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Appeals Court Finds Employer Liable for Supervisor's Same-Sex Sexual Harassment

Written by: Ryan N. Parsons

A recent case reminds us to take all claims of sexual harassment seriously, including when the two employees are of the same sex. In *Cherry v. Shaw Coastal* (http://tinyurl.com/7s5c5zh), the Fifth Circuit Court of Appeals recently found an employer liable for failing to respond following allegations that a male supervisor was sexually harassing a male employee.

The supervisor sent the employee sexually explicit text messages, touched him repeatedly ("in the way I touch my wife," according to one witness), touched his buttocks, and repeatedly made sexual comments to him and about him. The employee and a different supervisor repeatedly complained up the ladder, but management was dismissive. At first, management viewed the conduct as merely "horsing around" and failed to refer the claims to human resources, in spite of a company policy requiring them to do so. When HR finally did get involved, they concluded that the allegations were all "he-said-he-said," despite other witnesses who could have corroborated the employee's claims.

The employee eventually resigned because of the harassment and filed suit against the supervisor and the company for sexual harassment. A jury found for the employee on all the claims and awarded him $500,000. The trial court initially overturned the verdict, but the Fifth Circuit reversed the trial court and reinstated the jury's verdict and the damages award. The court first determined that the supervisor's actions were sexual in nature, rather than merely humiliating, and that the actions were severe enough to warrant the verdict. Finally, and most important for management, the court determined that the employer's response was inadequate. "An employer can escape liability if it takes remedial action calculated to end co-worker harassment as soon as it knows or should know of the harassment"; however, the employer's failure to respond to the employee's accusations ruined its chance to take advantage of this opportunity.

If a female employee complained about a male supervisor inappropriately touching her and sending her lewd and obscene messages, most employers would respond promptly and thoroughly. But some employers may not be as quick to address the same claim from a male employee. This case provides a strong reminder that employers must foster a culture where **all** sexual harassment claims are treated with the utmost seriousness. Failure to do so could be costly.

Sarbanes-Oxley's Protection Does Not Extend to Employees of Contractors of Public Companies

Written by: Jonathan W. Oliff

The Sarbanes-Oxley Act (SOX) (http://www.sec.gov/about/laws.shtml) provides "whistleblower" protection to employees of publicly traded companies who report corporate securities violations or fraud against investors. Usually this involves SOX's protection of employees against retaliation for reporting their own employers' alleged violation of securities law. In a recent case, two employees of a private contractor attempted to bring SOX retaliation claims against their former employers, which provided investment advising services to mutual funds registered with the Securities and Exchange Commission. After allowing the employees to bring the claims, the district court asked the U.S. Court of Appeals for the First Circuit to answer the question of whether SOX's whistleblower protection applies to an employee of a contractor of a public company. The First Circuit found that employees of the private contractor were not "employees" under SOX and could not bring their retaliation claims (http://tinyurl.com/7nzv5tb).

SOX's provisions prohibit an employer from retaliating against any employee who provides information or otherwise assists in an investigation that the employee reasonably believes constitutes a violation of securities law. Courts have found generally that SOX provides broad protection — to promote corporate ethics and to counteract a culture that discourages employees from reporting fraudulent behavior by protecting whistleblowers from retaliation. However, the First Circuit specifically looked to the language used by SOX that prohibits retaliation, focusing on how the statute defines an employee.

While other provisions of SOX clearly indicate they are intended to apply to employees of private companies, the caption of SOX's whistleblower section and its text refer specifically to employees of publicly traded companies. The First Circuit also recognized that other federal acts providing whistleblower protection, such as the Energy Reorganization Act and the Pipeline Safety Improvement Act,

specifically include contractors or subcontractors in their definition of an employer. Finally, the court acknowledged some Department of Labor decisions have indicated that an employee of a private company may be able to bring a SOX whistleblower claim if his or her employer acts as a contractor of a public company and retaliates against an employee at the public company's direction. Although the court did not give any deference to the Department of Labor's position, this remains a possibility since the court did not decide that issue in its opinion.

Public companies must be aware that the scope of SOX's protection has been interpreted broadly by courts, potentially including complaints about the illegal activities of a number of third parties, including clients, customers, and other business partners. Fortunately, based on the First Circuit's recent decision, private contractors of publicly traded companies may enjoy some relief from SOX claims brought by their own employees. If employees of a private contractor complain about or report alleged violations of securities law, they may not be entitled to the same protection employees of public companies enjoy against retaliation by their employer. Until additional Circuits weigh in on the issue, private contractors would still be well advised to have reporting mechanisms in place for complaints about securities and accounting issues related to their contracts with public companies, and be sure to fully evaluate the circumstances of any complaint before taking disciplinary action against an employee.

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