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Hands Off the Merchandise!: Appellate Court Orders Grocery Store to Ban Sexual Harasser from Premises

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The urban dictionary (http://www.urbandictionary.com/define.php?term=hands%20off) gives two definitions of the phrase "hands off the merchandise": (1) a "protest/order uttered by one of either gender when someone else (usually of the other gender) wants to indulge in a little touchy-feely but [the protester's] not in the mood:" or (2) "Basically 'Don't touch my stuff, punk.'"

Allen Manwaring, a former grocery store manager who was fired for sexual harassment, but reincarnated as a produce vendor for the very same store, might be the rare person for whom both definitions are appropriate. And the entity ordering him to keep his hands off is the U.S. Court of Appeals for the Second Circuit.

Pursuant to a recent ruling by that court, in *EEOC v. KarenKim, Inc.*, the EEOC is now entitled to obtain an injunction that prohibits Manwaring not only from touching the mostly-teenage-girl cashiers who work at the grocery store, but also from touching the *produce* or any other merchandise that would bring him physically into the store. In Manwaring's case, the fact section of the Second Circuit's opinion reveals a disturbing pattern of sexual harassment that went unchecked despite numerous complaints to the store owner.

The opinion also underlines the power—and obligation—that courts have to use equitable remedies when they are necessary to end discrimination. (Legal remedies typically consist of awards of money damages; equitable remedies typically consist of commands from a court to do, or cease doing, a certain action (although they can, confusingly in the employment context, also involve the payment of money).)

The Allegations in *EEOC v. Manwaring*: A Sordid Grocery Tale

Karen Connors owned and managed Paul's Big M Grocery, a store in Oswego, New York. In January, 2001, Connors hired Allen Manwaring as the store manager. Within months, the two began an intimate relationship that produced an engagement in 2006 and a child. But during that time, Manwaring also became a great liability to Connors business-wise. According to evidence presented at trial, he repeatedly and pervasively harassed a number of female employees, most of whom were teenage girls at the time. The harassment was both verbal and physical, and it continued over a period of several years, undeterred by intermittent complaints and reprimands.

Specific examples of the harassment that was the subject of trial testimony give the flavor of the hostile environment at the Big M:

- Victim #1 testified that after she began working there at age 16, Manwaring made sexual comments to her on a daily basis and frequently complimented parts of her body; he suggested he would like to begin a sexual relationship with her and her mother.
- Manwaring told victim #2, also a teenage girl, that if he were her boyfriend, he would never let her "out of the sheets"; and if he were "10 years younger, he would be on top of [her]." When she was working alone in the office, Manwaring would brush up against her breast, push his crotch against her buttocks, touch her hips, whisper in her ear, and rub her shoulders, all of which were unwelcome touches and gestures.
- Victim #3 testified that Manwaring discussed his sexual frustrations with her, and promised that one day he would "pick her up" and have sex with her.
- Victim #4 testified that Manwaring would "squeeze" in behind her in a tiny space by the cash register, so they were "body to body almost."
- Victim #5 testified that, even after this lawsuit began, Manwaring tried to console her after she had a fight with her boyfriend by suggesting that she tell the boyfriend that Manwaring had been wanting to have sex with her for a year- and-a-half.
- Victim #6, a high-school girl, testified that Manwaring walked up to her and stuck his tongue in her mouth while she was talking on the phone, and then walked away "with a smirk on his face."
- Victim #7 testified that Manwaring had touched her inappropriately and had demanded to know how much she charged for sexual favors.
- Victim #8 testified that Manwaring pulled up her underwear and made sexual comments when she bent over to restock a deli case.

Finally, there were other witnesses—a total of ten—who also testified to similar types of verbal and physical harassment.

An Employer's Failed Response to a Clear Problem of Harassment

Although it is sometimes the case that victims of harassment, especially minors, are reticent to complain about sexual harassment because they don't know their rights or fear reprisals, most of the women harassed by Manwaring did speak up. (Some of the special issues raised by the sexual harassment of minors at work are discussed **here (http://writ.news.findlaw.com/grossman/20060829.html)** .) They did so despite the fact that the company had no sexual harassment policy, nor any grievance procedure, in place. The victims who complained about Manwaring's conduct were rewarded, variously, by being reprimanded, accused of lying, or fired.

For example, the first employee to complain about Manwaring's behavior was terminated for absenteeism. When this employee, Victim #1, complained to a manager, the manager hurried away and did not follow up on the complaint.

After receiving a complaint from Victim #2, a manager confronted Manwaring by telling him he probably "just didn't realize . . . that certain things are inappropriate."

