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QUESTIONS-AND ANSWERS

Employer liability for third-party sexual harassment

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While most employers understand the scope of their responsibility to prevent sexual harassment between employees, the scope of an employer's responsibility to prevent sexual harassment by third parties is often less clear. Such third parties may include customers, clients, sales representatives, vendors, investors, or anyone in the workplace who is not a member of the employer's workforce. Although an employer may be unable to easily control non-employee actions, it is legally obligated to respond to any third-party sexual harassment of its employees that is brought to the employer's attention. With proper safeguards and remedial action, however, an employer can keep its employees safe from third-party sexual harassment and protect itself from liability in the process. This Q&A explains employer liability for third-party sexual harassment, describes the ramifications of an employer's failure to properly address or prevent it, and recommends strategies to reduce an employer's legal exposure.

KEYWORDS

employment, employment law, sexual harassment

1 | WHICH LAWS PROHIBIT THIRD-PARTY SEXUAL HARASSMENT?

Title VII of the Civil Rights Act of 1964, as amended ("Title VII"), prohibits all employment discrimination on the basis of sex at the federal level, including sexual harassment by third parties.[1] In addition to Title VII, a panoply of state and local laws also prohibit sexual harassment in the workplace. While each state and local statute is unique, several provide more significant protection for employees than their federal counterpart.[2]

2 | ARE EMPLOYERS RESPONSIBLE FOR SEXUAL HARASSMENT BY THIRD PARTIES?

Yes. Federal regulations explicitly state that "an employer may . . .be held responsible for the acts of non-employees [under Title VII] where the employer (or its agents or supervisory employees) knows or should have known of the conduct and fails to take immediate and appropriate corrective action."[3] Federal regulations also instruct, however, that agencies which enforce this regulation should "consider the extent of the employer's control and any other legal responsibility which the employer may have with respect to the conduct of such non-employees."[4] As such, an employer is more likely to be liable for sexual harassment by a non-employee where the employer has some degree of control over the harassing individual's conduct.[5]

3 | WHAT MUST AN EMPLOYEE SHOW TO ESTABLISH THIRD-PARTY SEXUAL HARASSMENT?

As an initial matter, an employee must articulate a viable sexual harassment claim. Title VII, along with its state analogues, prohibits two types of sexual harassment: (a) quid pro quo; and (b) hostile work environment.[6]

[1]42 U.S.C. § 2000e *et seq.*

[2]See, e.g., New York City Human Rights Law, N.Y.C. Admin. Code § 8-107; California Fair Housing and Employment Act, Cal. Gov't Code §12900 *et seq.*

[3]29 C.F.R. § 1604.11; see also U.S. Equal Employment Opportunity Comm'n, *Harassment* (last visited Jan. 6, 2018), *available at* https://www.eeoc.gov/laws/types/harassment.cfm.

[4]29 C.F.R. § 1604.11.

[5]See, e.g., *Crist v. Focus Homes*, 122 F.3d 1107, 1111-12 (8th Cir. 1997) (residential care home employer could be liable for sexual harassment by a resident where it could exercise control over the resident); *Magnuson v. Peak Tech. Serv.*, 808 F. Supp. 500, 511-14 (E.D. Va. 1992) (employer liable for sexual harassment of non-employee where it "clearly ha[d] authority over, and responsibility for, [harasser's] actions.").

[6]29 C.F.R. § 1604.11; U.S. Equal Employment Opportunity Comm'n, *Enforcement Guidance No. N-915-050* (Mar. 19, 1990), *available at* https://www.eeoc.gov/eeoc/publications/upload/currentissues.pdf. Federal regulations define "sexual harassment" as "[u]nwelcome sexual advances, requests for sexual favors, and other verbal or physical conduct of a sexual nature." 29 C.F.R. § 1604.11.

