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Fourth Circuit Holds Employer Liable for Third-Party Racial and Sexual Harassment

By Katie Goetzl

In its first published opinion on the topic, the U.S. Court of Appeals for the Fourth Circuit recently ruled in *Freeman v. Dal-Tile Corp.* that an employer is liable for harassment by a third party when the employer knows or reasonably should have known about the harassment and fails to take prompt, remedial action reasonably calculated to end the harassment.

The employee worked as a customer service representative selling ceramic tile and natural stone products. She had received the employer's anti-harassment policy which described both prohibited conduct and the avenues for reporting such conduct. The harasser was a sales representative for a kitchen and bath remodeling center. The plaintiff and the harasser interacted on a daily basis for three years. During these interactions, the harasser, among other things, showed the employee pictures on his cell phone of naked women, referred to his hungover state in racially derogatory terms, and called her a racial and sexual epithet.

On other occasions, the employee overheard the harasser make offensive racial and sexual comments. These comments included referring to other employees as "black b****es" and telling another female employee that he was going to have sex with one of her daughters. The employees' co-workers also testified that the harasser made inappropriate sexual and racial comments on a daily basis. The harasser himself admitted that he made sexual comments and comments that were "[m]aybe racially inappropriate."

The employee asked the harasser to stop using offensive language and repeatedly discussed the harassment with her direct supervisor as well as the harasser's employer. Her direct supervisor, who was present for some of the offensive incidents, acknowledged that the harasser was a "pig", and the harasser's employer laughed. When her direct supervisor took no action to stop the harassment for three years other than ineffectively telling the harasser to stop using inappropriate language, the employee complained to the human resources department.

The harasser was initially banned from the employer's facility. However, the employer then allowed the harasser to return on the conditions that he not communicate with the employee and that he schedule all of his on-site meetings through the employee's supervisor. The possibility of further harassment caused the employee to suffer from anxiety and depression and she had to take a two-month medical leave of absence. The employee resigned less than one month after returning from the leave of absence.

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The employee filed suit in the U.S. District Court for the Eastern District of North Carolina, alleging, among other things, sexual and racial harassment. The district court granted the employer's motion for summary judgment on the harassment claims. According to the district court, the employee showed that the harassment was unwelcome, based on her race or sex, and subjectively perceived by her to be abusive. However, she failed to create a genuine dispute of material fact as to whether the harassment was objectively severe or pervasive. In addition, the district court ruled that liability could not be imputed to the employer. The district court held that the employee had not complained to her direct supervisor and knew that there were other avenues for complaints if she was not satisfied with her direct supervisor's response, and that the employer's response to the harassment was adequate.

The employee appealed to the Fourth Circuit, which reversed and remanded the decision. First, reciting the frequent abusive behavior that occurred over the three-year period, the appeals court ruled that a reasonable jury could find that the sex-based harassment and the race-based harassment were objectively severe or pervasive. Second, the appeals court held that an employer is liable for third parties creating a hostile work environment if the employer knew or should have known of the harassment and failed to take prompt, remedial action reasonably calculated to stop the harassment. In this case, the employee's direct supervisor was aware of the harassment because she witnessed some of the incidents and was notified of other incidents by the employee. Moreover, the direct supervisor knew that the harassment was ongoing and took no action. The appeals court also found that when the employer did respond to the complaint of harassment, the response was neither prompt nor adequate. The employer took no action until the employee complained directly to the human resources department after enduring three years of harassment and then allowed the harasser to continue coming to the facility.

The following are actions employers in the Fourth Circuit (Maryland, North Carolina, South Carolina, Virginia, and West Virginia) should take in light of the *Freeman* decision:

- Review harassment policies to ensure that offensive conduct by third parties such as customers and vendors is prohibited and that multiple avenues to complain are made available to employees.
- Train supervisors to respond appropriately to harassment complaints by either investigating or notifying the human resources department.
- Ensure direct supervisors are vigilant about policing for harassment among their subordinates, even if no one makes a complaint.
- Take complaints of harassment by a third party as seriously as complaints of harassment by a supervisor or a co-worker.
- When harassment is substantiated, document the remedial action(s) taken and follow up to confirm that the harassment has stopped.

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