

# Seventh Circuit Opinion Focuses on Employee Handbook in Determining Whether Employer had Constructive Notice of Non-Supervisory Sexual Harassment

## Labor & Employment Law Update

on August 22, 2017

On August 2, 2017, the United States Court of Appeals for the Seventh Circuit issued a decision in *Nischan v. Stratosphere Quality, LLC* providing clarity on what constitutes an employer's "constructive notice" of harassment.

Michele Nischan worked as a project supervisor at Stratosphere Quality, LLC, a company that provides third-party inspection and quality-control services to car manufacturers. Nischan alleged that an employee of one of the client manufacturers "relentlessly" sexually harassed her by routinely rubbing himself against her and making offensive comments, amid other inappropriate actions.

Because the alleged harasser did not have supervisory authority over Nischan, Stratosphere could only be held liable for the alleged sexual harassment if it was negligent in discovering or remedying it. Normally, to prevail on this type of claim, the employee presents evidence that she made a concerted effort to report the harassment. Here however, it was undisputed that Nischan did not report the harassment during the relevant time period.

Nevertheless, an employer may be held liable even when an employee fails to report sexual harassment if the employer knew or should have known of the harassing conduct but failed to act. The Federal Appellate Court explained that constructive notice will generally attach when someone who has a duty to pass the information up the chain of command learns of the harassment.

Nischan claimed a fellow project supervisor (her peer) and an operations manager were both present when one of the incidents of harassment occurred. However she testified she was unsure whether the operations manager witnessed the harassment and he denied witnessing any conduct that

constituted sexual harassment. The lower court concluded there was no basis to impute liability to the employer because only her peer, not the higher level employee, knew of the harassment.

The Seventh Circuit disagreed. Even though the project supervisor who witnessed the harassment held the same low level project supervisor position as Nischan and was not Nischan's supervisor, the employer's handbook required that any employee with any supervisory responsibility report observed instances of harassment up the chain of command or to human resources. The Seventh Circuit noted that the employer "is accountable to the standard of care it created for itself" and that because the employer's own rules "required [the project supervisor] to report the sexual harassment that she observed, Stratosphere had constructive notice of the harassment."

**Bottom Line:** This case serves as a reminder that each company's unique employee policy may guide the court in determining an employer's legal obligations. Employers should review their harassment and reporting policies and ensure that all employees that fall under its scope receive proper training on identifying harassing behavior—even if it is directed at another—and promptly reporting it.

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