

Court Says Response to Harassment Needn't Be Equal, Just Effective

by Dennis J. Merley - Thursday, October 05, 2017



Employers must take timely and appropriate action in response to claims of sexual harassment but that does not mean that the action taken must always be the same.

David Hylko, Jr. alleged that while working at a U.S. Steel plant in Michigan, he was sexually harassed on a regular basis by Process Coordinator John Hemphill. Hemphill trained Hylko and assigned his work, but both men reported to Area Manager Mark Jobin.

Yes, This is Harassment But...

Hylko alleged that Hemphill kept asking about his sex life, which made him feel uneasy. In addition, Hemphill grabbed Hylko's rear end on a couple of occasions, remarking on his "nice firm a**." In one instance, Hemphill was said to have grabbed Hylko by the crotch so hard that it caused pain.

Hylko complained to his manager and to Human Resources, and was allowed to transfer to a different part of the plant where he would no longer work directly with Hemphill. After Hemphill admitted to some of this behavior, he received a verbal warning and a one-week suspension, was demoted and was required to attend a leadership class.

Thereafter, the harassment stopped but Hylko still decided to resign a few months later. He ended up filing a sexual harassment lawsuit against the company, which the lower court dismissed. He then appealed to the 6th Circuit Court of Appeals.

Hylko first claimed that regardless of the remedial action that was taken, the company was

still liable for Hemphill's harassment because Hemphill was his supervisor and an employer is vicariously liable for the wrongful acts of its supervisors. The court responded, however, that while Hemphill assigned his work, he did not have authority to "effect a significant change" in Hylko's employment and therefore was not his actual supervisor.

But what about the fact that the company actually referred to Hemphill as Hylko's supervisor? No big deal, said the court – the term "supervisor" has various colloquial meanings in the business world but it has a very specific definition under the law and it simply does not apply to Hemphill in this instance.

...What Part of "The Harassment Stopped" Don't You Understand?

Hylko shifted gears, claiming that even if Hemphill was not a supervisor, the company was still liable for his conduct because they did not respond reasonably to his harassment complaint. responded unreasonably to Hylko's complaint. In particular, Hylko claimed that the company treated men who harassed women more harshly than it treated Hemphill for his harassment of another male.

Wrong again. The appeals court explained that the employer is not required treat every harassment claim the same. Instead, they are obligated to make a timely and adequate response, and a response is adequate if it is "reasonably calculated to end the harassment." In this instance, the company transferred Hylko while demoting and disciplining the offending employee. The harassment ended at that point so the company did what it was supposed to do. Regardless of what the company needed to do to resolve other harassment claims, the company's response in this instance clearly was adequate. Hylko's case was therefore dismissed.

Bottom Line

This case offers a number of good reminders for employers. First, if someone is not a supervisor, do not call them one. Supervisors are viewed as agents of the employer and their improper actions could be binding upon them. The court in this instance was able to see through the casual use of the term and make a good decision but other courts might view things differently.

In addition, the long-standing advice to take timely and appropriate action in response to harassment is still relevant today. In harassment claims involving non-supervisors, liability is not determined by what occurred but rather, by what the employer did (or did not do) when learning of it.

Finally, always follow up on whatever action is taken. In this case, the employer prevailed because they showed that their response to the harassment was effective. How will an employer know that their response to a harassment claim has or has not been effective if they do not monitor and follow up on the resolution on a regular basis thereafter?

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