

Labor & Employment Advisory

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Harsh Reminder: Supervisors Need to Respond Promptly and Effectively to Suspected Sexual Harassment

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The U.S. Court of Appeals for the Second Circuit recently ruled in *Duch v. Jakubek*, 2009 WL 4421267 (2d Cir. 2009), that a jury reasonably could find that a supervisor who ignored facts regarding suspected workplace sexual harassment had constructive knowledge of the harassment and, thereby, exposed his employer to liability under Title VII of the Civil Rights Act.

To prevail on a claim for sexual harassment hostile environment, a plaintiff must show that: (1) "the harassment was sufficiently severe or pervasive to alter the conditions of the victim's employment and create an abusive working environment;" and (2) there is a "specific basis for imputing the conduct creating the hostile work environment to the employer." In *Duch*, the court focused on the second element, and in particular, whether the employer "knew, or in the exercise of reasonable care should have known, about the harassment yet failed to take appropriate remedial action." The court ultimately found that the employer failed to carry its burden of proof because a supervisor's intentional ignorance of the facts meant that he had constructive knowledge of the harassment, yet failed to take any remedial action.

The evidence before the court showed that: (1) the supervisor knew that Duch sought a change in her work schedule for a time when she was scheduled to work alone with the employee ultimately found to have harassed her; (2) the supervisor learned from other sources that Duch sought the schedule change to avoid working with the harasser; (3) when the supervisor asked the harasser about his contact with Duch, the harasser admitted having done something he should not have done; (4) the supervisor knew that the harasser had harassed other females in the past; (5) the supervisor told the harasser to "cut it out [and] grow up;" (6) the supervisor knew that the subject of working with the harasser caused Duch to become emotional and state that she could not discuss it; (7) the supervisor responded, "That's good because I don't want to know what happened;" and (8) the supervisor agreed to change Duch's schedule to ensure that she did not have to work alone with the harasser at night.

Based on the foregoing facts, the court determined that a jury reasonably could find that the supervisor "strongly suspected" ongoing sexual harassment and "had a duty to make at least a minimal effort to discover" whether any harassment had occurred. Instead, the supervisor discouraged Duch from discussing the issue by telling her that he did not want to know what happened. Therefore, the court concluded that a jury reasonably could find that the supervisor had constructive knowledge of the harassment, yet failed to take any remedial action.

The decision in *Duch* serves as a strong reminder that a duty to investigate possible harassment can be triggered by more than an express complaint from the harassed employee. Put simply, facts suggesting possible harassment, whatever the source, cannot be ignored on the misguided notion that an employee must make a formal complaint or a direct allegation of harassment. Accordingly, employers should take care to ensure effective reporting avenues are in place and that those charged with the responsibility to receive and investigate complaints are properly trained.

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