

CITY RESPONDS APPROPRIATELY TO SEXUAL HARASSMENT CLAIM

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As described by the U.S. Equal Employment Opportunity (EEOC), sexual harassment is a form of sex discrimination that violates Title VII of the Civil Rights Act of 1964. Unwelcome sexual advances, requests for sexual favors, and other verbal or physical conduct of a sexual nature constitute sexual harassment when this conduct explicitly or implicitly affects an individual's employment, unreasonably interferes with an individual's work performance, or creates an intimidating, hostile, or offensive work environment. (http://www.eeoc.gov/types/sexual_harassment.html)

HOSTILE ENVIRONMENT

In the case of *Nievaard v. City of Ann Arbor*, No. 03-2340, 2005 U.S. App. LEXIS 3690 (6th Cir. 2005), plaintiff Christine Nievaard claimed that she was subject to a "hostile work environment based on her sex" because she was the first female hired for the position of Parks Maintenance Foreperson by the City of Ann Arbor. Nievaard's job required her to "supervise five employees, both male and female, who were responsible for installing and maintaining playground equipment, fencing, and athletic fields for various parks throughout the city." In her position as maintenance supervisor, Nievaard also had to interact with employees from crews that she did not supervise.

Nievaard claimed that she experienced sexual harassment almost immediately after starting work. Most of the alleged incidents included non-sexual conduct, including one of the Parks Department employees telling Nievaard the day after she was hired that he would have a hard time working for a woman because of his religious beliefs. In addition, Nievaard alleged that several other city employees were insubordinate, calling her a "bitch" and questioning her competence, decisions, and orders on a daily basis.

Nievaard also claimed that various city employees "spread rumors about her relationship with various employees and made allegations of sexual promiscuity." Approximately three months after she was hired, Nievaard complained to the City about these and other incidents, alleging that she was experiencing harassment based on her sex. Nievaard contended, however, that her complaints did not stop the harassment.

A year after Nievaard was hired, the City hired a new manager for the City's Parks and Forestry Department. According to Nievaard, the new manager told her she lacked "integrity" because she had used a work vehicle and work issued cell phone for personal business. Nievaard took issue with the manager's assessment of her job performance, particularly her need to improve in several areas, including "honesty and integrity." Several months later, Nievaard was "terminated for job abandonment."

CITY'S RESPONSE

In response to Nievaard's sexual harassment claims, the City's Human Resources Department (HR) conducted an investigation and "quickly confirmed the fact that Nievaard was being subjected to a hostile work environment due to her gender." In reaching this conclusion, HR found that Nievaard had been "subject to rumors about her relationships, comments about her appearance and clothing, questions about her competence, questions about her decisions and orders, insubordination by various employees, [and] name calling (including 'bitch')." Following its investigation, HR determined that "the problem can not be pinned on one person, but rather on an attitude that has been allowed to pervade the workplace" at the Parks and Recreation Headquarters.

Having found Nievaard had been the subject of harassment based on gender, the HR department made several attempts to eliminate the harassment. Specifically, HR tried to "educate Parks and Recreation management about the City's Policy 404, which prohibited discrimination and harassment, and to provide support to Parks and Recreation management in uniformly enforcing the policy." A memo written by the HR director set forth numerous actions taken by the HR Department in response to Nievaard's complaints which included:

- (1) on August 8, 2001, the HR department held a two hour training session on Policy 404 for Parks and Forestry management who worked at the Parks and Forestry Headquarters [415 Building]
- (2) on August 15, 2001, the HR department met with supervisors from the 415 Building to go over Policy 404 again and to instruct them in how to inform their employees about the policy;
- (3) on August 16, 2001, and August 23, 2001, the HR department met with each division and work group to go over Policy 404 and to discuss the consequences of violating the policy;
- (4) on August 20, 2001, the HR department met with all Parks employees at the 415 Building about Policy 404;
- (5) on August 15, 2001, the HR department held numerous individual meetings with employees;
- (6) on various dates, the HR department held meetings with union officers from AFSCME Local 369 to discuss the situation with Nievaard;
- (7) the HR department provided support to the management staff of the Parks Operation and Forestry Division, as well as the Assistant Superintendent of Parks and Recreation, to ensure consistent enforcement of Policy 404;

(8) the HR department provided Nievaard with support services, such as personal counseling by outside consultants, daily consultations about how to handle various situations, offers to repair her damaged vehicle, and other support as needed;

(9) discipline was imposed on one manager and two supervisors in the Forestry division for their involvement in the harassment; and

(10) a seasonal employee was terminated for violation of Policy 404. In addition to these measures, an employee supervised by Nievaard, who had been accused of insubordination by Nievaard, was transferred to another supervisor.

