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Bank Facing Liability For Narrow Harassment Policy

by admin

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Even though a Charlotte bank had an anti-harassment policy in place, an employee who said her complaints about a supervisor were ignored can sue for a hostile work environment under Title VII, the U.S. Court of Appeals ruled Jan. 19.

The case is *Smith v. First Union* (North Carolina Lawyers Weekly No. 0-01-0157, 25 pages). U.S. Circuit Judge Francis D. Murnaghan Jr. wrote the decision, with Judges M. Blane Michael and Robert B. King concurring.

Generally, companies that can show they exercised reasonable care to prevent or stop a supervisor's sexually harassing behavior have an affirmative defense to a Title VII claim. An anti-harassment policy is a key factor in that defense.

However, the *Smith* ruling illustrates that a company can lose that shield if its policy is not broad enough to cover all kinds of illegal harassment or if the employer's efforts to enforce the policy come up short.

"The court is saying that if employers have a policy that's not written to cover everything that constitutes sex harassment — for example if it's deficient because it doesn't cover gender bias — that factor would allow a jury to find the employer has not made out an affirmative defense," said Charlotte lawyer Julie Fosbinder, who represented the plaintiff.

The decision allows the plaintiff to go to trial for a barrage of insults and threats she said her supervisor made. The supervisor often demeaned women, according to the allegations, but he never made any sexual advances toward the plaintiff.

The plaintiff was slow to complain, in part because she mistakenly believed her supervisor's behavior did not qualify as sexual harassment.

First Union's policy mentioned sexual advances and touching but was silent on gender bias. Given that policy language, the plaintiff's misunderstanding was reasonable, the court said.

"We therefore cannot hold that, as a matter of law, First Union's policy was a sufficient means of preventing sexual harassment,"Judge Murnaghan said.

The decision also faulted First Union's investigation of the plaintiff's allegations, Fosbinder said.

"The judges pointed to several factors that showed First Union didn't do an adequate investigation," she said. "That meant they weren't taking steps to prevent harassment. The company discouraged people from complaining about people or contradicting others in a public meeting. The court cited that as some evidence that the company wasn't doing enough to prevent harassment."

The ruling also reaffirmed that one element needed to show a hostile work environment severe and pervasive harassment is usually a jury question. The U.S. District judge had decided that question as a matter of law.

However, the ruling was bad news for the plaintiff on other fronts. The Fourth Circuit said the bulk of her state and federal claims, including discriminatory retaliation and negligent supervision, were properly dismissed.

The ruling forecloses federal court litigants from bringing sexual harassment claims under North Carolina's Equal Employment Practices Act. The *Smith* holding could also make it harder for federal litigants to prove discriminatory retaliation under Title VII, according to one employment law expert.

Facts

The allegations, viewed in the light most favorable to the plaintiff, show a pattern of gender-based harassment by the plaintiff's supervisor.

The plaintiff, Elizabeth F. Smith, worked in First Union's Charlotte offices from January 1990 until November 1995. She initially worked as an adjuster but in January 1993 was promoted to team leader in consumer credit collections.

In the spring of 1993, Smith began reporting to a new supervisor, Ronald Scoggins. According to Smith, Scoggins barraged her with gender-based insults and threats.

Among them:

- Scoggins said he preferred a male in the team leader position because males are "natural leaders." Scoggins made this comment more than 30 times in the weeks after Smith was assigned to him.

- Scoggins told Smith that women were "too emotional to handle a managerial role."

- If a female employee became upset, Scoggins told Smith that employee must be menstruating or that she needed a "good banging."

- Scoggins told Smith that "the only way for a woman to get ahead at First Union was to spread her legs."

- Scoggins said women should be barefoot and pregnant, and that they went through life looking for a man to marry.

Threats Made

Smith also catalogued a litany of threats that Scoggins made toward her, according to the opinion.

- Scoggins stood over Smith's cubicle and barked orders at her. He often concluded his orders by saying "or else you'll see what will happen to you."

- Scoggins called Smith at home at 10:00 p.m., accusing her of conspiring with another to "get him."

In 1995, Scoggins was named a team leader following a company reorganization. Smith chose not to remain on Scoggins' team, and his harassment intensified, she said.

