

## **PROACTIVE MEASURES REDUCE RISK OF LIABILITY FOR HARASSMENT**

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In *Rhodes v. Illinois Department of Transportation*, Case No. 03-1651 (7th Cir. 2004), the U.S. Court of Appeals for the Seventh Circuit (Indiana, Illinois, Wisconsin) affirmed the federal district court's entry of summary judgment for the employer with respect to the employee's claim of harassment thanks, in large part, to the employer's proactive efforts to prevent workplace harassment.

In this case, Rhodes claimed that, after she complained about a change to her snow plowing route, her supervisor referred to her in profane and derogatory terms, forced her to wash a truck in sub-zero temperatures, assigned her to work in the maintenance yard instead of on a road crew for several days, and prohibited her from driving the foreman's truck while other workers were patching potholes. Rhodes also claimed that pornographic magazines and movies were prevalent in the workplace, that she found and removed a picture of a nude woman placed on her locker, and that she often removed cartoons of a sexual nature from the bulletin board. She quit.

To succeed on a claim of sexual harassment based on a hostile work environment, a plaintiff must demonstrate that: (1) she was subjected to unwelcome sexual advances, requests for sexual favors, or other verbal or physical conduct of a sexual nature; (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. Interestingly, IDOT (Rhodes' employer) conceded that Rhodes was subjected to conduct that could create a hostile work environment. The question for the court of appeals was whether IDOT could be held liable.

The standard for employer liability for harassment hinges on the identity of the harasser(s). Harassment by a supervisor results in strict liability, although an affirmative defense may be available if the plaintiff suffered no tangible employment action. In contrast, harassment by someone other than the employee's supervisor results in employer liability only where the employer was negligent in discovering or remedying the harassment. In other words, the employer will be liable if it knew or should have known of the harassment and failed to take prompt corrective action reasonably calculated to put an end to the harassment.

The court of appeals determined that the alleged harassers, although possessing managerial authority, were not Rhodes' supervisors for purposes of Title VII because they could not directly affect her terms and conditions of employment. The alleged harassers managed Rhodes' work assignments, investigated complaints and disputes, and made recommendations concerning sanctions for rule violations to the Department Manager, however, they did not have authority to hire, fire, promote, demote, discipline or transfer Rhodes. Although the court of appeals treated this case as one of co-worker harassment, it is important to understand that two of the judges wrote separate opinions wherein they expressed concern over the narrow view of the definition of a "supervisor" for purposes of strict liability in the Seventh Circuit. Employers will have to keep an eye on developments in this area, as these separate opinions raise some strong policy arguments for expanding the definition of "supervisor".

IDOT ultimately carried the day by demonstrating that: (i) it had and posted a zero tolerance policy toward harassment; (ii) its policy contained a clear reporting procedure

(including names and telephone numbers of individuals to whom reports could be made); (iii) it conducted annual training sessions regarding its policy; (iv) the employer's highest ranking official at the site in question immediately threw away pornography discovered in the workplace; and (v) Rhodes really only complained about one incident (the picture of the nude woman on her locker), and that issue was promptly addressed.

*Rhodes* teaches the importance of implementing and regularly updating policies confirming your commitment to provide a workplace free of unlawful discrimination and harassment. Consider the following proactive measures to reduce the risk of liability for harassment: (i) a policy that addresses harassment by employees and non-employees, on and off your owned or leased premises and during all work functions, including holiday parties and other social gatherings; (ii) a policy that identifies the type of conduct that is covered (consider giving examples of prohibited statements, physical conduct, computer use, postings, etc.); (iii) a policy that prohibits retaliation for making reports of discrimination and harassment; (iv) a clear, simple procedure for employees to follow when reporting claims of discrimination and harassment, preferably with names and phone numbers; (v) a process of reviewing your policies with new employees at orientation and with all employees at least annually (such "training" should be documented); (vi) a process that requires prompt investigation of all reports of discrimination and harassment (the scope of your investigation will, of course, depend on the circumstances); and (vii) a process for dealing with situations where you cannot confirm the truth of a report (at a minimum, consider reviewing your policy with the accused, giving clear instructions on what is and is not acceptable conduct, and instructing the person who made the report to let you know of any future harassment or retaliation).

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