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APPELLATE COURTS RULE ON EMPLOYER LIABILITY FOR THIRD PARTY SEXUAL HARASSMENT

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It is becoming common for employers to use staffing agency employees to fill temporary or unique positions in their workplace. But, under civil rights laws, can the employer be held liable if a "temp" employee is sexually harassed in its facility? Conversely, can the staffing agency (or any employer) be liable for the sexual harassment of its employee by a non-employee third party? The answers may surprise you!

Civil rights laws permit the victim of sexual harassment to sue their own employer (or under some state civil rights laws, such as Michigan's Elliott-Larsen Civil Rights Act or "ELCRA," the harasser). However, claims brought by independent contractors under civil rights laws have been dismissed because those courts recognized that an employment relationship is necessary for protection under these laws. *See Falls v Sporting News Publishing Company*.

In *McClements v Ford Motor Co*, the Michigan Supreme Court provided an interesting twist to state law when it reviewed a case brought by an employee of AVI Food Systems (and not an employee of Ford) who worked as a cashier in the cafeteria operated by AVI at Ford's Wixom plant. McClements claimed that a Ford superintendent made indecent comments, requests for sex and, once, grabbed her and stuck his tongue in her mouth.

While McClements did not report the incidents, a Ford employee had complained previously about the superintendent, and he had been convicted in the past of exposing himself to three teenage girls. Thus, McClements argued that Ford was aware of the superintendent's propensities and violated the Elliott-Larsen Civil Rights Act by failing to protect her from his harassment. The court had to determine whether Ford could be held liable for its superintendent's harassment of the AVI Food Systems employee.

The court noted that, while ELCRA clearly contemplates suits by certain non-employees (such as a former employee or an applicant for employment), it requires *some* relationship whereby an

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"employer" can adversely affect the terms, conditions or privileges of the non-employee's employment. The court held that a worker *is* entitled to bring an action against a defendant who is not her employer, *but only if* the worker can establish that the defendant affected or controlled the terms, conditions or privileges of her employment. Here, because McClements was hired, paid and subject *only* to AVI's authority, she could not maintain her claim against Ford.

More recently, in *Dunn v Washington County Hospital*, the Seventh Circuit (federal) Court of Appeals was asked to decide whether, under Title VII, the federal discrimination law applicable to employers, the employer could be held liable for the sexual harassment of its employee by a third party.

In this case, a nurse was subjected to harassment by a physician who had staff privileges, but who was not an employee of the hospital. The court began by noting that Title VII holds an employer liable only for its *own* deeds.

While at first brush that might seem to be good news for an employer, the court clarified that this means an employer is liable for failing to take action or by tolerating a hostile work environment. Therefore, it does not matter whether the person creating the hostile environment is an employee, an independent contractor or even a customer. The *source* of the harassment is not the issue; what matters for purposes of Title VII liability is whether the employer takes appropriate action to stop the problem.

So, what are employers to glean from these two cases? First, an employer will be liable if a worker in its facility (who is not its employee) is sexually harassed *if* the employer has an ability to affect the terms, conditions and privileges of that worker's employment. Second, if an employer knows that one of its own employees is being sexually harassed on the job by anyone – whether another employee, a vendor or a customer – it has an obligation to take prompt and appropriate action to put an end to the harassment.

If you need further information concerning the cases above or require assistance in updating policies, please contact your Plunkett & Cooney attorney directly, or in the alternative, Plunkett & Cooney's Labor & Employment Law Practice Group Leader Theresa Smith Lloyd at (248) 901-4005.

For a complete copy of Michigan's Elliott-Larsen Civil Rights Act, click here.

For a complete copy of the Michigan Supreme Court's opinion on *McClements v Ford Motor Co*, click here.

For a complete copy of the Seventh Circuit Court of Appeals opinion on *Dunn v Washington County Hospital,* click here. To view the amendment, click here.

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