Who Knew? Even the Boss Can Be Sexually Harassed

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Although not prevalent, and seemingly counterintuitive, some federal courts have recently addressed the issue of subordinate sexual harassment of their supervisors. This conundrum is especially interesting as employer liability is usually determined by the status of the harasser, including a subordinate, co-worker, or supervisor of the victim. Under Illinois law there is strict liability for employers when the harasser is a supervisor of the victim – i.e., there are no defenses available to an employer if sexual harassment is shown.

Under both state and federal law, Illinois employers are liable for sexual harassment by a victim's co-worker when they (1) knew or should have known of the offensive behavior; and (2) failed to take immediate and appropriate corrective action. Under federal and most state laws, except Illinois which is strict liability, an employer is automatically liable for sexual harassment by a supervisor against a subordinate unless it can show that (1) it reasonably acted to prevent and to correct harassing behavior; and (2) the harassed employee unreasonably failed to take advantage of the employer's preventive and corrective actions or otherwise failed to avoid harm. Presently it is unclear what standard applies when the victim is the supervisor.

This issue was addressed on July 20, 2015 in *Simmons v. DNC Hospital Management of Oklahoma, LLC*, 2015 WL 4430967, wherein the court denied summary judgment for the employer on the employee's claimed sexual harassment at the hands of her subordinate. The court explained the employer essentially forced the employee to quit through its failure to remedy the complained of harassment. The *Simmons* case serves as a stark reminder that even when a supervisor is complaining of harassment by a subordinate, the employer still has a duty to stop the harassment regardless of what action the victim could have taken herself.

Further, courts across the country have started adopting standards to apply in supervisor-victim instances. Some recent court decisions have adopted a hybrid standard that meets in the middle between the reasonableness standard applied to co-worker harassment and the much higher burden imposed on supervisor harassment. This standard is as follows:

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An employer may be held liable for the harassment of a supervisor by a subordinate if the employer knew or should have known of the harassment and failed to implement prompt and appropriate action; *but an employer will not be liable for the sexual harassment of a supervisor by a subordinate where the supervisor-plaintiff had the ability to stop the harassment and failed to do so.*

Knudsen v. Bd. of Sup'rs of Univ. of Louisiana Sys., 2015 WL 1757695, at *5 (E.D. La. Apr. 16, 2015)

Although this is a "unique fact twist" on the sexual harassment theory, it is one that has gained traction with federal courts recently. What is important to note is that **NO** court has held that an employer is not liable for subordinate harassment of a supervisor. As such, although the area is still in development, employers should start incorporating this situation into their training and ensuring that all supervisors are aware that the employer's harassment policies apply to these situations as well. Only proactive prevention, training, and correction will protect against costly litigation.