In one alleged instance, Scoggins grabbed Smith's chair and spun her around to face him. Scoggins then looked her over and stated, in an apparent reference to the O.J. Simpson trial, that he could "see why a man would slit a woman's throat."

Smith said she feared Scoggins in part because of his alleged military background. He often bragged, she said, that he had to "take people out." Smith said she believed that Scoggins was capable of violence.

Smith formally complained on Nov. 3, 1995 about Scoggins' harassment. She offered several explanations for not complaining sooner:

- Scoggins' boss told Smith that she should never complain to human resources if she "ever wanted to get anywhere."

- Scoggins told Smith she would lose her job if she complained about his conduct.

- Smith did not think Scoggins behavior was sexual harassment under First Union's policy. It prohibited only "sexual harassment, sexual advances, requests for sexual favors, and other verbal or physical conduct of a sexual nature." Smith said she thought a sexual advance was needed to constitute a violation of First Union's policy.

In her meeting with human resources, official Marc Hutto, Smith detailed some of the threats and derogatory remarks toward women that Scoggins had made. She also asked to be transferred out of Scoggins' section.

Hutto interviewed Smith's co-workers and gathered similar comments about Scoggins' conduct, according to the allegations. However, First Union's investigation focused on problems with Scoggins' management style, ignoring Smith's allegations about sexual harassment, she said.

First Union never took any action for Scoggins' alleged harassment. The bank allowed him to keep his position but put him on probation for his management style, Smith said.

On Nov. 14, 1995, both Scoggins and Smith were suspended without pay and referred to the company's employee assistance program. After hearing Smith's concerns, an EAP counselor advised Smith not to work near Scoggins.

First Union transferred Scoggins to another team. However, Scoggins still worked on the same floor 100 feet away from Smith. The EAP counselor told Hutto, the human resources official, that Smith should not be placed so close to Scoggins, according to the allegations.

On Nov. 17, Smith met Hutto for the first time and discussed Scoggins' conduct toward her. Hutto suggested ways Smith could return to work but no decision was made.

Smith consulted with a therapist, who determined she was suffering from an adjustment disorder related in part to Scoggins' conduct.

Smith applied for disability benefits and told Hutto her therapist had recommend she not work in the same area as Scoggins. That annoyed Hutto, she said, and he warned her to return disability forms within 15 days or face firing.

In December 1995, Hutto told Smith she could get a transfer if she agreed to take her old job as a claims adjuster. She declined, according to the opinion.

The next month, First Union told her she could look for jobs outside her department, the opinion states. She applied for 75 jobs in a three-month period but got only two interviews and no offers. However, many of those jobs were for higher grade positions. Smith never got a new job at First Union but received disability benefits until she was removed from the payroll in July 1996.

On Feb. 20, 1997, Smith sued in state Superior Court, alleging sexual harassment under Title VII and G.S. Sect. 143-422.2. She also alleged retaliation under Title VII, and negligent supervision or retention. The case was removed to federal court.

In July 1998, Judge Robert Potter granted summary judgment for First Union on all claims. Smith appealed.

Ruling

The Appeals Court reversed on the federal sexual harassment claim, saying the plaintiff could take that claim to trial.

Under settled case law, an employee alleging sexual harassment must prove:

- She was harassed because of her sex.
- The harassment was unwelcome.
- The harassment was sufficiently severe or pervasive to create an abusive working environment.
- There is some basis for imputing liability to the employer.

The court said the supervisor's remarks, viewed in the light most favorable to Smith, made it clear that she was singled out because of her gender and did not welcome Scoggins' conduct.

The court focused much of its analysis on the third element of the claim — whether Scoggins' harassment was sufficiently severe or pervasive as to create a hostile work environment.

Among the factors weighed in that analysis: the frequency of the discriminatory conduct; its severity; whether it was physically threatening or humiliating, or a mere offensive utterance; and whether it unreasonably interfered with an employee's work performance.

In his opinion, Judge Potter ruled for First Union as a matter of law because "[p]laintiff has not

claimed that Scoggins ever inappropriately touched, propositioned or ogled her, that Scoggins ever invited her, explicitly or by implication, to have sex with him or to go out on a date with him."

