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Summa V. Hofstra — A Cautionary Tale For Employers

Law360, New York (April 11, 2013, 11:56 AM ET) -- After leaving the issue unaddressed for well over a decade, the Second Circuit has joined the majority of the other federal courts of appeals in holding that employers can be liable for the actions of nonemployees under Title VII. In *Summa v. Hofstra University, et al.*, the Second Circuit adopted the majority rule that an employer is liable for its own negligence in responding to the harassment of its employee by a nonemployee.

Employers should take heart in this new standard. If they follow the lead of Hofstra University by taking immediate corrective action and proactive steps to protect the harassed employee, they too will avoid liability.

But *Summa* also provides an important cautionary tale for employers. No matter how quickly and effectively an employer stops the harassment of an employee, if it does not protect the employee from subsequent retaliation, it will not avoid liability.

The sexual harassment at the center of the dispute in *Summa v. Hofstra University* was of a female graduate student employed as the part-time team manager for the university's football team. Over the course of the fall semester, the football players subjected Lauren Summa to a myriad of humiliating, sexually explicit comments and behavior.

Summa first complained to a supervisor about the harassment when she discovered that some of the players on the team had created a Facebook page that contained sexually demeaning content about her and her boyfriend (a player on the team). In response to the complaint, the head coach quickly spoke with the players involved and ordered them to delete the page.

Approximately two months later, on a team bus ride, some players began making sexually explicit and humiliating comments to Summa in response to a highly sexual movie being played on the bus. Summa became very upset and sought the protection of the assistant coach, who silenced the players, stopped the movie and sat by Summa for the duration of the ride.

In response to this incident, the head coach kicked the primary offender off the team. The bus incident also led the university to have a special harassment training for the coaching and athletics department staff.

The Second Circuit held that the university avoided liability for sexual harassment because it acted quickly and in proportion to the level of seriousness of the events, not because the harassers were not employees. The court stated that for a plaintiff to succeed on a claim of sexual harassment in the nonemployee context, the plaintiff must show that the employer failed to provide a reasonable avenue for complaint or that it knew or should have known about the harassment and failed to take the

appropriate remedial action.

The court advised that it would look at the timeliness and appropriateness of the response, given the control and legal responsibility of the employer over the nonemployee. The court explicitly cited to guidance by the Equal Employment Opportunity Commission concerning nonemployee harassment in addition to the case law applying a negligence standard in nonsupervisory co-worker sexual harassment cases.

Like so many other employers, where the university went wrong was that it failed to protect Summa from subsequent retaliation.

After she reported the sexual harassment that took place on the bus trip to the head coach and to multiple members of the university administration, the coaching staff replaced her as team manager for the spring semester, even though the university had originally hired her for both the fall and spring semesters. The coaching staff defended their choice to replace her by asserting that she had failed to call about the position until a few days prior to the beginning of the spring season.

Summa filed a complaint with the New York State Division of Human Rights for retaliation based on her replacement as team manager. During the same time period as filing her complaint, Summa applied for a graduate assistantship position, was offered the position and accepted it.

After the university learned of her complaint with the New York State Division of Human Rights, the university rescinded its offer of employment claiming that Summa's resume was "imprecise." Summa then filed a lawsuit against the university, asserting both sexual harassment and retaliation. Six months later, the university terminated her student employment privileges, claiming that she had double-counted some of her work hours.

The court held that while Summa did not have a claim for sexual harassment because the university acted to protect her from further harassment, her retaliation claims survived summary judgment. The court looked at the temporal proximity between her protected activity and the university's adverse action, noting that a temporal range of seven months was sufficient to raise an inference of causation given the other surrounding circumstances of the case.

The court found particularly probative the fact that the university official, who interceded in the graduate assistantship hiring process, resulting in the rescinding of the offer to Summa, and who later terminated her employment privileges, knew of Summa's protected activities.

The court also found ample evidence of pretext. For her replacement as team manager, the Court noted that the university had hired Summa for the team manager position for both the fall and spring semester, obviating any need to contact the department at an earlier time.

The court further noted that the head coach informed Summa that they had filled the position despite not knowing whether the position was actually filled. For the graduate assistantship position, the court looked at the unusual hiring process that ensued after the university learned of Summa's administrative complaint, as well as the disparate treatment of the other candidates for the position.

For the final adverse action, the termination of Summa's employment privileges, the court again examined the treatment of

similarly situated individuals and found that the university treated them in a “starkly different” manner.

The lesson from Summa v. Hofstra University is clear. When employers learn that their employee is being harassed, whether by co-workers or nonemployees, they need to act quickly and effectively to stop the harassment. This includes instances in which the harassment takes place via social media and outside of the workplace environment altogether.

But the vigilance of employers must not cease there. They must then ensure that the harassed employee does not face retribution for raising the issue in the first place. With the EEOC receiving 37,836 charges of retaliation in 2012, any employer that ignores the prevalence of the “shoot the messenger” mentality does so at its peril.

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