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Management Alert

EEOC Establishes As A Matter Of Law That Sexual Harassment By Individual Defendant Was Both Severe And Pervasive

OVERVIEW

On May 29, 2013, Federal District Judge Nancy Atlas in the Southern District of Texas granted a rare motion for summary judgment for a plaintiff in *Equal Employment Opportunity Commission v. Simbaki, Ltd.*, No. 4:12-cv-00221. The EEOC sued on behalf of two female employees, alleging sexual harassment and retaliation. Of note, Judge Atlas found that, given the unusual facts described in more detail below, partial summary judgment was warranted in favor of the EEOC without need for a trial.

BACKGROUND

Both employees were bartenders at a restaurant. At deposition, the franchise owner testified that he patted the bottom of one a number of times, and bit her on the hip. He admitted that he asked the other out numerous times and told her that he was going to have a baby with her, gave her gifts and little notes, and asked her repeatedly whether she wanted to make out with him. He described the workplace he managed as a "grab-assy" place. The two employees testified that they complained repeatedly about the behavior, to no avail. To the contrary, the harasser posted a sign a few months after receiving written complaints, saying "Notice: Sexual harassment in this area will not be reported. However, it will be graded." (At deposition he conceded that, "in hindsight, you know, it could have been construed as insensitive.")

The location never provided any training in sexual harassment or workplace discrimination. The franchise owner had never reviewed the corporate operations manual, and had never posted the corporate sexual harassment policy. He admitted that there was no one at the location other than himself who could investigate a claim of sexual harassment. The EEOC asserted that the employer could not assert the *Faragher/Ellerth* affirmative defense because it could not show that it exercised reasonable care to prevent and correct promptly any sexual harassment; and it could not show that the employees unreasonably failed to take advantage of any preventative or corrective opportunities provided by the employer.

In response, the franchise asserted that questions of fact regarding a hostile environment were not resolved by the EEOC's citations to the franchise owner's "vague and sometimes eccentric descriptions of the restaurant as 'grab-assy'," and noted that the female employees chose to continue working at the location because of the money. It conceded that the franchise owner "may have lapsed in his efforts" to respond to the complaints, and that "his eccentric manner of expression lacked a textbook response to the circumstances."

DISTRICT COURT OPINION

Judge Atlas ruled that "the uncontroverted evidence, primarily the deposition testimony of [the franchise owner], establishes that [the location] was rife with sexual harassment." She noted that, "[a]lthough the standard is severe **or** pervasive, the conduct admitted to by [the franchise owner] is both severe **and** pervasive."

Judge Atlas also concluded that the franchise had failed to raise a genuine issue of material fact regarding whether it had exercised reasonable care to prevent and correct harassment, or whether the intervenors had unreasonably failed to take advantage of any preventive or corrective opportunities to avoid harm. She found that there was no evidence of actual workplace protections, noting that "[t]he only avenues available to Intervenors were either to report the sexual harassment directly to the harasser, or to report it to individuals who had no authority other than to report the complaint to the harasser." Judge Atlas determined that both intervenors had verbally complained regarding the harassment and one had complained in writing. Consequently, she ruled that the franchise was precluded from asserting the Faragher/Ellerth affirmative defense.

TAKEAWAY

While it is customary for defendants to move for summary judgment in employment lawsuits, particularly in federal court, it is uncommon to see plaintiffs seeking such relief, and even more unusual to see these efforts succeed.

What is the takeaway for employers? In extreme circumstances, where the workplace environment is permeated with harassment and there are no effective policies in place, an employer can lose the right to present its case or defenses to the jury. Perhaps worse, an employer can find itself facing a jury that is instructed that the court has found, as a matter of law, that the workplace environment of the employer was hostile.

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