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EMPLOYMENT LAW

Decision Highlights Need for Employer Vigilance to Sexual Harassment in the Workplace

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Special to the Legal

With sexual harassment so much in the news, a recent decision of the U.S. District Court for the Eastern District of Pennsylvania reminds us of an employer's obligation when it becomes aware of harassing behavior from a co-worker. In *Jones v. Pennsylvania State Police*, 16-4205, 2017 U.S. Dist. LEXIS 163858 (E.D. Pa. Oct. 3), the court found that the response of the Pennsylvania State Police (PSP) to its knowledge of harassing behavior may have been insufficient, sending the case to trial.

DATING STATE TROOPERS

Rachel Jones began working as a patrol trooper for the PSP in March 2013. She began dating fellow trooper Craig Acord in June 2013. They broke up approximately one year later. After the break-up, however, Acord continued to pursue Jones by sending text messages asking for a resumption of their relationship. When simply asking was insufficient, Acord began to



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send her gifts and flowers beginning in July 2014 through February 2015. Jones, however, did not report these gifts to her supervisors. She believed that Corporals Hardeep Rai and Kevin Mills were aware of the situation, however, because Rai supervised both Jones and Acord, and Mills had asked Jones whether she wanted to change the time of her shooting lessons in order to avoid Acord.

In May 2015, Acord escalated his pursuit of Jones when he kissed her on the neck without her permission. Approximately one month later, he

took a picture of himself next to Jones while she was bending over. At that point, Jones specifically asked Rai to help stop Acord's harassment. She subsequently spoke to the station commander about Acord, who took steps to end Acord's behavior. Acord never bothered Jones again. Shortly after meeting with Acord, the station commander asked Jones whether she wanted to change her assigned station or work shift so as to avoid any possibility of overlapping with Acord. Jones declined.

Despite the PSP having successfully stopped Acord's harassment, Jones believed its response to be insufficient and brought suit claiming sexual harassment and retaliation. At the close of discovery, the PSP moved for summary judgment.

WHO IS A MANAGER?

The principal issue with respect to Jones' claim of hostile work environment was whether Corporals Rai and Mills were "management-level employees" such that the PSP was subject to respondeat superior liability. That is, that their alleged knowledge

of the harassment was sufficient to put the organization (PSP) on notice of the behavior—thereby triggering a duty to take remedial action.

Because Acord was Jones' co-worker, PSP, as her employer, would only be liable for Acord's harassment if "the employer failed to provide a reasonable avenue for complaint" or "the employer knew or should have known of the harassment and failed to take prompt and appropriate remedial action," citing *Huston v.*

The case highlights the need for ongoing training of managers to be attuned to the signs of harassment.

Procter & Gamble Paper Products, 568 F.3d 100, 104 (3rd Cir. 2009). It was Jones' burden to prove that "management-level employees had actual or constructive knowledge about the existence of a sexually hostile work environment and failed to take prompt and adequate remedial action.

The court found that there was an issue of fact as to whether Rai and Mills were "management-level employees." Specifically, the *Huston* court defined a management level employee as one who is "sufficiently senior in the employer's governing hierarchy, or otherwise in a position of administrative responsibilities over employees under him, such as departmental or plant manager, so that such knowledge is important to the employee's general managerial duties." Because the record indicated that

both Rai and Mills had taken some level of action in trying to address Jones' concerns, the court found that each "may have had" the authority to act on behalf of the police to stop Acord's harassment.

WHAT CONSTITUTES KNOWLEDGE OF HARASSMENT?

Jones also established a genuine issue of fact as to when Rai and Mills became aware of Acord's harassment. There was conflicting evidence as to their knowledge, which raised the issue of whether, assuming they were managerial-level employees, the police's action to end Acord's behavior was "prompt" in addition to being adequate.

The court granted the PSP's motion with respect to Jones' retaliation claim. Jones asserted that the station commander's offer to transfer stations or to change shifts was in retaliation for her complaints about Acord's harassment.

In order to support a viable claim for retaliation, an employee must establish that the employer's action was one that would "dissuade a reasonable worker from making or supporting a charge of discrimination." An "adverse employment action is action by an employer that is serious and tangible enough to alter an employee's compensation, terms, conditions or privileges of employment." Because Jones declined the offer to transfer stations without recrimination, the offer, in itself, was not an adverse action. While Jones schedule was changed, the Court found that the reason was to avoid any overlap with Acord—and not in retaliation for having complained about the harassment.

VIGILANCE IS KEY

While the PSP did many things right in this matter—providing an avenue of complaint and stopping the harassment after Jones made a specific complaint, the case highlights the gray areas of sexual harassment law. That is, while it was clear that Corporals Rai and Mills knew of the break-up in the relationship, even if they knew that Acord was continuing to text Jones and send her gifts and flowers, there was no indication that Jones had specifically objected to this or complained. As such, the case places upon the (alleged) supervisors to discern whether Acord's overtures were "unwelcomed." It is notable that once Jones made a specific complaint, remedial action was taken—which would indicate that PSP had procedures in place to address harassing behavior.

Employers should continue to be vigilant to harassing behavior in the workplace. The case highlights the need for ongoing training of managers to be attuned to the signs of harassment, as well as the need for documentation of any discussion or intervention in that area. •