivated by general hostility toward members of the same gender in the workplace." Id. at 1123.

IV. "Tangible Employment Action"

Employers are strictly and vicariously liable for severe or pervasive sexual harassment perpetrated by a supervisor if the supervisor took a "tangible employment action" against the victim that was related to the harassment. The definition of "tangible employment action" is a frequent subject of litigation.

A. Jin v. Metropolitan Life Ins. Co., 310 F.3d 84 (2d Cir. 2002)

The Second Circuit ruled that a jury could find that the benefit of continued employment was a tangible employment action where the plaintiff had regularly been forced to engage in sexual acts with her supervisor under threat of termination. The court faulted the district court's instruction to the jury that tangible employment actions must be adverse and its implication that they must cause economic harm. The court rejected MetLife's

argument that “an employee’s acquiescence in a supervisor’s sexual abuse under a threat of a tangible employment action (such as termination) is not itself a tangible employment action because the threatened action is never carried out.” *Id.* at 96. To the contrary, “[r]equiring an employee to engage in unwanted sex acts is one of the most pernicious and oppressive forms of sexual harassment that can occur in the workplace. . . . [It] fits squarely within the definition of ‘tangible employment action’ that the Supreme Court announced in *Faragher* and *Ellerth*.” *Id.* at 94.

B. *Jaros v. LodgeNet Entm’t Corp.*, 294 F.3d 960 (8th Cir. 2002)

The Eighth Circuit upheld a jury finding and an award of \$300,000 for the plaintiff on her claims of sexual harassment and constructive discharge. The court rejected LodgeNet’s attempt to invoke an affirmative defense because such defenses are not available “if the harassment results in a ‘tangible employment action’ against the subordinate,” and “constructive discharge constitutes a tangible employment action.” *Id.* at 966.

C. *Suders v. Easton*, _ F.3d _, 2003 WL 1879011 (3rd Cir., April 16, 2003)

The Third Circuit reversed the district court’s grant of summary judgment to the defendants, finding that genuine issues of material fact existed and that the affirmative Faragher-Ellerth defense was unavailable to the employer because the sexual harassment led to a tangible employment action. Recognizing a split among the Courts of Appeals, the court ruled that a constructive discharge is a tangible employment action. The court noted that the Second and Sixth Circuits have held that a constructive discharge does not constitute a tangible employment action; the Eighth Circuit has ruled that it does constitute a tangible employment action; and the Seventh and Ninth Circuits and the Supreme Court have declined to decide the question. The Third Circuit found that “holding an employer strictly liable for a constructive discharge resulting from the actionable harassment of its supervisors more faithfully adheres to the policy objectives set forth in *Ellerth* and *Faragher* and to our own Title VII jurisprudence.”

V. Prompt Remedial Action

In the absence of a tangible employment action or a finding of alter ego status, an employer can raise the affirmative Faragher-Ellerth defense to liability for sexual harassment by proving, among other things, that it took prompt remedial action to correct any sexually harassing behavior. Courts continue to debate how prompt and how effective such action must be in order to excuse an employer from liability.

A. *Moisant v. Air Midwest Inc.*, 291 F.3d 1028 (8th Cir. 2002)

The Eighth Circuit reversed a grant of judgment as a matter of law to the employer. Moisant complained to Air Midwest about three incidents of alleged harassment by her supervisor, Stillwell. First Stillwell made an offensive comment to Moisant; then he

“belittled her and criticized her work performance,” allegedly “because she had rebuffed his advances”; and finally, Stillwell sexually assaulted her. Id. at 1030.

As to the first and third incidents, the court found that Air Midwest Inc. had “acted promptly to provide appropriate remedies for the events of which Ms. Moisant complained,” but because the harasser was her supervisor, that prompt remedial action

does not immunize them from the vicarious liability that Faragher imposes. In granting judgment as a matter of law, perhaps the district court had in mind the rule that prompt remedial action will shield an employer from liability when the complaint against it is bottomed on acts committed by a plaintiff’s co-worker rather than by a supervisor.

Id. at 1031.

The court affirmed the grant of judgment as a matter of law to the employer as to the second incident about which Moisant complained because she did not tell Air Midwest that it was “in any way related to Mr. Stillwell’s sexual harassment of her,” providing Air Midwest “with a defense to liability based on that incident.” Id.

