A Timely Analysis of Legal Developments

ASAP®

In This Issue:

June 2009

The Third Circuit Court of Appeals narrows the scope of employer liability for co-worker harassment in hostile environment claims, holding that an employee with mere supervisory authority does not qualify as a management-level employee whose knowledge of harassment would be imputed to the employer.

Third Circuit Clarifies Definition of Management-Level Employee in Harassment Claims

By William J. Leahy and Elizabeth Tempio

On June 8, 2009, the U.S. Court of Appeals for the Third Circuit handed down a decision that may narrow employers' liability in hostile work environment claims involving co-worker harassment. In *Huston v. Procter & Gamble Paper Products Corp*., the Third Circuit held that an employee with mere supervisory authority does not qualify as a "management-level" employee and therefore the supervisory employee's knowledge of alleged co-worker harassment is not imputed to the employer.

The Third Circuit has long held that an employee can prove a hostile environment exists if she shows that she suffered intentional discrimination, it was pervasive and regular, it detrimentally affected her, and it would affect a reasonable person in the same position. When the hostile work environment stems from harassment by the employee's co-workers (as opposed to harassment by the employee's supervisor), the employer is only liable if it failed to provide a reasonable avenue of complaint or if it *knew, or should have known*, of the harassment and failed to take prompt and appropriate remedial action. The Third Circuit has taken the position that an employer knew or should have known about co-worker harassment if "management-level employees had actual or constructive knowledge" about the existence of a hostile environment. However, before its decision in *Huston*, the Third Circuit had provided district courts and employers with little guidance as to who qualifies as a "management-level" employee.

Factual Background

In May 2004, Priscilla Huston, a technician at a Procter & Gamble plant, learned that one of her male co-workers had exposed himself in the presence of three other male employees. Ms. Huston claimed that someone informed two supervisory employees of this incident the following day. A similar incident, in which a male employee exposed himself in front of male co-workers, occurred later that month. Shortly after the second incident, a male employee allegedly exposed himself to Ms. Huston on two consecutive days. Ms. Huston reported these incidents to a senior-level manager and a human resources manager, who immediately investigated Ms. Huston's complaint and disciplined all the employees involved.

Several months later, Procter & Gamble terminated Ms. Huston for falsifying machine log data. She then filed a complaint in the United States District Court for the Middle District of Pennsylvania asserting sexual harassment and retaliation claims. The district court granted summary judgment for the employer, finding that Ms. Huston could not prove that management-level employees knew or should have known of Ms. Huston's alleged harassment before her complaint. Specifically, the court found that the two supervisory employees whom Ms. Huston claimed knew of the first incident of harassment were not "management-level" employees. In so holding, the court specifically noted the lack of guidance from the court of appeals on who is considered a "management-level" employee for purposes of hostile environment claims.

The Third Circuit's Analysis

On appeal, the Third Circuit focused on Ms. Huston's hostile environment claim. Ms. Huston argued that Procter & Gamble knew, or should have known, of the initial incidents in May 2004 because two supervisory employees — a process coach and a machine leader — had been informed of them, and that Procter & Gamble failed to take prompt and appropriate remedial action at that point. For Ms. Huston's argument to succeed, the court would have had to conclude that these two individuals qualified as management-level employees.

In considering whether the two supervisors who had been informed of the incidents were management-level employees whose knowledge would be imputed to Procter & Gamble, the Third Circuit looked to the principles of agency law. Applying these principles, the court concluded that the process coach and machine leader were not management-level employees and, therefore, their knowledge of the harassment could not be imputed to Procter & Gamble. The court delineated two ways in which an employee can qualify as management level. The first is if the employee is "sufficiently senior in the employer's governing hierarchy, or otherwise in a position of administrative responsibility over employees ... so that such knowledge is important to the employee's general managerial duties." The court suggested departmental or plant managers as examples of such individuals. The second way that an employee can qualify as "management level" is if the employee is "specifically employed to deal with sexual harassment," such as members of the employer's human resources, personnel, or employee relations group or department.

In support of this conclusion, the court noted that the supervisors who had been informed of the initial incidents did not have the authority to affect the employment status of their co-workers. Additionally, unlike Procter & Gamble's managerial employees, they did not have any responsibility to discover or act upon knowledge or rumors of unlawful harassment. The court further clarified its position by stating that "mere supervisory authority over the performance of work assignments by other co-workers is not, by itself, sufficient to qualify an employee for management level status." Thus, the Third Circuit affirmed summary judgment in favor of Procter & Gamble.

Implications of the Decision

As a result of *Huston*, in the Third Circuit an employer's responsibility in hostile work environment claims involving co-worker harassment will now turn on the specific job responsibilities and seniority level of the employee with knowledge of such harassment. Employees may no longer succeed in showing that an employer had notice of harassment simply because a low-level supervisory employee was aware of it. Despite this ruling, to reduce the risk of litigation, employers should continue to provide harassment prevention training to all supervisors and stress the importance of properly reporting and responding to allegations of co-worker harassment, particularly for management-level employees. Employers should also ensure that all employees are aware of the company's anti-harassment policy, and that they understand the proper means for reporting any instances of harassment.

William J. Leahy is a Shareholder and Elizabeth Tempio is an Associate in Littler Mendelson's Philadelphia office. If you would like further information, please contact your Littler attorney at 1.888.Littler, info@littler.com, Mr. Leahy at wleahy@littler.com, or Ms. Tempio at etempio@littler.com.