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SHOULD EMPLOYERS BE HELD RESPONSIBLE FOR SEXUAL HARASSMENT OF EMPLOYEES BY CUSTOMERS IF THEY WERE AWARE OF IT?
A California Court Says No, But Gets It Wrong

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Raquel Salazar is a woman who worked as a bus driver transporting mentally disabled adults to and from home, work, and school. She seemed to have all the makings of a slam-dunk sexual harassment case - but a court ended up dismissing her suit nonetheless.

Salazar was sexually harassed while at work. The harassment was severe--involving repeated instances of physical contact, genital exposure, and sexual assault. It was also pervasive--happening on an almost daily basis.

Moreover, Salazar reported the harassment to her employer (which had already been on notice of the problem, having received similar reports from previous employees driving Salazar's route). She requested a different route to avoid future harassment, but her request was denied. Since her employer made no attempt to remedy the situation, she quit.

Based on these facts, it appears that Salazar did everything right, from the law's perspective, and her employer did everything wrong. But Salazar's case turned out to be a loser, at least according to an appellate court in California.

The court held, in *Salazar v. Diversified Paratransit, Inc.*, that Salazar's claim was not valid. Why? Because the alleged harasser was not a supervisor or fellow employee of the bus company, but a passenger on the bus.

The court held that employers cannot be held liable under California's anti-discrimination law for harassment committed by third parties, including business customers such as bus passengers.

The ruling is in error for several reasons. The easiest way to see why is to compare the California ruling to the rulings of courts interpreting Title VII, the analogous federal anti-discrimination law - which broadly prohibits various forms of discrimination, including sexual harassment. Federal courts' easy embrace of employer liability for preventable customer harassment shows why California should embrace such liability, too.

Analogous Federal Law on Liability for Supervisors and Co-Workers

Most courts to consider the issue have held that Title VII permits employers to be held liable for harassment committed against their employees by third parties, at least when the victim-employee is forced to interact with the harasser as part of her job.

When a supervisor is the harasser, employers are automatically liable - subject to an affirmative defense the employer can raise when the harassment does not result in a tangible employment action (that is, it does not result in her being fired, demoted, or similarly disadvantaged).

But for co-worker harassment, employers are only liable based on their own negligence--when they knew, or should have known, harassment was occurring and failed to stop it. This standard would help Salazar if it were applied to third-party harassers such as bus passengers. Salazar told her employer of the harassment - and so had previous drivers, for that matter.

Should the Co-Worker Standard Apply to Third Parties? Federal Courts Say Yes

Those federal courts to address the issue have applied the co-worker standard of liability - that is, the "knew or should have known" standard - to harassment by third parties such as customers.

Early cases confronted the third-party harassment issue in a relatively straightforward context: the suing employees had been sexually harassed as a result of being required to wear sexually provocative uniforms to work. Courts were quick to find that such dress codes, which resulted in harassment, could violate Title VII, even though the harassment came from customers rather than co-workers.

Later cases applied the same theory to other cases of third-party harassment, in which the employer had no particular policy or practice that produced the harassment. Instead, the practice for which the employer was being faulted was failing to maintain control over the work environment and protect its employees.

These courts drew on the Supreme Court's statement that Title VII gives employees "the right to work in an environment free from discriminatory intimidation, ridicule, and insult" to justify this standard of liability. It is the employer's responsibility to provide such an environment - which means, at a minimum, responding to harassment it learns about, or should have reasonably been aware of.

This approach is consistent with federal regulations enacted pursuant to Title VII.

The applicable EEOC regulation states that an "employer may also be responsible for the acts of non-employees, with respect to sexual harassment of employees in the workplace, where the employer . . . knows or should have known of the conduct and fails to take immediate and appropriate corrective action."

"Level of Control" is the Most Significant Factor in Determining Liability

The touchstone for the federal approach to third-party harassment is control--the extent to which the employer has the ability and responsibility to control the offending third party. The applicable federal regulation explicitly states that the EEOC will consider the level of control when reviewing administrative claims brought before it.

Federal courts hearing third-party harassment cases have similarly focused on the level of control in evaluating the employer's obligation to respond to claims of harassment. Using that approach, courts have held employers liable for harassment by customers in restaurants, hotels, and other businesses; by patients in residential treatment facilities; and by employees of joint-venturing companies.

In each case, the court found that the employer had the ability to exercise control over the environment or the behavior but failed to do so. That failure translates to liability under a negligence standard.

In what environments might an employer not have a high enough level of control? Arguably, those in which employees work alone and in which the employer has no way to exclude a given customer beforehand - but even there, a security guard could be hired, if necessary, to stop the harassment, and the employer thus arguably has the requisite level of control. This standard does not require an employer to anticipate harassment, only to respond to it after the fact.

