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Seventh Circuit Reaffirms the Importance of Prompt, Effective Remedial Action as a Defense to Harassment Claims

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On December 26, 2018, the Seventh Circuit Court of Appeals issued a decision affirming summary judgment and dismissing claims of sexual discrimination, sexual harassment and retaliation against an employer, in *Swyear v. Fare Foods Corporation*. The Seventh Circuit reiterated that single or isolated incidents of inappropriate conduct in the workplace may not always rise to the level of creating legally actionable harassment under the law, while highlighting the importance of employers taking prompt, effective remedial action in the face of offensive or inappropriate conduct to help prevent future liability. Taking prompt, effective remedial action to stop inappropriate conduct helps to prevent conduct from interfering with an employee's ability to do his or her job and from rising to the level of creating a hostile work environment.

Factual Background

In *Swyear*, the plaintiff was the first female outside sales representative for Fare Foods. She alleged that the work environment was sometimes "unprofessional," with employees calling other employees sexually offensive nicknames at times and making fun of another employee's dating life. She described the environment as not overly sexualized, but aggressive, disrespectful and rude. Supervisors had been present for many of the conversations, had used the nicknames for others on occasion and, at times, either pretended not to hear them or did not take action to stop them. However, the offensive nicknames were not directed at the plaintiff, the plaintiff did not tell anyone she was offended by the incidents of unprofessional conduct and she did not make any formal or informal complaints related to the occasional use of nicknames directed at others.

Later, the plaintiff and a male non-supervisory colleague, Scott Russell, were on a work-related trip. During the trip, Mr. Russell made comments about being on a date with the plaintiff when they went to dinner, touched the plaintiff's arm, pulled her chair out, placed his hand on her lower back, and stood close to her. Later that evening, Mr. Russell also had several drinks and was slurring his words, told her he was single, suggested they go skinny-dipping at the hotel, crawled into her bed back at the hotel and told her he liked to watch movies and cuddle. He also suggested the plaintiff needed a "cuddle buddy" and they could share a bed. After the plaintiff declined, told Mr. Russell she was tired and he left, Mr. Russell tried to return to her room multiple times that night. The plaintiff later testified the incident made her uncomfortable, but she always felt in control during the incident. The plaintiff did not initially report the incident with Mr. Russell.

Approximately a week after the incident with Mr. Russell, a performance review of the plaintiff was conducted, several performance deficiencies, including tardiness, were noted, and ways to improve were discussed. The plaintiff told her supervisors about the incident with Mr. Russell from a week prior during this performance review. Her supervisors investigated the incident and determined discipline was not warranted because the conduct occurred off-duty but took effective measures to ensure the plaintiff and Mr. Russell were separated at work from then on. No further incidents of inappropriate conduct by Mr. Russell toward the plaintiff occurred after the one incident.

Several weeks later, another review of the plaintiff's performance was conducted during which there was a detailed discussion of ongoing punctuality issues and improper use of company-vehicles for personal use, and she was given another chance to improve her performance. Despite the discussion and warning given about using company vehicles for personal use, the plaintiff left the meeting and used the company vehicle for personal use. Her employment was terminated a few days later. After she was fired, the plaintiff filed a complaint in federal district court alleging sexual discrimination, sexual harassment and retaliation in violation of Title VII of the Civil Rights Act of 1964.

Seventh Circuit Decision and Reasoning

Based on the facts described above, the Seventh Circuit found the plaintiff's claims failed and must be dismissed. With respect to the sexual harassment claim, the Seventh Circuit explained that the plaintiff was required to show:

> (1) her work environment was objectively and subjectively offensive,
> (2) the harassment she complained of was based on her gender,
> (3) the conduct was so severe or pervasive as to alter the conditions of employment and create a hostile or abusive working environment, and
> (4) there is a basis for employer liability.

In *Swyear*, when dismissing the sexual harassment claim, the Seventh Circuit said the plaintiff failed to prove the conduct was so severe or pervasive as to alter the conditions of employment or interfere with her ability to do her job.

Considering the totality of the circumstances and its prior holdings, the Seventh Circuit recognized "the environment at Fare Foods was at times inappropriate and offensive," but not sufficiently severe and pervasive to create an abusive work environment. The occasional comments (inappropriate nicknames and discussions about others), which the plaintiff merely overheard but were not directed at the plaintiff, lacked the severity and frequency needed to create employer liability. The Seventh Circuit explained that it assumes "employees are generally mature individuals with the thick skin that comes from living in the modern world." And, "[a]s a result, employers generally do not face liability for off-color comments, isolated incidents, teasing, and other unpleasantries that are, unfortunately, not uncommon in the workplace. In addition, the court explained that it has previously held that "occasional vulgar banter, tinged with sexual innuendo of coarse or boorish workers generally does not create a work environment that a reasonable person would find intolerable."

