GONZALEZ SAGGIO HARLAN

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Philip S. Holloway, Esq.

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Is Ignorance Bliss? Not Under Title VII

By Philip S. Holloway, Esq.

There is no question that sexual harassment complaints are a minefield for employers. In trying to limit instances of and liability from such complaints, employers have taken such steps as implementing training sessions and creating reporting policies and procedures for its employees. Yet, these efforts can only do so much.

What happens, for instance, when an aggrieved employee, in spite of numerous avenues set up by the employer to report allegations of sexual harassment, fails to specifically identify alleged upsetting conduct as sexual harassment? Must the employer read the employee's mind? Does the employer have to assume that any allegation that might possibly be categorized as sexual harassment is worthy of a full-blown investigation? Or, can an employer "stick its head in the sand" and claim ignorance when an employee fails to specifically allege that conduct he or she has experienced amounts to sexual harassment?

The Second Circuit Court of Appeals recently addressed this issue in *Duch v. Jakubek*, 588 F.3d 757 (2nd Cir. 2009), when it overturned a lower court's granting of summary judgment in favor of the employer. In *Duch*, the plaintiff, Karen Duch, allegedly was subjected to a series of unwanted sexual advances by a co-worker, Brian Kohn, when both worked for the New York State Office of Court Administration ("OCA"). The alleged harassment began after Ms. Duch and Mr. Kohn engaged in a brief consensual sexual relationship. The alleged offending conduct included physical contact, sexually graphic language and physical gestures. When Ms. Duch learned she was scheduled to work a Saturday shift alone with Mr. Kohn, she went to her supervisor, Mr. Jakubek, and requested that particular Saturday off. She did not, however, tell Mr. Jakubek why she wanted the day off.

After Mr. Jakubek heard from others that Ms. Duch requested the day off to avoid working alone with Mr. Kohn, Mr. Jakubek asked Mr. Kohn why Ms. Duch did not want to work with him. Mr. Kohn told Mr. Jakubek, "Well, maybe I did something or said something I shouldn't have." Mr. Jakubek then told Mr. Kohn to "cut it out [and] grow up." Later that day, Mr. Jakubek approached Ms. Duch to discuss her problems with Mr. Kohn. When Mr. Jakubek asked Ms. Duch what was wrong with working with Mr. Kohn, Ms. Duch became emotional and said, "I can't talk about it." Ms. Duch alleges Mr. Jakubek then laughed and said, "That's good, because I don't want to know what happened." After this exchange, Mr. Jakubek changed Ms. Duch's schedule so that she would no longer work alone with Mr. Kohn, but he took no further action. In the months that followed, Mr. Kohn allegedly continued to harass Ms. Duch, causing her to become seriously ill. Ms. Duch eventually quit her position.

Although the OCA provided its employees with six different avenues to report allegations of sexual harassment, the Second Circuit found that it still could be liable if it knew or should have known through an exercise of reasonable care about the harassment, yet still failed to take remedial action. Because Mr. Jakubek was Mr. Kohn's supervisor and had a duty to act on any knowledge of sexual harassment, the court focused on what he knew or should have known. Looking at the above factual allegations, along with the fact Mr. Jakubek knew that Mr. Kohn previously had engaged in sex-related misconduct, the court found that a jury could reasonably find that Mr. Jakubek strongly suspected Ms. Duch was complaining of sexual harassment. That finding, in turn, would have obligated Mr. Jakubek to make at least a minimal effort to discover whether she had been the victim of sexual harassment. Instead, Mr. Jakubek discouraged her from revealing the full extent and nature of the harassment by telling her that he did not want to know what happened.

In deciding *Duch*, the Second Circuit emphasized that it was not announcing "a new rule of liability for employers who receive non-specific complaints of harassment from employees." Rather, the court was emphasizing that under the case law of the Second Circuit, which covers only Connecticut, New York, and Vermont, "when an employee's complaint raises the specter of sexual harassment, a supervisor's purposeful ignorance of the nature of the problem . . . will not shield an employer from liability under Title VII."

Although *Duch* is a Second Circuit case, and therefore only applies to sexual harassment actions filed in that circuit, it teaches employers everywhere the following important lessons:

(1) Employers must make sure that all employees are aware of every avenue available to them to report allegations of discrimination or harassment.

(2) Employers should make sure employees know that when they use those avenues, they can openly and fully discuss any allegations without fear of retribution.

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(3) Employers should train all employees, especially those employees whose actions or inactions can bind the employer, to err on the side of caution when deciding whether particular allegations constitute sexual harassment. If an allegation could constitute sexual harassment, the employer should dig a little deeper, and certainly not accept "I can't talk about it" as an answer.