

Alex Decision Leaves The Door Open For 1981 Hostile Work Environment Claims Against Individual Co-Workers Despite Lack Of Management Or Company Involvement

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A recent decision in the United States District Court for the Northern District of New York may have a significant upshot for workers who have been subjected to a hostile work environment by their co-workers but not necessarily by management workers or their employer. In *Alex v. General Electric Co.*, an individual hourly employee defendant made a motion for reconsideration arguing for, among other things, the dismissal of a 42 U.S.C. § 1981 claim against an individual defendant for creating a hostile work environment, arguing that an individual employee cannot be liable for a hostile work environment claim where the employer was not responsible for creating or allowing the workplace to become hostile. 1:12-CV-1021 (GTS/CFH), 2014 WL 2510561 (N.D.N.Y. June 4, 2014). The court had already dismissed the plaintiff's § 1981 hostile work environment claim against the employer, as well as those same claims against other defendants in management positions and all other hourly employee defendants. *Id.* The court denied the remaining hourly defendant's motion for reconsideration, finding that "While the circumstances appear to be rare in which no Section 1981 hostile-work-environment claim exists against an employer but such a claim exists against a co-worker, the Court does not understand such a circumstance to be impossible." *Id.* The court rejected the hourly defendant's assertion that previous cases had decided the matter in his favor, finding that those cases were distinguishable from the present case. *Id.* Rather, the court compared the case at hand to several previous matters that have presented evidence that hostile work environment claims against employers in their official capacities are distinct from those against co-workers in their individual capacities. *Id.*; see also *Moore v. Metro. Transp. Auth.*, 07 CIV. 3561 DAB, 2013 WL 7759749 (S.D.N.Y. Aug. 22, 2013).

Crucial to this case are the different elements needed to establish corporate or employer liability and individual liability. An employer is liable for a hostile work environment claim under § 1981 if the employer knows about, or reasonably should know about, a hostile work environment "created by a victim's co-workers . . . but fails to take appropriate remedial actions." *Turley v. ISG Lackawanna, Inc.*, 960 F. Supp. 2d 425, 440 (W.D.N.Y. 2013) (internal quotations omitted). To impose individual liability, however, the plaintiff "must [show] that the individual defendant (1) directly participated in the alleged violation; (2) exhibited gross negligence in the supervision of subordinates who committed the wrongful acts; or (3) failed to take action upon receiving information that violations are occurring." *Id.* (emphasis added).

Indeed, the court explained that it had dismissed the claims against the other defendants in their individual capacities because: (1) the plaintiff did not factually allege that any of the other hourly defendants created a hostile work environment themselves or directly participated in the remaining hourly defendant's creation of a hostile work environment; and (2) the plaintiff did not factually allege, nor did any admissible record evidence demonstrate, that the management defendants were "personally

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involved in the creation of a hostile work environment and there was no specific basis for imputing the remaining hourly defendant's conduct to them (e.g., they did not fail to provide a reasonable avenue for complaint or take appropriate remedial action based on the facts that they knew or reasonably should have known)." Alex, 2014 WL 2510561, at *2.

Thus, the court in Alex leaves open the possibility of extending potential liability for hostile work environment claims under Section 1981 to individual co-workers, regardless of whether or not there is also a valid like claim against the plaintiff's employer or management personnel. This creates the prospective that people in the workplace will be able to bring a cause of action when they have been subjected to severe harassment by people who are in similarly situated roles in the workplace as they are, irrespective of whether or not those individuals are in management or supervisory positions or whether or not the plaintiff reported the alleged harassment to a manager. Whether the court will ultimately welcome such claims, however, is yet to be determined. Indeed, the court granted the remaining individual hourly defendant leave to rebrief this issue at the close of discovery.

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