

Federal Court Affirms Employer Liability for Acts of Non-Employees

By Hayes Edwards

Written with assistance from Zachary Aman, Law Clerk

Employers are well aware that discrimination and harassment against employees is unlawful, but a recent [ruling](#) by the Fourth Circuit Court of Appeals (which covers Maryland, Virginia, North Carolina, South Carolina, and West Virginia) serves as an important reminder that, in certain circumstances, employer liability can extend to misconduct by third parties (other than co-workers). In that case, an employee of a North Carolina assisted living facility resigned and filed an EEOC complaint and subsequent lawsuit after her employer's *six-year-old child* made racist comments toward her on multiple occasions. In its defense, the employer argued that it did not know of the child's comments and was not given enough time to remedy the situation upon learning of them. In rejecting the employer's "see no evil, hear no evil" strategy the Court emphasized that employers need to maintain a "reliable" means for employees to register complaints. Critical to this decision was the Court's conclusion that employers do not need to have "actual knowledge" of misconduct, but that they can also be liable for misconduct that should have been discovered, even if it was not. The Court also questioned (but did not decide) whether the employer's actions to make the child apologize was a sufficient way to remedy the hostile work environment created by the very offensive comments.

A pending case before the U.S. District Court for Vermont paints a similar picture. Several employees of an assisted living facility filed a claim of discrimination under Title VII based on racially-based physical and verbal threats made by one of the patients of the facility. When this behavior was reported, the employer took no corrective action to remedy the situation (which the plaintiffs assert created a hostile work environment). When the employees requested a transfer of the patient to another facility, the transfer was denied. Time will tell how the District Court will assess the employer's response, and whether it is deemed liable for the patient's comments. But the lesson is clear: customers and others who interact with employees can create a hostile work environment, for which the employer might be legally responsible.

Employers are reminded to stay vigilant about potentially discriminatory or harassing conduct that might affect their workers. But, because bad acts might go un-seen by supervisors, employers should also ensure their policies and procedures (like those typically included in an employee handbook) anticipate third-party misconduct, emphasize that the employer will not tolerate employee harassment coming from a third party, and provides reasonable procedures for employees to register complaints. Appropriate systems should allow the employer to promptly learn of any misconduct and intervene to mitigate the negative impact on employees and avoid liability for the employer.

If you have questions about Title VII or about updating your harassment or discrimination policies, please contact the employment attorneys at Paley Rothman.