Victim #8 complained directly to Karen Connors—the owner of the company (and Manwaring's fiancée). Connors accused the employee of lying and fired her on the spot. Other employees also complained directly to Connors, including one employee who quit and submitted a resignation letter detailing Manwaring's harassment of her over the course of several years.

As one might expect given the number of witnesses who complained about Manwaring's harassment, his behavior was well-known to other employees and to store management. One manager testified that she personally witnessed his inappropriate behavior "at least twice a week." Victim #4 testified that Manwaring's behavior was "chattered about on a daily basis," but that she stopped participating in such conversations after being called into the stock room by Manwaring, who told her she was lucky "he didn't fire [her] right then and there" for spreading "rumors" about his misconduct. Fearing termination, she began to cry. Manwaring consoled her by hugging her, kissing her on the cheek, and reassuring her that "if he was gonna sexually harass

anybody, it would be [her]."

Despite how well-known and widespread Manwaring's misconduct was, Connors testified that she recalled only two complaints of sexual harassment and that she believed both were handled "appropriately." With respect to the high school girl who complained that Manwaring had stuck his tongue in her mouth, Connors testified that she believed Manwaring's explanation that he had fallen into her by accident, and that therefore he had not done anything wrong. Nonetheless, she suspended him for 30 days with pay and warned him that he would be fired if another complaint was filed against him. Right when the incident happened, the girl, crying hysterically, called a friend's mother, who in turn called the police. Manwaring was charged with, and pled guilty to, second-degree harassment. However, Manwaring testified that in his "heart, [he] always felt it was an accidental joking incident," and he told others that the girl was lying.

The other complaint about which Connors admitted knowing involved Victim #5. That woman at first didn't complain because Connors had showed her the resignation letter (mentioned above) and stated that it was full of lies. But eventually she complained to Connors and told her about several incidents of inappropriate touching and sexual overtures. The victim said she was going to quit because of the harassment.

Connors cried (this was, after all, her fiancée who was being accused) and later informed the victim that Manwaring had been fired. By this point, the harassment lawsuit was already pending, so Connors told employees "to lie and tell everybody he was farming" rather than that he had been fired for harassment. Connors also asked this particular victim not to seek a protective order against Manwaring because that would jeopardize Connors and her company.

Why KarenKim, Inc. Was Found Liable for Sexual Harassment

This lawsuit against the company that owned the grocery store, KarenKim, Inc. was filed by the Equal Employment Opportunity Commission (EEOC), the agency that is charged with implementing Title VII—the main federal antidiscrimination statute. Title VII itself broadly prohibits employers from discriminating against employees on the basis of protected characteristics like race and sex. The Supreme Court made clear, however, in its landmark 1986 decision in ***Meritor Savings Bank v. Vinson*** **(http://supreme.justia.com/cases/federal/us/477/57/)** that Title VII also prohibits sexual harassment, for it is a form of illegal sex discrimination.

Winning a sexual harassment case under Title VII involves two steps. First, the plaintiff must prove that actionable harassment occurred. This entails proof of a quid pro quo—in other words, the threat of employment consequences for the failure to submit to sexual conduct—or a hostile environment. An actionable hostile environment involves unwelcome conduct of a sexual nature that is either severe or pervasive, and which creates a subjectively and objectively hostile, offensive, or abusive working environment.

Second, the plaintiff must prove that the employer can be held liable for the harassment. (There is no individual liability under Title VII.) For harassment by co-workers or third parties, the employer is only liable if it knew or should have known about the harassment and failed to take prompt and effective remedial action. For harassment by supervisors, employers are held to a higher standard, because courts reason that the supervisors are "aided by the agency relation" with the employer. When a supervisor directly draws on that power by threatening or imposing an employment quid pro quo, the employer is strictly liable.

When a supervisor draws less obviously on that power by creating a hostile environment, the employer is automatically liable, but has the opportunity to avoid liability or damages through proof of an affirmative defense. To make use of the defense, an employer must show that (i) it took reasonable care to prevent and correct harassment and (ii) the victim unreasonably failed to take advantage of corrective opportunities—such as internal company harassment complaint procedures.

Given the facts of this case, it is no surprise that the jury found KarenKim liable for harassment and awarded both compensatory and punitive damages. Manwaring's conduct created a hostile work environment several times over, and poisoned the work environment for all of the female employees there. The harassment was both severe and pervasive, and it was very clearly unwelcome. And given that Manwaring was the Store Manager,

KarenKim was subject to the supervisory standard for liability.

