



ROBINSON & COLE LLP

Labor, Employment & Benefits



Employer that Made Reasonable Efforts to Stop Harassing Conduct by Non-Employees Ruled Not Liable under Massachusetts Discrimination Law

Whitleigh Edmands, an apprentice carpenter, was employed by Modern Continental/Obayashi on a job site of the “Big Dig” Massachusetts public works project. Modern subcontracted the ironwork on the project to Mohawk Construction, and Edmands worked with Mohawk’s ironworkers on the job site. Edmands was using portable toilet facilities on the site when she saw an ironworker peering through an air vent into the facility. Edmands attempted to exit the facility, but was unable to because it had been jammed shut with tie wire. Edmands reported the incident to her foreman. Modern investigated the incident, and a Mohawk ironworker admitted to placing the tie wire on the door, but not to peeping into the facility. Modern attempted to have the employee removed from the site, but Mohawk and the ironworkers’ union did not remove him. Neither Modern nor Edmands were able to uncover the identity of the peeper. Edmands subsequently experienced other harassing incidents by Mohawk employees, including vulgar graffiti on the toilet facilities. In response to these issues, Modern conducted sexual harassment avoidance training, and implemented security measures at the restroom facilities. Modern later transferred Edmands to another job site, but Edmands ultimately resigned.

Edmands filed a complaint against Modern with the Massachusetts Commission against Discrimination. The MCAD found that the incidents experienced by Edmands constituted sexual harassment and that Modern was liable under Massachusetts law because its response to the incidents was inadequate. Modern appealed, arguing that it could not be held liable for the conduct of independent third parties over whom it did not have control.

In [Modern Continental/Obayashi v. MCAD](#) (9/7/05), the Massachusetts Supreme Judicial Court rejected Modern’s argument that an employer can never be held liable for acts of harassment perpetrated by third parties. Citing MCAD’s guidelines on sexual harassment, the court observed that employers are obligated to take prompt, effective and reasonable remedial action against harassment. The extent to which an employer may be held responsible for actions of non-employees depends on the level of control the employer has over the non-employees. Applying these standards, the court found that Modern did take prompt action reasonably calculated to end the harassment against Edmands. Modern’s investigation of the incidents, attempts to remove the perpetrator of the tie wire incident from the site, sexual harassment avoidance training, and implementation of security measures satisfied its obligations. The court recognized that Modern had limited control over Mohawk’s employees, and that its efforts to have an offender removed from the site were blocked by Mohawk and the Union. Although Modern did not completely eradicate the harassment at the site, that did not justify imposing liability on Modern for acts of third parties.

Offensive Conduct Directed at Women May Violate Title VII Even if Not Facially Sex-Specific

National Education Association-Alaska is a labor union that represents public school employees. Three female employees of NEA filed charges with the U.S. Equal Employment Opportunity Commission against NEA, alleging that the organization created a sex-based hostile work environment. Specifically, the employees claimed that supervisor Thomas Harvey frequently engaged in loud and hostile outbursts, including using foul and profane language, and also engaged in physically threatening actions toward them and other female employees. Harvey’s conduct did not include gender-specific or sexual remarks, and some male employees also experienced aggressive behavior by Harvey. The EEOC filed suit against NEA on the employees’ behalf in federal court in Alaska, alleging sexual harassment in violation of Title VII of the Civil Rights Act of 1964. The lower court found that because there was no evidence of sexual overtures or lewd comments, or gender-specific terms, the harassment was not “because of sex,” as required under Title VII. The lower court dismissed the case, and the EEOC appealed.

In [Christopher v. National Education Association](#) (9/2/05), the U.S. Court of Appeals for the Ninth Circuit reversed the lower court’s decision. The court found that offensive conduct need not be sex- or gender-specific in order to constitute sexual harassment. A plaintiff may prove sexual harassment by demonstrating that members of one sex are exposed to disadvantageous terms and conditions of employment to which members of the other sex are not exposed. Although the evidence showed that Harvey also engaged in aggressive conduct with male employees, neither the quantity nor the quality of the conduct was comparable to that he displayed toward females. Moreover, the evidence demonstrated that Harvey’s behavior affected women more adversely than men. This was sufficient to allow the EEOC to proceed on the Title VII claims.

Trainee Cannot Prove Race or Gender Bias Where Decisionmaker was Unaware of Misconduct by “Similarly Situated” Trainee

Pauline Goins was hired by Echostar Communications Corporation and placed in training classes with Susan Roach and other trainees. During a training class, there was an argument between Goins and Roach that included cursing. According to Goins, a white male trainee, Jeff Hack, also engaged in disruptive behavior. Roach subsequently quit. Management conducted an investigation and terminated Goins for using profanity and engaging in abusive behavior. Goins sued Echostar, claiming race and gender discrimination under Title VII of the Civil Rights Act of 1964 and Pennsylvania discrimination law. The lower court dismissed Goins’s claims, and she appealed.

In [Goins v. Echostar Communications Corp.](#) (8/31/05), the U.S. Court of Appeals for the Third Circuit agreed with the lower court. Goins’s arguments that other similarly employees were not disciplined for misconduct failed. Specifically, Goins claimed that Jeff Hack was not disciplined for his disruptive behavior. However, the evidence demonstrated that the decisionmaker in management was unaware of Hack’s misconduct at the time Goins was terminated. Goins also argued that the trainer of the class, who was aware of Hack’s misconduct, was the real decisionmaker because she was the gatekeeper of any information that was or was not conveyed to management. However, the evidence showed that the trainer did not report Goins, Roach or Hack to management; another employee reported the incident between Goins and Roach, but did not report any conduct by Hack. Therefore, the facts did not establish race or sex discrimination by any of the decisionmakers and Goins’s claims failed.

