

First Circuit Court of Appeals Holds That Employer Can be Found Liable Under Quid Pro Quo Sexual Harassment Negligence Theory for Discriminatory Actions of Co-Worker

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In a case of first impression, the First Circuit Court of Appeals recently held that an employer can be held liable under Title VII for **quid pro quo sexual harassment** based on the **discriminatory actions** of a non-supervisory employee where the employer knew or should have known of the employee's discriminatory actions.

The Facts

In [Velazquez-Perez v. Developers Diversified Realty Corp.](#), Rosa Martinez, a non-managerial, human resources representative mounted a campaign to have the Company terminate Velazquez-Perez's employment terminated after Velazquez-Perez, a regional general manager, rejected her romantic advances. When Velazquez-Perez complained to his supervisor about Martinez's behavior, his supervisor warned him that Martinez could get him fired if he didn't send her a conciliatory email. His subsequent complaints were also ignored and Martinez's entreaties continued.

In the meantime, Martinez began criticizing Velazquez-Perez's job performance to his supervisors and strongly recommended his termination. When she failed to convince the top company official in Puerto Rico to terminate Velazquez-Perez, she contacted two senior officials at the company's headquarters to recommend his immediate termination. A few days later, Velazquez-Perez's immediate supervisors terminated his employment.

Velazquez-Perez sued the company for sex discrimination (sexual harassment under quid pro quo and hostile work environment theories) and for retaliation under Title VII and corresponding Puerto Rican laws. The District Court dismissed the action on summary judgment and Velazquez-Perez appealed.

The First Circuit Applies Vance's "Supervisor" Definition to Quid Pro Quo Sexual Harassment Claims

Sexual harassment is a type of sex discrimination and it involves unwelcome sexual advances, requests for sexual favors or other verbal or physical conduct of a sexual nature. Sexual harassment can be proved in two ways: (1) quid pro quo; or (2) hostile work environment.

Quid pro quo harassment occurs when a supervisor conditions the granting of an economic or other job benefit upon the receipt of sexual favors from a subordinate, or punishes that subordinate for refusing to comply. If the plaintiff proves this theory, then the employer is vicariously (or automatically) liable for the supervisor's actions. The key here has always been whether a supervisor took an action against the victim. The First Circuit first concluded that Martinez was not Velazquez-Perez's "supervisor" as that term was defined by the Supreme Court in [Vance v. Ball State Univ.](#), and stated that although Vance involved a hostile work environment claim, that same definition should apply to quid pro quo claims.

The First Circuit Allows for the Application of a Negligence Standard of Liability to Quid Pro Quo Sexual Harassment Claims

With hostile work environment claims – the second type of sexual harassment claim – the status of the harasser is a critical issue in determining whether to hold the employer responsible. If the harasser is a "supervisor" and took a "tangible employment action" against the victim, then the employer is vicariously liable. If the supervisor did not take a tangible employment action, then the employer will not be liable where it can show that (1) it exercised reasonable care to prevent and promptly correct any harassing behavior; and (2) the plaintiff unreasonably failed to take advantage of any preventive or corrective opportunities that were provided (also known as the Faragher- Ellerth defense). If the harasser is merely a co-worker instead of a supervisor, then the employer is responsible only if it was negligent in controlling the working conditions – that is, it failed to provide a reasonable avenue for the victim to complain about the harassment, or it knew of the harassment and failed to take the appropriate action.

The Supreme Court has never ruled on whether an employer can be held liable under a negligence theory where a co-worker participates in quid pro quo sexual harassment as opposed to creating a hostile work environment; it has only addressed such claims as it relate to supervisor conduct. That was the seminal issue the First Circuit tackled in this appeal and it answered that question in the affirmative.

Specifically, the First Circuit held that an employer can be held liable for sex discrimination under Title VII where: (1) a co-worker makes statements maligning the plaintiff out of discriminatory animus and an intent to cause the plaintiff's termination, (2) the co-worker's discriminatory acts proximately caused the plaintiff's termination, and (3) the employer acted negligently by allowing the co-worker's acts to have their desired effect even though the employer knew, or reasonably should have known, of the co-worker's motivation. In other words, if the employer acts negligently in response to a co-worker's discriminatory actions, the employer can be held liable.

The First Circuit went on to reverse the District Court on the quid pro quo sexual harassment claim finding issues of fact on whether plaintiff could satisfy these factors. It otherwise affirmed the District Court's dismissal of the hostile work environment and retaliation claims for reasons not worth mentioning here.

Conclusion

This case expands the application of quid pro quo claims to capture the actions of non-supervisors, and in turn therefore, expands the universe of potential claims that employers will face on a going forward basis. While workplace relationships are rarely easy for employers to navigate, Velazquez-Perez shows that an employer cannot simply bury its head in the sand when relationships between co-workers (not superiors and subordinates) sour. Employers can avoid liability by investigating complaints of discrimination thoroughly or thinking twice before acting on adverse employment action requests made under unusual circumstances. Employers should also make sure that their anti-discrimination, anti-harassment, and anti-retaliation policies are up-to-date and enforced consistently and must be prepared to take corrective action where necessary.

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