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EEOC Sues NY Diner for Alleged Rampant Sexual Harassment of Female Employees

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A recent lawsuit filed by the Equal Employment Opportunity Commission (EEOC) alleges that female employees of a New York diner were subject to sexual harassment and sex-based discrimination, thereby creating a hostile work environment. The case, which was filed in federal court, illustrates the elements necessary to bring a claim against an employer on the basis of sexual harassment.

Background of the Case

The Colony Diner in New York employed many women of all ages, but was owned and operated by two men. The diner has no written policy prohibiting sexual harassment or other sex-based harassment.

According to the EEOC's complaint, Colony Diner's owners subjected female employees to numerous forms of harassment, including:

- unwelcome, non-consensual touching;
- invasive questions about female employee's personal lives;
- sexual remarks about female employees and customers; and
- instructions to wear tight or revealing clothing to work.

Additionally, the EEOC's complaint alleges that female employees were held to different standards than male employees. For example:

- female employees were criticized as "lazy" when male employees were not;
- female employees were yelled at and instructed to answer the owner with "Yes, George," or

"No, George," when male employees were not;

- owners expressed a preference for male employees, calling them "more reliable."

The complaint further asserts that although the owners knew or should have known about acts of sexual harassment being committed by male employees, they took no action to prevent it. This includes claims that the owners knew that both a busboy and a server had made unwanted sexual remarks to female employees and had non-consensually touched female employees on multiple occasions. The EEOC contends that although the owners witnessed these events, and were aware of female employee's objections, they did not take measures to stop the conduct from happening.

Moreover, the EEOC charges that the owners retaliated against female employees who objected to harassment. According to the complaint, employees who spoke up or complained about their working environment had their shifts changed or were reassigned to less lucrative parts of the restaurant, leading to a reduction in tips.

Legal Elements of Sexual Harassment

Showing Sexual Harassment

Title VII of the Civil Rights Act of 1964 prohibits an employer from discriminating against an employee on the basis of their membership in a protected class, including discrimination based on sex. 42 U.S.C. §2000e-2(a).

Courts recognize claims of workplace sexual harassment as a form of sex discrimination under Title VII.[1]

To prove sexual harassment, an employee must show that:

- they are part of a protected class;
- they experienced unwelcome sexual harassment;
- the sexual harassment was based on their sex; and
- a term, condition, or privilege of their employment was affected.

Carroll v. Bayeriche Landesbank, 125 F. Supp. 2d 58, 62-63 (S.D.N.Y. 2000)(citing *Meritor Sav. Bank, FSB v. Vinson*, 477 U.S. 57 (1986)).

Courts generally recognize two types of harassment:

- quid pro quo harassment occurs when a supervisor offers a benefit to an employee in exchange for sexual favors or punishes an employee for rejecting his advances.;
- harassment through a hostile work environment, as is at issue in *Stardust Diners*, occurs when harassment is "severe or pervasive."

To determine whether harassment is actionable under Title VII, courts look at several factors:

- the frequency of the harassment;
- the severity of the harassment;
- whether it was physical in nature; and
- whether it unreasonably interfered with the employee's work performance.

***Harris v. Forklift Sys., Inc.*, 510 U.S. 17, 23 (1993).**

While the frequency of harassment is a part of courts' analysis, courts have held that particularly severe single incidents, such as sexual assault, may be sufficient to establish a hostile work environment. *See Hush v. Cedar Fair, L.P.,* 233 F. Supp. 3d 598, 603 (N.D. Ohio 2017); *Little v. Windermere Relocation, Inc.,* 301 F.3d 958, 967 (9th Cir. 2002).

The complaint in *Stardust Diners* alleges that sexual harassment persisted over a period of many years and included both verbal harassment as well as unwanted physical touching. Those facts could potentially indicate that harassment was both severe *and* pervasive, thereby creating a hostile work environment.

Employer Liability

Under the EEOC's regulations, an employer is liable for sexual harassment in the workplace if it "knows or should have known about the conduct, unless it can show that it took immediate and appropriate corrective action." 29 C.F.R. § 1604.11. This applies to harassment by both employees and non-employees.

This means that employers can be held liable for sexual harassment by supervisors, fellow employees, or even customers,[2] provided that the employer did not take action to address the harassment.

The *Stardust Diners* case addresses the issue of employer liability. The EEOC alleges that the defendant violated Title VII not only through the sexual harassment and discrimination perpetrated directly by the restaurant owners but also by permitting and condoning the illegal conduct of multiple male employees.

Retaliation

Title VII likewise prohibits employers from retaliating against employees for exercising a right under the Act or for objecting to any practice made illegal by Title VII. 42 U.S.C §2000e-3(a). This can include taking action against employees for filing complaints or participating in EEOC investigations; however, it may also include punishing employees for speaking up against harassment or for rejecting unwanted sexual advances.

The EEOC's complaint contends that Stardust Diners retaliated against employees who complained about harassment by reassigning them and reducing their potential to receive tips. This could be

found to be illegal retaliation under Title VII.

Takeaways

Employees who believe they have suffered from illegal sexual harassment or retaliation may have a cause of action under federal and/or state law.

An employee can bring a claim for sexual harassment under Title VII if sexual harassment has led to a hostile work environment. A hostile work environment occurs when harassment is severe or pervasive, and courts look to the frequency, severity, and physicality of the harassment when determining whether this standard is met.

Actionable sexual harassment does not need to come from a supervisor. An employer can be held liable for the conduct of a third party if they know or should have known that sexual harassment was happening and they failed to take reasonable measures to prevent it.

Employers are also barred from taking retaliatory action against employees who object to harassment or who exercise their Title VII rights.

[1] The Supreme Court has held that Title VII's ban on sex discrimination also covers same-sex sexual harassment cases. *Oncale v. Sundowner Offshore Servs., Inc.*, 523 U.S. 75 (1998).

[2] While an employer is not always vicariously liable for the conduct of its customers, *see EEOC v. Costco Wholesale Co.,* 903 F.3d 618, 627 (7th Cir. 2018), courts have consistently held that an employer may be liable when it fails to take steps reasonably likely to prevent harassment. *See Id*.; *see also Watson v. Blue Circle, Inc.*, 324 F.3d 1252 (11th Cir. 2003); *Christian v. Umpqua Bank*, 984 F.3d 801 (9th Cir. 2020)

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