EMPLOYER LIABILITY FOR NON-EMPLOYEE
SEXUAL HARASSMENT

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CASE DESCRIPTION

The primary subject matter of this case sexual harassment. This case has a difficulty level of three to four, and is appropriate for an upper division, undergraduate level. This case is designed to be taught in one class hour, and is expected to require two to three hours of outside preparation by students.

CASE SYNOPSIS

This case examines the limits of employer responsibility for sexual harassment of their employees. Title VII of the Civil Rights Act of 1964 prohibits discrimination based on race, color, religion, sex or national origin. Sexual harassment is considered sex discrimination, and is prohibited under this act (Meritor Savings Bank v. Vinson, 1986). A majority of employers are well aware that sex harassment by supervisors and co-workers is an unlawful employment practice that will subject the employer to vicarious liability (Harris v. Forklift Systems, Inc., 1993). Not so well known is the fact that sex harassment by non-employees such as independent contractors, customers, clients, and suppliers will also subject the employer to exposure for discrimination liability (Lockard v. Pizza Hut, Inc., 1998). The following case presents basic information about non-employee sexual harassment law, followed by several vignettes. In each case, students are to evaluate the vignette, determine whether sexual harassment has taken place, and whether the employer can be held liable for the discriminatory acts of non-employees.

INSTRUCTORS’ NOTES

RECOMMENDATION FOR TEACHING APPROACHES

I have often found that students do not clearly understand the concept of environmental sexual harassment, without seeing specific examples. This case was designed to help clarify this particular issue, in specific, those instances of sexual harassment by third parties, in a manner that allows insightful discussion of the topic.
Generally, the approach I take is to divide the class up into small groups, and assign them each one or more of the cases to discuss. Then each group will present their determinations to the class, and we will discuss, as a whole, whether the analysis picked up the important facets of the case. Each of these cases is based on a specific real situation, and have been decided in a court of law. The specifics of each case follow:

GENERAL DISCUSSION POINTS

Employer liability for workplace environmental discrimination under Title VII is usually based upon traditional notions of agency law which ordinarily poses no difficulty in resulting employer liability because the vast majority of environmental discrimination complaints are founded upon the actions of the company’s employees both co-workers and supervisors (Faragher v. City of Boca Raton, 1998). However, imposing liability upon the employer for the discriminatory acts of non-employees is problematic (Berry v. Delta Airlines, 2001). Third party non-employees typically cannot be considered an agent of the employer and consequently the employer cannot be held liable for environmental discrimination because of the acts of non-employees upon an agency theory (Burlington Industries, Inc. v. Ellerth, 1998). The courts, however, have ruled that employers are liable for harassing conduct by non-employees “where the employer either ratifies or acquiesces in the harassment by not taking immediate and/or corrective actions when it knew or should have known of the conduct” (Folkerson v. Circus Circus, 1997). The EEOC guidelines on the subject are in accord and recite: “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 agents or supervisory employees) knows or should have known of the conduct and fails to take immediate and appropriate corrective action” (29 CFR §1604.11 (e), 1980). The courts, then, have applied a negligence theory of liability to impose legal responsibility upon the employer of the victim of discrimination as a result of the harassing acts of non-employees (Little v. Windermere Relocation, Inc., 2001). “Thus, employers may be held liable in these circumstances if they ‘fail to remedy or prevent a hostile or offensive work environment of which management-level employees knew, or in the exercise of reasonable care should have known” (Lockard v. Pizza Hut, Inc., 1998).

THE CASES

Complaint 1- The employee sales rep and a customer.

In Galdamez v. Potter, Galdamez, a US postal service employee, alleged that she was subjected to a hostile work environment, due to her Honduran ancestry and strong accent. She claimed harassment and unwarranted discipline by supervisors, customers and community members. While the initial court decision ruled against Galdamez, an appeals court held that an employer may
be liable for actionable harassment of an employee by third parties if it failed to investigate and remedy the harassment after learning of it. This decision creates a stand-alone claim under Title VII for an employer’s failure to investigate and remedy harassment of its employees by third parties, such as customers and community members. Galdamez v. Potter, 415 F.3d 1015 (9th Cir 2005).

