

Even If The Employee Didn't See Or Know About Harassing Behavior, Court Allows Evidence

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In a sexual harassment suit, a U.S. District Court Judge will permit evidence of harassing behavior even though the plaintiff employee neither directly saw nor knew about such conduct. The court found that if the employee learned about the conduct while she still worked for the company, then such evidence may be relevant to whether the plaintiff experienced a hostile work environment. Additionally, the court held that if such conduct was readily known, then the employer had “constructive notice” of the bad behavior, thereby triggering the “knew or should have known” standard imposed upon employers in such hostile work environment sexual harassment claims. In *Schmidlin v. Uncle Ed's Oil Shoppes, Inc.*, Case No. 13-cv-1-552 (E.D. Mich.), the plaintiff (a female auto mechanic) claimed she was subjected to a sexually hostile work environment, which included sexual comments and conduct that included repeated batteries. The employer brought several motions *in limine*, seeking to exclude evidence about which the plaintiff had no direct knowledge. For example, the employer sought to exclude the deposition testimony of a former assistant manager who testified about the various male employees' (including by the store manager) sexual comments about and gestures toward the plaintiff when she was not looking or of which she was not aware. Some of these comments and gestures were reported to plaintiff after-the-fact, but during the course of her employment. Similarly, the employer sought to exclude the plaintiff's deposition testimony regarding her knowledge of two other former employees experiencing harassment, but neither of whom complained. In denying the employer's motions *in limine*, the District Court followed a prior decision by the Sixth Circuit Court of Appeals, which held that a factfinder can consider similar acts of harassment that an employee learns of during the course of her employment even if the conduct was not directed at the employee. Such evidence, reasoned the District Court, is relevant to establishing a hostile work environment and the employer's knowledge of such conduct. As the District Court noted, this evidence would establish actual or constructive notice of the conduct based on the sheer pervasiveness and openness of the behavior and a reasonable employer would have knowledge of such. This case is a good reminder for employers to promptly address bad behavior even if no complaint – formal or informal – has been made. In other words, if the supervisor or manager is aware of inappropriate comments or conduct even if the person about whom the comments or made is unaware, the supervisor should immediately address the behavior. Failure to do so can be costly for employers, both financially and from a morale perspective, including a loss of personnel.

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