"Quid pro quo" sexual harassment occurs where "(1) submission to [sexual harassment] is made either explicitly or implicitly a term or condition of an individual's employment, [or] (2) submission to or rejection of [sexual harassment] by an individual is used as the basis for employment decisions affecting such individual[.]"[7]

Alternatively, hostile work environment sexual harassment, which is more likely to be seen in the third-party context, occurs where sexual harassment "has the purpose or effect of unreasonably interfering with an individual's work performance or creating an intimidating, hostile or offensive working environment."[8] To succeed on a hostile work environment claim, a plaintiff must demonstrate the following: "(1) that the workplace was permeated with discriminatory intimidation that was sufficiently severe or pervasive to alter the conditions of the [employee's] work environment; and (2) that a specific basis exists for imputing the conduct that created the hostile environment to the employer."[9] The first element of a hostile work environment claim has both a subjective and objective component, meaning that "'the misconduct must be severe or pervasive enough to create an objectively hostile or abusive work environment, and the victim must also subjectively perceive that environment to be abusive.'"[10]

The United States Equal Employment Opportunity Commission (the "EEOC") has determined that Title VII claims for third-party sexual harassment, such as harassment by a customer or vendor, should be evaluated in the same way as claims for harassment by non-supervisory fellow employees.[11] Applying this analysis, employers may be liable for third-party sexual harassment to the extent of their own negligence in failing to prevent or remedy the harassment.[12] According to the EEOC and reviewing courts, in order to prevail on a claim for third-party sexual harassment, an employee "must demonstrate that the employer 'failed to provide a reasonable avenue for complaint or that it knew, or in the exercise of reasonable care should have known about the harassment yet failed to take appropriate remedial action.'"[13]

Recent cases evaluating employee claims of third-party sexual harassment highlight the type of conduct that may give rise to such causes of action. For instance, in *Freeman v. Dal-Tile Corp.*, the United States Court of Appeals for the Fourth Circuit (the "Fourth Circuit") evaluated a customer service representative's sexual harassment claim against her employer, Dal-Tile, based on the actions of a sales representative for one of Dal-Tile's customers.[14] The sales representative allegedly made several lewd comments to the plaintiff, discussed his sexual prowess with her, and showed her nude photographs of women on his cell phone.[15] The plaintiff complained of the sales representative's behavior to her supervisors on multiple occasions, but her supervisors allegedly ignored the plaintiff or instructed her not to take the sales representative's behavior seriously.[16] The plaintiff escalated her complaint to Dal-Tile's Human Resources Department, which banned the sales representative from communicating with the plaintiff, but continued to permit him to visit Dal-Tile's facility.[17] The plaintiff resigned and sued Dal-Tile for hostile work environment sexual harassment based on the sales representative's actions.[18] The Fourth Circuit permitted the plaintiff's claims to proceed, holding that Dal-Tile's knowledge of the third-party sales representative's harassment, coupled with its failure to promptly protect the plaintiff by controlling the sales representative's access to its facilities, subjected it to liability under Title VII and applicable state anti-discrimination laws.[19]

Likewise, in *EEOC v. GNLV Corp.*, the United States District Court for the District of Nevada determined that an employee of Las Vegas' Golden Nugget Casino had a viable Title VII sexual harassment claim against her employer based on the behavior of the casino's customers.[20] The plaintiff, a blackjack dealer, alleged that various casino customers, among other things, stared at her, made lewd comments to her, and tried to kiss her throughout the course of her employment while her managers watched and did nothing to avoid turning the customers away.[21] Despite the fact that the plaintiff had no personal knowledge that any of her supervisors actually heard or saw the harassment that she described, and although she had never complained of any harassment, the court permitted her claims to go forward by determining that the casino should have known about the plaintiff's complained-of experience at the hands of its customers.[22] Both *Freeman* and *GNLV Corp.* serve as a reminder that courts will not hesitate to hold employers responsible for sexual harassment of their employees by third parties, even where remedial action has been taken or the employer's liability is not obvious.

4 | WHAT DAMAGES MAY AN EMPLOYER FACE IF FOUND LIABLE FOR THIRD-PARTY SEXUAL HARASSMENT?