The Appeals Court said Judge Potter's view of sexual harassment was too narrow.

"The District Court failed to recognize that a woman's work environment can be hostile even if she is not subjected to sexual advances or propositions," the court said. "A work environment consumed by remarks that intimidate, ridicule, and maliciously demean the status of women can create an environment that is as hostile as an environment that contains unwanted sexual advances."

Evidence of Hostile Workplace

The *Smith* court distinguished a 1997 Fourth Circuit ruling, *Hartsell v. Duplex Prods., Inc.*, 123 F.3d 766, 772. In *Hartsell*, the court said a supervisor's remarks were not sufficiently severe or pervasive to create a jury issue on a hostile work environment claim. At one point, the *Hartsell* supervisor said, "We've made every female in this office cry like a baby." He also asked, "Why don't we have sales assistants like that?" when he saw a buxom woman in a company magazine. And he asked another sales representative whether she would be a "minivan driving mommy" or "be a salesperson and play with the big boys."

The gender-based comments the supervisor in *Smith* made were much stronger, the court said. Among those alleged by the plaintiff:

- Scoggins said he preferred a male in the team leader position because males are "natural leaders."
- He said Smith would "crack" because women "are not emotionally capable of handling the management role."
- Scoggins said women were "out to get him" and that women generally conspired against men.
- Scoggins once wished he were a woman so that he could "whore his way through life."
- He told Smith she was lucky to have her job, and would not get any further at First Union because she was not attractive.
- He said women had no place in management and did not even belong in college.
- Women's hormones do not allow them to handle work matters in a professional manner.

The plaintiff also alleged a pattern of threats, the *Smith* court said.

"Scoggins often concluded his orders to Smith by saying 'or else you'll see what will happen to you,'" the court said. "Further, Scoggins made the 'slit a woman's throat' remark in the context of physically threatening gestures. Scoggins made what a jury could find was a thinly veiled threat to kill Smith because of her gender in a way that made Smith feel that he was serious about harming her, especially in light of Scoggins' boasts about 'taking people out' while he was in the military."

Those actions, and the late-night angry phone calls that Scoggins made to the plaintiff, interfered with her work performance, the court said.

"Smith's therapist and … First Union's EAP counselor, confirmed Smith's inability to work in the same area as Scoggins," the court said. "Looking at the totality of the circumstances, the factors … strongly weigh toward a finding that Scoggins' harassment, if proven at trial, was sufficiently severe or pervasive so as to create a hostile work environment. The District Court incorrectly resolved this question of fact that a jury should decide."

Imputing Liability

The *Smith* court also ruled First Union could be liable for the actions of Scoggins despite an express policy against harassment.

The policy stated: "It is First Union's policy to prohibit sexual harassment of our employees.

Sexual harassment includes any unwelcome offensive sexual advances, requests for sexual favors, and other verbal or physical conduct of a sexual nature. This applies to management employees, nonmanagement employees, outsiders, and customers."

Under two 1998 U.S. Supreme Court cases, *Faragher v. City of Boca Raton*, 118 S. Ct. 2275, and *Burlington Indus., Inc. v. Ellereth*, 118 S. Ct. 2257, an employer can be held vicariously liable for a supervisor's hostile environment unless this affirmative defense is available:

- The employer exercised reasonable care to prevent and correct promptly any sexually harassing behavior.

- The employee unreasonably failed to take advantage of any preventive or corrective opportunities provided by the employer or to avoid harm.

First Union, said its anti-harassment policy showed it exercised reasonable care to prevent and correct promptly any sexually harassing behavior.

The *Smith* court said that words were not enough under another Fourth Circuit case, *Brown v. Perry*, 184 F.3d 388 (1999). The *Brown* court held that any anti-harassment policy an employer adopts must be "both reasonably designed and reasonably effectual."

The employer prevailed on the first element of its affirmative defense in *Brown* because the plaintiff did not provide evidence that the employer adopted the policy in bad faith or that the policy was "otherwise defective or dysfunctional."

The *Smith* plaintiff argued First Union's policy was defective or dysfunctional. The reason: the policy language made it sound as though a sexual advance was a prerequisite to a sexual harassment claim.

