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ARTICLES & INSIGHTS

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Beware! Employers Can Be Held Liable for Third Party Harassment

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On April 29, the United States Fourth Circuit Court of Appeals, a federal court which governs cases in North Carolina, held for the first time in a published opinion that a negligence standard applies to third-party harassment claims under Title VII of the Civil Rights Act, joining other federal courts in embracing this standard. The Court held that an employer can be held liable under Title VII of the Civil Rights Act of 1968 for “third parties creating a hostile work environment if the employer knew or should have known of the harassment and failed to take prompt remedial action reasonably calculated to end the harassment.”

In the case of *Freeman v. Dal-Tile Corp.*, Ms. Freeman alleged that over a period of three years Timothy Koester, an independent sales representative of a vendor or customer of Dal-Tile, a tile and natural stone product manufacturer in Raleigh, created a sexually and racially hostile work environment through racial slurs, sexist language, and other inappropriate behavior. Koester’s actions included repeated verbal insults and racist, degrading name-calling. He told one of her coworkers in Freeman’s presence that Koester wanted to “hook up with” her coworker’s daughters, and made numerous comments about his sexual encounters with women. Koester also showed Freeman at least one picture on his telephone of a naked women with whom Koester allegedly had a sexual relationship. These incidents left Freeman visibly upset and ultimately led her to take a medical leave of absence as a result of the depression and anxiety caused by these actions.

Freeman’s supervisor and coworkers witnessed a number of these incidents and Freeman reported her concerns about Koester’s actions to her direct supervisor at least twice. Dal-Tile did not take action against Koester until Freeman contacted the regional human resources manager three years after the harassment started.

The district court granted summary judgment in favor of Dal-Tile on the basis that Freeman could not establish that liability should be imputed to Dal-Tile and that no reasonable jury could find the company negligent because it temporarily banned Koester from the premises and subsequently barred any contact between Koester and Freeman after Freeman complained to Dal-Tile’s regional human resources department.

The Fourth Circuit reversed the district court's ruling and applied a negligence standard for holding the employer liable for the third party's harassment, reasoning that if the employer knew or should have known about the harassing conduct and failed to take prompt remedial action to end the harassment, the employer is on the hook. The Fourth Circuit held that given the evidence, a reasonable jury could find that the harassment was unwelcome and that it was based on Freeman's sex or race. Moreover, a jury could find, using an objective standard, that the harassment was sufficiently severe or pervasive as to constitute a hostile work environment and that Dal-Tile waited too long to respond to Freeman's complaints.

In this 2-1 decision, one judge dissented on the basis that he believed that the opinion extended the scope of Title VII beyond its original intent of regulating the employer-employee relationship.

What should an employer take away from this case?

First, if an employee complains about harassing conduct from a third party, the employer needs to promptly undertake an investigation and seek to take corrective action if the complaints are legitimate. A ban on communication between the harasser and the offended employee may be sufficient to resolve the issue, but a total ban on the harasser's access to the employer's premises may be required under appropriate circumstances. Second, an employee need not make a formal complaint if management is aware of harassing conduct. Under the "should have known" standard, a supervisor's knowledge of the harassment is likely enough to put the employer on notice of the harassing conduct, particularly if the conduct is severe and pervasive.

If you have questions or would like more information about this court opinion or other legal issues, please contact Connie Carrigan at ccarrigan@smithdebnamlaw.com.

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