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Employer May Be Liable for Low-Level Supervisor's Harassment of a Part-Time, Teenage Employee

Food service, retail establishments and other employers of young, inexperienced workers should be mindful of the important role of front-line staff in preventing and reporting sexual harassment.

That's one lesson to be learned from a recent ruling by the U.S. Court of Appeals for the Seventh Circuit in a sexual harassment case involving a 16-year-old ice cream shop worker who sued to hold her employer liable for conduct that culminated in the statutory rape conviction of a 25-year-old shift supervisor.

The court, in *Jane Doe v. Oberweis Dairy*, reversed summary judgment for the company that operates a number of ice cream parlors in the Chicago suburbs, holding that a jury should decide whether to impute sexual harassment liability to the employer for the employee's conduct.

The appellate opinion, written by Judge Posner, is noteworthy for its analysis of whether a higher duty of care should apply to an employer when an alleged harasser has some minimal supervisory authority but is not the "paradigmatic" supervisor with the ability to hire and fire employees. The court concluded that even if an employer cannot be held strictly liable for harassment by a low-level shift supervisor, it still must exercise greater care with such a supervisor than would be required in a case of routine harassment by a co-worker. The court went on to find that necessary degree of care will normally be a question for the jury.

In its analysis, the court was highly critical of the employer for apparently failing to have adequate procedures in place to protect young workers — particularly teenage girls — from harassment by a problematic shift supervisor. The court pointed to the fact that other shift supervisors were aware of the alleged harasser's sexually suggestive behavior in the workplace with teenage ice cream scoopers, and his practice of inviting them to his apartment. Yet, the other shift supervisors apparently failed to report such conduct to their managers, or the managers who knew of the conduct took no action because they apparently believed — mistakenly — that activity outside the workplace was "none of their business," regardless of the fact that it originated in the workplace and had workplace consequences. The court noted that "[n]o procedures were in force or utilized for protecting girls like the plaintiff from what happened to her, even though it should have been clear that the situation in the store as a result of [the shift supervisor's] antics was explosive."

Save the Date

This year, in response to your feedback, we will be replacing our annual full-day labor and employment seminar with a series of Breakfast Briefings. The first of these Briefings will be held on **October 18, 2006** at our offices in the Sears Tower and is titled "*Can't You Hear the Whistle Blowing? How to best avoid, respond to and handle the aftermath of retaliation and whistleblower claims.*" We will also be addressing the latest developments in Labor and Employment Law and allowing some time to answer your questions on any employment-related topic. We hope that you are able to join us and look forward to seeing you at our Breakfast Briefings throughout the year.

The case also illustrates how an employee who may not be considered a supervisor for purposes of the Fair Labor Standards Act or the National Labor Relations Act may still hold enough authority that there is a jury question of whether to impute liability to the employer for an employee's actions.

In addition, the court ruled on other issues in the appeal, holding that the plaintiff, who was 16 years old and working her first part-time job at the time of the events that gave rise to her complaint, had met the requirement of exhausting the administrative process at the EEOC investigative stage even though she declined to be interviewed by an EEOC investigator.

The court also held that the defense of "consent" is not available for a sexual harassment charge where the complaining party is below the age of consent to sexual relations as set by applicable state laws.