Recent Case Underscores Importance of Harassment Training

*Duch v. Jakubek*

Sexual Harassment Victim Wins Important Appeal In Second Circuit

**When Do Discussions About Sexual Harassment At Work Constitute Reporting Which Requires Investigation?**

This case addresses an issue in sexual harassment cases that comes up often in real life experience but is not often the central issue of an opinion from a federal court of appeals.

It has to do with reporting of sexual harassment when a victim talks about the harassment with others at work -- but doesn't file a formal complaint. Does the conversation constitute a complaint which requires an investigation?

The case also addresses discussions at work about sexual harassment where the victim says: "don't tell anyone." What's an employer to do?

The new case -- *Duch v. Jakubek* from the United States Court of Appeals for the Second Circuit -- addresses these common but thorny issues.

Here’s what happened in the case:

**The Harassment**

Karen Duch was employed as a court officer by the New York Unified Court System and was assigned to the Midtown Community Court “(MDC) in August of 1999.

In May of 2001, Brian Kohn began working at MCA as a court officer along with Duch. Several months later Kohn and Duch had a consensual sexual encounter at Duch’s apartment. The encounter did not involve sexual intercourse.

Duch told Kohn the next day that she had made a mistake and did not want to pursue any further relations with him.

After the encounter, and until January 2002, Kohn made a series of sexual advances towards Duch and continued to harass her with unwanted physical contact, sexually graphic language, and physical gestures.

In the months that followed Duch became seriously ill with depression. She stopped eating and began avoiding work. She became suicidal and eventually left the job.

**The Reporting**

Duch told three people about the harassment:

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Edward Jakubek: The Highest Ranking Court Officer at MCC

In October of 2001, when Duch learned that she was scheduled to work alone with Kohn on an upcoming Saturday she approached Jakubek and asked for the day off. She didn’t tell him why she wanted the change.

Later that day, Jakubek called Duch in her office and told her that he heard she wanted to change her schedule to avoid working with Kohn. He also told her that he had talked to Kohn and asked him directly why Duch didn’t want to work with him.

Kohn responded to Jakubek by saying, “well, maybe I did something wrong or said something that I should not have.”

Jakubek told Kohn to “cut it out and grow up.” He then asked Duch if she had a problem with Kohn. According to the testimony, Duch became emotional and after gaining her composure said, “I can’t talk about it.”

Jakubek replied, “that’s good because I don’t want to know what happened,” and then laughed.

Jakubek offered to change Duch’s schedule so she would not have to work alone at night with Kohn, and thereafter did not schedule her to work alone with him.

Rosemary Christiano: The EEO Liaison

Later in October 2001, Duch told Christiano about Kohn’s harassment. When asked “are you speaking to me as a friend or as an EEO Liaison, Duch responded “I think I am telling you as a friend”.

When Chritsiano asked Duch whether she wanted her to report Kohn’s behavior, Duch said “absolutely not.” Christiano did not report the harassment to anyone.

David Joseph: Chritsiano’s Replacement As EEO Liaison

In December of 2001, David Joseph replaced Christiano as the EEO Liaison. Within days, Duch informed him that she wanted to file a formal complaint about Kohn’s conduct.

An investigation was conducted, and disciplinary charges were brought against Kohn. Duch refused to be cross-examined claiming that she was medically unfit to testify.

All charges were eventually dropped against Kohn. Duch stopped working at the court in 2002 and filed a lawsuit in 2004.

The Lower Court’s Opinion

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Duch filed a sexual harassment lawsuit pursuant to Title VII of the Civil Rights Act of 1964 and the statutory laws of the state of New York and New York City.

The Defendants requested that Duch’s claims be dismissed as a matter of law and the federal District Court agreed holding that:

• OCA provided a reasonable avenue of complaint
• no reasonable fact-finder could conclude that the employer-defendants had actual or constructive knowledge of the alleged harassment
• even assuming the employer defendants did know or should have known about the harassment, their response was reasonable

Duch filed an appeal to the Second Circuit Court of Appeals.

Sexual Harassment Law

The law of sexual harassment is a bit complicated.

In short, in order to prove a hostile environment sexual harassment claim Duch was required to establish that:

• the harassment was sufficiently severe or pervasive to alter the conditions of the victims employment and create an abusive working environment and
• there was a specific basis for imputing the conduct creating the hostile work environment to the employer

Proving the harassment was not the problem -- Duch could provide that proof with her testimony.

The thorny issue in this case turned on whether Duch could impute the conduct that created the hostile work environment to her employer – and that depended on who did the harassing and who knew about it.

When the harassment of an employee is done by an officer, owner, or manager the company will in most circumstances be automatically liable for the illegal conduct.

