

First Circuit Reverses Summary Judgment for Policyholder, Holds That Existence of Sexual Harassment Prior to Retroactive Date Is Issue for Factfinder

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The United States Court of Appeals for the First Circuit has held that the district court could not determine on summary judgment whether conduct giving rise to a claim of sexual harassment began before or after the retroactive date of the insurance policy. *Manganella v. Evanston Ins. Co.*, 2012 WL 6217625 (1st Cir. Dec. 14, 2012).

The former president of a clothing boutique sought coverage under an employment liability policy for a charge of sex discrimination filed by the boutique's former human resources manager. The insurer sought a declaratory judgment that it had no duty to defend or indemnify the boutique or its president because the policy limited coverage to claims for wrongful conduct occurring "in its entirety" after the policy's retroactive date of April 28, 1999. In the harassment charge, the manager alleged that she had worked for the boutique from 1997 to 2006 and that the president had subjected her to nearly constant physical and verbal sexual harassment "throughout her employment."

The First Circuit held that neither party was entitled to summary judgment because conflicting evidence existed regarding whether the conduct at issue began before the retroactive date. The manager previously had presented evidence that the former president made "offensive" statements prior to the retroactive date but that she did not believe those statements were actionable at the time they were made. The court held that a reasonable factfinder could determine either that the president's pre-April 1999 statements were a part of the broader pattern of harassment or that they constituted isolated incidents that merely made the manager uncomfortable and did not contribute to the hostile environment that resulted in the ultimate harassment complaint.

As part of her settlement with the insureds, the manager also had submitted an affidavit stating that the actions forming the basis of her complaint against the insured all occurred after the retroactive date. Noting the danger of collusion between claimants and insureds, the court refused to consider the affidavit because it went to the manager's subjective intent, making it irrelevant and inadmissible. Even if the affidavit were

admissible, the court found, it did not resolve the question of fact because a factfinder could determine that the affidavit lacked credibility.