Harassment Liability Can Extend to Non-Employees

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Practice Area: Labor and Employment

From time to time, employers try to dodge responsibility for harassing comments made by "guests" to their facilities. However, many courts have said that if harassment happens on the employer's watch—and the employer knew or should have known about the harassment—then the employer might be held responsible for the actions of its customers or business partners. In *Freeman v. Dal-Tile Corp.*, the Fourth Circuit Court of Appeals held that an employer can be liable under a "negligence standard" for harassment attributable to non-employee visitors, meaning that the employer will be liable if it knew or should have known of the harassment.

Dal-Tile Corporation was a manufacturer and distributor of tile and stone products. The plaintiff, Lori Freeman, was employed as a customer service representative for Dal-Tile.

Dal-Tile did a large amount of business with a company that was serviced by Timothy Koester, an independent sales representative. Koester frequently visited the Dal-Tile facility and was in contact with Freeman, either in person or by phone, several times per week. During this contact, Koester repeatedly made sexist and racist comments using terms such as "black b----es" and "n----rs", showing Freeman pictures of naked women on his cell phone, making sexual remarks, telling Freeman's co-workers that he would "hook up with one of your daughters", and passing gas on Freeman's telephone.

Freeman frequently told Koester that his comments were offensive and demeaning, asking him not to use that sort of language anymore. Freeman also reported each instance to her supervisor. Freeman's supervisor's reaction was to laugh, roll her eyes, and state that Koester was an "a--hole". After Freeman's supervisor failed to remedy the situation, Freeman reported Koester's remarks to Human Resources. Human Resources promised to permanently ban Koester from the facility. However, Dal-Tile quickly lifted the ban and instead prohibited Koester from communicating with Freeman. Koester remained free to visit Dal-Tile's facilities.

Upset that she might bump into Koester at work, Freeman took a two and one-half month medical leave, during which time she received treatment for depression and anxiety. When Freeman returned, she was told that Koester no longer represented the same customer, but would continue to do business with Dal-Tile. Freeman resigned, stating that the depression and anxiety became too much for her. Freeman filed a complaint with the U.S. Equal Opportunity Commission and subsequently brought a claim for sex and race discrimination in federal court.

On appeal, the Fourth Circuit found that the record was replete with evidence of frequent abusive behavior by Koester. This evidence supported the requisite finding that the harassment was so objectively and subjectively severe and pervasive that it created a hostile work environment.

In finding Dal-Tile liable for Koester's actions, the Fourth Circuit adopted a "negligence standard" for third-party harassment under Title VII of the Civil Rights Act. The court noted that a negligence standard already had been applied for co-worker harassment. The court then extended this holding to third-party harassers, stating that an employer could be held liable for the actions of non-employees if it knew or should have known about the offensive behavior.

The court determined that any reasonable jury could find that Dal-Tile—through the supervisor—knew or should have known of the harassment. The supervisor not only knew about specific incidents, but also knew that the harassment was ongoing. First, the supervisor witnessed several inappropriate comments by Koester. Second, the supervisor received several complaints about the incidents from Freeman. Third, the supervisor witnessed Freeman crying from the harassment. Fourth, the supervisor was aware that terms such as "n----r" and "black b----es" had been used in Freeman's presence. As stated by the court, "an employer cannot avoid Title VII liability for a co-worker harassment by adopting a 'see no evil, hear no evil' strategy".

Once an employer has notice of harassment, it must "take prompt remedial action reasonably calculated to end the harassment". Unfortunately, Dal-Tile did not take any effective action to halt the harassment until Freeman reported her complaints to Human Resources. At this point, the harassment had been ongoing for three years. Although the Human Resources professional originally told Freeman that Koester would be permanently banned from Dal-Tile, this ban was quickly rescinded and replaced with a communications ban. Had the communications ban been put in place promptly, it might have been an adequate response. However, the three-year gap showed that the remedial action was not "prompt".

All employers should have written discrimination policies, which include complaint procedures. These complaint procedures should point to multiple people to whom employees can report harassment. Policies prohibiting discrimination and harassment should clearly state that they apply not only to co-worker behavior, but also to behavior by third parties, such as vendors, customers, business partners, and other visitors to an employer's facilities. Employers also are advised to address these issues in management/supervisor training, as well as new hire orientation.