Importantly, the Seventh Circuit also explained that the incident between the plaintiff and Mr. Russell while on the work trip did not necessitate a finding that the environment at Fare Foods was hostile or abusive, considering the conduct was not threatening and the fact that it happened on only one occasion with the

employer taking action to separate the employees after they learned of the incident. The Seventh Circuit discussed the difficult line-drawing required for the inquiry of determining whether a work environment is hostile, explaining:

> "Cumulatively or in conjunction with other harassment, such acts might become sufficiently pervasive to support a hostile environment claim, but if few and far between they typically will not be severe enough to be actionable in and of themselves. A hand on the shoulder, a brief hug, or a peck on the cheek lie at this end of the spectrum. Even more intimate or more crude physical acts—a hand on the thigh, a kiss on the lips, a pinch of the buttocks—may be considered insufficiently abusive to be described as "severe" when they occur in isolation."

The Seventh Circuit reasoned that the incident with Mr. Russell, while entirely inappropriate behavior by a coworker and crossing a line, did not constitute sexual harassment alone or when considered with the other above-described incidents of inappropriate nicknames and discussions. The Seventh Circuit said Mr. Russell's actions were not so severe as compared with acts the court has found sufficient to create a hostile or abusive work environment in other cases. The court reasoned that Mr. Russell's actions were not forceful, threatening and severe, with the plaintiff testifying that she always felt she was in control of the situation. In addition, and most importantly, Mr. Russell's inappropriate actions happened only once, were not part of a pattern of harassment directed toward the plaintiff and were immediately and sufficiently responded to by Fare Foods. Therefore, the Seventh Circuit affirmed the lower court's decision to dismiss the plaintiff's sexual harassment claim.

The Seventh Circuit also dismissed the plaintiff's sexual discrimination and retaliation claims because each claim required the plaintiff to establish, she was meeting the employer's legitimate performance expectations and the purported reasons for termination were a pretext for either discrimination or retaliation. As detailed above, Fare Foods had several examples of the plaintiff's performance deficiencies, and the Seventh Circuit found Fare Foods had convincing evidence the plaintiff was not meeting the legitimate performance expectations of her employer. In addition, the plaintiff could not point to any evidence suggesting the employer's purported reasons for terminating her employment were a pretext for either discrimination or retaliation. Therefore, the Seventh Circuit affirmed the lower's court's decision to dismiss the plaintiff's sexual discrimination and retaliation claims.

Key Take-Aways

The Seventh Circuit has reminded us that, while not every incident of inappropriate conduct between colleagues automatically creates liability under Title VII, it is still imperative to take prompt, effective remedial action to address inappropriate conduct in order to prevent liability in the future. Even if isolated incidents of inappropriate conduct may not rise to the level of legally actionable harassment under Title VII, allowing such conduct is a slippery-slope and there is no bright line rule for a court to determine what will rise to the level of harassment under Title VII. In addition, such inappropriate conduct (including the use of offensive nicknames) is likely a violation of work rules and standards of conduct warranting discipline or other action to stop further reoccurrence of the conduct. In *Swyear*, for example, it was important that the employer took action to stop further interaction between the plaintiff and Mr. Russell after his inappropriate conduct while on a work trip. Employers permitting offensive or inappropriate conduct to continue, once supervisors know or have reason to know of the conduct, is more likely to lead to successful arguments that the conduct is so severe and pervasive that it interferes with the ability of a plaintiff to do his or her job, which could create liability under Title VII.

Employers must train and remind their supervisors not to engage in offensive or inappropriate conduct themselves, but to immediately address and stop offensive or inappropriate conduct they observe or learn about, even if one instance of such conduct does not create liability. Attorneys at Buelow Vetter are available to assist in training employees and supervisors on avoiding risk behaviors that could lead to harassment claims and to understand the obligations under the law and employer policies if employees or supervisors obtain knowledge of harassing conduct having occurred. In addition, we can assist with strategies to investigate and adequately address inappropriate conduct affecting the workplace in order to reduce the risk of liability for a harassment claim.

If you have any questions regarding this decision, or you require assistance in training your employees and supervisors, please contact Attorney Claire Hartley, at 262-364-0260 or chartley@buelowvetter.com, or your Buelow Vetter attorney.

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