Despite these efforts, the HR Department conceded that "selected supervisory personnel and hourly employees are increasingly directing harassing comments and initiating extremely negative rumors towards Nievaard." According to the HR Department, "the harassment was continuing because of a lack of cooperation and follow-through by Parks Department management." In reaching this conclusion, the HR Department found that "Parks Operations and Forestry management staff, as well as Parks Department senior management, ceased enforcing Policy 404 and taking a proactive approach to stop the ongoing harassment directed at Nievaard by the beginning of September." In light of "the lack of follow-through by the Parks Department," which undermined "HR's ability to enforce Policy 404," the HR Department concluded that it had "no more to offer on this situation, until such time as follow-through and accountability issues within Parks are resolved."

DISTRICT COURT

Despite what HR described as the "Parks Department's lack of initiation and maintenance of an appropriate level of action to effectively stop the daily harassment directed at Nievaard," the federal district court characterized most of Nievaard's complaints as nothing more than "personal animosity or specific disagreements and misunderstandings between her and her co-workers... not based on any gender discrimination." On the other hand, the district court found that four of Nievaard's allegations did occur because of sex:

(1) two employees calling Nievaard a "bitch" and the anonymous note calling her a "superbitch;" (2) "wolf whistling" by an employee that she saw rarely; (3) an employee putting his arm around Nievaard and telling her she was "sexy;" and (4) an employee's statements that if Nievaard pulled down her shirt a little more the workers could have a "view all day" and that Nievaard's shirt was "too tight."

In the opinion of the district court, it was "doubtful" whether these incidents amounted to serious or pervasive harassment. In any event, the district court concluded that the City's "prompt and adequate remedial measures" precluded any finding of gender

discrimination based upon a hostile work environment. The federal district court, therefore, granted summary judgment in favor of the City. Nievaard appealed.

ON APPEAL

Assuming the fact that certain incidents of harassment were based on Nievaard's gender and that the harassment was severe or pervasive, the issue before the appeals court was, therefore, whether "the City made a good-faith effort to respond to the harassment." As cited by the federal appeals court, pursuant to Title VII of the Civil Rights Act of 1964, 42 U.S.C. 2000e, *et seq.*, an employee alleging a hostile work environment based on sexual harassment must show the following:

(1) the employee was a member of a protected class; (2) the employee was subjected to unwelcome sexual harassment; (3) the harassment complained of was based on sex; (4) the charged sexual harassment created a hostile working environment; and (5) the existence of employer liability.

Further, the appeals court noted that "[a] hostile work environment occurs when the workplace is permeated with discriminatory intimidation, ridicule, and insult that is sufficiently severe or pervasive to alter the conditions of the victim's employment and create an abusive working environment." As described by the court, "the conduct must be so severe or pervasive as to constitute a hostile or abusive working environment both to the reasonable person and the actual victim."

In response to the Nievaard's claim of a hostile work environment, the City maintained that Nievaard had "failed to prove that the harassing incidents were motivated by her gender." Moreover, the City rejected Nievaard's contention that "the incidents were severe or pervasive, or that the City did not respond adequately to Nievaard's complaints."

Assuming some of the harassing incidents were severe or pervasive and based on gender, the appeals court nevertheless found that Nievaard had "failed to establish that the City did not respond promptly and adequately to her complaints." Accordingly, the appeals court agreed with the district court's determination that "the grant of summary judgment in favor of the City was proper." In so doing, the appeals court found Nievaard had failed to establish employer liability for a hostile work environment based on sexual harassment.

As noted by the appeals court, "[t]he standard for employer liability differs depending upon the identity of the alleged harasser, with a distinction drawn between co-worker harassment and harassment perpetrated by a supervisor."

Because employer liability for co-worker harassment is based directly on the employer's conduct, an employer is only liable "if it knew or should

have known of the charged sexual harassment and failed to implement prompt and appropriate corrective action."

But in the case of harassment committed by a supervisor, an employer's liability is vicarious. In such a case, the employer must demonstrate that it "exercised reasonable care to prevent and correct promptly any sexually harassing behavior, and that the plaintiff employee unreasonably failed to take advantage of any preventative or corrective opportunities provided by the employer or to avoid harm otherwise.