When the harassment is that of a co-worker, the employer is not automatically liable. In a co-worker harassment case like this one, Duch was required to have proof that her employer:

• knew about the harassment or
• in the exercise of reasonable care should have known about the harassment and
• failed to act promptly to stop it

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The District Court found that Duch failed to properly report Kohn’s harassment and as a result her employer was not liable. Duch appealed.

**The Court of Appeals Decision**

The Second Circuit Court of Appeals reversed and in its opinion gave us some helpful guidance on what does and does not constitute sufficient reporting by a victim of harassment for purposes of imposing employer liability.

**Conversations With Christiano**

Because Christiano was a co-worker without supervisory authority, her knowledge could only be imputed to her employer if:

- she had an official duty to act, and whether in light of her knowledge
- her response was unreasonable

There was no dispute that Christiano knew about Kohn’s harassment. Duch however told Christiano “absolutely not “to tell Jakubek about it.

The Court found that Christiano acted reasonably in honoring Jakubek’s request. In so doing, the Court acknowledged:

> [T]here is certainly a point at which harassment becomes so severe that a reasonable employee simply cannot stand by, even if requested to do so by a terrified employee.

In this case, however, the Court sided with the defense. It did so because it concluded that:

- there was no evidence that Christiano was aware of the psychological toll that Kohn’s harassment was allegedly inflicting on Duch
- therefore the jury could not conclude that Christiano breached a duty to Duch and
- the defendant employer could not be liable because of Christiano’s inaction

**Conversations With Jakubek**

The evidence involving Jakubek caused the Court to reach a different conclusion than it did with Christiano and reversed the district court.

That’s because Jakubek was Kohn’s supervisor, and as such, “was charged with a duty to act on the knowledge and stop the harassment.”

As the Court stated:

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Where the person who gained notice of the harassment was the supervisor of the harasser (e.g. had the authority to hire, fire, discipline, or transfer him, knowledge will be imputed to the employer on the ground that the employer vested in the supervisor.

The Court held that there was sufficient evidence from which the jury could find that Jakubek knew, or should have known about the harassment including proof that Jakubek:

• knew that Duch asked for a change in her work schedule when she was scheduled to work alone with Kohn
• asked Kohn about it, and Kohn admitted that he did or said something “he should not have”
• knew that Kohn had engaged in sex-related misconduct toward females in the past
• told Kohn, in reference to his conduct towards Duch, to “cut it out and grow up”
• knew that the subject of working with Kohn caused Duch to become emotional, teary and red, and lose her composure
• said “good”, when Duch said she didn’t want to talk about it, because “I don’t want to know what happened”
• agreed to change Duch’s schedule so that she didn’t have to work with Kohn alone

Based on the above, according to the Court, Jakubek had a duty to make at least a minimal effort to discover whether Kohn had engaged in sexual harassment, and encourage (rather than discourage) her to reveal the full extent and nature of the harassment.

The Court wrote:

In so holding, we do not announce a new rule of liability for employers who receive nonspecific complaints of harassment from employees.

We merely recognize that, under the existing law of this Circuit, when an employee’s complaint raises the specter of sexual harassment, a supervisor’s purposeful ignorance of the nature of the problem – as Jakubek is alleged to have displayed —will not shield an employer from liability under Title VII.

Accordingly, notwithstanding the District Court’s observation that Jakubek ‘was never told of, and did not witness, the alleged harassment,’ we hold that a reasonable jury could conclude that Jakubek knew, or in the exercise of reasonable care should have known about the harassment.

The Adequacy Of The Response
According to the District Court, even if the employer knew about the harassment, the response was reasonable. The Court of Appeals disagreed:

Although Jakubek did adjust the schedule so that Duch and Kohn would not be working together without other court officers on duty, Kohn’s harassment persisted and escalated during the months that followed.

A formal investigation of Kohn was not commenced until January 2002, after Duch informed another co-worker of the harassment and three months after the date upon which a jury could find that Jakubek first learned of the harassment.

Under these circumstances, we cannot say as a matter of law, that defendants’ response was ‘effectively remedial and prompt.’

**Lessons To Be Learned**

It’s very common for victims of harassment to be fearful of reporting the harassment. It’s also common for an employee to confide in a co-employee, or supervisor, without making a formal complaint and to say, “don’t tell anyone.”

What we learn in this case is that those informal and non-specific conversations can trigger an employer's obligation to investigate and take appropriate action to stop the harassment.

We also learn that those conversations may not satisfy an employee’s obligation to report harassment --- very much depends on what level of authority the person has who hears what the victim has to say and how much the victim reveals.

This case provides lots of valuable legal analysis in some gray area of sexual harassment law which have been infrequently addressed in the past.

In my opinion, it's an important and useful decision for all employers, victims of harassment, and all practitioners of employment law.