Why the California Appeals Court Reached a Different Outcome

As mentioned above, the court in *Salazar* was interpreting California's anti-discrimination statute rather than Title VII. The two statutes are in many respects similar, and have, in many instances, been interpreted to be coextensive. Although they do have some textual differences, the California statute, however, can easily be interpreted as Title VII has been to provide liability for third-party harassment.

The California statute specifically prohibits harassment "of an employee . . . by an employee other than an agent or supervisor shall be unlawful if the entity . . . knows or should have known of this conduct and fails to take immediate and appropriate corrective action." Arguably, this provision only applies to co-worker harassment - as the *Salazar* court held.

But in a separate provision, the statute also makes it unlawful for an employer to "fail to take all reasonable steps necessary to prevent discrimination and harassment from occurring." This provision is not limited to discrimination and harassment by coworkers, supervisors or anyone else. On its face, it applies to all discrimination and harassment the employer can take reasonable steps to prevent its employees from suffering on the job.

The legislative history was mixed. An uncodified preamble to 1984 amendments, expressly stated that employers should prevent harassment caused by employers as well as their "clientele." But the amendments themselves

omitted a proposed amendment that would have expressly made employers liable for third-party harassment.

The majority looked to the unenacted amendment alone, refusing to interpret the statute to create liability the legislature had purportedly rejected. But an angry dissent pointed out that the preamble, too, is part of California's statutory law even though it is uncodified - and that it specifically answers the question posed in *Salazar*. The dissenting judge contended that statutes should be interpreted according to legislative intent, and the preamble is a reasonable source for determining it. Moreover, the statute directs courts to construe it "liberally" to serve its overriding purpose of eliminating employment discrimination.

The dissent also criticized the majority for failing to defer to the California state agency interpretation of the statute. That interpretation holds employers liable for failing to stop third-party harassment. Courts are supposed to defer to agencies' interpretations of the very statutes they are charged with administering; the dissent pointed out that the majority gave no such deference to California's EEOC equivalent on this matter.

The Federal Approach: A Fairer Balance

The federal approach to third-party harassment is better than California's. Permitting liability, but making it dependent on the employer's ability to control the behavior strikes a reasonable compromise.

On the one hand, allowing no liability at all would make employees assume the risk of harassment - a trauma that can wreak both economic and psychological damage. Certainly Salazar should not have had to suffer sexual assault and indecent exposure simply to do her job.

On the other hand, allowing extremely broad liability might unfairly hold employers responsible for occurrences beyond their reach. Forcing the bus company to be liable even if neither Salazar or her predecessors had breathed a word about the harassment would be unfair.

Using a negligence standard, employers cannot be held liable without first having the opportunity to intervene and stop the harassment. Once notified about a problem of harassment, it is not unreasonable to expect that they will respond. Employers, after all, can refuse service to customers on any basis (unless they run public accommodations and the basis is discriminatory, just as they can fire their employees on any non-discriminatory basis). In both cases, harassing conduct should induce them to act.

In Salazar's case, simply circulating a photo of the perpetrator and directing drivers to refuse him service might have been sufficient - or giving Salazar a "co-pilot" until the perpetrator got the idea and chose other transportation might have worked, too.

Not only does the federal approach strike a better balance than California's, it is also more likely to lower the overall rate of harassment. Employer control of the working environment has been linked in studies both to the likelihood that harassment will occur, and to the likelihood that victims will complain about it.

Although theorists differ on the likely causes of harassment, studies have shown that harassment flourishes in environments where there is a norm of employer tolerance or even encouragement for harassing behavior. This may include sexualized work environments, male-dominated work environments, or simply work environments in which the employer exercises little or no control over behavior.

A standard of liability for third-party harassment that induces employers to exercise greater control over the environment should have the concomitant benefit of reducing the incidence of other types of workplace harassment, too.

If employers are vigilant against customer harassment, coworkers will get the message too: If Salazar gets visible help against her groping customers, her coworkers will think twice before they grope. If she doesn't, coworkers may think the company simply doesn't care what happens as long as its buses get driven.

Studies have also shown that victims are more likely to complain to employers who maintain a tightly controlled environment, since they perceive that employers will respond to their complaints. Since victims are generally reluctant to come forward with complaints, a standard of liability that encourages them to do so will improve the remedial process and may also contribute to lower rates of harassment. (For instance, if Salazar complains and visibly gets results, her coworkers may no longer feel as frightened to complain.)

As the dissenting judge in *Salazar* pointed out, it "makes no sense to have a comprehensive scheme protecting employees in the workplace from discrimination, with a huge gap leaving employees unprotected when the harasser is a nonemployee."

Employees should not be forced to choose between keeping their jobs and tolerating, as Salazar was expected to do, sexual harassment from customers.

Joanna Grossman, a FindLaw columnist, is an associate professor of law at Hofstra University. Grossman's other articles on discrimination law may be found in the archive of her pieces on this site.