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Three's a crowd Non-employees complicate workplace harassment claims

Attorney Lindy Korn is leading the fight against sexual harassment in the workplace.

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Experts say a growing number of companies and organizations are turning to contract labor to perform a variety of functions.

From vendors to outside service providers, many offices have a steady stream of people passing through who are not direct employees. But while it's a cost savings in some cases and a necessity in others, are businesses vulnerable to potential legal claims if harassment occurs and the perpetrator is a third party?

The 2nd Circuit Court issued a decision earlier this year involving allegations of harassment lodged against Hofstra University by a female team manager for the football squad. At issue was whether the university was liable for the actions of those who were not its employees when one or more of them was accused of engaging in harassing behavior.

Anne Simet, a partner in Hodgson Russ LLP, also is a member of the firm's employment litigation group. While she said she doesn't see a lot of third-party harassment cases, the issue coming down from the Court of Appeals is significant in that it draws a line and puts the onus on the employer to address claims of harassment, regardless of who is doing it.

"It sort of flies in the face of the old adage, 'The customer is always right.' The fact is, sometimes you are going to have to have a very firm talk with the customer or the vendor and this ruling makes that clear," she said.

The issue of third-party harassment isn't limited to customers in a business, according to Simet. It covers a number of scenarios in which outside workers (or volunteers) are involved in activities at a business.

"One hypothetical scenario could be a case where you have outside IT people coming in to work on computers in an office. The technician may always want to work with one particular employee, and there may be some harass-

ment there," she said. "So that is the kind of scenario where we might see this come up."

The question for employers then becomes: For fear of possible liability, how wary must they be in allowing outside vendors, contractors and other people into their place of business?

Simet said the answer begins with a point of clarity.

"It is important to remember that an isolated incident wouldn't constitute sexual harassment," she said. "It would need to be what we call severe and pervasive to be considered harassment."

To that point, she said harassment claims involving a third party aren't much different than those involving your own employees. Indeed, it comes down to common sense.

"If the employer has knowledge of a situation, they are required under this ruling to take effective action to end the harassment," she said. "And in some cases, that may mean that you have to fire the vendor."

Robert Weissflach is a partner in the Buffalo office of Harter Secrest & Emery LLP. He said he deals with a fair amount of claims involving third-party harassment, with potential cases ranging from contractors to physicians.

"There are so many different reasons why there might be non-employees in your place of business, and so with that, there is the potential for lawsuits to arise out of their actions," he said.

Are companies — particularly smaller ones that may not have the resources to devote to a large HR office — potentially unprepared to address such issues as they come up?

"I would say most employers are tuned into, at least in their written policies, the issue of harassment by third parties," he said. "Most include in their written policies that the prohibition of harassment applies to vendors and independent contractors."

According to Weissflach, such preparation may stem from a number of OSHA regulations that require employers to do certain things with respect to their contractors to

ensure a safe work environment."

Where they may run into trouble is if and when a manager is aware of a situation but, because the accused is not a direct employee, the manager hesitates to take action.

"That's the biggest problem I see because the standard that is applied is: As an employer, once you became aware of a situation, did you do anything about it? There are definitely times when the employer may have a harassment issue brought to their attention but they mistakenly think there isn't anything they can do about it because it isn't one of their employees," he said. "So they won't take any action."

When it comes to harassment claims, he said it's the not doing anything that typically gets employers in trouble.

"It's not the harassment that necessarily gets you in trouble as an employer; it is the failing to stop it once you know it is going on," Weissflach said. "I don't think you have employers consciously ignoring it. I think it is more that they think they are helpless to do anything about it."

Amy Habib Rittling of Lippes Mathias Wexler Friedman said while she hasn't litigated any third-party harassment cases, she has had plenty of queries from clients who want to know how to address an employee's concerns with a potential third-party harassment.

She said she advises clients to err on the side of caution and follow EEOC guidelines, which say that third parties can commit acts that result in exposure to employers under the harassment rules, even before this latest ruling.

"As I advise my clients, the policies in place really need to speak to a harassment-free workplace, regardless of who the alleged offender is," she said.

As with standard harassment procedures in a workplace, Habib Rittling said making sure employees have a process in place to lodge a complaint is key.

"While the decision kind of confirmed that the courts follow the EEOC guidelines, for employers, they should have been working to control these situations, be proactive and then be responsive when there is a complaint," she said.

As far as the unique nature of third-party harassment in the workplace, it may involve a few more steps to address the issue, such as scheduling a meeting with the company that employs the person in question.

She said it really comes down to the same legal obligations as if it were your own employee.

"It may not always be easy for an employer to deal with that third party, and it may create uncomfortable situations and cover unfamiliar ground," she said. "But at the end of the day, I've never seen a case where these issues can't be handled effectively."

Buffalo attorney Lindy Korn specializes in cases of sexual harassment in the workplace, representing victims. She said rulings such as the one handed down by the 2nd Circuit are important because, despite progress that has been made, the issue isn't going away.

"Sexual harassment will always be with us. As long as there is sexual attraction, it will continue to be an issue both in and out of the workplace," Korn said. "People are more subtle, in many cases, because they know there are rules that can get them terminated."

"However, it has not stopped and I don't believe it will ever stop ... it is part of the human condition," she said.

When it comes to third-party cases, while employers may be conflicted as to what actions they can take against a non-employee, she said she sees the same questions for the victim.

"The employee may think there isn't anything he or she can do about it because the person creating the hostile work environment isn't a regular employee," she said. "So I think you need to educate the employees so that they understand their rights and duties when it comes to reporting these claims."

Korn said if employees aren't properly educated, and regularly re-educated, it can lead to underreporting of harassment claims and not only create a hostile work environment, but ultimately could leave the employer vulnerable to legal action. Her advice to employers: Lead by example.

"The upper management needs to understand that they give permission to their employees by their actions," she said. "You can have the best policies in the entire world. You can offer training and document everything. But if the president and vice president or the CFO are inappropriate, everyone else says, 'I can, too.'"