The court agreed.

"Smith's reading of First Union's policy was entirely reasonable," the court said. "First Union's policy does not mention discrimination on the basis of gender. It merely prohibits unwanted sexual advances and other sexually provocative misconduct. We therefore cannot hold that, as a matter of law, First Union's policy was a sufficient means of preventing sexual harassment at First Union."

The first prong of the affirmative defense would not be met, the court said, where management employees discouraged lower-level employees from complaining. According to the plaintiff's allegations, that happened here, the court said.

"When Smith started at First Union, Scoggins' boss warned Smith that if she 'ever wanted to get anywhere, [I'd] never contradict anyone in an open meeting, and [I'd] never complain to human resources,'" the court said.

First Union did not take reasonable steps to correct the alleged harassment, according to the opinion. First Union management focused on Scoggins' management style when it launched its investigation and ignored complaints about sexual harassment, the court said.

"Given First Union's inadequate investigation, its failure to discuss or even mention the topic of sexual harassment with Scoggins, and its insistence on keeping Smith working in close proximity to Scoggins, a jury could find that First Union did not act with reasonable care to correct promptly Scoggins' harassing behavior," the court said.

"Because a dispute of fact exists as to whether First Union exercised reasonable care to prevent and correct promptly Scoggins' harassment of Smith, First Union cannot rely on an affirmative defense to justify the district court's grant of summary judgment."

Other Claims

The Fourth Circuit ruling rejected the rest of the plaintiff's state and federal claims.

The court said the plaintiff did not have a private cause of action under North Carolina's Equal Employment Practices Act.

"Neither the North Carolina Supreme Court nor the North Carolina Court of Appeals has

recognized a private cause of action under the NCEEPA," the court said. "Instead, most courts have applied the NCEEPA only to common law wrongful discharge claims or in connection with other specific statutory remedies."

An employment law expert said that would foreclose similar arguments in federal district courts.

"This means you can't use the EEPA to bring a sexual harassment claim," said Greensboro lawyer and mediator Jonathan R. Harkavy. "It may be an open question as to what that statute means in state court, but not in federal court."

The court also rejected the plaintiff's retaliation claim under Title VII. The plaintiff failed to show that First Union's explanations for not transferring her were a mere pretext for discrimination.

"Under *Vaughan v. MetraHealth Cos*. [145 F.3d 197 (4th Cir. 1998)] if the defendant advances a reasonable explanation for its action, the plaintiff can't just rely on that as a pretext,"Harkavy said. "The plaintiff must not only show the defendant's lying, but also that he's lying in order to discriminate.

"*Vaughan* applied that 'pretext-plus' doctrine in a straight discrimination case," he said. "This case applies that doctrine to a retaliation claim. That means plaintiffs will have to show a pretext plus retaliation to win that cause of action."

The negligent retention and supervision failed, the court said, because Smith could not show First Union knew of Scoggins' harassment before Nov. 3, 1995, when Smith first complained.

On Notice

Murphy Archibald, a Charlotte lawyer who handles employment discrimination cases, said the opinion should put employers on notice that their anti-harassment policies may not protect them from vicarious liability.

"The Fourth Circuit has defined the circumstance under which a facile sexual harassment policy is insufficient and will subject the employer to liability," Archibald said. "I believe that many companies have perfunctory policies. They'll post it in the handbook, but it has no teeth. An employee who believes he or she has a grievance is not going to receive adequate protection or adequate investigation under these perfunctory policies, and the employer will be liable for that.

"The circuit court is in part saying that talk is cheap when it comes to these policies," he said. "Judges will require vigorous action on the part of employers to try to truly eradicate this kind of social disease."

Course Of Action

The case holds several lessons for employers, according to Fosbinder.

- Employers should draft broad anti-harassment policies to cover all types of harassment, including gender-based harassment, she says.

- Employers must do an adequate investigation, using a reasonable person standard, of any allegations of sexual harassment.

- Once an investigation is launched, employers must respond in a way that adequately addresses the allegations made by the victim of harassment. "Here, the supervisor was counseled about his management techniques, but the company ignored the allegations of sexual harassment," Fosbinder said.

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