While the Galdamez case involves race and national origin discrimination, the extension of Title VII to include harassment by customers, applies in sexual harassment cases as well. Since Susan has reported this to her supervisor, and it has happened repeatedly, the company should have taken reasonable steps to rectify the issue. Their failure to do so may make them liable under the “negligence theory of liability” highlighted above.

1) **Do the actions detailed in this complaint constitute environmental sexual harassment, that is, is this scenario sufficiently severe or pervasive to alter the terms and conditions of your employee’s employment and create an abusive working environment?**

   The behavior is extreme and repeated. This would be likely to satisfy the requirements for a hostile work environment.

2) **Does your employee express a basis upon which your company can be held liable for the harassment?**

   The employee has given notice to the company supervisor, providing sufficient information to indicate that a hostile work environment exists.

3) **What could your employer do, if anything, to reduce its exposure for liability for discrimination?**

   Companies should have a clear set of guidelines regarding hostile work environments. The EEOC sexual harassment guidelines state that:

   > The employer should investigate promptly and thoroughly. The employer should take immediate and appropriate corrective action by doing whatever is necessary to end the harassment, make the victim whole by restoring lost employment benefits or opportunities, and prevent the misconduct from recurring. (Policy Guidance, 1990)
Complaint 2-The employee maintenance personnel and an independent contractor.

This scenario is based on Hicks v. Sheahan, 2004 U.S. Dist. Lexis 26791 (N.D. Ill. 2004), wherein the employer argued that it could not be liable for the actions of a person who is employed by an independent contractor. The U.S. Supreme Court has thrown into question whether an employer can be vicariously liable for I.K. harassment because of the lack of agency relationship but the court in Hicks dodged the issue by holding that courts have applied the EEOC standard of negligence liability to situations involving harassment by a non-employee and distinguished this case from a vicarious liability agency theory to one involving negligence by the employer in failing to address the sexual harassment by Wilson. The court said, “Even assuming that the employer is correct that it did not have the authority to control an Aramark employee, Defendant has offered no reason that it should not have at least tried to address the problem when “Sam” was repeatedly complaining of the harassment. The employer could have notified Aramark of Sam’s allegations and asked it to investigate so Wilson’s status as a non-employee does not preclude liability by the employer if it is otherwise negligent.

1) Do the actions detailed in this complaint constitute environmental sexual harassment, that is, is this scenario sufficiently severe or pervasive to alter the terms and conditions of your employee’s employment and create an abusive working environment?

Yes. The courts look to the frequency and severity of the harassment to determine whether it is sufficiently severe or pervasive to alter the terms of the worker’s employment. Here, the acts of the independent contractor were subjectively and objectively frequent and severe because of the overt sexual content and because the worker perceived the acts to be unwelcome and offensive.

2) Does your employee express a basis upon which your company can be held liable for the harassment?

Yes. The key to the employer’s liability here is that the worker repeatedly reported the harassment and the employer was negligent in responding to his complaints.

3) What could your employer do, if anything, to reduce its exposure for liability for discrimination?

The company SHOULD have fully investigated the claims, and contacted Aramark about the harassment.
Complaint 3- Employee receptionist encounters a supplier.

This case was inspired by Fulmore v. Home Depot, 2006 U.S. Dist. Lexis 22906 (S.D. Ind, 2006). The court reasoned that no matter how severe this conduct the incident did not support a hostile environment claim because the conduct could not be attributed to Home Depot. The EEOC Guidelines regulating sexual harassment state that an employer may be responsible for harassment by an non-employee where the employer knows (or should have known) of the conduct and fails to take immediate and appropriate corrective action, depending on the control and other legal responsibility the employer may have over the non-employee. Several courts have held that discriminatory harassment by a customer or patron can be evidence of a hostile environment claim where the employer ratified or condoned the conduct by failing to investigate and remedy it after learning of the conduct. Under circumstances where an employer ratifies or otherwise condones discriminatory conduct there can be a basis for employer liability. Here, however, no reasonable jury could find that Home Depot ratified the conduct, ignored the complaint of abuse or otherwise forced Mary to endure discrimination by suppliers. Home Depot had no control over this supplier with whom it had no business or other relationship and where the harassing behavior had ceased Mary has failed to raise an issue as to whether Home Depot had either the ability or the duty to do anything further. This court has not imposed upon employers the obligation to reprimand or otherwise punish persons over whom they have no control for harassing behavior when the employee is no longer being subjected to the harassment.

