

## Third-party harassment: The next frontier for New Jersey courts?

New Jersey courts have long been in the forefront of employment discrimination law. The question is: How far will they go next?

One likely path is to expand liability for sexual harassment committed by a nonemployee.

Last month, a federal jury in Florida awarded \$630,000 to 14 female prison employees who alleged that the state Department of Corrections created a hostile work environment by failing to prevent lewd behavior by male inmates.

New Jersey may follow Florida's lead.

### When nonemployees harass

Since 1945, the New Jersey Law Against Discrimination (NJLAD) has prohibited unlawful sex discrimination, including sexual harassment. Employers may be liable for sexual harassment committed by supervisors, nonsupervisory employees and, in some circumstances, by third parties such as customers or outside contractors.

Extending liability to the employer in such circumstances is based on the concept that the employer is the party with the authority and responsibility to take remedial action and impose measures to prevent future discrimination and harassment in the workplace.

Despite New Jersey's resolve to oust sexual harassment, courts may still hesitate to impose damages on an employer when the harassment is caused by a third party. According to federal regulations, an employer *may be responsible* for the acts of nonemployees who sexually harass employees in the workplace when the employer knows or should have known of the conduct and fails to take immediate and appropriate corrective action.

Thus, a court is not compelled to find an employer liable for harassment caused by a third party. Rather, liability is often determined on a case-by-case basis.

The general principle is that an employer who knows or should know an employee is being harassed in the workplace should take immediate and

effective action to prevent it.

Whether the employer is held liable frequently turns, at least in part, upon the amount of control the employer had over the third-party harasser. (*Woods-Pirozzi v. Nabisco Foods*, 290 N.J. Super. 252, 268 App. Div., 1996)

Still, employers should prepare to root out all sexual harassment in the workplace because New Jersey may follow the Florida District Court and expand the scope of liability for the actions of third-party harassers.

### *Beckford v. Florida*

An all-male jury recently returned verdicts in favor of 12 nurses, a physician and a prison classification officer, all of whom were female. It awarded them \$45,000 each for the emotional stress and mental anguish they sustained due to harassing behavior by "close-management" male inmates. (*Beckford v. Florida*, No. 2:06-CV-14324-JEM)

Close-management units are areas where inmates who abused the rights of other inmates or otherwise failed to follow prison rules are segregated from the general prison population. The job duties of the female employees required them to enter inmates' dormitories, where the men were frequently naked in their cells and would make obscene sexual gestures at the women.

The plaintiffs argued that the Florida Department of Corrections failed to exercise reasonable care to prevent the sexually harassing behavior committed by the inmates against the employees. The plaintiffs made numerous complaints to prison officials, but the complaints received no response—the officials refused to institute rules or disciplinary actions or use other means to stop the prisoners' behavior.

The award came more than a year after a jury in the Northern District of Florida awarded \$990,000 to 12 state prison nurses in a similar case (*Rudolph v. Florida Dep't of Corr.*, 28 EDR 178), and is one of several such cases now pending in federal court in the state of Florida.

### Will New Jersey follow the leader?

*Beckford v. Florida* extends principles of employee protection that New Jersey courts have recognized for some time. What makes *Beckford* unique is that it imposes liability on the employer for the conduct of nonemployees who were imprisoned in a correctional facility, even though those inmates were deemed so unruly that separation from other inmates was required.

This holding may be extended to make employers responsible for the conduct of other institutionalized persons who live in residential settings, such as hospital and psychiatric patients.

So what does this mean for New Jersey employers?

Because New Jersey courts have often taken the lead in the area of employee rights, the courts in New Jersey will likely continue to hold employers to a higher standard, making more significant damage awards when employers fail to prevent regular, foreseeable harassment of employees regardless of the identity of the harasser.

Thus, employers should:

- Be sure to have a written policy against harassment that is distributed to all employees, including a process for reporting harassment.
- Investigate and proactively respond to any employee complaints of harassment, whether the harassment is coming from within the company or a third party.

Ultimately, employers can best protect themselves by protecting their employees.



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