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Employers' Responses to Harassment Complaints Are Key to Outcomes

How courts decide cases of sexual harassment can often hinge on how employers handle the allegations against them. Here are two cases that offer a stark contrast in employer response to suits. One company aggressively investigated and resolved the claim against it, while the other reacted passively. Let's take a look at how the different styles resulted in different outcomes.

Case 1: Graffiti Demears Worker

In *Scarberry v. ExxonMobil Oil*, a female worker alleged that sexual harassment by her coworkers resulted in a hostile work environment and that the company failed to take reasonable steps to end the harassment. The trial court dismissed her suit.

The employee asked the 10th Circuit to reinstate her case. She argued that a trial was necessary to resolve whether the employer had adequately responded to sexually demeaning graffiti referring to her and another



female employee and to demeaning statements about both women spray-painted on plant walls during the night three weeks later. The employee argued that a jury could conclude that the employer's investigation wasn't prompt or adequate for two reasons: First, because the manager of human resources didn't come in to work on his day off to personally view the first graffiti, and, second, because the company investigated the incidents for three months before it fired the suspected perpetrator.

Manager Responds Aggressively

The 10th Circuit disagreed, citing the manager's actions on the day after the graffiti appeared when he:

- ☛ *Personally photographed the graffiti so he could determine who wrote it,*
- ☛ *Ordered its immediate removal,*
- ☛ *Began interviewing employees and security guards to determine possible suspects, and*
- ☛ *Started to interview targeted suspects.*

Furthermore, the 10th Circuit found that, during the following weeks, the manager also compared the suspect's writing samples to the graffiti, reviewed surveillance tapes, checked trucking logs of outside contractors, hired a forensic handwriting expert, asked headquarters to assign a security advisor to the case and alerted security to potential problems at the plant.

The 10th Circuit found that the manager's not coming in on his day off hadn't significantly detracted from overall promptness. The court concluded that a rational jury could find that the investigation was adequate and reasonable under the circumstances.

The 10th Circuit also disagreed that the company's response to the wall writings was inadequate. The head of plant security had called police immediately, photographed the graffiti and removed it, and the operations manager immediately began to question suspects.

The company also beefed up security and for the next three days required all employees to attend meetings where the manager demanded compliance with the harassment policy. Within 11 days, the security advisor found that the handwriting of a man who had temporarily worked near the plaintiff was similar to the graffiti. Within six weeks of the second incident, the company fired a highly probable culprit. Based on these facts, the 10th Circuit held that the company's response was prompt, adequate and effective as a matter of law.

Response Must Be Proportional

The court noted that a victim may have to suffer repeated harassment while an employer progressively disciplines a perpetrator to determine whether he or she is a "hard head" case who simply never changes. The test for this is whether the employer's response to each harassment is proportional to the incident and reasonably calculated to end the harassment and prevent future harassing behavior. The court found that the company had responded appropriately to each incident.

In conclusion, the court found that the employee could point to no evidence indicating that the company could have done more to prevent future harassment. Also, requiring employers to impose discipline without

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investigation or to impose excessive discipline would inevitably subject employers to claims from the other direction of violations of due process rights and wrongful terminations.



Case 2: Patrons Harass Female Bartender

The other case, *McDonald v. B.E. Windows Corp.*, was filed by a female bartender. She complained to the manager that three regular bar patrons taunted her with lewd and obnoxious comments, such as asking her to take off her clothes and inquiring about her breast size.

After this incident, the bartender and management agreed that if these patrons returned, she wouldn't have to serve them and they couldn't sit

at her station. But two months later, they returned to her station. She lost two hours of tips until the manager finally persuaded the patrons to stay 10 feet away from her. Over the next few months, the three patrons regularly returned to the bar, tried to sit at her station, called her names and smirked at her for the rest of the evenings. She threatened the manager with legal action and told him she had already complained to the EEOC.

The next month, a private investigator came to the bar and later alleged that the bartender had misquoted prices and served him a free drink. As a result of his report, the bar fired her. She alleged hostile work environment and retaliation in violation of Title VII.

Court Refuses To Dismiss Case

The court refused to throw out the bartender's suit, noting that nonemployee harassment was subject to the same standard as coemployee harassment. That is, an employer is liable unless it provides a reasonable avenue for complaint or acts promptly to end the harassment.

The court held that management's knowledge of the harassers' persistence created an issue of fact regarding the reasonableness and effectiveness of its efforts to end the harassment. While the initial efforts to control the situation may have been reasonable, the harassment continuation should have served as notice that an otherwise reasonable remedy had proven ineffective.

Tips on Investigating Sexual-Harassment Complaints

Make sure the complainant knows that the company's policy bars sexual harassment or any form of unlawful discrimination and that the company won't tolerate retaliating against an employee for filing a complaint.

