Fourth Circuit Opinion Highlights Risk of Harassment by Nonemployees

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In a recent decision from the Fourth Circuit Court of Appeals, a South Carolina food service company could be liable for failing to protect an employee who was subjected to a daily barrage of lewd comments and gestures by employees of one of the employer's biggest clients. The Fourth Circuit reversed the lower court's decision which granted the employer summary judgment and remanded the case for trial.

The employer, a food-stocking company that sells snacks and beverages in vending machines it places on clients' premises, employed the plaintiff, Homer Ray Howard, as a route driver. The plaintiff's route included a stop at Greenville Hospital to service its vending machines. After an incident with a co-worker who left a note in the hospital canteen calling him gay, two hospital employees began harassing the plaintiff daily. The hospital employees would make unwanted sexual comments during almost every encounter they had with the plaintiff including calling him "Homo Howard," groping themselves, and propositioning him.

Despite having brought the alleged harassment to the attention to several supervisors and a manager of the employer who was also the son of the Chairman of the Board, management still refused to intervene, telling the plaintiff that there was nothing they could do because the harassers were not under the employer's control. According to the plaintiff, when he reported the harassment to his direct supervisor, he was told that the hospital employees behavior was "just a joke" and that he should not take things too seriously.

Only after filing a charge with the Equal Employment Opportunity Commission (EEOC), did the chairman of the company's board offer to change the plaintiff's shift so he would no longer have to make deliveries to the hospital. The EEOC argued that such a shift change would result in less pay for the plaintiff and would also conflict with his child care responsibilities. As a result, the plaintiff declined the shift change and was forced to resign. The EEOC then sued the employer.

The trial court found that although there was a dispute of fact regarding when the employer had become aware of the harassment, that dispute was immaterial because the employer lacked the requisite details regarding the harassment to take curative action. The Fourth Circuit disagreed and held that the plaintiff had articulated sufficient facts to show that it would be reasonable to conclude that his employer had actual or constructive notice of the harassment and failed to take any corrective action.

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This is the first Fourth Circuit decision addressing whether employers may be held liable for the actions of nonemployees. The court applied a negligence standard, holding that an employer can be liable if it has actual or constructive knowledge of the situation and takes no steps to protect the employee from harassment.

This case provides a clear example of how same-sex harassment can be actionable under Title VII. Moreover, the court's decision also serves as an important reminder to employers that all complaints about sexual harassment, whether it be harassment by other employees, contractors, customers or clients of the employer, must be addressed promptly and taken seriously in order to avoid liability under Title VII.

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