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SEXUAL HARASSMENT

Time is money—especially when building a harassment case

by Lauren Moak Russell

As every employer knows, harassment claims are some of the hardest to defend, and the job just got harder. The U.S. 3rd Circuit Court of Appeals, which hears appeals from the federal district courts in Delaware, New Jersey, and Pennsylvania, recently issued a decision holding that an employee could assert a claim of harassment covering more than 10 years of alleged misconduct.

Background

Shannon Mandel was employed by M&Q Packaging from October 1996 until May 2007. Following her resignation, she alleged that during the 10 years of her employment, she had suffered sexual harassment and discrimination. The alleged harassment ranged from inappropriate nicknames (e.g., "missy" and "hon") to sexual propositions.

At no time during her 10 years of employment did Mandel make a complaint in accordance with M&Q's antiharassment policy. In fact, she engaged in inappropriate conduct herself, sending e-mails containing sexual humor and calling coworkers "gay." Moreover, in her resignation letter, she made no mention of the persistent harassment that allegedly resulted in her leaving the company. Based on that evidence, the Equal Employment Opportunity Commission (EEOC) issued a no-cause finding, and a district court dismissed the case before trial in favor of the employer.

Nonetheless, the 3rd Circuit reversed the district court's dismissal, concluding that Mandel's persistent failure to complain and the 10-year

delay in filing a charge of discrimination were not terminal to her claim.

Discussion

In reversing the district court, the 3rd Circuit took umbrage with several of the lower court's decisions. Among them was the court's holding that the majority of Mandel's allegations were barred by the statute of limitations because they occurred more than 300 days before she filed her charge of discrimination.

The 3rd Circuit rejected the district court's analysis, concluding instead that Mandel had established a continuing violation—that is, she suffered an ongoing pattern of harassing conduct that could be considered a single incident of discrimination that persisted until her separation from employment. As long as *one* of the alleged harassing incidents occurred within the 300-day statutory requirement, the other incidents could be included as a continuing violation.

In addressing M&Q's concerns that it would be forced to defend alleged misconduct that had occurred more than 10 years earlier, the 3rd Circuit directed it to assert a defense known as *laches*. *Laches* is similar to a statute-of-limitations defense but argues that it would be unfair to make an employer defend such conduct. Specifically, it means that an unreasonable delay in the proceedings prejudiced, or harmed, the employer. It is much more subjective than a statute-of-limitations defense, and the likelihood of success is much less certain.

The 3rd Circuit also directed the district court to consider allegations of harassment that were contained in the charge of discrimination but that Mandel didn't raise during her deposition. Interestingly, the EEOC submitted a "friend of the court" brief arguing for inclusion of the evidence. The agency apparently didn't find it ironic to argue against dismissal after it had issued a no-cause finding regarding Mandel's allegations. Further, its finding indicated there was no basis to conclude that M&Q had engaged in unlawful conduct in violation of Title VII of the Civil Rights Act of 1964. *Mandel v. M&Q Packaging Corp.*, No. 11-3193 (3rd Cir., Jan. 14, 2013).

Bottom line

The 3rd Circuit's decision underscores why harassment allegations are so hard to defend. The allegedly harassing conduct frequently spans a period of years and includes innumerable incidents. Additionally, the employee often continues to make novel allegations through the course of the proceedings. While the 3rd Circuit affirmed dismissal of nearly all Mandel's claims, it permitted her harassment claim to go forward based on 10 years of allegations. The employer's only recourse is to argue that "it's not fair"—a position that rarely receives much traction in court.

Given the current enforcement environment, an employer's only defense is vigilance. Managers must be carefully trained to behave appropriately and to report any complaints of harassment to HR immediately. Only by keeping careful records can an employer hope to combat harassment

claims that span years of employment.

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