- ☛ **Get all complaints in writing, signed and dated. (You can have counsel conduct investigatory interviews.) Interview all witnesses and get their statements in writing. Advise the accused of the allegations and get a signed statement.**
- ☛ **Determine, with counsel assistance, whether a violation of company policy occurred. You may make reasonable credibility resolutions as to who is telling the truth based on the parties' history, witnesses' corroboration or lack of corroboration, the consistency of the parties' statements and their inherent probability.**
- ☛ **If the company determines a violation occurred, see that the punishment fits the crime. Employment termination isn't the only remedy against an offender, though it may be appropriate. Other appropriate ways to deal with an offender include warnings, suspensions, requiring seminar attendance and transferring one party. But transfer the complainant only if he or she consents.**
- ☛ **Notify the complainant of the company's determination in writing, and if he or she agrees with it, get his or her agreement in writing. Notify the accused of the determination and follow through with any remedy or discipline set forth in the determination.**

Guidance Is a Phone Call Away

Clearly, in the first case, the oil company made a serious and impressive effort to identify the culprit who wrote the offensive graffiti and to prevent reoccurrences. In fact, the employee had complained that the company's investigation was so aggressive, it turned her coworkers against her.

In the other case, the bar tried to accommodate the bartender's and patrons' conflicting interests. But it should have seen that it had to ban the harassers *totally* to prevent their obnoxious conduct. With sexual harassment, the customer isn't always right.

Another factor in the oil company's favor was that it had strong policies and procedures in place governing harassment investigations, while the bar improvised and developed ad hoc remedies. Granted that not every company is as big as the oil company here, with its enormous resources to deal with harassment complaints. But even a small company can afford the tiny investment of a phone call to labor counsel for guidance on how to deal with a harassment complaint. 🏠

When Is a Disabled Employee Qualified To Do a Job Under the ADA?

To sustain a claim of disability discrimination under the Americans With Disabilities Act (ADA), disabled employees must show that they are “otherwise qualified” to perform the “essential functions” of a job. And to qualify for medical leave under the Family & Medical Leave Act (FMLA), workers must notify their employers of their need for leave, among other things.

Two recent cases shed light on what constitutes being “otherwise qualified” and “essential job functions” under the ADA and what constitutes notice under the FMLA.

What Are Essential Functions?

The first case, *Shannon v. New York City Transit Auth.*, involved a bus driver whose employer discovered he was color-blind.



Before he was hired, the driver had passed a color-vision test, and a doctor certified that he was qualified to drive a bus. Six weeks into the job, his bus was involved in a minor traffic accident. A mandatory postaccident vision exam was inconclusive because he was wearing yellow-tinted glasses. After passing a retest the next day, he was tentatively recertified but was referred to an experienced ophthalmologist who gave him an “expanded” color-vision test in which he correctly identified only two of 24 color plates. Another ophthalmologist performed 1) a more elaborate test in which the driver correctly identified two of nine color plates, and 2) administered a test to check elements that can affect color vision.

The employer then decided the driver shouldn’t be allowed to drive because he “might” have some retina dysfunction affecting his color vision and asked him to resign in lieu of dismissal. He alleged that he was constructively discharged in violation of the ADA and state and local disability-discrimination laws.

Was Color Vision Essential?

The trial court granted the employer’s motion to dismiss the suit without a trial, and the driver appealed to the 2d Circuit. It affirmed, finding that, under the ADA, the

driver first had to establish a prima facie discrimination case. He had to show that he had a disability within the meaning of the ADA *or* that his employer perceived him to be disabled but that he was otherwise qualified to perform essential job functions.

The driver argued that he met the requirement that his employer *perceived* him to be disabled. The 2d Circuit called this a “stretch” but accepted it for the sake of argument. Nevertheless, the court decided he wasn’t qualified to perform the essential job functions with or without reasonable accommodation.

The 2d Circuit found that EEOC rules define “essential functions” to mean the “fundamental duties to be performed, but not functions that are merely ‘marginal.’” In making this determination, a court must give considerable deference to an employer’s judgment regarding what functions are essential to perform a particular job. A reasonable accommodation can never involve the elimination of an essential job function.

What Constitutes FMLA-Disability Notice?

In *Byrne v. Avon Products Inc.*, the 7th Circuit held that an ex-engineer who asked for his job back after two months of treatment for depression was entitled to a trial on his FMLA claim. (For more facts about the case, see “What’s the Purpose of Accommodation?”) The court noted that the FMLA provides up to 12 weeks of yearly leave for those who can’t work because of a serious health condition.

The employer argued that it couldn’t be held liable for violating the FMLA because the engineer hadn’t notified it of his medical condition when it fired him. Disagreeing, the 7th Circuit held that a worker’s dramatic behavior change could reasonably constitute notice of a medical problem. Unusual behavior, such as the engineer’s, can provide all the notice required by the FMLA.

