Supreme Court Limits Employer Liability for Quid Pro Quo Sexual Harassment

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Recently, the Michigan Supreme Court made it harder for employees to prevail on *quid pro quo* sexual harassment claims under the Elliott-Larsen Civil Rights Act (ELCRA).

In the employment context, *quid pro quo* harassment occurs when a submission to sexual conduct is made a term or condition of employment or where a submission to or a rejection of the conduct is used as a factor in decisions affecting employment.

In the case of *Hamed v Wayne County, et al.,* the court reviewed its 1996 decision in *Champion v Nation Wide Security* and determined it had, contrary to Michigan's common law agency principles, incorrectly adopted the "aided-by-agency" exception. Specifically, *Champion* held that an employer is liable for criminal acts of its employees that are not reasonably foreseeable if the employee used his supervisory authority to commit the acts.

In both *Hamed* and *Champion*, a female under the supervision of a male employee was lead to a remote area and sexually assaulted. In *Champion*, the female was an employee, while in *Hamed,* she was a jail inmate. In general terms, both claimed that the criminal act was accomplished because of the male employee's authority granted by his employer.

While the lower court dismissed Hamed's *quid pro quo* claim finding that the county and sheriff could not be held vicariously liable for the criminal acts of the jail officer since there was no prior notice that he was a sexual predator. The dismissal was reversed by the Michigan Court of Appeals which was bound by *Champion*.

The Supreme Court not only reversed the decision of the appellate court in *Hamed*, it also overruled *Champion.* The court criticized *Champion* because (1) its holding was contrary to the plain language of the ELCRA, (2) it elevated the ELCRA's "general remedial purpose above its plain language," (3) it was based on an unfounded fear that if liability was not imposed by the "aided-by-agency" exception, employees could not impose vicarious liability on employers for *quid pro quo* sexual harassment claims, and (4) it relied upon federal precedent under Title VII (the federal civil rights law) which is not bound

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by Michigan common law principles as is the ELCRA.

Examining common law principles, the *Hamed* court noted that employers may be held liable for the torts of its employees committed within the scope of their employment, but not liable for those acts committed beyond the scope of their employer's business. "Independent action, intended solely to further the employee's individual interests, cannot be fairly characterized as falling within the scope of employment. Although an act may be contrary to an employer's instructions, liability will nonetheless attach if the employee accomplished the act in furtherance, or the interest, of the employer's business." In this case, the officer's sexual assault was for his own interests and did not benefit the County or the Sheriff and, in fact, was expressly prohibited.

However, the court noted that an employer can still be held liable for prohibited acts if it knew, or should have known, of the employee's criminal propensities and record. The court instructed that this will require an analysis of whether the employer had "actual or constructive knowledge of prior similar conduct" and "of the employee's propensity to act in accordance with that conduct."

The court noted that to adopt a rule that would hold an employer vicariously liable for criminal actions of its employees without some *indicia* of foreseeability would be too high a standard. Such a rule would improperly hold employers liable for harms, which could not be anticipated and are unpreventable, and make them insurers for victims of their employees' crimes.

Because there was no *indicia* of the officer's propensity to sexually assault women, the county and sheriff could not be held liable for his unforeseeable criminal act.

To minimize potential claims of *quid pro quo* harassment, employers should examine their practices concerning background checks, making sure that they are in compliance with the Equal Employment Opportunity Commission's rule against denying all felons.

Is your company conducting background investigations of applicants, including criminal records? If you are unsure whether your practice in screening applicants is sufficient or advisable under this new ruling, contact the author or any Plunkett Cooney attorney specializing in employment law.

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