SECOND CIRCUIT TACKLES THIRD-PARTY HARASSMENT OF EMPLOYEES, SETS NEW LEGAL STANDARD

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Although most employers are aware of their potential liability for supervisor and co-worker harassment, the issue of liability for harassment by third parties, such as customers and vendors, had not been decided. The Second Circuit Court of Appeals recently answered the question in *Summa v. Hofstra University*, 2013 WL 627710 (2nd Cir. Feb. 21, 2013).

The facts in Summa were egregious. Lauren Summa, a graduate student at Hofstra, was hired in 2006 as a part-time football-team manager for the fall and spring football seasons. Summa's position required her to assist the coaches during and after practices and travel with the team to away games on the team bus. While traveling with the team, she was subjected to constant comments about having sex with her boyfriend and with other players. Team members even made a Facebook page about Summa and her boyfriend suggesting, among other things, that her weight fluctuated due to "excessive sexual activities." She complained to the head coach, and he ordered the players to take it down. On a bus trip on the last day of the football season, the assistant coach played a movie with numerous explicit sex scenes, causing the players to jeer at Summa and make sexual comments and propositions to her. After a particularly egregious sexual comment made Summa cry, she asked the assistant coach to turn the movie off, which he promptly did. Following the trip, Summa complained to the head coach, the Public Safety Department, and the University's Equality Officer. The team player who made the most egregious comments was ultimately dismissed from the team, and non-harassment training was scheduled for the coaching and athletics staff.

Following these incidents, Summa was denied the team manager position for the spring season, denied a position in another university office, and her graduate assistantship was rescinded. She then filed a complaint with the New York State Division of Human Rights and subsequently filed a lawsuit in the U.S. District Court for the Eastern District of New York. The federal court complaint alleged causes of action for sexual harassment and retaliation under Title VII of the Civil Rights Act of 1964, Title IX of the Educational Amendments of 1972, and the New York Human Rights Law. After discovery, the university filed a motion for summary judgment, which the court granted, dismissing both causes of action.

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On appeal to the Second Circuit, the court assumed Summa's allegations constituted a hostile work environment, but found that the conduct could not be imputed to the university. In so doing, it adopted the rules of the Equal Employment Opportunity Commission (EEOC) for imputing liability for harassment by non-employees to employers with the proviso that it would 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." 29 C.F.R. § 1604.11(e).

By analogy to the EEOC rules, the court stated that "the employer will be held liable only for its own negligence," and the plaintiff 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."

The court applied the test for imputing harassment by non-supervisory co-workers to the university since the coaches had a high degree of control over the football players. Since the university "knew or should have known" about the harassing behavior, it had a legal obligation to address and end the harassment, which it did. Specifically, it promptly spoke to the players and ordered them to take the Facebook page down. Similarly, the offensive movie was turned off, and the football player who made the most egregious comments was dismissed from the team within 48 hours of the complaint. Further, the entire athletics staff had to complete non-harassment training before the next season. Thus, the court concluded that the university met its legal obligation and affirmed the dismissal of Summa's cause of action for sexual harassment.

Summa's retaliation cause of action fared far better. The court disagreed with the district court that Summa had failed to engage in protected activity and that the university's alleged adverse employment actions were not connected to the protected activity. The court explained its position, that all Summa had to show was that she had a "reasonable" belief that the alleged sexual harassment violated federal and state law and that it was employment related since she was on the bus "in her capacity as an employee." The court further held that the university's denial of a spring-season manager position just four months after she complained allowed causation to be inferred since the time span was so short between her complaint and the alleged adverse action. Accordingly, the court reversed the district court's dismissal of Summa's retaliation claim and sent it back for further proceedings.

The Bottom Line for Employers

Summa teaches that employers must not only have non-harassment policies and procedures that include a strong anti-retaliation provision; they must also promptly investigate complaints, including those that do not involve employees. Moreover, remedial action must be geared to end the harassment, even if this means talking directly with a customer or vendor.

Following any investigation, steps must be taken to ensure that no adverse employment actions are taken against the complainant without consultation with human resources and/or legal counsel. Employers should take notice of the *Summa* decision and update their policies and training accordingly.