The range of damages that an employer who had been found liable for third-party sexual harassment varies based on the employer's size and the statute in question. Title VII allows plaintiffs to recover both compensatory and punitive damages in an amount that is capped based on the size of the employer.[23] Specifically, Title VII sets four statutory limits on the amount of recoverable damages: (a) $50,000 for employers of 15 to 100 employees; (b) $100,000 for employers of 101 to 200 employees; (c) $200,000 for employers of 201 to 500 employees; and (d) $300,000 for employers with 501 or more employees.[24] A prevailing plaintiff in a Title VII action may also recover reasonable attorneys'

[7]29 C.F.R. § 1604.11.
[8]Id.
[9]*Petrosino v. Bell Atl.*, 385 F.3d 210, 220 (2d Cir. 2004) (internal quotation marks and citations omitted).
[10]Id. (quoting *Terry v. Ashcroft*, 336 F.3d 128, 148 (2d Cir. 2003)).
[11]See, e.g., *Summa v. Hofstra Univ.*, 708 F.3d 115, 124 (2d Cir. 2013) (citing *Duch v. Jakubek*, 588 F.3d 757, 762 (2d Cir. 2009)).
[12]*Summa*, 708 F.3d at 124.
[13]Id. (quoting *Duch*, 588 F.3d
[14]750 F.3d 413, 416 (4th Cir. 2014).
[15]Id. at 417.
[16]Id.
[17]Id. at 418.
[18]Id. at 419.
[19]Id. at 426.
[20]No. 2:06-cv-01225-RCJ-PAL, 2014 WL 7365871, at *18-20 (D. Nev. Dec. 18, 2014).
[21]Id. at *3-4.
[22]Id. at *19/
[23]42 U.S.C. § 1981a(b)(3)
[24]Id.

fees.[25] Title VII does not limit the amount of damages that a plaintiff may recover under state anti-discrimination statutes, some of which permit recovery of uncapped compensatory and punitive damages.[26]

5 | WHAT SHOULD AN EMPLOYER DO IF IT SUSPECTS OR LEARNS OF THIRD-PARTY SEXUAL HARASSMENT?

Once an employer is made aware of potential third-party sexual harassment, either through employee reports, personal observation or other means, prompt and thorough investigatory action is critical to prevent additional harassment and avoid future liability. First, the employer should identify and implement any immediate interim protective measures to ensure employee safety, such as prohibiting a third party from entering the workplace entirely or adjusting the employee's job duties to avoid interaction with the alleged harasser. Next, the employer should investigate the allegations by, among other things, gathering and preserving all relevant documentation that might shed light on the potential harassment, such as recordings by premises video cameras, service logs, work schedules, text messages or emails. The employer should then proceed to interview any witnesses to the alleged harassment, taking care to document the date, time and content of each witness statement. During all steps of the investigation process, the employer should take care to preserve the confidentiality of both employees and third parties to the extent possible for a thorough investigation. Once the investigation is complete, the employer should consider and implement any remedial measures that may be necessary to prevent future harassment, such as permanently banning the individual from the employer's premises.

6 | HOW CAN AN EMPLOYER PREVENT THIRD-PARTY SEXUAL HARASSMENT?

Today's employer can take a variety of measures to prevent sexual harassment by third parties in the workplace. As an initial matter, an employer should encourage employees to report inappropriate behavior of any kind, regardless of whether the individual is a co-worker. To reinforce the importance of employee reporting, the employer should include a policy to this effect in employee handbooks or other applicable policy documents. Additionally, the employer should conduct regular trainings to advise employees that sexual harassment by third parties is unacceptable, and provide clear information regarding all available reporting and remedial mechanisms. Finally, as described above, the employer should promptly and thoroughly investigate all reports of sexual harassment, and take remedial measures if necessary.

Though it may not always be able to control the behavior of third parties, an employer must understand that it may still be responsible for sexual harassment committed by a third party. The significant ramifications of failing to address third-party harassment brought to an employer's attention can be severe, and may also cause reputational damage to the employer in the future. An employer which thoroughly implements the best practices described above takes a significant step toward preventing third-party sexual harassment entirely, and reducing or eliminating liability in the unfortunate event that it does occur.

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[25]42 U.S.C. § 2000e-5(k); see also *CRST Van Expedited, Inc. v. E.E.O.C.*, 136 S. Ct. 1642, 1651-52 (2016).

[26]See, e.g., New York City Human Rights Law, N.Y.C. Admin. Code § 8-107.