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VERDICT

LEGAL ANALYSIS AND COMMENTARY FROM JUSTIA

Protection Against Sexual Harassment Is Alive and Well in the Sixth Circuit

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In *Smith v. Rock-Tenn Services, Inc.*, the U.S. Court of Appeals for the Sixth Circuit affirmed a jury verdict in favor of a sexual harassment plaintiff, agreeing with the apparent finding of the jury that the employer had ample notice of the problem and failed to take appropriate measures to stop it. This shouldn't be a newsworthy ruling, but there have been too many cases in which courts have given a free pass to employers who have failed miserably in satisfying their legal obligation to maintain a non-discriminatory work environment. So when the law

gets enforced properly—and the workplace is made safer and more equal for everyone—it is worth a tip of the hat.

Life at the Cardboard Box Factory

Jeff Smith worked in the Converting Department of a corrugated box company in Murfreesboro, Tennessee. He was a support technician on a die cutter machine, operated by a colleague named Clinton Gill.

About four months after he began work with the company, a man, Jim Leonard, who had been on medical leave, returned. On his first day back, Smith watched Leonard come up behind Gill, grab his butt and then sniff his finger. Not sure what to make of this bizarre behavior, Smith continued to talk to Leonard, at least briefly when necessary. At some point, Leonard came by Smith's workstation and "slapped him on the tail as he went by." Smith warned Leonard that he better "keep his hands off." About a week later, Leonard came up behind Smith again, only this time grabbing his butt so hard it became sore. Smith grabbed Leonard by the arm and again warned him to stop, cautioning that "you're going to cause somebody to get hurt in here."

Smith was aware of the company's harassment policy, which had been given to him as part of an employee handbook on his first day. The policy, disturbingly, directs subjects of harassment to speak directly to their harassers to ask that the conduct be stopped before complaining to management. [Note to employers: This is a wrong-headed and dangerous approach.] Smith thus did not report either of these first two incidents, believing that Leonard would stop because Smith had sternly

told him to. A month later, however, Leonard was up to his old tricks. He came up behind Smith, who was bent over loading boxes onto a pallet, grabbed his hips and began simulating sexual activity. Leonard's "privates" were "up against" Smith's butt. Smith whipped around and grabbed Leonard by the neck, lifting him from the ground, and cursed him out.

Smith was so upset after this incident that Gill sent him home. Smith told a friend from work, and the friend told the plant superintendent, Scott Keck. Then, at the daily safety meeting, Smith directly informed his supervisor, who noted that Leonard had "done . . . this again." The superintendent called Smith into his office, and Smith told him directly about the incidents. Keck told Smith that nothing could be done until about ten days later because Leonard's supervisor was on vacation. Smith was then sent to the same area to continue working with Leonard. Smith was a wreck—having difficulty concentrating, making stupid mistakes, and working more slowly and ineffectively than usual. He and Leonard were also sent to get a hearing test together.

Smith survived a week of working 10-15 yards from Leonard before having an anxiety attack. He then sent a letter to management in which he described the incidents, alleged that Leonard had done this to others, and that Leonard carries a knife in his pocket and has pulled it on one of his other victims. He requested sick leave until he was able to receive counseling for the harassment. He closed his letter by noting: "I like my job and most of the people and want to do my best but can't until I seek help." Smith's request for leave was granted.

Four managers then called a meeting with Leonard, who said he had put his arm around Smith, and Smith had then backed into him.

Management interviewed other employees but could not find a witness to the simulated sex (“hunching”) incident. Several mentions of Leonard’s tendencies came up, though. One of the managers later testified that the company’s sexual harassment policy was “a guideline that could be followed,” but did not need to be. There were no formal notes taken during the investigation, and no report was prepared. Although several managers recommended termination, the general manager, David McIntosh, settled on a two-day suspension, for which Leonard says he was paid.

