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Recent Developments in Employment Law

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7th Circuit Federal Court Finds Employer Liable Under Title VII for Discriminatory Actions of an Independent Contractor

The 7th Circuit Court of Appeals recently found that where the employer knew or should have known of the harassment by the independent contractor against its employee, the employer was responsible for the employee's protection from workplace harassment under Title VII. *Dunn v. Washington County Hospital*, 429 F.3d 689 (7th Cir. 2005).

In *Dunn*, the Plaintiff, a nurse, filed suit against her employer Washington County Hospital claiming that its independent contractor, Dr. Thomas Coy, head of obstetric and emergency services harassed her in violation of Title VII of the Civil Rights Act of 1964.

Proceeding as if it were a tort action, the district court reasoned that since Coy was an independent contractor, the Hospital could not be liable under on principles of *respondeat superior* for intentional torts he committed against the plaintiff; consequently, the judge incorrectly found that the Hospital could not be liable under Title VII either. While the district court assumed that the plaintiff encountered discriminatory working conditions, summary judgment was entered for the Hospital finding that Dr. Coy was not one of the Hospital's employees. The court reasoned that Dr. Coy had staff privileges, which he used to furnish medical services directly to patients. The Hospital therefore could not control his conduct and thus, the Hospital was not liable for his actions.

Relying on the Supreme Court decision in *Burlington Industries, Inc. v. Ellerth*, 524 U.S.

742 (1998), and *Faragher v. Boca Raton*, 524 U.S. 775 (1998), the 7th Circuit stated that an employer is answerable under Title VII for "its own deeds-and this is so even if the person who takes supposedly discriminatory action is on the payroll. An employer is responsible for every "tangible employment action" (hiring, firing, promotion or its absence, wage setting, and the like) plus any other discriminatory term or condition of employment that the employer fails to take reasonable care to prevent or redress. When a supervisor causes the objectionable conduct, proof of reasonable care is an affirmative defense; otherwise the plaintiff bears the burden of showing that the employer knew of the problem (usually though not always this requires the employee to show that a complaint was made) and that the employer did not act reasonably to equalize working condition once it had knowledge."

As such, because liability is direct rather than derivative, the appellate court found that it makes no difference whether the person whose acts are complained of is an employee independent contractor or for that matter a customer. The *Dunn* court stated,

“the ability to control the actor plays no role. Employees are not puppets on strings, employers have an arsenal of incentives and sanctions (including discharge) that can be applied to affect conduct. It is the use (or failure to use) these options that makes an employer responsible and in this respect independent contractors are no different than employees.”

Relying on the *Restatement (2d) of Agency* §§ 213(d), the court stated, “indeed, it makes no difference whether the actor is human. Suppose a patient kept a macaw in his room, that the bird bit and scratched women but not men, and that the Hospital did nothing. The Hospital would be responsible for the decision to expose women to the working conditions affected by the macaw, even though the bird (a) was not an employee, and (b) could not be controlled by reasoning or sanctions. It would be the Hospital's responsibility to protect its female employees by excluding the offending bird from its premises. This is, by the way, the norm of direct liability in private law as well: a person "can be subject to liability for harm resulting from his conduct if he is negligent or reckless in permitting, or failing to prevent, negligent or other tortious conduct by persons, whether or not his servants or agents, upon premises or with instrumentalities under his control."

Finding that the plaintiff stated a valid cause of action for gender discrimination under Title VII against the Hospital for the actions of its independent contractor, the 7th Circuit reversed the district court's ruling in favor of the Hospital and remanded the case back to the district court for decision as to whether “Coy's conduct was severe enough (and the Hospital's response feeble enough) to justify liability, and if material facts are in dispute a trial must be held.”

The *Dunn* decision reiterates the now long standing opinion of the United States Supreme Court in *Ellerth and Faragher*, which outlined the importance for employers to have a written policy against harassment which is distributed to all employees. The policy should inform the employee as to what constitutes illegal discrimination and where to make a complaint if they are a victim of discrimination or harassment whether by another employee, independent contractor or customer. Once the employee complains, it becomes necessary for the employer to act and stop the harassing conduct and not retaliate against the employee for voicing the complaint. If the employer fails to appropriately respond to an employee complaint, the employer may be subject to liability. To the contrary, if the policy is properly prepared and distributed to employees, in some situations, the anti-harassment policy can be used to defend the employer where the employee pursues a claim for harassment but fails to inform the employer of the complaint as directed by the policy.

Providing employee training is another excellent way to educate employees as to the provisions of the anti-harassment policy. An individual knowledgeable about the

laws against harassment and discrimination should train all employees including supervisors as the provisions of the policy including the legal definition of harassment, discrimination and retaliation. The training should also include a discussion of the written policy, advice to employees regarding the complaint process and assurance that the complaint will be investigated without fear of retaliation. The training should include both identifying the discriminatory behavior and instruction to those charged with the duty to conduct a proper investigation and to stop the discriminatory or harassing conduct.

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