Finally, KarenKim had no chance to prevail on the affirmative defense given that it had no policy or grievance procedure, had never trained its employees on the subject, and, most damningly, had responded to complaints by either ignoring them or punishing the complainants. The company thus would have been liable even under the weaker negligence standard applied to cases of co-worker harassment.

The Real Fight in This Case: What Should the Scope of the Remedy Be?

The issue on appeal in this case did not concern the finding of harassment or the imposition of liability on KarenKim. It concerned, instead, whether the lower court should have granted the EEOC's request for an injunction, to ensure that the grocery store did not continue to be plagued by harassment.

Title VII's ban on sexual harassment can be enforced by private victims, or by the EEOC on their behalf. In either case, Title VII allows for the imposition of monetary damages—both compensatory and punitive—and various forms of equitable relief and attorneys' fees.

In this case, the EEOC won compensatory and punitive damages for the victims, amounting to a little over $100,000 for each of the ten victims. But it also requested various forms of equitable relief, based on the contention that the company still had not adopted adequate measures to prevent future harassment. Among other indications of KarenKim's inadequate efforts is the fact that Manwaring, despite having been fired for sexual harassment, is regularly present in the store by virtue of his new job as a produce vendor. In stark contrast, one of the victims who attempted to buy groceries at the store after the jury issued its verdict was ordered out of the store, and told never to return as a customer. Manwaring is also still in a romantic relationship with the store owner, and there is no legal bar to her rehiring him.

The injunction requested by the EEOC was admittedly broad. It sought an order that would last for ten years and include, among other restrictions, the following: (1) prohibit KarenKim from hiring or paying Manwaring in any way, except for purchasing produce from him; (2) prohibit Manwaring from entering the grocery store building and require the posting of a notice of the prohibition; (3) force KarenKim to hire a monitor to review KarenKim's employment practices and to investigate allegations of harassment; and (5) require KarenKim to revise its harassment policy and grievance procedures and conduct annual anti-harassment training.

The district court denied the EEOC's request for injunctive relief on the basis that it was unnecessary and overly burdensome. It also objected to the length of the requested relief and the intrusiveness of having both an independent monitor and the EEOC overseeing their efforts.

Fundamentally, the district court disbelieved that the future risk of harassment was as great as the EEOC urged. It pointed out in its ruling that the problem was comprised of "isolated instances involving a manager who is no longer employed by the company . . . during a period when the company did not have clearly established anti-harassment policies." But now, the district court pointed out, the company has both an anti-harassment policy and a "keen awareness of the issue." The court characterized as "specious" the idea that Connors would let her relationship with Manwaring affect her ability to curtail his behavior. The court was thus "hard-pressed to imagine that should complaints by employees concerning sexual harassment or employment discrimination of any other kind arise in the future, . . . KarenKim will not take them seriously."

Although the district court has broad discretion to determine whether injunctive relief is necessary to prevent future violations, it cannot blindly refuse to take account of the future risk of harassment. Title VII explicitly grants courts the power to award injunctive relief, and "the bounds of discretion are set by the purposes of Title VII, which are to prevent discrimination and achieve equal employment opportunity in the future."

Applying that standard, the U.S. Court of Appeals for the Second Circuit found an abuse of discretion on the part of the district court. In particular, the Second Circuit held that the district court had failed to account for the strong likelihood of future harassment given Manwaring's relationship with Connors, her record of failing to deal appropriately with his misconduct, and his continued presence in the store. Their relationship was, the Second

Circuit reasoned, "the primary reason why Manwaring's harassment went unchecked for years, subjecting an entire class of young female KarenKim employees to a sexually hostile working environment."

Thus, at a minimum, the Second Circuit concluded, the district court was obligated to enjoin KarenKim from employing Manwaring in the future and from allowing him to enter the premises. The district court had the discretion to deny some of the EEOC's more specific and intrusive measures, but could not deny the request to remove the specter of future harassment by Manwaring. A concurring judge on the Second Circuit panel wrote separately to emphasize that injunctive relief is presumptively justified in cases of intentional discrimination, and that the defendant has the burden to prove it is not necessary.

As I wrote in **an earlier column (http://verdict.justia.com/2012/09/04/costly-mistakes)** , the failure to respond appropriately to problems of sexual harassment can be a costly mistake. But, as this ruling shows, that failure can engender a loss of freedom as well. Employers simply are not free to turn a blind eye to the actions of a harasser, particularly one the actions of which are so rampant, and have led to the exploitation of so many victims.

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