Employment, Labor and Benefits Alert: Ignorance Is Not Bliss: Supervisors May Not Bury Their Heads in the Sand To Avoid Sexual Harassment Liability

12/16/2009

By Richard H. Block and David M. Katz

On December 4, 2009, in *Duch v. Jakubek*, No. 07-3503-cv, the United States Court of Appeals for the Second Circuit found that a supervisor's "purposeful ignorance" of potential co-worker harassment will not shield an employer from liability under Title VII. In rejecting the notion that a supervisor may bury his or her head in the sand and invoke the "ostrich defense," the Second Circuit reinforced the rule that liability will be imputed to an employer in situations where a supervisor knew, or in the exercise of reasonable care should have known, of the workplace harassment and failed to take appropriate remedial action.

Background

On September 25, 2001, plaintiff Karen Duch, an employee of the New York State Office of Court Administration (OCA), had a consensual sexual encounter with Brian Kohn, her co-worker at the Midtown Community Court (MCC). The next day, Duch informed Kohn that the encounter had been a "mistake," and she did not want to pursue further relations with him. For the next four months, Kohn allegedly made a series of unwanted sexual advances toward Duch that included physical contact, sexually graphic language, and physical gestures.

In October 2001, Duch informed her (and Kohn's) direct supervisor, Edward Jakubek, that she wanted to avoid working with Kohn. When Jakubek asked Kohn why he thought Duch did not want to work with him, Kohn allegedly responded, "Well, maybe I did something or said something that I should not have." Duch alleged that Jakubek told her that he responded to Kohn by telling him to "cut it out" and "grow up." When Jakubek asked Duch about her problem with Kohn, she became emotional, stating that she "can't talk about it." According to Duch, Jakubek replied, "That's good because I don't want to know what happened," and then laughed.

Later that month, Duch spoke to the MCC's Equal Employment Opportunity Liaison, Rosemary Christiano, about Kohn's harassment. However, Duch insisted that Christiano not report Kohn's behavior, and Christiano agreed not to report it. Instead, Christiano allegedly gave Duch inappropriate advice, including asking why Duch "didn't … just grab [Kohn] and hurt him."

Duch commenced a federal lawsuit in 2004 in the United States District Court for the Southern District of New York, alleging that Kohn, Jakubek, the OCA, and the State of New York created a hostile work environment in violation of Title VII and the New York State and City Human Rights Laws. The District Court granted summary judgment in the defendants' favor on the grounds that:

1. the OCA provided a reasonable avenue of complaint to its employees
2. no reasonable fact-finder could conclude that the employer defendants had actual or constructive knowledge of the alleged harassment
3. even assuming that the employer defendants did know or should have known of the alleged harassment, their response was reasonable.

Duch appealed only the dismissal of her Title VII claims against Jakubek, the OCA, and the State of New York, as well as the District Court's denial of her motion to amend the Complaint to add State and City law claims against Jakubek in his individual capacity.

The Second Circuit's Decision

According to the Second Circuit, the issue on appeal was whether Duch can impute the conduct creating the hostile work environment to her employer, noting that the rule when the alleged "harasser" is a co-worker, rather than a supervisor, is that the employer will only be held liable for its own negligence.

First, the Second Circuit upheld the District Court's finding that no reasonable fact-finder could conclude that the employer defendants failed to provide Duch with a reasonable avenue of complaint. The court found that even though Christiano may have been an inadequate avenue of complaint, the effectiveness of *a particular* avenue of complaint is not the issue. Rather, an employer is only liable for co-worker harassment if it provides *no* reasonable avenue of complaint. Furthermore, the Second Circuit agreed with the District Court that Christiano did not breach a duty owed to Duch and, therefore, the employer defendants could not be held liable for Christiano's inaction.