What’s the Purpose Of Accommodation?

The second case, *Byrne v. Avon Products Inc.*, involved a night-shift stationary engineer who was caught reading and sleeping on the job. When the company fired him, he claimed that he suffered from depression that caused his sleeping and that he was incapable of working. After two months of treatment, he felt able to return to work, but the company refused to rehire him.

The engineer alleged that the company violated the ADA and the FMLA. (See “What Constitutes FMLA-Disability Notice?” at left.) He claimed that the employer should have accommodated his disability by allowing him not to work. The district court disagreed and dismissed his suit without a trial.


Was a Trial Justified?

The driver argued that the evidence didn’t sufficiently prove that he couldn’t distinguish traffic-light colors. He claimed that material-fact issues justified a trial, noting that he had previously passed a test and citing questionable results of two other tests. He also argued that color vision wasn’t essential to drive a bus, because the U.S. Department of Transportation can waive the color-vision standard and allow a color-blind person to be licensed to drive a bus. The 2d Circuit disagreed. It found conclusive the doctors’ testimony that, when the driver resigned, he couldn’t distinguish colors. Passing a previous color-vision test was irrelevant.

The 2d Circuit also dismissed the waiver argument on the ground that a doctor still had to certify that the driver could distinguish traffic-signal colors. Moreover, the transit authority could hold its drivers to higher standards than the minimum required by law. Accordingly, the court upheld dismissal of the suit.

The engineer appealed to the 7th Circuit. It held that the ADA didn’t contemplate this type of accommodation, and that an accommodation’s purpose is to allow a person to perform essential job functions. Someone who can’t perform a job’s essential tasks isn’t qualified, and someone who isn’t able to be at work can’t be a qualified person. The court noted that time off may constitute a proper accommodation for intermittent conditions, such as arthritis or lupus. But inability to work for a period of several months removes a person from the ADA-protected class.

What Should Employers Consider?

These two cases show the complex legal issues raised when employers decide to discharge workers with physical or mental problems. Employers must tread carefully when making these decisions, taking into account not only the ADA and the FMLA but also local and state laws. 

Does a Retirement Plan That Excludes Hourly Employees Violate ERISA?

An employer's retirement plan covered only salaried employees. The plan denied pension benefits to a 22-year employee for the 18 years he was paid an hourly wage. Although the company didn't count his years as an hourly employee in computing his retirement benefits, it counted them in satisfying the plan's five-year vesting period for the years he was eligible to participate in the plan as a salaried employee.

The employee alleged that ERISA entitled him to benefits for all the years he was an hourly employee, even though the company's plan specifically excluded hourly employees. The trial court dismissed his suit (*Bauer v. Summit Bancorp*) and he appealed.

Who Can Be Denied Participation

The 3d Circuit first noted that ERISA doesn't require employers to establish employee benefit plans in the first place. But ERISA requires any plan provided to meet minimum participation, funding and vesting-standards requirements. Participants may sue for benefits due under a plan's terms or to enforce or clarify rights under it. But to establish participant status, plaintiffs must satisfy two requirements: They must be common-law employees and they must be eligible to receive a benefit under the plan.

The court found that while the worker was clearly a common-law employee, he failed the test's second prong in that he wasn't eligible to receive benefits. The worker

conceded that he wasn't eligible as an hourly employee under the plan, but he alleged that:

- ✦ *The salaried-only plan violated ERISA by restricting its definition of an employee to salaried employees,*
- ✦ *Any employee — however compensated — who works 1,000 hours or more in a year is entitled to pension benefits for that year, and*
- ✦ *An employee who meets the minimum-participation standard is eligible to participate, and the company can't impose additional requirements.*



The 3d Circuit disagreed. Instead, it held that ERISA allows an employer to deny participation to employees for any reason other than age or service length. The company was neither obliged to create a plan nor to provide benefits to every employee. It could limit plan participation to some groups or employee classifications as long as it didn't base the limit on age or service length.

Avoiding Discrimination Under ERISA

In creating ERISA-governed benefit plans, employers must meet ERISA-imposed participation, funding and vesting restrictions. When excluding groups of employees from plan participation, employers must be careful not to violate ERISA's strictures against discrimination based on age and length of service. This issue frequently comes up when employers offer early-retirement plans or other severance programs governed by ERISA. 🏠

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We hope you enjoy this edition of the Employment Law Briefing. Our goal is to provide you with articles and information that will assist you in managing the employer/employee relationship, whether you are in the public or private sector. Should you have any questions regarding the topics in this newsletter, or any related employment matter, I would ask that you contact us.

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If you have any questions or comments about this publication, or if you know someone who would like to be included in our mailing list, please call **Michael J. Rose** at 860-249-1361 or e-mail me at mrose@hl-law.com.

Very truly yours,

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