FOURTH CIRCUIT EXPANDS DEFINITION OF "SUPERVISOR" WITH REGARD TO EMPLOYER LIABILITY FOR SEXUAL HARASSMENT

In *Whitten v. Fred's, Inc.*, No. 09-1265 (April 1, 2010), the U.S. Court of Appeals for the Fourth Circuit, which includes North and South Carolina, ruled that an employer could be held vicariously liable for a store manager's alleged sexual harassment of an assistant manager even though the store manager had no authority to hire, fire or demote the assistant manager. Because the store manager controlled the assistant manager's schedule and assigned her duties, among other things, the court determined that he qualified as a supervisor. The decision expands the traditional considerations for determining supervisory status and thereby exposes employers to greater risk of liability for the sexual harassment claims of their employees.

Background Facts

Clara Whitten was an assistant manager for Fred's in its Greenville, S.C., store. In February 2006, Fred's transferred her to the same position in its Belton, S.C., store, where Matt Green was the store manager. Green immediately expressed his displeasure at Whitten's transfer, calling her "dumb" and "stupid" and telling her that he did not want her to work there.

On Whitten's first day Green allegedly told her that if she wanted long weekends off from work, she "needed to be good to [him] and give [him] what [he] wanted." Green also told her that he would make her life "a living hell" if she ever took work matters in the store "over [his] head."

Whitten also claimed that on the same day Green twice pressed his genitals against her. Green later called Whitten into the storeroom; fearing what might happen there, she ignored him. According to Whitten, Green became angry and ordered her to stay late and clean the store. The following day, Green informed her that she had set the alarm improperly and that her punishment was working on Sunday, her scheduled day off.

Sunday morning, Whitten called two other Fred's managers and informed them of Green's conduct, indicating that she wanted to quit. She also complained to Green's superior, district manager Robert Eunice. Eunice told Whitten that she was overreacting and that she should return to work on Monday as if nothing had happened. Instead, Whitten quit, and the next day she contacted Fred's corporate office to lodge a formal complaint of sexual harassment. Fred's investigated, but ultimately could not verify or refute Whitten's claims. Fred's did not discipline Green and did not offer reinstatement or transfer to Whitten.

Whitten subsequently sued Fred's, alleging state law sexual harassment claims under the South Carolina Human Affairs law. The trial court granted Fred's motion for summary judgment, finding that because Green had no authority to hire, fire or demote Whitten, he was not her supervisor. As such, the trial court determined there was no basis for imputing any liability to Fred's for Green's alleged actions. Whitten appealed, and the Fourth Circuit reversed and remanded the case for a trial on the merits.

Fourth Circuit's Ruling on the Merits of the Sexual Harassment Claim

Although Whitten asserted only state law claims against Fred's, the South Carolina Human Affairs law essentially follows the substantive structure of Title VII, and Title VII cases are persuasive if not controlling in construing the state law. Accordingly, the trial court looked to federal law for guidance in rendering its decision. Under Title VII, to proceed on a hostile environment sexual harassment claim, a plaintiff must show that the offensive conduct was (1) unwelcome; (2) based on her sex; (3) sufficiently severe or pervasive to alter the conditions of her employment and create an abusive work environment; and (4) imputable to her employer. The determinative issue in Whitten's case was whether Green's alleged actions were imputable to Fred's.

Imputing liability depends, in large part, on whether the purported harasser is a supervisor or a co-employee of the plaintiff. If a plaintiff's claim is based on the actions of her supervisor, and if the plaintiff suffers a tangible employment action such as demotion or termination, then liability is imputed to the employer. If the employee did not suffer a tangible employment action, then the employer may raise the *Faragher/Ellerth* affirmative defense. This defense is named for twin 1998 U.S. Supreme Court decisions, *Faragher v. City of Boca Raton* and *Burlington Indus., Inc. v. Ellerth*, in which the Court held that where a plaintiff suffers no tangible employment action, the employer is not liable for workplace harassment if it (1) exercised reasonable care to prevent and promptly correct any harassing behavior; and (2) the plaintiff unreasonably failed to take advantage of any preventative or corrective opportunities provided by the employer to correct the behavior.

If the purported harasser is a co-worker, the employer is not vicariously liable and can be held accountable to the plaintiff only if the plaintiff shows that the employer negligently failed to take effective action to stop harassment about which the employer knew or should have known. So it is somewhat easier to impute liability to an employer if the purported harasser is found to be a supervisor instead of a co-worker.

In Whitten's case, the trial court concluded that Green was Whitten's co-worker rather than her supervisor because Green lacked the authority to hire, fire, promote or demote her, actions that are generally viewed by the courts as the ability to take "tangible employment actions." The trial court ultimately determined that Whitten could not show Fred's negligently failed to take effective action to stop harassment about which it knew or should have known and granted summary judgment to Fred's.

The Fourth Circuit reversed, however, holding that the trial court erred in viewing the ability to take tangible employment actions as dispositive of supervisory status. Rather, the Fourth Circuit looked to "other features of the employment relations" to determine whether Green qualified as Whitten's supervisor. Specifically, the court noted the following factors contributed to Green's status as a supervisor for purposes of imputing potential liability on Fred's: he was the highest-ranking employee in the store; his title was store manager; Green directed Whitten's activities, including the tasks he expected her to accomplish; Green controlled Whitten's work schedule; he possessed the authority to discipline Whitten by giving her undesirable work assignments and schedules; and both Whitten and Green believed Green was her supervisor.

The Fourth Circuit ruled that Green was Whitten's supervisor for purposes of her sexual harassment claim and that Fred's was subject to vicarious liability for Green's conduct. Fred's liability would then hinge on whether Whitten had suffered a tangible employment action and, thus, whether Fred's would be entitled to assert the *Faragher/Ellerth* defense.

The Fourth Circuit concluded that the changes in Whitten's work schedule, assignment of unpleasant tasks and verbal and physical abuse did not constitute "tangible employment actions" because they did not create a change in Whitten's status as an assistant manager.

The Fourth Circuit also considered Whitten's claim that she was constructively discharged and that the constructive discharge qualifies as a tangible employment action. The court found that, regardless of whether Whitten could ultimately prove her constructive discharge claim, the alleged constructive discharge did not constitute a tangible employment action in her case. The court noted that "constructive discharge … does not always qualify as a tangible employment action." Ultimately, the Fourth Circuit remanded the case to the trial court, where Fred's would be permitted to assert the *Faragher/Ellerth* defense to Whitten's claims.

Implications and Action Items for Employers

Because of the Fourth Circuit's expanded definition of "supervisor" for purposes of imputing vicarious liability, employers should consider taking several steps to reaffirm their sexual harassment policies and procedures. These may include:

- Train *all* managers on the company's sexual harassment policies – even if the managers do not have hiring/firing authority;

- Include training for individuals who are the highest-ranking employees at remote sites, if applicable. Employers should also canvas those sites to ensure that they are comfortable with the employees in those positions, given their potential to inflict vicarious liability on the company;

EMPLOYMENT LAW

- Be sure to provide training on the company's harassment policies to new hires or individuals who are promoted into positions of management; and

- Train managers how to investigate a harassment complaint. Remind all managers that any harassment complaint must be treated with seriousness and immediacy; telling someone they are "overreacting" is never an appropriate response.

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