



McKENNA
EMPLOYMENT BULLETIN

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**UNDER ILLINOIS HUMAN RIGHTS ACT,
THE EMPLOYER IS STRICTLY LIABLE
FOR SUPERVISOR SEX HARASSMENT**

In Sangamon County Sheriff's Department v. The Illinois Human Rights Commission, No. 105517 and 105518, decided April 16, 2009, the Illinois Supreme Court declined to follow the Federal Rule and held that an employer is strictly liable for a supervisor's sex harassment even though that supervisor is not a direct supervisor of the claimant.

The Federal rule is that an employer is liable for the sexual harassment of a supervisor where that supervisor has the authority to directly affect the terms and conditions of employment relative to the victim.

The Illinois Supreme Court ruled that the Illinois Human Rights Act is unambiguous and under the plain language of the statute, an employer is liable for the sexual harassment of its employees. Where the offending employee is either a "non-employee" or "non-managerial or non-supervisory employee," an employer is responsible for the harassment only if it was aware of the conduct and failed to take reasonable corrective measures.

The Illinois Supreme Court ruled that where the offending employee is neither a "non-employee" nor a "non-managerial or non-supervisory employee," the employer is strictly liable for the sexual harassment of the victim regardless of whether the employer was aware of the harassment or took measures to correct the harassment. Opinion, pg. 8.

The Illinois Supreme Court held that whether a supervisor has direct supervisory authority over a

victim's working condition is irrelevant under the plain language of the Illinois Human Rights Act.

There is no language in the Act that limits the employer's liability based on the harasser's relationship to the victim. This is because a supervisor is empowered to act on the employer's behalf, supervisors are the "public face" of the employer and employers are in the best position to train supervisors and make them aware of the law prohibiting sexual harassment. Opinion, pg. 10.

**A FOREMAN IS NOT A SUPERVISOR
FOR PURPOSES OF EMPLOYER TITLE
VII LIABILITY**

In EEOC v. Ceisel Masonry, Inc., 2009 WL 174995 (N.D.Ill. 2009), the employee alleged Title VII liability against the employer based on a foreman's conduct. The court held that the employer could not be liable for the foreman's conduct. The foreman was not a supervisor for purposes of determining the employer's liability under Title VII for the foreman's alleged harassment of Hispanic employees.

The court ruled that the foreman was not a supervisor because his job duties consisted of supervising the work of bricklayers and laborers and ensuring the job site's safety. The foreman could only recommend discharge and issue disciplinary citations. However, he did not have the authority to hire, fire, demote, promote, or transfer employees.

This is an example of the Federal rule which provides for liability of employers for a supervisor's activity only where the supervisor can directly affect the terms and conditions of the employee's employment.

COMMENTS TO CO-WORKERS AND TO THE EMPLOYEE WERE NOT SUFFICIENT FOR HARASSMENT

In Barrett v. Whirlpool Corp., 2009 WL 425969 (6th Cir. 2009), racial statements and racist graffiti were directed against a white employee's African-American co-workers. In addition, there were instances of alleged harassment directed against the Caucasian employee herself. The racist comments and graffiti were not directly harassing toward the Caucasian. The harassment directed against the Caucasian employee allegedly consisted of a few rude comments, the directing of desirable work away from the employee and the employee being treated coldly by co-workers. Furthermore, the employee made a number of comments suggesting that she herself did not view her workplace as particularly hostile. Under this fact scenario, the Court ruled that the racist comments and alleged actions against the Caucasian employee were insufficiently severe or pervasive to establish a prima facie Title VII hostile work environment claim based on the Caucasian employee's association with her African-American co-workers.

A VOICE CONDITION MAY CONSTITUTE A DISABILITY

In Willnerd v. First National Nebraska, Inc., 2009 WL 635219 (8th Cir. 2009), the employer gave as its reasons for terminating an employee poor economic conditions in the community and overstaffing at the bank relative to the income the bank generated. The employer also said that the employee's performance was poor, and that his position was the most expendable.

The employee alleged that he was terminated from his position of bank loan officer because of his voice condition. The court ruled that this presented a question of fact as to whether the employer's reasons for terminating the employee were a pretext and whether the employer had a discriminatory animus. Therefore, the court ruled that summary judgment could not be entered for the employer in the employee's Americans with Disabilities Act action.

WHERE COMPARATIVE EMPLOYEES ARE TREATED THE SAME AS THE PLAINTIFF, THERE IS NO TITLE VII LIABILITY

In Greene v. Potter, Seventh Cir. No. 08-1829, March 5, 2009, an employee in a Title VII action alleged that the employer denied the plaintiff overtime opportunities on account of her gender. The trial court granted summary judgment for the employer even though the plaintiff had not completed her case in chief at the trial. The Seventh Circuit affirmed on the basis that the employer explained that business needs required that the plaintiff work on other days that resulted in less overtime opportunities. Further, the plaintiff's evidence indicated that her supervisor also deprived similar overtime opportunities to male co-workers. The court ruled that this established that some other non-gender reason motivated the supervisor's decision to deny the plaintiff her requested overtime opportunities.

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