

U.S. COURT OF APPEALS: CITY DEALT PROPERLY WITH SEXUAL HARASSMENT CLAIM

Next we review a federal court case dealing with alleged sexual harassment in the workplace and with retaliatory action by the employer against the complainant. *Brooks v. City of San Mateo et al.*, USCA 9th cir. No. 98-15818 (Oct. 23, 2000).

Brooks was a dispatcher for the City when a male co-worker “placed his hand on her stomach and commented on its softness and sexiness” and then, after being told to stop and being forcefully pushed away by Brooks, forced his hand under her clothing to fondle her bare breast. Brooks reported the incident and the City placed the co-worker on leave, pending investigation. The co-worker eventually quit his job, pled no contest to sexual assault charges and spent time in jail.

Following some time off and counseling, Brooks returned to work but found the work environment had changed. Male employees ostracized her and supervisors treated her unfairly. Brooks sued under both California law and Title VII of the federal Civil Rights Act for sexual harassment and retaliatory discrimination.

Title VII prohibits discrimination on the basis of “race, color, religion, sex or national origin.” When an employer permits employees to be harassed because of their sex, that is a violation equal to refusing to hire on account of sex, paying less for the same work based on sex, or any other blatant discrimination. Sexual harassment is divided into two types, “quid pro quo” and “hostile work environment.” “Quid pro quo” means “something for something” which, in the workplace translates into something like “If you do this sexual favor for me, I’ll recommend you for a promotion.” That type of harassment does not apply in this case.

Brooks alleged a “hostile work environment.” In order to prove that, as a female plaintiff she had to show conduct which **another reasonable woman** would consider sufficiently severe or pervasive as to create an abusive work environment. The court noted that this was a single episode of unwelcome sexual advances that was dealt with promptly by the employer. Although prior similar acts had been committed by the same person towards other female employees, neither Brooks nor the employer knew of them until later. Therefore, Brooks could not show a pattern of behavior so pervasive as to cause a reasonable woman to assume a hostile work environment. Also, because the employer acted promptly to correct the work environment, it could not be held liable for prior episodes of which it was unaware.

Brooks also argued that the fact that she had been touched on the stomach and then on the breasts constituted repeated episodes. The court found these touchings to have happened within a few minutes and thus to constitute a single event which was not severe enough to create a hostile work environment.

On the other hand, the court said that a repeated and escalating pattern of less severe acts can constitute a hostile work environment. It cited a case that began with requests for dates and then escalated through love letters after having been told “No” by the object of the affection as well as by the employer as serious enough to create fear for a reasonable woman.

The court did not condone the acts in Brooks, but found that the employer was not liable because there was only a single episode, there was lack of knowledge of prior similar acts, and the employer took prompt action against the perpetrator.

Finally, the court considered Brooks' claim of retaliation against her after her return to work. In order to support a claim of retaliation a plaintiff must show (1) that they are engaged in a protected activity, (2) there was an adverse employment action, and (3) that there was a causal link between the two. After the plaintiff has showed those three things, it is then up to the employer to explain away the adverse employment action.

First, Brooks was engaged in the protected activity of complaining about the initial sexual assault. Second, was she subjected to an adverse employment action? Only if the employment actions were "non-trivial" ones that would deter reasonable employees from complaining, said the court.

Examining the employment actions, the court began with the fact that other employees ostracized Brooks. The court said that employers cannot force their employees to socialize and that forcing them to might be unconstitutional.

Brooks complained that she was forced to attend group therapy sessions with other employees even though she was uncomfortable there. The court found that these were employee workshops designed to educate all employees about sexual harassment and Brooks was not singled out in any way.

Brooks was scheduled to work with a friend of the perpetrator who was allegedly openly hostile to her. The evidence here was not convincing and the court said that "a victim of sexual harassment is not entitled to avoid contact with the harasser's friends."

Brooks complained that the City was dilatory in processing her workers' compensation claim. However, even though the City took all of the allowed time to process her claim, there was no evidence that this was unusual or discriminatory.

Brooks received a somewhat negative performance report. While such a report may be an actionable adverse employment decision, in this case the report was not a final report in that it was appealable. Brooks chose not to pursue the appeal. Therefore, she cannot claim this as an unfair adverse action because it was not a final action.

Finally, Brooks claimed that she was given unfavorable shift assignments and was denied her vacation preference. Like the performance report, these were not final actions and could have been appealed.

Municipal employers, such as the City of San Mateo, must have a workable and working policy on sexual harassment. Employees must be encouraged to report incidents and the municipality must treat them promptly and seriously. In this case, San Mateo put the alleged perpetrator on administrative leave the next day, launched an investigation, and began termination proceedings against him. He subsequently resigned, pled no contest to criminal charges and spent 120 days in jail. A less speedy or less decisive approach by the City could easily have resulted in a decision in favor of Brooks. Municipalities beware!!

- Libby Turner, Esq.

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