Ninth Circuit Decision Reminds Employers of Need to Promptly and Effectively Address Complaints of Workplace Harassment

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Both the Washington Law Against Discrimination and Title VII of the Civil Rights Act of 1964 prohibit discrimination on the basis of sex, including sexual harassment. Both sexes are protected from sexual harassment, including from same-sex sexual harassment.

In addition to *quid pro quo* sexual harassment (where a supervisory employee promises special treatment or reprieve from punishment in exchange for sexual favors), employees can also pursue claims for hostile work environment harassment. Such harassment requires evidence that an employee: (1) was subjected to verbal or physical conduct of a sexual nature; (2) that was unwelcome; and (3) that was sufficiently severe and pervasive to alter the terms and conditions of employment and create an abusive working environment. Single, isolated incidents of questionable conduct are generally not enough to create a hostile work environment.

Once an employer learns of harassing behavior it can avoid liability for hostile work environment harassment by taking prompt and effective action sufficient to correct or end the bad behavior. Conversely, failing to act can lead to significant liability, a lesson Prospect Airport Services ("PAS") learned the hard way according to a recent Ninth Circuit decision.

Failing to Act Promptly and Effectively to End Harassment Lands Employer in Hot Water

The Ninth Circuit in *EEOC v. Prospect Airport Services* (2010) considered a claim by a male employee, Rudolph Lamas, who allegedly suffered hostile work environment sexual harassment at the hands of a female co-worker, Sylvia Munoz. PAS supplies wheelchair assistance to disabled passengers at Las Vegas' McCarran International Airport. Lamas, initially a passenger service assistant for PAS, was a well-respected employee who was promoted to lead passenger service assistant and was assigned to one of PAS' airline accounts specifically to help retain PAS' contract with the airline.

Starting in the fall of 2002, shortly after Lamas' wife passed away, Munoz, who was married, made a series of rejected sexual overtures toward Lamas. Munoz's efforts included: several explicit notes to Lamas, including one note where Munoz said – "Seriously, I do want you sexually and romantically"; giving Lamas suggestive pictures of herself; repeatedly approaching Lamas and asking him out or soliciting him for sex, including in front of other co-workers and airline passengers; and enlisting Lamas' co-workers to pressure Lamas into going out with Munoz. Munoz's behavior continued from the fall of 2002 through the spring of 2003.

PAS had a policy prohibiting sexual harassment and encouraging employees to report any violations of the policy to a supervisor so that PAS could investigate complaints. Lamas, bothered by Munoz's repeated advances, reported her overtures to PAS' Assistant General Manager, who told Lamas he should tell Munoz that the advances were not welcome, and that Lamas should let him know if the behavior continued so he could take care of it. Lamas

also complained to his immediate supervisor, who promised to talk to Munoz, which she didn't do. Finally, Lamas complained to PAS' General Manager ("GM"), who acknowledged that Munoz's behavior violated PAS' policy, but advised Lamas that he did not want to get involved in personal matters. PAS' GM did eventually talk to Munoz, telling her if her advances continued he "would have to take action."

Despite Lamas' repeated complaints, Munoz's behavior continued and worsened. Lamas, feeling helpless, consulted with a psychologist. He also raised his complaints anew with four different PAS managers, including a manager who told Lamas that the advances were just a joke and he should feel flattered. During this period Lamas' job performance declined, and he was eventually fired. Lamas attributed his declining performance to the stress caused by more than half a year of harassment.

On these facts, the Ninth Circuit held that Lamas had more than met his burden to overcome summary judgment. Specifically, Lamas had presented sufficient evidence that he was subjected to conduct of a sexual nature; that he repeatedly rejected Munoz's advances and communicated his displeasure with those advances to Munoz and his employer; and that Munoz's conduct had contributed (or caused) the performance decline resulting in his termination. Lamas also presented evidence sufficient to show that PAS failed to take effective action to stop the harassment where, despite repeated reports of bad behavior, Munoz's conduct continued and worsened.

Advice to Employers

Nearly all employers, just like PAS, have adopted "anti-harassment" policies requiring employees to report incidents of sexual harassment to specific individuals so that any alleged harassment can be promptly investigated and corrected. The lesson of PAS is that simply having a policy is not enough to avoid liability for hostile work environment harassment. It must also be followed in every instance. Complaints of harassment should be processed in accordance with your policy including prompt investigation and effective punishment for any instances of harassment that are found to have occurred. A slap on the wrist may be enough for minor violations, but continued violations or more egregious conduct likely call for something more severe. The ultimate test is whether the corrective action could reasonably be expected to stop the inappropriate conduct and deter such conduct in the future.

In addition, employers should train their managers and supervisors on their procedures for harassment reporting because the potential for liability starts once a management-level employee learns of the bad behavior. Managers should understand the potential risks to the company of not passing complaints up the chain, and should also understand that every complaint is important, no matter how minor it may seem.