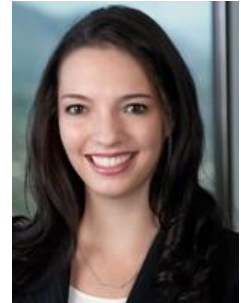


Harassment Ruling Doesn't Clear Cos. Of All Worker Conduct

By **Melissa Legault** (June 24, 2020)

We all know that employers have a legal obligation under federal law, as well as under various state and local laws, to provide their employees with a safe work environment free from sexual harassment, and that under certain circumstances, an employer can be held legally responsible for harassment directed at its employees.

However, do companies have a legal obligation to protect their customers against sexual harassment perpetrated by their employees and supervisors? This was the issue recently considered by the U.S. Court of Appeals for the Third Circuit, which covers Delaware, New Jersey and Pennsylvania, in *Yucis v. Sears Outlet Stores LLC*, and employers should take notes.



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Background

In *Yucis*, a female customer, Elisabeth Yucis, visited a Sears Outlet Store to shop for a refrigerator. While at the store, she was allegedly subjected to harassment and inappropriate comments by one of the store's male sales managers.

For example, the manager allegedly asked her "What is a pretty girl like you doing in a place like this?" and when she tried to show him a photo of the type of refrigerator she wanted, he suggestively asked "Are there photos on there that I'm not supposed to see?"

When she indicated she was uncomfortable with his comments, the manager allegedly said, "I am married and so are you, I am just having fun," and as she tried to end the encounter, the male supervisor gave her his business card and said, "Text me later if you feel lonely." Unsurprisingly, Yucis found these comments unwelcome and degrading.

After the incident, Yucis complained to Sears' corporate relations department about the situation, but she was dissatisfied with the company's response.

Accordingly, she sued Sears Outlet Stores under the public accommodation provisions of New Jersey's Law Against Discrimination, claiming she was subject to unlawful sexual harassment while shopping at their store, and that Sears Outlet, as the perpetrator's employer, was liable for its employee's harassing behavior of customers. She did not sue the sales manager directly.

The trial court dismissed the action for failure to state a claim, finding that Yucis had not alleged facts that would support Sears Outlet's vicarious liability for the harassment. She appealed, seeking both monetary and equitable relief.

In its June 1 opinion, the Third Circuit affirmed, holding that Sears Outlet was not liable for the manager's sexual harassment because Yucis was unable to show that the harasser acted within the scope of his employment when he engaged in the complained-of behavior.

Legal Standard and Court's Holding

Employers are not always strictly liable for harassment committed by their employees. Rather, the issue of liability is often dependent on the type of relief sought by the plaintiff.

If the plaintiff seeks equitable relief — such as discipline of the harasser — then the employer is strictly liable because the employer is the party that has the power to provide such relief. However, for cases involving compensatory damages, the analysis of whether an employer is strictly liable for the harassment committed by its employees is governed by agency principles.

Yucis argued that these principles do not apply in the context of public accommodations, and an employer is always strictly liable for an employee's harassment of customers. The Third Circuit rejected this position, however, and after analyzing New Jersey state case law, determined that agency principles should apply in public accommodations harassment cases under the Law Against Discrimination.

Yucis argued that her case satisfied the vicarious liability standard. To establish vicarious liability in a sexual harassment case under agency principles, the plaintiff must satisfy any of the following five tests:

- (1) the employee was acting in the scope of his employment;
- (2) the employer intended the conduct or the consequences;
- (3) the employer was negligent or reckless;
- (4) the employee's conduct violated a non-delegable duty of the employer; or
- (5) the employee purported to act or to speak on behalf of the employer and there was reliance upon apparent authority, or he was aided in accomplishing the illegal act by the existence of the employment relation.

Here, the Third Circuit held that Yucis' allegations did not satisfy any of these tests. First, the court found that the sales manager was not acting within the scope of his employment when he was harassing Yucis.

Notably, the dissenting judge believed that a jury could find the manager's sexual advances were part of his "sales strategy to flirt with or flatter Yucis in order to make a sale" and therefore were carried out within the scope of his employment.

However, the majority did not subscribe to this theory and found that the manager was not in fact acting within the scope of his employment when he perpetrated the harassment, pointing in part to his statement that he was "just having fun" which, to the court, implied personal motives.

The court also determined that the second, third and fourth tests were not applicable to Yucis' situation because she did not present any facts that Sears Outlet intended the harassment or was negligent or reckless in failing to prevent it, and she did not provide any authority to support her contention that the Law Against Discrimination imposes any nondelegable duty.

Yucis argued that the fifth test applied to her circumstances, arguing that an employee is aided by his employment when harassing a customer because he would not have interacted with that customer but for his employment. The Third Circuit rejected this argument as well, explaining that for an employee to be aided by his employment in committing a wrongful act, he must have taken advantage of some special mechanism or authority afforded to him by his employment.

For example, courts have held that a hotel employee was aided by his employment in sexually assaulting a hotel guest where he had access to the guest's room key because of the nature of his employment. Similarly, a sheriff's deputy was aided by his employment in coercing a civilian into a sexual act because the deputy's position gave him "unique access to a citizen who is depending upon the law enforcement officer for protection."

Because Yucis did not allege any facts suggesting that the store manager's harassment was enabled by a mechanism he obtained through his employment or that his position as a sales manager afforded him any special authority over her, the Third Circuit refused to find vicarious liability. The court also dismissed Yucis' equitable claim, finding that she lacked the requisite standing.

Employer Takeaways

In this post-#MeToo world, sexual harassment of employees is top of mind to many employers, but this case serves as a reminder that sexual harassment allegations can come in many forms. Although this case demonstrates that employers will not always be liable for sexual harassment committed by their employees against customers, it is important for employers to realize that the court's ruling in Yucis does not absolve employers of all liability to customers for their employees' harassing behavior.

Courts may still hold employers vicariously liable for the actions of their employees if one of the five tests for vicarious liability are met.

Accordingly, employers should not encourage employees to flirt with customers as a business strategy or to behave in any way that could be perceived by the customer as harassing when acting within the scope of their employment. Further, employers should not condone such behavior when they become aware of it, particularly when the employer will be a beneficiary of the fruits of such conduct in the form of increased business or revenue.

In addition, an employer could be held liable if their employee was aided in accomplishing the harassment by the existence of the employment relationship. Therefore, employers who afford their employees access to or authority over their customers by the nature of their employment should be particularly aware of the potential for vicarious liability and ensure there are mechanisms in place to prevent harassment perpetrated by employees in those roles.

Regardless of whether they will be held liable for sexual harassment of a customer in a court of law, employers should still strive to eradicate sexual harassment of all kinds in the work environment and make sure that their anti-sexual harassment policies and expectations are clearly written and sufficiently articulated to employees.

In addition, employers should carefully vet their employees and investigate all complaints regarding sexual harassment promptly and thoroughly. Further, employers should consider implementing sexual harassment training for all employees, and should remember that in

some states, such as California, Connecticut, Delaware, Illinois, Maine and New York, sexual harassment training is mandatory for certain employers.

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