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The Missouri Court of Appeals, in a case of first impression has held that employees may be held individually liable for sexual harassment under the Missouri Human Rights Act.

Midwest Edition

A Littler Mendelson Midwest-specific Newsletter

Individual Employees May Be Liable for Violations Committed Under the Missouri Human Rights Act

By Erin A. Webber and Michael A. Freimann

In a case of first impression, the Missouri Court of Appeals in *Cooper v. Albacore Holdings Inc, et al.*, No. ED87027 (Mo. Ct. App., Aug. 29, 2006), ruled that an individual employee may be liable in sexual harassment cases brought under the Missouri Human Rights Act (MHRA).

Factual and Procedural Background

Tamara Cooper, a former Vice President of Human Resources for Albacore Holdings' Abiliti Solutions, Inc., and the only female member of the senior business team, sued the company and its Chief Executive Officer, Gordon Quick, for sexual harassment and retaliation in violation of the MHRA.

Cooper alleged that while at a dinner party, Quick spilled a glass of wine onto the front of her blouse and slacks. While trying to help Cooper remove the wine from her clothing, Quick touched Cooper's breasts, chest above her breasts, thigh, torso and arm several times. Cooper told Quick a number of times to stop touching her but he continued. Additionally, Cooper alleged Quick tried to touch her several more times during the party and that she tried to move out of the way to avoid him.

Later that evening, Quick suggested that nobody would mind if Cooper took her shirt off (presumably because of the spilled wine). He also made comments about her undergarments, observed that Cooper had not eaten her dinner, that she needed to put more meat on her bones, and pinched her waist. Other dinner party attendees tried to get Quick to stop bothering Cooper.

At the end of the evening, Quick asked Cooper to go home with him, telling her his wife would not mind. Cooper declined the invitation.

The day after the party, Cooper called into the Abiliti's human resources department and advised them that she would not be coming into work. In fact, she never returned to work. Cooper did not notify the company that she was resigning nor did she follow the company's internal procedures for making a sexual harassment complaint.

Approximately a week after the dinner party, Cooper's attorney sent a letter to Quick and Abiliti, advising of his representation of her on her potential claims of sexual harassment and battery. The next month, Abiliti's CFO spoke with a potential employer of Ms. Cooper, and allegedly mentioned to the potential employer he had heard Ms. Cooper had received "a boob job" and was dating someone at Abiliti. As a result of that conversation, Cooper asserted that the potential employer questioned her character and decided not to hire her.

Ultimately, Cooper filed a two-count petition against the company alleging sexual harassment and retaliation in violation of the MHRA and battery. The lower court granted summary judgment in favor of the company and Quick. Cooper appealed this ruling.

Definition of "Employer"

The MHRA provides in pertinent part that it is an unlawful employment practice "for an employer . . . to discriminate against an individual ... because of such individual's race, color, relation, national origin, sex, ancestry, age or disability." The term

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"employer" includes "any person employing six or more persons within the state, and ***any person directly acting in the interest of the employer***..."

On appeal, defense lawyers advocated for the Missouri court to follow the analysis applied by the federal courts in Title VII cases. Under Title VII, the definition of "employer" does not allow for individual liability. The Eighth Circuit had previously forecast, in *Lenhardt v. Basic Institute of Technology*, that the Missouri Supreme Court would interpret the definition of "employer" as federal courts had. However, the Missouri Court of Appeals in the *Cooper* decision quoted a Missouri Eastern District opinion which held "[w]ith all due respect to the Eighth Circuit, the Missouri Supreme Court does not blindly follow the 'predictions' of the federal courts."

Conversely, Cooper argued the court should allow that an individual be held personally liable for sexual harassment. She referred the court to an analogous Ohio Supreme Court decision where the court did impose individual liability on managers and supervisors for their own discriminatory conduct. The provision relied on by the Ohio Supreme Court defined "employer" as "any person employing four or more persons within the state... and any person acting directly or indirectly in the interest of an employer," which, Cooper pointed out, was similar to the definition in the MHRA.

In addition to relying on this Ohio case, the court of appeals also cited the definition of "employer" under the Family Medical Leave Act in an Eighth Circuit case that held a person "should be subject to liability in his individual capacity," if he met the definition of "employer" under the FMLA which includes "any person who acts, directly or indirectly, in the interest of an employer to any of the employees of such employer."

The Missouri Court of Appeals then reversed the grant of summary judgment in favor of the Abiliti on Cooper's battery claim and upheld the grant of summary judgment in favor of the company on the harassment claim because Cooper failed to file a complaint under the company's detailed harassment policy. The court upheld the grant of summary judgment on Cooper's retaliation claim because the statement about the prospective employer was hearsay evidence, inadmissible at trial. Thus, Quick was left to defend himself on the sexual harassment and battery claim.

Daunting Result for Supervisors: Missouri Court Allows Individual Liability

The Missouri Court of Appeals ruled that the wording of the definition of "employer" within the MHRA is nearly identical to the definition of "employer" as applied in the Ohio Supreme Court case. Also, the Missouri Court of Appeals concluded that the wording of the definition of "employer" within the MHRA was more analogous to the FMLA definition of "employer" rather than the Title VII definition of "employer."

The Missouri Court of Appeals held that given "[t]he plain and unambiguous language of the definition of 'employer'," the MHRA imposes individual liability for discriminatory conduct. The court found that in this case, Quick, as the CEO of Abiliti, fell within the definition of "employer" under the MHRA, and thus, he could be found individually liable for sexual harassment under the MHRA.

Practical Effect for Employers and Supervisors

While it is likely the Missouri Supreme Court will provide input at some point, for now this ruling obviously has a huge impact on the potential exposure and liability for high level management and supervisors. It may become more difficult to remove harassment cases to federal court and plaintiffs may gain an advantage in that state courts are viewed as more plaintiff-friendly in such cases, with uncapped punitive damages available and judges less likely to grant summary judgment on behalf of defendants. Further, since supervisors could be personally liable for damages in harassment cases, defending both the company and the individual defendant may present potential conflicts. More practically, while companies have detailed harassment policies and training with which to defend themselves, supervisors will more likely be relying on a mere denial of the plaintiff's allegations to defend him or herself. Finally, the opinion reminds companies it is crucial that everyone in the company, from the CEO to a mailroom clerk, participate in sexual harassment training in order to assert the appropriate affirmative defense.

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