

Third Circuit Clarifies "Management Level Employee" Test for Purposes of Determining Employer Liability for Co-Worker Sexual Harassment

On June 8, 2009, the United States Court of Appeals for the Third Circuit issued a precedential opinion defining what constitutes a "management level" employee for purposes of employer liability for co-worker sexual harassment.* The case is *Huston v. Procter & Gamble Paper Products Corp.*, and the text of the opinion may be accessed at the following link: <http://www.ca3.uscourts.gov/opinarch/072799p.pdf>

Employer liability for co-worker sexual harassment exists only if (1) the employer failed to provide a reasonable avenue for employee harassment complaints or (2) it "knew or should have known" of the harassment and failed to stop it. An employer "knew or should have known" about harassment if "management level" employees either had actual knowledge of it or had enough information to raise a reasonable probability that harassment was taking place. In other words, if a "management level" employee had reason to know about the harassment, then the employer "knew or should have known" about it. Though the "management level" test had been in place for many years, there was scant guidance from the Third Circuit on who within the supervisory chain of command constitutes a "management level" employee. The court took the opportunity in *Huston* to address that issue.

Huston was a co-worker sexual harassment case in which the plaintiff claimed her employer "knew or should have known" about the harassment because two supervisory employees had knowledge of it. The extent of these employees' supervisory authority was to oversee the production line work of their fellow workers. They had no authority to affect the employment status of their alleged subordinates. The court took the opportunity to clarify the "management level" definition. It determined that knowledge of facts may be imputed to the employer only if the facts are within the scope of, and are important to, the management employee's duties.

Accordingly, the court found that an employee's knowledge of sexual harassment may typically be imputed to the employer in two circumstances: (1) where an employee with knowledge of the harassment is sufficiently senior in the governing hierarchy or otherwise in a position of administrative responsibility over employees, and (2) where such employee is specifically employed to deal with sexual harassment. The court found that supervisory employees, who have "mere supervisory authority over the performance of work assignments by other co-workers," typically would not be considered "management level."

Applying its newly-clarified definition, the court found that the two supervisory employees in *Huston* were not sufficiently "managerial" to justify imputing their knowledge to the employer. Accordingly, *Huston* could not prove that her employer "knew or should have known" of the harassment prior to the time at which it acted to stop it.

Huston is a beneficial opinion for employers. However, it should not be taken as a signal that supervisory employees are free to ignore harassment. Whether employees are "management level" will require a fact-intensive inquiry in nearly every case, and the consequences of a finding that a knowledgeable supervisory employee was "management level" - and that the employer therefore knew or should have known of the harassment - may be too severe to risk. Accordingly, *Huston* is a reminder that employers should ensure that supervisors, as well as true "management level" employees, remain vigilant in properly investigating and addressing issues of alleged co-worker harassment.

If you have any questions or comments about this E-Flash, please contact Post & Schell, P.C. Labor and Employment Attorney Robert Toy. Bob can be reached at rtoy@postschell.com or 215-587-1091.

*Co-worker harassment is to be contrasted from harassment by a supervisor, for which an employer may be held strictly liable if the harassment results in a tangible adverse employment action.

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