In this particular instance, the appeals court found Nievaard had alleged that she was harassed by both co-workers and by a supervisor. The appeals court, however, determined that the claim against the supervisor could not form the basis for a hostile work environment claim because the alleged harassment attributed to her supervisor was not based on Nievaard's gender. Specifically, Nievaard had stated that she felt that her supervisor had "questioned her integrity, and questioned her about her personal use of a city-issued cell phone and truck, in an attempt to force Nievaard to resign in retaliation for her complaints." According to the appeals court, "conduct alleged to have occurred in retaliation for complaints made about a hostile work environment can not be figured into the hostile working environment equation because such incidents are not alleged to have occurred 'because of sex'." Moreover, the appeals court noted that Nievaard had not alleged that a claim of retaliatory discharge in her complaint against the City.

Nievaard had also alleged that her supervisor had discriminated against her based on gender when he told her that "if she wanted to fit in, she should dress less femininely." According to the appeals court, "a manager's warning, without more, that plaintiff's clothing is inappropriate in the workplace is not sexual harassment." Applying this principle to the facts of the case, the appeals court found Nievaard had not demonstrated that these particular comments about her dress were anything more than a legitimate concern about the appropriateness of her attire. As a result, the appeals court found that such comments by the supervisor could not be considered in determining whether Nievaard had established a hostile work environment.

Having found no legal basis to support a hostile work environment claim attributable to the supervisor's conduct, according to the appeals court, the only other possibility of sexual harassment had to be committed by Nievaard's co-workers.

In this particular instance, the appeals court found that some of the incidents were "clearly based on Nievaard's sex, such as an employee commenting that he would have a hard time working for a woman." In addition, the appeals court noted that "non-sexual conduct may be illegally sex-based and properly considered in a hostile environment analysis where it can be shown that but for the employee's sex, she would not have been the object of harassment." However, in this case, the appeals court determined that Nievaard could not demonstrate employer liability based upon co-worker harassment because "the City took sufficient action to redress Nievaard's complaints."

[E]mployer liability for co-worker harassment is based directly on the employer's conduct, and an employer can only be held liable if it knew or should have known of the charged sexual harassment and failed to implement prompt and appropriate corrective action.

PERMISSIVE INDIFFERENCE

In determining whether an employer's response was "prompt and appropriate," the appeals court noted that mere negligence in fashioning a remedy was not sufficient for the employer to incur liability. Rather, the employer will only be liable if its response to allegations of sexual harassment involving a coworker "manifests indifference or unreasonableness in light of the facts the employer knew or should have known."

The act of discrimination by the employer in such a case is not the harassment, but rather the inappropriate response to the charges of harassment. Thus, an employer who implements a remedy can be liable for sex discrimination in violation of Title VII only if that remedy exhibits such indifference as to indicate an attitude of permissiveness that amounts to discrimination.

Since it was "undisputed that the City knew of the alleged harassment," the only remaining issue before the court was, therefore, "whether the actions taken by the city were "prompt and appropriate." Upon learning of the alleged harassment, the City contended that it had responded appropriately to Nievaard's complaints because it conducted training on Policy 404 and met with city employees on numerous occasions to discuss Policy 404. In addition, the City maintained that it had "provided Nievaard with assistance in dealing with the harassment," and had "disciplined certain employees who were identified as having engaged in harassing behavior."

In response, Nievaard asserted that the lack of cooperation by the Parks Department had prevented implementation of the HR Department's attempt to remedy the harassment. Specifically, Nievaard cited the HR department's memo which had concluded that Parks Management had disregarded HR's advice and had "ceased enforcing Policy 404 and taking a proactive approach to stop the on-going harassment directed at Nievaard." Thus, Nievaard argued that "the actions taken by the HR Department cannot insulate the City from liability if another division of the City, the Parks Department, caused these remedial efforts to be unsuccessful." The appeals court rejected this argument.

While the response taken to Nievaard's complaints did not eliminate the problem entirely, Nievaard does not allege that the HR Department's response was not undertaken in good faith. As noted previously, mere negligence in fashioning a response is not sufficient to hold an employer liable. Rather, the employer's response will be considered inadequate "only if that remedy exhibits such indifference as to indicate an attitude of permissiveness that amounts to discrimination."

In this case, because the City actually made several attempts to remedy the discrimination, the City has not exhibited "such indifference as to indicate an attitude of permissiveness that amounts to discrimination." Imposing liability in the face of such an extensive and good-faith attempt to remedy the problem would run contrary to the underlying theory of the claim itself, that the act of discrimination by the employer in such a case is not the harassment, but rather the inappropriate response to the charges of harassment."

Having concluded that "the City took prompt and appropriate remedial action in response to Nievaard's complaints of co-worker harassment," the appeals court held there was no "employer liability" for the alleged harassment. The appeals court, therefore, affirmed the district court's decision granting the City's motion for summary judgment and dismissing Nievaard's case.