BY JOHN C. SCHLINKER AND MATTHEW K. PAYOK

The Customer Is Not Always Right

Most employers are well aware of their potential liability for discriminating against their employees "because of" sex, including hostile work environment claims. The logic of holding the employer responsible for a hostile work environment created by managers or supervisors is sound. An employer's liability for a hostile environment created by co-workers is less direct, but the employer is still responsible for hiring and controlling its employees, and so a reasonable basis for liability does exist.

Employers may also be responsible, however, for a hostile environment created by non-employees, such as customers, if a court determines the employer could have fixed the problem. The logic of imposing this liability is not as sound, since the employer did not hire the customer and the employer has done absolutely nothing that would constitute harassment. Regardless, courts addressing Title VII claims have held that, to the extent the employer can take steps to control or minimize the harassment of its employees by customers, it must do so.

Title VII

Federal law makes it unlawful for an employer to discriminate "because of" an individual's "race, color, religion, sex, or national origin."[1] In 1986, six years after the EEOC had administratively reached the same conclusion, the Supreme Court of the United States held that the prohibition against "sex" discrimination also prohibited the creation of hostile work environments.[2] In 1988, the Court also held that same-sex sexual harassment is actionable under Title VII.[3]

In 1998, in a pair of decisions with identical holdings, the Supreme Court created a new liability scheme. The Court held that Title VII of the Civil Rights Act of 1964 would henceforth impose strict liability on employers for workplace harassment perpetrated by supervisors. An employer with (1) a satisfactory procedure for reporting and eradicating workplace harassment and (2) an employee who negligently fails to take advantage of that procedure may exercise a judicially-created affirmative defense to supervisory wrongdoing. In addition, an employer is exposed to liability if it fails to take corrective action when it knows or should know of workplace harassment by a co-worker or a non-employee.[4] The following is an overview of Title VII liability as it relates to non-employees' conduct.

The Basics of Non-Employee Harassment

Administrative guidance in this area of the law is contained in the EEOC's, "Guidelines on Discrimination Because Of Sex."[5] On the issue of non-employee sexual harassment, the EEOC offers the following summary of its view of the law:

> *An employer may also be responsible for the acts of non-employees, with respect to sexual harassment of employees in the workplace, where the employer, or its agent or supervisory employees, knows or should have known of the conduct and fails to take immediate and appropriate corrective action. In reviewing these cases, the Commission will consider the extent of the employer's control and any other legal responsibility that the employer may have with respect to the conduct of such non-employees.*[6]

The Supreme Court has never addressed non-employee harassment. This may be because lower court rulings have applied a consistent rule in both co-worker and non-employee cases: there must be evidence of an employer's negligence in order to establish liability.

Some illustrative cases

The facts underlying non-employee harassment claims range from mundane to bizarre. In one particularly strange case, the plaintiff worked as a mime in a Las Vegas casino. Apparently, she was better at her job than she expected to be, and some patrons began touching her to find out if she was a real person. To counteract this problem, the casino assigned a large man dressed in a clown suit to protect the plaintiff during her performances. She also wore a sign on her back, provided by the casino, that read, "Stop, do not touch."

Despite these efforts and three warnings from another employee, one customer felt he needed to find out for himself and tried to grab the plaintiff. After touching her on the shoulder, he received

all the proof he needed: the mime punched him in the mouth. The casino fired the mime after this incident because the attempted groping was, in its view, insufficient to warrant a belt in the chops. Unsurprisingly, the mime sued, alleging that she was fired for refusing to put up with the patron's harassment.

The Ninth Circuit, facing the issue of non-employee harassment for the first time, held that an employer is "liable for sexual harassment on the part of a private individual, such as the casino patron, where the employer either ratifies or acquiesces in the harassment by not taking affirmative and/or corrective actions when it knew or should have known of the conduct."[7] Because the casino had done everything it could reasonably do to protect her and avoid such incidents, the Court determined that the plaintiff failed to carry her burden.

The Eighth Circuit applied the same standard in *Crist v Focus Homes.*[8] The plaintiff, an employee of a residential care facility for patients with developmental disabilities, was the unwelcome recipient of the attention of one of her patients. A young male patient, around 16 years old, but 6 feet tall and weighing over 200 pounds, frequently groped the plaintiff as she did her rounds. The employer was aware of this but did nothing to prevent it.

Non-employee harassment in the workplace

The Court held that an employee does not assume the risk of harassment, and accordingly that the employer is responsible for providing a safe working environment. Liability may exist if the employer "clearly controlled the environment . . . and had the ability to alter those conditions to a substantial degree."[9] The Court noted that an employer need not guarantee a harassment-free workplace, but that it take action that is "appropriate in light of all the circumstances" when it is notified of harassment.[10]

The employer in *Rodriguez-Hernandez v Miranda-Velez,*[11] was held liable because instead of discouraging one of the firm's best clients from harassing the firm's office manager, it encouraged the office manager to keep the customer happy.[12] In *Lockard v Pizza Hut,*[13] the restaurant took no action to protect the plaintiff waitress, despite her reports of increasingly abusive behavior by some of the customers. The Court wrote: "An employer who condones or tolerates the creation of such an environment should be held liable" even if a non-employee creates that environment.[14]

An employer may also be responsible for harassment committed by independent contractors.[15] To be sure, however, Title VII does not extend beyond the workplace. In *Whitaker v Carney,*[16] the Fifth Circuit confirmed what should be obvious: an employer is not liable for harassment by a non-employee committed outside the workplace.

Conclusion

In light of these decisions, it appears to be settled law that employers are responsible for harassment by non-employees and independent contractors under Title VII. As a result, it is important to counsel employers, particularly those in service industries, that they may be liable for activities of these people, whom the employer may assume are not its responsibility. It is also important to emphasize that an employee's complaints regarding harassment by customers are real concerns and need to be handled in a prompt fashion.

The best way to deal with these problems is to prepare for them. Employers need competent legal representation to draft and implement appropriate anti-harassment policies, and advice regarding enforcement. Conversely, employees should be made aware of their right to be free from unlawful harassment in the workplace, regardless of the status of the harasser. If both employers and employees are aware of the rights and responsibilities, non-employee harassment can be dealt with quickly and effectively to avoid workplace disputes. ✦

Fast Facts:

Employers may be responsible for a hostile environment created by non-employees.

Courts addressing Title VII claims have held that, to the extent the employer can take steps to control or minimize the harassment of its employees by customers, it must do so.

An employee's complaints regarding harassment by customers are real concerns and need to be handled in a prompt fashion.

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Footnotes

1. 42 USCA 2000e, 703(a).
2. *Meritor Savings Bank v Vinson,* 477 US 57, 65 (1986).
3. *Oncale v Sunclowner Offshore,* 523 US 75, 82 (1999).
4. *Burlington Industries v Ellerth,* 524 US 743 (1989).
5. Posted at www.eeoc.com.
6. 29 CFR 1604.11.
7. *Folkerson v Circus Enterprises,* 107 F3d 754 (CA 9, 1997).
8. 122 F3d 1197 (CA 8, 1997).
9. Id. at 1112.
10. Id. note 5.
11. 132 F3d 848 (CA 1, 1998).
12. Id. at 854.
13. 162 F3d 1062 (CA 10, 1998).
14. Id. at 1073–1074.
15. See *Trent v Valley Electric Association,* 41 F3d 524 (CA 9, 1994).
16. 778 F2d 216 (CA 5, 1985).