B. Longstreet v. Illinois Department of Corrections, 276 F.3d 379 (7th Cir. 2002)

The Seventh Circuit affirmed a grant of summary judgment to the employer, finding that its failure to prevent harassment by employees it knew had harassed others in the past did not create automatic liability. Longstreet complained of two incidents of sexual harassment by two different male co-workers, both severe. In the first incident, Ronald Bester yelled at Longstreet to bring him soap and water while he masturbated in front of her; DOC’s investigation quickly led to Bester’s resignation. In the second incident, Ronald Bills allegedly rubbed his penis against Longstreet’s buttocks. DOC investigated and found the allegation to be without merit, but Bills “promised the investigator that he would have no further contact with Longstreet, a promise which has been kept.” Id. at 381. Longstreet argued that despite its prompt remedial action, DOC should be liable for the harassment because it had received previous complaints from other female employees of sexual harassment by Bester and Bills.

The Seventh Circuit ruled that DOC was not liable for the co-worker harassment Longstreet suffered. DOC had reassigned Bester after a previous, less serious incident of harassment, satisfying the victim’s requirement that she never have to work with him again. Longstreet made only “vague hearsay allegations” of other previous harassment by Bester and Bills, and did not allege “that any of these incidents were reported to a supervisor.” Id. at 382. While acknowledging that “deterrence is an objective in imposing liability on employers for the creation of a hostile environment by a plaintiff’s co-workers,” the court found that

[i]t would push the role of deterrence too far to say that a response which seemed to be within the realm of reasonableness in one situation can, if

ultimately it did not have the proper deterrent effect, be the sole basis for liability in another case even if the employer's response in the second case was clearly sufficient.

Id. In short, the court refused to “conclude that an employer is subject to what amounts to strict liability for every second incident of harassment committed by an employee, especially when the first incident was far less serious than the second.” Id. at 383.

C. Alexander v. Alcatel NA Cable Systems, Inc., 50 Fed. Appx. 594 (4th Cir. 2002)

The Fourth Circuit reversed a grant of summary judgment for the employer because the employer failed to take prompt remedial action to stop the harassment. The court noted that the perpetrator of the alleged harassment, Dale Anderson, was not Alexander's supervisor, meaning that “the harassment was ‘unaided’ by any supervisory power granted to the offenders by the company.” Id. at 601. Therefore, the employer would be liable only “if it was negligent in failing, after actual or constructive knowledge, to take prompt and adequate action to stop the harassment.” Id.

Holding that “an employer, whose tepid response to valid complaints of sexual harassment emboldens would-be offenders, may be liable if a vigorous response would have prevented the abuse,” id. at 602, the Fifth Circuit noted that “previous allegations against Dale Anderson went unchecked.” Id. at 601. The court remanded the case to the district court, which had “exclude[ed] from consideration” the previous allegations and the employer's response to them. Id. at 602, n.10.

D. Minnich v. Cooper Farms, Inc., 39 Fed. Appx. 289 (6th Cir. 2002)

The Sixth Circuit reversed a grant of summary judgment to the employer, holding that Cooper Farms' many attempts to stop the sexual harassment perpetrated by an employee, Huston, did not relieve it of liability for the harassment because it knew of Huston's history of sexually harassing female co-workers and of the severity and frequency of the harassment. Huston had been disciplined several times for harassing female co-workers before he began harassing the two plaintiffs in this case. The remedial actions Cooper Farms took against Huston did not stop the harassment, which included physical assaults, implicit threats of violence, and frequent sexual propositions. The court ruled that

[o]n the one hand, there is evidence that [a supervisor] promptly investigated plaintiffs' complaints when they were brought to him directly, gave Huston a warning that was effective in stopping the harassment for a time, suspended and moved Huston when harassment continued, and terminated his employment (twice) for sexually offensive and harassing behavior. However, when the severity and frequency of the alleged harassment is considered in light of the facts that plaintiffs claim defendant either knew or should have known of, we find there is sufficient evidence from which a rational trier of fact could find in favor of plaintiffs on the issue of employer liability.

Id. at 295.

E. Little v. Windermere Relocation, Inc., 301 F.3d 958 (9th Cir. 2002)

The Ninth Circuit reversed a grant of summary judgment for the employer. Little’s job “required her to develop an ongoing business relationship and relocation contacts with corporations in order to obtain corporate clients” for Windermere. Id. at 964. At a dinner meeting with one of these clients, a representative of Starbucks, Little became ill and fainted. The client then raped her repeatedly. Little reported the rapes to the Vice President of Operations, who told her to “try to put it behind her,” and that she should stop working on the Starbucks account. Id. at 965. Little’s supervisors, however, continued to ask her frequently about the status of the Starbucks account. Because of these questions, Little told her immediate supervisor about the rapes; her supervisor told her to tell Windermere’s president, Gayle Glew. Glew’s response was “that he did not want to hear anything about it. He told Little that she would have to respond to his attorneys.” Id. Glew then told her that he was reducing her pay effective immediately. When Little insisted that the pay cut was unacceptable, Glew terminated her employment.