At the time discipline was imposed, McIntosh did not know that Leonard had been disciplined only a few months earlier for identical conduct. And there was a note in his personnel file noting the discipline for “horseplay—sexual harassment,” directing that he avoid any contact with employees that could be interpreted as sexual harassment, and warning that “[a]ny future complaints would be subject to termination of employment.” Leonard was finally fired, but only because he admitted in a deposition for this case that he had “mooned” or touched other men at work also.

The jury returned a verdict for Smith, finding the company liable for failing to take appropriate measures in response to Leonard’s behavior. He was awarded \$300,000. The company appealed, arguing that Smith had not proved that he was unlawfully harassed, nor that the company should be held liable. To understand why the company lost on appeal, we must turn to some basic harassment law.

Sexual Harassment Law: Nuts and Bolts

Title VII of the Civil Rights Act of 1964 prohibits discrimination on the basis of sex. Sexual harassment is a form of unlawful sex discrimination, a principle recognized by the Supreme Court in 1986 in *Meritor Savings Bank v. Vinson*. To be actionable, harassment has to be serious enough to affect the terms or conditions of employment—the touchstone language in Title VII. The Supreme Court gave its imprimatur to two types of harassment: quid pro quo (the demanding of sexual favors in exchange for the avoidance of harm) and hostile environment (unwelcome conduct of a sexual nature that is sufficiently severe or pervasive to create an objectively and subjectively hostile, offensive, or abusive working environment).

Implicit in the definition of actionable harassment is that the conduct must occur “because of sex.” That is what distinguishes discriminatory (and unlawful) conduct from all other kinds of misconduct and bullying in the workplace. In cases of opposite-sex harassment, the “because of sex” requirement has traditionally been overlooked. Courts have simply presumed that when men harass women they do so because of sex—that is, they wouldn’t direct the same conduct at men. In *Oncale v. Sundowner Offshore Services*, the Supreme Court considered whether same-sex harassment could be actionable as discrimination and, if so, upon what proof. The Court had no trouble concluding that same-sex harassment could satisfy the “because of sex” standard and gave, by way of example, three ways to prove it: (1) that the perpetrator is gay and motivated by sexual desire; (2) that the harasser is motivated by general hostility to the presence of men in the workplace; or (3) comparative

evidence that the perpetrator in fact targeted victims of only one sex in a mixed-sex workplace.

But proving that actionable harassment occurred is only half the battle—and not always the important half. To obtain any remedy, or even a technical victory, the plaintiff must also establish employer liability—that the employer is responsible for conduct that was, presumably, in violation of its own policies.

In 1998, the Supreme Court issued two rulings on employer liability on the same day, *Faragher v. City of Boca Raton* and *Burlington Industries v. Ellerth*. Each case raised questions about the proper standard of liability for supervisory harassment.

In a joint holding, the Court ruled that for supervisory harassment culminating in a tangible employment action, such as a demotion or firing, employers are automatically liable. For supervisory harassment that does not result in a tangible employment action (the more common kind), the Court also imposed automatic liability, but it created a two-pronged affirmative defense that a defending employer may raise. As the Court explained, the

defense comprises two necessary elements: (a) that the employer exercised reasonable care to prevent and correct promptly any sexually harassing behavior, and (b) that the plaintiff employee unreasonably failed to take advantage of any preventive or corrective opportunities provided by the employer or to avoid harm otherwise.

This standard of liability—and the affirmative defense—only apply to cases of supervisory harassment, but the Court indirectly approved the most common standard of liability for harassment by co-workers: an employer is liable if it knew or should have known of the harassment and failed to take prompt and effective remedial action.

Law Meets Cardboard Box Factory

A surprising number of the issues discussed in the previous section are at issue in *Smith v. Rock-Tenn Services, Inc.*

The company argued first that Smith did not prove he was harassed because of sex. Smith had alleged and proven that Leonard had targeted only men for his attacks. (Leonard admitted as much in his deposition.) Smith thus chose one of the three routes pre-approved by the Supreme Court in *Oncale*: “direct comparative evidence about how the alleged harasser treated members of both sexes in a mixed-sex workplace.” Rock-Tenn had the gall to argue that this was not in fact a mixed-sex workplace because only 30 percent of the employees were female. But it cited no precedent to suggest that those numbers, without stark segregation by job or location, could be sufficient to render this a single-sex workplace. The court thus rejected Rock-Tenn’s argument on this point.