As to Jakubek, the Second Circuit found that "the critical question is whether he had actual or constructive knowledge that Duch was being sexually harassed. If he did, there is no doubt that his knowledge can be imputed to the remaining employer defendants because Jakubek was Kohn's supervisor and, as such, was 'charged with a duty to act on the knowledge and stop the harassment.'" Here, a jury could find that Jakubek knew that (a) Duch did not want to work with Kohn, (b) the subject of working with Kohn caused Duch to become emotional, (c) Kohn had engaged in sex-related misconduct toward females in the past, (d) Kohn admitted that he had done something or said something he "should not have," and (e) he did not want to hear the specifics of Kohn's actions when Duch approached him.

Based on these facts, the Second Circuit held that a jury could reasonably find that Jakubek "strongly suspected that it was sexual harassment on Kohn's part that was responsible for Duch's

emotional reaction" and that he "understood the issue was ongoing." Additionally, a jury could find that "the indications of sexual misconduct were sufficiently strong, that Jakubek had a duty to make at least a minimal effort to discover whether Kohn had engaged in sexual harassment, and that instead of encouraging Duch to discuss the problem, Jakubek *discouraged* her from revealing the full extent and nature of the harassment by stating in response to her reticence that he did not want to know what happened." As such, a reasonable jury could conclude that the employer defendants had at least constructive knowledge of the sexual harassment directed at Duch.

The Second Circuit cautioned that its intent is not to create unreasonable expectations for supervisors:

[W]e do not announce a new rule of liability for employers who receive nonspecific complaints of harassment from employees. We merely recognize that, under the existing law of this Circuit, when an employee's complaint raises the *specter* of sexual harassment, a supervisor's *purposeful ignorance* of the nature of the problem—as Jakubek is alleged to have displayed—will not shield an employer from liability under Title VII. (emphasis added)

Next, contrary to the District Court's ruling, the Second Circuit held that a jury could also find that the employer defendants' response was "unreasonable" and not "effectively remedial and prompt," given that a formal investigation of Kohn was not commenced until *three months after* Jakubek first learned of the harassment. Finally, the Second Circuit remanded the case for further proceedings and ruled that Duch should be given leave to amend the Complaint to add claims against Jakubek in his individual capacity under State and City law because of the finding that he had constructive knowledge of the harassment.

Implications for Employers

Duch v. Jakubek serves as yet another sobering reminder that an employer's anti-harassment and anti-discrimination policies, no matter how well-conceived, will be rendered useless if supervisors are not properly trained on how to respond to employee complaints. It is critical for supervisors to understand that all harassment and discrimination complaints, no matter how insignificant they may seem, should be taken seriously and adequately investigated, even relatively vague complaints that simply raise the "specter" of harassment or discrimination. Supervisors must be continuously reminded that burying their heads in the sand will not cause harassment or discrimination liability to disappear. Indeed, such "purposeful ignorance," as the Second Circuit calls it, may *lead to liability* in a situation where liability could have been avoided if the supervisor had responded properly, and thereby enabled the employer to take appropriate remedial measures.

If you have any questions regarding the subject covered in this Alert, or any related issue, please feel free to contact one of the attorneys listed below or any of Mintz Levin's Employment, Labor and Benefits practice attorneys.

Andrew J. Bernstein
(212) 692-6742
AJBernstein@mintz.com

Richard H. Block
(212) 692-6741
RHBlock@mintz.com

James R. Hays
(212) 692-6276
JRHays@mintz.com

David R. Lagasse
(212) 692-6743
DRLagasse@mintz.com

Jennifer B. Rubin
(212) 692-6766
JBRubin@mintz.com

Michael S. Arnold
(212) 692-6866
MArnold@mintz.com

Gregory R. Bennett
(212) 692-6842
GBennett@mintz.com

Jessica W. Catlow
(212) 692-6843
JCatlow@mintz.com

Jennifer F. DiMarco
(212) 692-6260
JFDiMarco@mintz.com

David M. Katz
(212) 692-6844
DKatz@mintz.com