The Ninth Circuit dismissed the district court’s finding that Windermere was not liable for the rapes as irrelevant, finding that Little’s “claim is about whether Windermere’s reaction to the rape created a hostile work environment.” Id. at 966. The court found that Windermere’s actions, including its failure to remove Little from the Starbucks account, its reduction of her compensation, and its “failure to take immediate and effective corrective action,” altered Little’s work environment “irrevocably.” Id. at 967.

VI. “Good Faith Efforts to Comply”

Employers can, in some circumstances, escape liability or punitive damages for sexual harassment if they have made good faith efforts to comply with Title VII. Recent opinions have discussed which employer actions constitute good faith efforts.

A. Hall v. Bodine Elec. Co., 276 F.3d 345 (7th Cir. 2002)

The Seventh Circuit affirmed a grant of summary judgment to the employer. The court rejected Hall’s argument that her employer, Bodine, was liable for her sexual harassment by a co-worker because it had not published and distributed a sexual harassment policy. Bodine had promptly remedied the harassment of which she complained, suspending the harasser the day she complained and terminating his employment five days later. The court stated that it had “never held that Title VII employers must institute formal sexual harassment policies. Instead, we have focused on whether an employer has a reasonable mechanism in place for ‘detecting and correcting harassment.’” Id. at 356. Because Hall knew how to file a complaint of sexual harassment with Bodine, and because Bodine responded promptly and effectively when she did complain, the Seventh Circuit found

that it had made good faith efforts to comply with Title VII sufficient to avoid liability for co-worker harassment.

B. Hatley v. Hilton Hotels Corp., 308 F.3d 473 (5th Cir. 2002)

The Fifth Circuit upheld the district court's decision not to instruct the jury on punitive damages. The jury awarded \$150,000 each to the two plaintiffs, former waitresses at Bally's who had suffered sexual harassment from their supervisors. The jury found that the employer's "investigation was inadequate and that Bally's did not take reasonable measures to correct or prevent the harassment." Id. at 476. Therefore, the Fifth Circuit ruled, Bally's could not avail itself of the affirmative defense provided in Ellerth. Nevertheless, the court found that Bally's was not liable for punitive damages because it made a good faith effort to comply with Title VII, "evidenced by the fact that Bally's had a well-publicized policy forbidding sexual harassment, gave training on sexual harassment to new employees, established a grievance procedure for sexual harassment complaints, and initiated an investigation of the plaintiffs' complaints." Id. at 477.

VII. Retaliatory Harassment

Harassment, including non-sexual harassment, by employers or by fellow employees can constitute retaliation.

A. Mast v. IMCO Recycling of Ohio, Inc., 58 Fed. Appx. 116 (6th Cir. 2003)

The Sixth Circuit affirmed the district court's grant of summary judgment to the employer, finding that the conduct that Mast claimed constituted retaliatory harassment did not in fact rise to the level of harassment. Mast claimed that Robert Rehrman, a supervisor, retaliated against her for complaining that he had sexually harassed her by staring and grinning at her and following her, as well as trying to run her off the road on one occasion. The court ruled that Mast had "not shown that her working conditions were so difficult or unpleasant that a reasonable person in her shoes, even one with plaintiff's history of sexual abuse, would have felt compelled to resign, or that her resignation would have been foreseeable by IMCO Ohio." Id. at 123.

B. Ericson v. City of Meriden, 55 Fed. Appx. 11 (2d Cir. 2003)

The Second Circuit affirmed the district court's entry of judgment as a matter of law for the city after a jury verdict in favor of the employee. Ericson complained to the City of Meriden about her co-workers' viewing of a lewd videotape in the employees' break room, and claimed that her co-workers harassed her in retaliation for complaining. Ericson acknowledged that the videotape did not constitute sexual harassment, leading the court to conclude that "there was no showing that the conduct for which she was harassed constituted activity protected by Title VII." Id. at 13.

VIII. Equal Protection

C. Schroeder v. Hamilton Sch. Dist., 282 F.3d 946 (7th Cir. 2002)

The Seventh Circuit affirmed a grant of summary judgment to the employer of a former school teacher who had complained of harassment based on his sexual orientation. The teacher alleged that the Hamilton School District violated his right to equal protection under the law by permitting the harassment to continue and by reacting more vigorously to racial harassment than to his claims of harassment based on sexual orientation.