Injury Sustained in Basketball Game Played at Employers’ Request During Working Hours is Compensable under Connecticut Workers’ Compensation Act

Edward Anderton III worked for WasteAway Services, LLC, cleaning up after games and events held at Bluefish Stadium in Bridgeport, Connecticut. The owners of WasteAway asked Anderton and Anderton’s supervisor to play basketball against them during working hours. Anderton agreed, believing that if he refused, his employers and supervisor would look on him unfavorably as an employee. During the game, Anderton sustained an injury to his Achilles tendon. He claimed that he was totally disabled from work for over three months and had a seven percent permanent partial disability. The workers’ compensation commissioner held that the injury was compensable under Connecticut’s Workers’ Compensation Act, but the Connecticut workers’ compensation review board reversed that decision. The board concluded that to demonstrate that the injury occurred in the course of employment, the plaintiff had to prove a direct tie-in between his employment duties or status and his attendance at the activity. The board found insufficient evidence for a reasonable person to believe that there would be adverse employment-related consequences if he declined to play basketball. Anderton appealed the board’s decision.

In [Anderton v. WasteAway Services, LLC](#) (9/13/05), the Connecticut Appellate Court determined that the review board's standard was too strict and reversed its findings. The court observed that the injury occurred during working hours, and that Anderton's employers exercised some compulsion in that they invited Anderton to play and scheduled the game during working hours. Moreover, one of the employers acknowledged that playing basketball with the employees boosted morale and fostered loyalty. From these facts, the commissioner reasonably concluded that Anderton's injury arose out of and in the course of his employment, as playing basketball that day was part of his employment. The court reversed the board's decision and reinstated the commissioner's initial finding of compensability.

Employer's Honest Belief that Employee Made Bomb Threats Establishes Legitimate, Non-Discriminatory Reason for Termination

Michael Johnson, a 41 year old African American male, worked for National Telemarketing Association, a division of AT&T, as an account representative. On two consecutive days, the AT&T Consumer Sales and Service Center received bomb threats. AT&T suspected that the calls were made by an employee, because the number called was traditionally used by employees. The following weekend, an anonymous caller made calls from a cell phone to 911 concerning bomb threats at the AT&T facility. Based on the caller's voice, the police dispatcher believed that the caller was an African American male between the ages of 30 and 40. This description was consistent with the description given by an AT&T receptionist that took one of the initial calls. In its investigation of the bomb threats, AT&T obtained a tape recording of the 911 calls, and a manager played the tape for a group of sales team leaders. Of the twelve individuals at the meeting, nine identified the voice as that of Michael Johnson. The individuals were not informed that the police suspected the caller was an African American male between the ages of 30 and 40. AT&T confronted Johnson, who denied involvement in the bomb threats. Relying on the statements of the employees, AT&T terminated Johnson's employment for violation of its code of conduct. The police subsequently traced the 911 calls to a cell phone that was not associated with Johnson, and co-workers later testified that they saw Johnson on days the calls were made and did not observe him using a cell phone.

Johnson sued AT&T, alleging age and race discrimination in violation of Title VII and Missouri law. In support of his claims, Johnson argued that the reason AT&T gave for his termination was false. The lower court rejected Johnson's claims, and Johnson appealed. In [Johnson v. AT&T Corp.](#) (9/7/05), the U.S. Court of Appeals for the Eighth Circuit upheld the lower court's ruling. The appeals court rejected Johnson's attempts to establish discrimination by introducing evidence that AT&T was mistaken in its belief that Johnson placed the bomb threats. According to the appeals court, the proper inquiry was not whether AT&T was factually correct in its findings that Johnson made the threats, but whether AT&T honestly believed that Johnson made the threats. AT&T's determination that Johnson made the calls was based on sufficient evidence—namely, the voice identification by his co-workers, who were unaware that the caller had been identified as an African American male between 30 and 40. Johnson failed to put forth evidence that AT&T's reasons for the termination were pretextual.

Department of Homeland Security Stays I-9 Requirements for Employers Hiring Hurricane Katrina Victims

Recognizing that many individuals may have lost employment eligibility and identity documents as the result of Hurricane Katrina, and may be unable to apply for and receive such documents at this time, the Department of Homeland Security issued an [announcement](#) on September 6, 2005 that it has temporarily waived certain I-9 requirements. For 45 days, the DHS will not penalize employers that hire Hurricane Katrina victims who are unable to provide documentation normally required by Section 274A of the Immigration and Nationality Act due to loss or damage to their homes or due to evacuation.

Employers remain responsible for completing and retaining Employment Eligibility Verification (I-9) Forms for hired individuals. Employers should note on the forms that the required documentation is not available at this time as the result of Hurricane Katrina. The DHS will review this policy at the end of the 45 days and will make further recommendations.

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The logo for Robinson & Cole LLP is displayed in white, uppercase letters on a dark blue, curved banner. The banner has a slight 3D effect with a lighter blue shadow on the right side.

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