Employer May be Liable for the Activities of Non-Employees in a Claim for Sexual Harassment

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In a case of first impression in the Fourth Circuit, the Court held that an employer may be liable for sexual harassment committed by non-employees where the employer either knew or should have known of the harassment and failed to take appropriate action to halt it. EEOC v. Cromer Food Servs., Inc., 2001 U.S. App. LEXIS 4279, at * 13 (4th Cir. Mar. 3, 2011).

The defendant, Cromer Food Services ("CFS"), sold snacks and beverages in vending machines that it placed on its clients' premises. CFS employed Homer Ray Howard ("Howard") as a route driver who serviced the machines at Greenville Hospital, CFS's biggest client. Id., at * 2. Starting in December of 2006, two hospital employees began harassing Howard daily, making inappropriate sexual comments and propositioning Howard. Id., at * 3. Howard made multiple complaints to CFS supervisors, but CFS did nothing to remedy the harassment. Id., at * 4-5. Howard also complained to the supervisor of the harassing hospital employees, but, after a two-day reprieve, the harassment continued. Id., at * 6.

In March of 2007, Howard filed a complaint with the Equal Employment Opportunity Commission ("EEOC"). Id. at * 7. Upon receiving the EEOC complaint, CFS offered Howard a different route schedule. Id. Howard, however, declined the offer, claiming that his hourly pay would be less on his new shift and that the new shift conflicted with his childcare responsibilities. CFS terminated Howard shortly after his rejection of the offer. Id., at * 8.

On appeal, CFS argued that Howard failed to follow company policy by not reporting the harassment directly to the company president. Id. at * 13-14. CFS also argued that it took prompt remedial action after receiving the EEOC complaint by offering Howard a different route schedule. Id. at * 18-19. The Fourth Circuit Court of Appeals rejected both arguments.

Noting that the Fourth Circuit has not previously considered whether an employer may be held

liable for the activities of non-employees in a claim for sexual harassment, the Court looked to other circuits for guidance. Id. at * 11-13. The Fourth Circuit concluded that CFS would be liable if it knew or should have known of the harassment and failed to take appropriate remedial action to stop it. In this case, Howard complained to several CFS supervisors as well as directly to the hospital; this was sufficient to put CFS on notice of the sexual harassment. Id. In addition, the Court questioned CFS's policy that all complaints of harassment must be brought directly to the president, noting that an employee in a 100-member company may be too intimidated to report harassment directly to the president. Id. at * 16-17. Accordingly, the Court concluded that an employer cannot insulate itself from liability by adopting a "see no evil-hear no evil" policy. Id.

Additionally, the Court concluded that CFS's offer of a different route schedule was not a sufficient response to the harassment because it resulted in Howard being worse off. Id. at * 18. Arguably, the new route schedule would place Howard in a more difficult position because he would receive less hourly compensation and would be unable to drive his young child to doctor's appointments. Id. The Court noted that CFS could have asked the management at the hospital to discipline the harassing employees or could have requested that one of its other employees switch routes with Howard. Id. at * 19. Instead, CFS chose to take an ineffective corrective action that was "too little-too late."

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