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COZEN O'CONNOR

Third Circuit Reversal on Sexual Harassment Claim References Revelations of "Me-Too" Era

In a July 3, 2018, opinion based in part on the revelations of the "Me-Too" era, the U.S. Court of Appeals for the Third Circuit held that an employee's failure to report sexual harassment over a period of several years was not *per se* unreasonable, and therefore did not preclude her sexual harassment claims from reaching a jury. The Third Circuit reversed the district court's decision granting summary judgment to defendant Susquehanna County in the matter of *Minarsky v. Susquehanna County et al.*, and remanded the case to the district court for trial.

Sheri Minarsky was a former part-time secretary at the County Department of Veterans Affairs who worked one day per week for the former Director Thomas Yadlosky, Jr., in an area separate from other county employees. Soon after she began working for the department in 2009, Minarsky alleged, Yadlosky began to attempt to kiss and embrace her on a weekly basis, as well as massage her shoulders and touch her face. She jokingly and mildly protested, but this continued for several years. Additionally, Yadlosky allegedly engaged in non-physical conduct that Minarsky found disturbing, including, but not limited to, tracking her whereabouts and becoming hostile toward her when she did not answer his calls.

Minarsky did not report Yadlosky's alleged sexual harassment until 2013 when her doctor recommended that she do so as a result of its effects on her health. Minarsky first emailed Yadlosky in protest and then confided in a co-worker friend, which made its way to Yadlosky's supervisor, Chief County Clerk Judith Beamer. Beamer was aware of two prior incidents of misconduct by Yadlosky and had reprimanded him for one that she personally observed. After being interviewed by Beamer and admitting to the allegations, Yadlosky was placed on leave and then terminated. Minarsky quit several years later.

Adopting the report and recommendation of a magistrate judge, the district court held that the county could not be held liable for Yadlosky's alleged harassment on the grounds that there was no triable issue as to either element of the *Faragher-Ellerth* affirmative defense: that (a) the county exercised reasonable care to prevent and correct promptly any sexually harassing behavior; and (b) that Minarsky unreasonably failed to take advantage of any preventive or corrective opportunities or to avoid harm otherwise.

The Third Circuit noted that the "cornerstone of this analysis is reasonableness: the reasonableness of the employer's preventative and corrective measures, and the reasonableness of the employee's efforts (or lack thereof) to report misconduct and avoid further harm." As to the first element, the court reasoned that a jury could find that the county's policy and handling of Yadlosky were not reasonable because despite Yadlosky being twice reprimanded and then fired, the record reflected a "pattern of unwanted advances toward multiple women other than [Minarsky]," including "two of the women in authority," Beamer and a county commissioner. The court found that "County officials were faced with indicators that Yadlosky's behavior formed a pattern of conduct, as opposed to mere stray incidents, yet they seemingly turned a blind eye toward Yadlosky's harassment."

More strikingly, regarding the reasonableness of Minarsky's actions, the Third Circuit found that a jury could decide that Minarsky was effectively prevented from reporting Yadlosky's harassment by her legitimate fear of the possible consequences of doing so. In so reasoning, the court highlighted the "national news regarding a veritable firestorm of allegations of rampant sexual misconduct that has been closeted for years, not reported by victims … [who] asserted a plausible fear of serious adverse consequences had they spoken up at the time that the conduct occurred." The court found that while an employee's "generalized and unsupported fear of retaliation is insufficient to explain a long delay in reporting sexual harassment," Minarsky had offered several legitimate reasons for her

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failure to report that a jury could find reasonable: “her fear of Yadlosky’s hostility on a day-to-day basis and retaliation by having her fired; her worry of being terminated by the Chief Clerk; and the futility of reporting, since others knew of [Yadlosky’s] conduct, yet it continued.” On remand, the Third Circuit found, the “trial judge can instruct the jury that a plaintiff’s fears [of reporting sexual harassment] must be specific, not generalized, in order to defeat the *Faragher-Ellerth* defense.”

Minarsky portends a significant change in the approach to be taken by district courts in the Third Circuit with regard to employer liability for supervisors’ sexual harassment of subordinate employees. Indeed, *Minarsky* effectively offers employees a road map to a jury on this issue.

Because employees can now avoid summary judgment on the issue of *respondeat superior* liability by offering evidence of a specific fear of reporting allegations of sexual harassment, *Minarsky* makes it significantly less likely that district courts will grant summary judgment to employers under the *Faragher-Ellerth* affirmative defense. Employers must recognize the need to carry out regular training related to their anti-harassment policies and specifically address the issues of non-retaliation and fear of coming forward.

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