

management matters

Second Circuit Reaffirms That Employers May Be Liable for Off-Duty Sexual Harassment

By Jonathan A. Wexler

In a recent case, the Court of Appeals for the Second Circuit ruled that an employer may be liable for sexual harassment that occurred away from the workplace at a time that both the harasser and the victim were off duty, and that off-duty harassment will suffice to place an employer on notice of a harasser's actions. This decision highlights the need for employers to be vigilant about their employees' off-premises interactions, as well as the proclivities of employees to commit what may be actionable sexual harassment.

Ferris v. Delta Air Lines

In *Ferris v. Delta Air Lines* and *Michael Young*, the plaintiff, Penny Ferris, and individual defendant, Michael Young, were flight attendants who worked together on a New York-Rome flight. Upon landing in Rome, the flight crew was taken by bus to a hotel arranged by Delta. Ferris went to Young's room, where she claimed that Young had drugged a glass of wine she was drinking, and proceeded to rape her as she drifted in and out of consciousness. Ferris worked the return flight with Young the next day and did not work with him again. Beginning two weeks after the alleged rape, and over the course of two months, Ferris reported the incident to various Delta employees, periodically revealing more details of the incident until she identified Young by name and submitted a written report to Delta management. Young was suspended

and eventually separated from Delta's employ. Ferris sued Delta for sexual harassment as a result of Young's assault on her in Rome.

Granting summary judgment in favor of Delta (thus preventing a jury from considering the matter), the court cited the following: the alleged rape did not occur in the "work environment"; plaintiff was off duty; plaintiff voluntarily went to Young's room for "purely personal reasons"; and the airline had no reason to know that Young "was a sexually dangerous predator who should not have been placed in close proximity to a fellow employee." Although acknowledging that an employer may be liable for a hostile environment where an employee must work with a sexual harasser after an off-duty incident between them, the court also held that because plaintiff did not report the incident until several weeks later, Delta could not be liable for Ferris having to work with Young on the return flight, and that the mere possibility of Ferris having to work with Young again (which she never actually did) was too speculative to support a claim of a sexually hostile environment.

On appeal, the Second Circuit reversed the district court's grant of summary judgment for several reasons. First, the appeals court took a different view from the district court's as to whether Delta was on notice of Young's past behavior and proclivities to commit sexual assault. In that regard, the Second Circuit pointed to three incidents of alleged rapes and

other sexually hostile conduct, some of which occurred off duty and off the work premises, that Young had committed against other Delta flight attendants, who had reported the incidents to Delta supervisors. In each instance, Delta took no action in response to those reports, and in one case, the Delta supervisor to whom the report was made took affirmative steps to quash any further inquiry.

Second, the appeals court disagreed that the hotel-room locale of the alleged rape of Ferris could not be found to be a work environment under Title VII of the Civil Rights Act, the federal law that prohibits sexual harassment. The court observed that members of flight crews frequently spend layovers together at the same hotel, generally brought there by ground transportation arranged for by the airline, inevitably socialize with one another in view of the fact that they rarely know anyone else in what is usually a foreign city, and often do not know the local language. Accordingly, the court determined that a jury could have found that Young's hotel room was part of Ferris' work environment.

The Second Circuit held that a single incident of rape was sufficient to establish the first element of a hostile environment claim, i.e., severe sexual harassment that altered a plaintiff's employment conditions and created an abusive workplace. The court further determined that Ferris could establish the second element—a basis for imputing the offending conduct to the employer—through the various reports to Delta of Young's past sexual misconduct. In finding that the attack on Ferris could be deemed to have resulted from Delta's negligence, the Second Circuit highlighted Delta's lack of response to the previous reports about Young. The court stated that Delta was fully on notice of Young's proclivities despite the fact that those reports involved non-work-related, off-duty conduct. While acknowledging that off-duty conduct is more difficult for an employer to investigate, the Second Circuit held that where the conduct was as egregious as that of which Young was accused, the employer has a duty to protect coworkers from that conduct.

Discussion

With this decision, the Second Circuit continues the expansion of the concept of the work environment. Sales trips, marketing events, conventions, seminars and other business-related activities will no

doubt be considered part of the workplace for sexual harassment purposes, especially when the event involves overnight stays that place employees in close proximity to one another. And where the employees who are traveling together are in a supervisory-subordinate relationship, the "pressure" on the potential victim to engage in what might be undesired socializing will be greater. Of course, an employer will be absolutely liable for any harassment by a supervisor that is accompanied by a tangible employment action, such as a discharge, demotion, denial of a pay increase, etc.

One lesson of the *Ferris* case is that employers need to be ever vigilant with respect to what is taking place at off-site business events—where employees are staying, what evening activities are planned, the organizational relationship among the employees in attendance—and control those factors to the extent possible to minimize risks of inappropriate interactions. A more important lesson is that employers must respond promptly and effectively to complaints and reports of improper, sexually related actions by employees. As the Second Circuit's ruling in *Ferris* demonstrates, once an employer is on notice of an employee's tendencies to commit sexually harassing acts, the employer is likely to be held liable for acts committed by that employee, even against different victims. In this regard, companies are well advised to investigate all complaints and reports of such conduct, even if the employee making the report specifically requests that the employer do nothing. It was Delta's inaction toward, and affirmative covering-up of, complaints about Young that led the appeals court to hold that a jury could find Delta negligent in connection with the attack on Ferris.

Toward this end, employers should be sure to have an anti-harassment policy with an effective procedure for reporting harassment that occurs at and away from the actual workplace, and that all employees are given and trained about the policy. Companies must also have a mechanism in place to investigate such reports promptly, and be sure that the employees who are responsible for investigations are properly trained as well. ▽

Jonathan A. Wexler, Esq., is an attorney in the New York office of Vedder Price Kaufman & Kamholz, where he practices labor and employment law.

DID YOU KNOW?

Any person employed in a professional capacity at a CPA firm is eligible for an Associate Membership? Pass the word along to your colleagues. As soon as they join:

They can enjoy all the membership benefits and discounts right away.