Rock-Tenn also argued that Leonard’s behavior was mere “horseplay,” which Justice Scalia specifically said was not actionable in *Oncale*. But the court thought it was perfectly reasonable for the jury to conclude that “pinching and slapping someone on the buttocks or grinding one’s

pelvis into another's behind goes far beyond horseplay.” It thus left this aspect of the verdict intact.

The company next argued that Leonard's conduct was not sufficiently severe or pervasive to create an objectively hostile environment. (Given that Smith had to take medical leave, followed by a year-and-a-half of unemployment while he battled serious depression, there is no question that the environment was subjectively hostile.) But the company pointed to little by way of precedent to support its claim that multiple incidents of “physical invasion” with multiple victims over a short period of time is insufficient to meet the standard for hostile environments. In fact, the appellate court's review of prior cases made this case seem even stronger for the plaintiff. And, as the court noted, the determination of whether harassing conduct is “severe or pervasive” is “quintessentially a question of fact,” meaning an appellate court should defer to the jury unless the jury's conclusion is pretty clearly unreasonable.

Finally—and here's the part of the opinion that really lifted my spirits—the court evaluated the company's response to a problem of known harassment and found it severely lacking. This is the point when too many courts punt—they acknowledge that an employer did something and look no further before pronouncing the efforts sufficient to avoid liability.

But here, the court took the time to really understand what had happened—and how Smith's situation was bungled. The court applied the usual standard of liability for co-workers harassment—requiring the plaintiff to show that the employer knew or should have known of the

harassment and failed to take prompt and appropriate corrective action. In other phrasing, this means that “a response is adequate if it is reasonably calculated to end the harassment.”

Here, Smith followed the policy (even the bad part about confronting the harasser directly) and then brought the unwanted touching to the attention of his supervisor and then management higher-ups. And the response was inadequate and flawed. In particular, the court took issue with the following aspects of the company’s response: (1) the plant superintendent told him nothing could be done because one particular person was on vacation; (2) Smith was sent back to work in close proximity to his harasser; (3) the company did not even initiate an investigation until Smith wrote a letter and requested medical leave; (4) when management interviewed Leonard, they “apparently took him at his word” even though there was widespread knowledge of Leonard’s M.O.; (5) management admitted it did not even follow its own policies, viewing them as nothing more than optional guidelines; (6) the investigation produced no formal report; (7) the investigation uncovered red flags, which were not followed up on, including mention of Leonard’s engaging in similar behavior toward other employees; (8) not all witness interviews were recorded in writing; and (9) the managers in charge of conducting the investigation did not communicate with the manager who imposed discipline, leading him to impose much more lenient discipline than Leonard’s own personnel file would have supported.

But where the court found nine obvious deficiencies, the company argued that “the steps it took were so clearly prompt and appropriate as

to entitle it to judgment as a matter of law.” As the court pointed out, though, “defendant fails to grasp that what it failed to do is just as important.” Certainly, the court concluded, “a reasonable jury could find that the failure to take any of these steps or others rendered its response neither prompt nor appropriate in light of what it knew or should have known regarding Leonard’s prior misconduct.”

Conclusion

In a prior column, I wrote about an appalling Eleventh Circuit case, *Baldwin v. Blue Cross, Inc.*, in which the court refused to find fault with an egregiously deficient response by an employer to a blatant and awful course of harassing conduct by a supervisor. (More details can be found [here](#).) The court simply refused to analyze the elements of the employer’s response, observing that “We already have enough to do, our role under the *Faragher* and *Ellerth* decisions does not include micro-managing internal investigations.” But the *Smith* ruling from the Sixth Circuit is cause for hope that not all courts think themselves above enforcing sexual harassment law, as Congress and the Supreme Court intended it to be enforced.

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