

## **EFFORTS TO PREVENT HARASSMENT BENEFIT EMPLOYER IN LAWSUIT**

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In *McPherson v. City of Waukegan*, 379 F.3d 430 (7th Cir. 2004), the U.S. Court of Appeals for the Seventh Circuit considered a case in which a former employee alleged that her supervisor sexually harassed her. She claimed that her supervisor: (1) asked her what color bra she was wearing; (2) asked her if he could make a "house call" when she called in sick; (3) looked through Victoria's Secret catalogues near her desk and one time pointed to an outfit and stated that she would look good in it; (4) asked her the color of her bra and pulled back her tank top so that he could see it; (5) slid his hand under her shirt and felt her breasts; and (6) put his hand down her pants and touched her genitals.

The plaintiff did not report any of these incidents until incident six occurred, shortly after which she reported only incidents five and six. The day she reported incidents five and six, the Mayor, a City attorney, and two other City employees met with her supervisor and gave him the option of resigning or being suspended while they investigate. He insisted that what happened was consensual, but he chose to resign rather than risk what he thought would be certain termination following an investigation. According to this case, he was indicted by a grand jury, arrested and charged with criminal sexual assault, criminal sexual abuse, and battery. He pleaded guilty to attempted criminal sexual assault, resulting in his being placed on felony probation and ordered to register as a sex offender under state law.

Even though the plaintiff did not request it, the City granted her 30 days of paid leave, none of which counted against her accrued paid time off. Near the expiration of that leave, she was told she could take an additional 22 days of paid leave, consisting of her remaining sick, personal and vacation time. She also was told that if she felt she needed more time after that, she could apply for a discretionary leave.

Toward the end of her paid leave, the plaintiff demanded 90 days of additional paid leave with full benefits. In addition, her attorney inquired about the status of her employment. The City informed her attorney that: the "hostile work environment" perceived by the plaintiff could no longer exist because her supervisor resigned; she was still considered an employee; and her position had been filled on a temporary basis but would be available to her upon her return to work. The plaintiff's attorney responded by tendering the plaintiff's resignation. The attorney claimed that the plaintiff was unable to "return to a work place that permitted sexual intimidation and created a hostile work environment." The plaintiff then sued, alleging, among other things, sexual harassment.

In order to prevail on a claim of sexual harassment, an employee must establish: (1) she was subjected to unwelcome sexual harassment; (2) the harassment was based on her sex; (3) the sexual harassment unreasonably interfered with her work performance by creating an intimidating, hostile or offensive work environment; and (4) there is a basis for employer liability.

To prove that a hostile work environment existed, an employee must demonstrate that the conduct was "so severe or pervasive as to alter the conditions of employment and create an abusive working environment." To qualify as hostile, the work environment must be "both objectively and subjectively offensive, one that a reasonable person would find hostile or abusive, and one that the victim in fact did perceive to be so." When determining whether a work environment is objectively hostile, courts consider all of the circumstances, including the

frequency and severity of the conduct, whether it was threatening and/or humiliating or merely an offensive utterance, and whether the harassment unreasonably interfered with the plaintiff's work.

Based on these standards, the court found that a hostile work environment did not exist until incident five occurred. Once the court determined that a hostile work environment existed, it had to determine whether the City should be liable for that hostile work environment.

When a supervisor commits the harassment that causes a hostile work environment, an employer is strictly liable for the supervisor's conduct, subject to any affirmative defenses that may apply. In a case of supervisor harassment that results in a tangible employment action (for example, firing or demotion) there is no defense, and the employer is liable. However, when supervisor harassment does not result in a tangible employment action, an employer can escape liability by proving: (1) that it exercised reasonable care to prevent and correct promptly any sexually harassing behavior, and (2) that the plaintiff unreasonably failed to take advantage of any preventive or corrective opportunities provided by the employer or to avoid harm otherwise.

In this case, the plaintiff claimed that she was "constructively discharged" (which would, if true, constitute a tangible employment action) and, therefore, the City was liable. In order to show a hostile work environment resulting in constructive discharge, an employee must demonstrate that a hostile work environment existed and that the work environment was so intolerable that her resignation was an appropriate response. The Court found no constructive discharge because, within hours of learning about the plaintiff's allegations, the City: (1) offered the plaintiff the opportunity to take a lengthy paid leave of absence; (2) confronted the plaintiff's supervisor; (3) promptly removed the source of the alleged harassment by giving the plaintiff's supervisor the option of suspension pending investigation or resignation; and (4) the supervisor resigned (thereby permanently removing the source of alleged harassment from the workplace). The plaintiff's resignation several months after her supervisor's resignation was not a reasonable response to the situation for purposes of determining that she was "constructively discharged." The court determined that she was not constructively discharged, so there was no tangible employment action.

Because the supervisor harassment did not result in a tangible employment action, the City was permitted to avoid liability by demonstrating that it promptly took steps to investigate, correct and prevent future recurrences of the offending behavior and that the plaintiff failed to take advantage of the corrective measures available to her. The City could not have known about events five and six, which took place behind closed doors in the supervisor's office, until the plaintiff reported them. As soon as the plaintiff reported the events, the City responded as summarized above. In addition, the City had adequate preventive and remedial policies in place to protect its employees from harassment and violence. Its workplace harassment policy prohibited harassing behavior and identified available avenues for reporting, and its workplace violence policy encouraged employees to report incidents of violence. The plaintiff knew of these policies, as she had previously complained about another co-worker through appropriate channels, yet she failed to avail herself of those policies in this case. In addition, she did not file a grievance with her union despite the fact that the collective bargaining agreement governing her employment contained a non-discrimination clause and detailed grievance procedures for employees to follow if a suspected breach occurred. She failed to take advantage of corrective measures available to her.

This case demonstrates how employers may avoid liability for even egregious harassment by supervisors if they have appropriate policies and procedures in place for employees to report unwelcome conduct without fear of retaliation, and they promptly investigate, correct, and take reasonable steps to prevent future recurrences of the offending behavior.

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