

Second Circuit Holds That Both Sexually Overt And Sex-Neutral Acts Should Be Considered In Hostile Work Environment Cases

September 30, 2011 • Legal Updates & Insights

In *Moll v. Telesector Resources Group, Inc.*, the Second Circuit reversed a lower court's decision dismissing the plaintiff's hostile work environment claims because she failed to allege any "sexually offensive acts" within the applicable statute of limitations, finding that a gender discrimination plaintiff need not rely only on allegations of sexually offensive acts, but can also rely on allegations of sexually neutral offensive acts that were based on gender. This decision further cements Second Circuit precedent that mistreatment of one gender – regardless of whether the conduct alleged is sexual in nature – is prohibited under Title VII of the Civil Rights Act of 1964 ("Title VII") and the New York State Human Rights Law ("NYSHRL").

As set forth in the Court's decision, Plaintiff Cindy Moll began working for Verizon in 1997 and worked her way up the ranks from a clerical employee to Systems Analyst and Sales Engineer. Shortly after the commencement of her employment, however, in 1998 and 1999, Daniel Irving, a Senior Systems Analyst, began making sexual passes at Ms. Moll, including leaving her inappropriate notes and calling her hotel room repeatedly and asking her to come to his hotel room while they were on a business trip together. In March 2001, Mr. Irving became Ms. Moll's direct supervisor after which he left her a note stating that he thought about her when he was taking a shower. Mr. Irving also prohibited Ms. Moll from communicating with him by email or telephone, demanding that she meet with him in person instead, and prevented her from working from home despite allowing Ms. Moll's male colleagues to do so. Moreover, during the same time period, Mr. Irving promoted two of Ms. Moll's male colleagues while simultaneously refusing to have Ms. Moll assessed for a promotion, telling her that there was a "promotion freeze." Starting in January 2003, Mr. Irving no longer served as Ms. Moll's direct supervisor, and six months later her new supervisor, Christopher Gaglione, promoted her.

In September 2003, Ms. Moll filed a Charge of Discrimination with the Equal Employment Opportunity Commission ("EEOC") and, after receiving her Right to Sue notice, filed suit in the Western District of New York in October 2004, alleging that she had been: (1) subjected to gender-disparate treatment; (2) subjected to a sexually hostile work environment; (3) retaliated against; and (4) paid less than male employees, in violation of Title VII and the NYSHRL.

Subsequent to filing suit, in December 2004, Ms. Moll and her fellow Sales Engineer coworkers were transferred from Verizon's Buffalo office to the Syracuse office. Later that same month, Verizon filed a motion to dismiss Ms. Moll's complaint in part. The district court dismissed Ms. Moll's hostile work environment claims under Title VII and the NYSHRL, reasoning that Ms. Moll failed to allege that any sexually offensive conduct occurred within the applicable statute of limitations and, thus, her hostile work environment claims were time-barred. Ms. Moll, still employed by Verizon, eventually took disability

leave because of the “overwhelming stress and anxiety” she was experiencing, and returned to work in February 2006. A year later, in February 2007, Ms. Moll was terminated as part of a Reduction in Force (“RIF”), along with approximately 155 other Verizon employees. Ms. Moll was allegedly selected because of her work performance compared to her peers. Ms. Moll filed an Amended Complaint in April 2008, adding claims for retaliation in light of her transfer to Syracuse and her termination.

In September 2011, Verizon moved for summary judgment. The district court granted the motion in part, and dismissed all claims except claims related to the discriminatory delay of Ms. Moll’s promotion from 2001 to 2003. Ms. Moll and Verizon eventually resolved that claim, but Ms. Moll appealed the district court’s 2005 dismissal of her hostile work environment claims to the Second Circuit.

Relying on prior Second Circuit case law, the Second Circuit found the district court in error for failing to consider the “totality” of Mr. Irving’s conduct, including both sexually overt and facially sex-neutral conduct. Indeed, in *Alfano v. Costello*, 294 F.3d 365, 375 (2d Cir. 2002), cited by the court in *Moll*, the Second Circuit held that facially sex-neutral acts could be used to demonstrate sex discrimination where, for instance, “the same individual is accused of multiple acts of harassment, some overtly sexual and some not.” Under Ms. Moll’s allegations, Mr. Irving engaged in sexually harassing conduct, including inviting her to his hotel room and leaving her sexually suggestive notes, while also utilizing other adverse actions to further discriminate against her on the basis of her sex (although not obvious on their face), including freezing her promotion.

Moll is undoubtedly a win for plaintiffs. The Court of Appeals decision correctly found that, under the law, gender discrimination can come in many forms, including both sexually overt and sexually neutral conduct.

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