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ETRENDS – FOURTH CIRCUIT ADOPTS NEGLIGENCE STANDARD FOR THIRD-PARTY HARASSMENT CLAIMS

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When is an employer liable for workplace harassment of its employees by a customer, vendor or other third-party? In ***Freeman v. Dal-Tile Corp***., decided on April 29, 2014, the United States Court of Appeals for the Fourth Circuit adopted a negligence standard for third-party workplace harassment claims. Under this standard, an employer is liable if it "knew or should have known of the harassment and failed to take prompt remedial action reasonably calculated to end the harassment."

In *Freeman*, the plaintiff, a black female customer service representative, alleged that she was repeatedly harassed based on her race and sex by a male independent sales representative with whom she frequently interacted at work. The harassing behavior included highly offensive racial epithets, sexist and lewd comments, and other crude conduct that occurred over the course of almost three years. During that time, the plaintiff's supervisor witnessed some of the harassing behavior, and the plaintiff reported other incidents to her supervisor and eventually to a human resource manager. At that point, the company promised that the sales representative would be banned from the facility, but it later lifted the ban and simply prohibited him from communicating with the plaintiff. The plaintiff took a medical leave and ultimately resigned due to depression and anxiety arising from the harassment. She then brought racial and sexual hostile work environment claims against the company.

The trial court held that the plaintiff had not demonstrated that the company could be held responsible for the sales representative's conduct, but the Fourth Circuit reversed. The court explained that "an employer is liable under Title VII for third-parties creating a hostile work environment if the employer knew or should have known of the harassment and failed to take prompt remedial action reasonably calculated to end the harassment." The court concluded that the plaintiff was entitled to a jury trial to determine whether her employer knew or should have known about the harassment and whether its response to the harassment was adequate.

The Fourth Circuit's decision in *Freeman* serves as a reminder that employers may be held liable not only for harassment carried out by supervisors and co-workers, but also for workplace harassment perpetrated by suppliers, vendors, customers and others outside the company.

Employers can take the following steps to minimize the risk of liability for third-party harassment claims:

1. Employers should have a well-drafted harassment policy that covers the possibility of third-party harassment and how such allegations will be addressed.
2. Employers should follow that policy quickly and consistently whenever they learn about possible harassment.

3. When employers determine that remedial action is necessary, that action should be reasonably calculated to put a stop to the harassment, and should be revisited if the employer learns or suspects that it has not actually ended the harassment.

The Fourth Circuit's decision in *Freeman v. Dal-Tile Corp.* is available **HERE**. Please contact **Kerry Shad** or **Isaac Linnartz** with any questions.

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