

HR Weekly Podcast
July 9, 2014

Today is July 9, 2014, and welcome to the HR Weekly Podcast from the State Human Resources Division. This week's Podcast deals with a recent United States Fourth Circuit Court of Appeals case involving an employer's liability regarding third party harassment of its employees.

Information used to develop this Podcast was gathered from an article written by Littler Mendelson and Katherine A. Goetzl on the Lexology website. The United States Court of Appeals for the Fourth Circuit recently ruled that an employer is liable for harassment by a third party when the employer knows or should have known about the harassment and fails to take prompt, remedial action reasonably calculated to end the harassment.

The plaintiff was a customer service representative where she and the harasser, a customer, interacted daily for the span of 3 years. During these interactions, the harasser showed the employee sexually inappropriate pictures on his cell phone, used racially derogatory terms, and called her a racial and sexual epithet. She also overheard the harasser make offensive racial and sexual comments to others. Other co-workers and the supervisor were witnesses to some of these events.

The employee asked the harasser to stop and discussed his behavior with her direct supervisor and his employer as well. When her direct supervisor took no action to stop the harassment for three years other than telling the harasser to stop, the employee complained to the human resources department. Initially the harasser was banned from the facility, but was eventually able to return on the conditions that he not communicate with the employee and that he schedule all of his on-site meetings through the employee's supervisor. The employee took a two-month medical leave of absence for anxiety and depression after he was allowed back in the work environment. The employee resigned less than a month after returning to work from her leave.

The employee filed suit in the district court alleging sexual and racial harassment, among other things. The district court found that the employee showed that the harassment was unwelcome, based on her race or sex, and subjectively perceived by her to be abusive; however, she failed to create a genuine dispute of material fact as to whether the harassment was objectively severe or pervasive. In addition, the district court ruled that liability could not be imputed to the employer and that the employer's response was adequate.

The employee appealed to the Fourth Circuit, which reversed and remanded the decision. First, reciting the frequent abusive behavior that occurred over a three year period, the appellate court ruled that a reasonable jury could find that the sex-based harassment and the race-based harassment were objectively severe and pervasive. Second, the appellate court held that an employer is liable 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 stop the harassment. In this case, the direct supervisor was aware and failed to take action. The appellate court also found that, when the employer did respond, the response was neither prompt nor adequate by allowing the employee to endure over three years of harassment before banning the harasser, then ultimately allowing the harasser to continue to visit the facility.

If you have questions about this topic, please contact your HR consultant at 803-896-5300. Thank you.