Flying the Not So Friendly Skies – A New Kind of Sexual Harassment?

Consider this scenario – a male manager tells his female subordinate that he is requiring her to allow a third party to take nude pictures of her but if she prefers, she can instead elect to be groped by a total stranger. This is part of her job and if she refuses she could be terminated or face other adverse action, e.g. discipline or demotion. That manager should be fired immediately, you say? How about this scenario: a male manager tells his female subordinate that he is requiring her to take a commercial airline flight to visit a customer. That one happens every day and could hardly be objectionable, or could it? Unfortunately, the Transportation Security Administration's (TSA) controversial new screening procedures may erase the distinction between the two scenarios.

Under the new procedures, travelers have a choice of going through full-body scanners at the sixty (60) airports where they are currently installed or submit to an invasive pat-down by a TSA officer. The full body scanners essentially take a nude photograph of you through your clothes to look for weapons or explosives. Although there have been assurances of privacy and security, at the very least the TSA personnel manning the scanners get a peek.

Some lively discussion has cropped up online about whether requiring employees to travel could lead to sexual harassment claims. In most circumstances, I think the answer is no. In the context of sexual harassment by someone other than a supervisor, a plaintiff must establish: 1) she was subject to unwelcome harassment; 2) the harassment was because of sex; 3) the harassment was sufficiently pervasive to affect a term, condition, or privilege of employment; and 4) the employer knew or should have known about the harassment. Courts have consistently recognized that employees may be harassed by individuals who do not work for their employer. Examples include: customers harassing employees (Folkerson v. Circus Circus Entertainment, Inc. 1998, Lockard v. Pizza hut, Inc. 1998, and McDonald v. B.E. Windows Corp. 2003); health care provider and a patient (Van Horn v. Specialized Support Services, Inc., 2003); relocation consultant and client (Little v. Windermere Relocation, 2001); and a store manager and a safety inspector (Weiland v. El Kram, Inc., 2002). Most of these cases turn on the issue of whether the employer failed to remedy or prevent a hostile or offensive work environment, of which management-level employees knew, or in the exercise of reasonable care should have known.

Applying these standards to the TSA screening procedures, the problem is with the second element of a sexual harassment claim, i.e. that the harassment be "because of sex." It cannot seriously be argued that the TSA or its officers are motivated by sex in enacting or executing them. Even if there are isolated incidents of inappropriate conduct, they would certainly not be endorsed by the TSA and are not the intent of the procedures. Moreover, courts have recognized that in third-party harassment cases, the employer's ability to take remedial action may be limited. As a result, employers are only expected to take "reasonable steps" to stop harassment by third parties. In the case of TSA screenings, there are no steps, reasonable or otherwise, that an employer could take to stop the conduct, i.e. the screenings.

There may be much room for debate over whether the TSA screening procedures are appropriate, necessary or effective but they simply do not fit within the analysis for workplace sexual harassment. Nevertheless, there is a caveat. Joking by employees about the TSA screening

procedures, in general or directed at co-workers, could still serve as a basis for a conventional workplace harassment claim.