1) Do the actions detailed in this complaint constitute environmental sexual harassment, that is, is this scenario sufficiently severe or pervasive to alter the terms and conditions of your employee’s employment and create an abusive working environment?

This is a very close question and the answer is mixed. Usually one incident of harassment will not be deemed sufficiently severe or pervasive to affect the conditions of the worker’s employment. The single remark of one of the salesmen will not be sufficient to create an abusive working environment. However, a single incident of an offensive and un-consented touching can constitute a basis for environmental sexual harassment. A single incident of harassment must be exceedingly severe to be actionable and the act of touching the worker’s breast just once will probably not constitute environmental sexual harassment.

2) Does your employee express a basis upon which your company can be held liable for the harassment?

No. The general rule is that an employer may be liable for discriminatory harassment by a non-employee where the employer ratified or condoned the conduct by failing to
investigate and remedy it after learning of the conduct. Here, however, there is no evidence that the employer ratified the conduct, ignored complaints of abusive treatment or otherwise forced the employee to endure discrimination by third parties in the reception area. The employer had no control over the conduct of the visitors and where the harassing behavior had ceased there was no evidence that the employer had the ability to do anything. The courts have not imposed upon an employer an obligation to reprimand or otherwise punish third parties over whom they have no control from harassing behavior when the employee is no longer being subjected to the harassment.

3) **What could your employer do, if anything, to reduce its exposure for liability for discrimination?**

   Nothing. The harassment having ceased and the third parties having no relationship to the employer then the employer is under no duty to act.

**Complaint 4- Public Relations Employee Raped by Client.**

The facts for this case were derived from Little v. Windermere Relocation, 301 F.3d 958 (9th Cir. 2001). The issue in the case was not whether the employer created a hostile work environment but whether the employer’s reaction to the rape created environmental sexual harassment. Here, the employer’s actions after the rape were insufficient and negligent. The employer’s failure to take immediate and effective corrective action allowed the effects of the rape to permeate the Public Relations employee’s work environment and alter it irrevocably.

1) **Do the actions detailed in this complaint constitute environmental sexual harassment, that is, is this scenario sufficiently severe or pervasive to alter the terms and conditions of your employee’s employment and create an abusive working environment?**

   Yes. Rape is unquestionably among the most severe forms of sexual harassment and being raped by a business associate while on the job irrevocably alters the conditions of the employee’s work environment.

2) **Does your employee express a basis upon which your company can be held liable for the harassment?**

   Yes. An employer’s reaction to a single serious episode may form the basis for an environmental sexual harassment claim. Again, an employer can be liable for harassing conduct by non-employees where the employer either ratifies or acquiesces in the harassment.
by not taking immediate and corrective actions when it knew or should have known of the conduct.

3) What could your employer do, if anything, to reduce its exposure for liability for discrimination?

Make an unequivocal response to the complaint and the wrongful behavior. Here, the employer’s reaction to the rape was equivocal at best. The employee was encouraged to get the account; when she reported the incident she was not effectively removed from the account and when she finally reported the incident to the President she was demoted. The employer failed to prevent contact between the employee and Guerrero such as effectively removing the employee from the account or informing Starbucks that it must replace the contact it used with the employer. In short, the employer failed to take appropriate remedial measures so that its inaction can be deemed to be a ratification or acquiescence in the rape such that it is liable for creating an abusive and hostile work environment.

REFERENCES

Allen v. Tyson Foods, 121 F.3d 642 (11th Cir. 1997).

Berry v. Delta Airlines, 260 F.3d 803 (7th Cir. 2001).

Breda v. Wolf Camera & Video, 222 F.3d 886 (11th Cir. 2000).


Folkerson v. Circus Circus Enterprises, Inc., 107 F.3d 754 (9th Cir. 1997).


Galdamez v. Potter, 415 F.3d 1015 (9th Cir. 2005).

Guidelines on Discrimination Because of Sex, 29 C.F.R. Section 1604.11(a).

Guidelines on Discrimination Because of Sex, 29 C.F.R. Section 1604.11(e).


Little v. Windermere Relocation, 301 F.3d 958 (9th Cir. 2001).

Lockard v. Pizza Hut, Inc., 162 F.3d 1062 (10th Cir. 1998).


