



Client Alert

Romantic overtures between co-workers pose risks to employers.

Employer Faces Trial For Failing to Prevent Employee's Sexual Overtures to Fellow Employee

Workplace romances are not unusual. But when do an employee's romantic overtures to another employee cross the line and become sexual harassment? Under what circumstances can an employer be held liable for failing to prevent unwelcome advances by one of its employees? The United States Court of Appeal for the Ninth Circuit confronted these issues in a recent decision, *Equal Employment Opportunity Commission v. Prospect Airport Services, Inc.* The appellate court's opinion shows that an employer can face liability if it fails to stop sexual propositions that an employee finds offensive, even if most employees would not be bothered by them.

The case involved allegations of sexual harassment brought by a male employee against a female co-worker. Over a period of six months, the female employee sent her colleague four increasingly explicit love notes, showed him a picture of herself with her cleavage exposed, and made a series of suggestive comments and gestures. In addition, she enlisted other employees to deliver messages to him on her behalf. The male employee told her he was not interested, but she persisted. He told his supervisor that her actions made him uncomfortable. The supervisor instructed the female employee to stop, but she failed to do so.

Eventually, the employer fired the male employee because of poor work performance. After his



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termination, he lodged a complaint against the company with the Equal Employment Opportunity Commission (EEOC). The EEOC sued in federal court on his behalf, alleging that the employee had been subjected to a hostile work environment. The trial court threw out the claim, granting summary judgment in favor of the employer. The court concluded that the female employee's conduct was "not severe and pervasive enough to amount to sexual harassment objectively for a reasonable man." In fact, the male employee had admitted that "most men in his circumstances would have 'welcomed' the behavior...but that due to his Christian background he was 'embarrassed.'"

The Court of Appeals reversed the trial court's ruling and reinstated the lawsuit. It held that a jury could reasonably conclude that the male employee had been subjected to unlawful sexual harassment. It did not matter whether most men would have welcomed the advances, because "welcomeness is inherently subjective." The appellate court held, "[i]t would not make sense to try to treat welcomeness as objective, because whether one person welcomes another's sexual proposition depends on the invitee's individual circumstances and feelings."

The appellate court noted that if the female employee had simply "asked [the male employee] to go out on a date, or to see whether they might have a romantic relationship, or straightforwardly propositioned him for sex, and then quit when he clearly told her no, the EEOC would not have shown enough evidence to survive summary judgment." Because the conduct persisted after the male employee made clear that it was unwelcome, the appellate court held that the case should proceed to trial.

Significantly, the Court of Appeals made clear that the employer could have avoided liability by taking "prompt and effective remedial action." Although the employer told the female employee to stop propositioning the male employee, it did nothing to make sure she followed this directive.

Conclusion. The decision shows that an employer should act immediately in response to claims that one employee has harassed another, whether or not the employer believes that the conduct in question is offensive. In this case, the employer could have avoided liability if it had taken effective disciplinary action against the female employee upon learning of the male employee's complaints. Yet because it failed to take the complaints seriously enough, the employer

will be forced to defend itself in an expensive and risky jury trial.

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