

APRIL 7, 2011

First Circuit Case Provides Useful Guidance for Employers to Fashion Appropriate Discipline for Title VII Coworker Harassment

BY H. ANDREW MATZKIN AND MATTHEW K. MARUCA

In a recent decision that provides employers with useful guidelines for lawfully responding to employee complaints of harassment, the First Circuit in *Wilson v. Moulison North Corp.* (*Wilson*) held that (1) applying progressive discipline in a reasonable manner generally constitutes a lawful and appropriate response to most instances of employee harassment, and (2) a coworker lacking authority to affect the terms and condition of his colleagues' employment is not a "supervisor" under Title VII, and his or her knowledge of a harassment complaint will not be imputed to an employer, regardless of whether the individual complaining of harassment believes the coworker is an appropriate contact for such complaints.

The plaintiff in *Wilson*, Arthur Wilson, was an African American male who worked for Moulison North Corporation, a company that installs and repairs heavy electrical lighting systems. Shortly after Wilson began work at Moulison North, two of his coworkers began directing racial epithets at him, using terms such as "Aunt Jemima" and "n#gger." Eventually, Wilson contacted Moulison North's CEO, Ken Moulison. According to the court, Mr. Moulison promptly investigated the complaint, confirmed the allegations, and took several steps to remedy the problem, including issuing a verbal warning to the alleged harassers and a threat that future harassment would result in their immediate dismissal. Despite the CEO's warning, one coworker continued to use racial epithets towards Wilson. And Wilson's relationship with other coworkers soured: an unidentified coworker slapped him with a live electrical wire and another tainted his water bottle with dirt and gasoline.

Wilson complained about this conduct to his "lead" coworker, a senior Moulison North employee whose responsibilities included allotting daily work assignments to coworkers when supervisors were not present at the worksite. The "lead" coworker took no steps to discipline or report the offending employees. Despite numerous opportunities, Wilson never reported the conduct again to the CEO or to any other supervisor at Moulison North. After taking disability leave due to a workplace injury, Wilson chose not to return to work, and subsequently asserted claims against Moulison North for hostile work environment under Title VII of the Civil Rights Act of 1964.

The First Circuit held that Moulison North's initial response to Wilson's internal complaint—investigating the complaint and issuing a verbal warning and threat of dismissal—was lawful and appropriate. Rejecting Wilson's argument that verbal punishment was too mild, the court held that Title VII does not require an employer to terminate or to suspend an employee who harasses a coworker, and that "a reasoned application of progressive discipline will ordinarily constitute an appropriate response to most instances of employee misconduct." The court weighed several factors in ultimately determining that the verbal reprimand was sufficient "to fit the crime," including the following:

- The offending employees were not "repeat offenders";

- Racial discrimination was not a long-standing problem at Moulison North;
- The discipline handed out to offending employees conformed to Moulison North's antiharassment policy; and
- The reprimand of the offending employees had "teeth"; that is, Moulison North ordered the harassment to stop and credibly threatened immediate termination if it did not.

The court also rejected Wilson's claim that the coworker to whom he reported subsequent harassment was a *de facto* supervisor and was required to take remedial action to stop harassment. The court found that the coworker lacked the actual or apparent authority to affect the terms and condition of his colleagues' employment—that is, he did not have authority to hire, fire, demote, promote, transfer, or discipline them—and therefore that he was not a "supervisor" whose knowledge could be imputed to Moulison North under Title VII.

The court noted that, even though Wilson *believed* he could direct his complaints to the coworker, he nevertheless failed to meet his evidentiary burden to show that Moulison North had *actually* designated such coworker to receive harassment complaints on behalf of the company. Absent this evidence, the court would not impute the coworker's knowledge to Moulison North. Accordingly, Wilson failed to put Moulison North on notice of the renewed harassment, and Moulison North therefore could not be liable under Title VII for failing to remedy the alleged misconduct.

Next Steps

The court's holding in *Wilson* provides useful guidance for employers to follow to best ensure that they lawfully and appropriately address an employee's allegations of hostile work environment harassment against a coworker.¹

- If they have not done so already, employers should immediately implement an antiharassment/antidiscrimination policy.
- Employers should review their current (or newly implemented) antidiscrimination and antiharassment policy to ensure that it is clearly written and easy for both employees and supervisors to follow. Employers specifically should ensure that the policy clearly identifies the appropriate management "contacts" for employee complaints of harassment or discrimination, and explains the steps that these management contacts must take when receiving and addressing such complaints.
- Employers should train their managers and supervisors on how to promptly investigate and respond to complaints of harassment or discrimination the workplace. When any such complaint is made, employers must ensure that managers and supervisors respond in a prompt and appropriate manner, and properly document the steps being taken in response to the complaint.
- Employers should review all relevant facts and circumstances when determining the type of disciplinary action to be taken against an employee accused of harassment, including but not limited to the following: the type and amount of previous complaints of harassment in the workplace (regardless of whether the same actors are involved); the prior disciplinary history of the offending employee (including whether he or she is a "repeat offender"); the history of disciplinary action taken by the company in similar circumstances; the punitive and remedial effect that discipline will have on the offending employee; and the potential deterrent effect on current and future employees.

If you have any questions about this advisory, please contact the authors or your Mintz Levin attorney.

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Endnotes

- ¹ *Wilson* addressed coworker harassment of a coworker, rather than supervisor harassment of a subordinate. Harassment by a supervisor that results in a tangible employment action will result in strict liability for the employer under Title VII. Harassment by a supervisor that results in a hostile work environment for a subordinate does not result in strict liability. An employer may defend a claim of harassment on such basis by showing that it exercised reasonable care to prevent and promptly correct any harassment, and that the employee unreasonably failed to take advantage of any preventive or corrective opportunities provided by the employer or to avoid harm otherwise.
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1026-0411-BOS-ELB