Court Revives Gender Discrimination Claim Based on Spouse's Jealousy

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By Jeffrey Campolongo | November 30, 2017

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With the recent spate of sexual harassment and sexual misconduct cases populating the cable news and talk radio airwaves we decided to take a closer look at two recently decided cases. Each of the decisions, while impactful in their own right, may be signaling a heightened awareness to a very troubling public crisis.

Take, for example, the decision from a New York appeals court, *Edwards v. Nicolai*, 2017 NY Slip Op 06235, N.Y. App. Div., No. 160830/13 (Aug. 22), where a gender discrimination lawsuit based on allegations that the employee was fired for being "too cute," was revived. Dilek Edwards was hired as a yoga and massage therapist for Wall

Street Chiropractic and Wellness (WSCW). The co-owners of WSCW were defendants Charles Nicolai and Stephanie Adams. Nicolai was the head chiropractor overseeing the medical operations, while Adams was the chief operating officer.

According to the opinion, the relationship between Nicolai and Edwards was "purely professional" and that Nicolai "regularly praised the plaintiff's work performance throughout her period of employment." In June 2013, however, Nicolai allegedly "informed the plaintiff that his wife might become jealous of the plaintiff, because the plaintiff was too cute." Approximately four months later, on Oct. 29, 2013, at 1:31 a.m., Adams sent Edwards a text message stating, "You are NOT welcome any longer at Wall Street Chiropractic, DO NOT ever step foot in there again, and stay the [expletive] away from my husband and family!!!!!!! And remember I warned you." A few hours later, at 8:53 a.m., Edwards allegedly received an email from Nicolai stating, "You are fired and no longer welcome in our office. If you call or try to come back, we will call the police." There were no allegations of consensual (or nonconsensual) sexual conduct, innuendo, harassment or hostile work environment.

Edwards filed a gender discrimination complaint under New York state law. The owners, Nicolai and Adams, filed a motion to dismiss which the trial court granted. In dismissing the case the trial court found that "spousal jealousy, alone" did not give rise to a gender discrimination claim. The trial court surveyed the landscape of cases involving spousal jealousy as a basis for the wrongful firing of an employee. In doing so, the court relied on cases involving consensual sexual affairs or consensual conduct between the employer and the employee. One case in particular upon which the trial court relied, *Nelson v. James H. Knight DDS, P.C.*, 834 N.W.2d 64 (Iowa 2013), explicitly rejected an employee's gender discrimination claim where the male business owner fired a female employee purportedly because she was too physically attractive, thus tempting the employer to think about entering into an extramarital affair with her.

On appeal, the appellate division revived the lawsuit declaring that the defendants' reliance on the "spousal jealousy" cases was misplaced. In those cases, it was the employee's behavior—not merely the employer's attraction to the employee or the perception of such an attraction by the employer's spouse—that prompted the termination. In the case of Edwards, there was no reason to believe the plaintiff had ever behaved inappropriately in interacting with Nicolai, and was fired for no reason other than "Adams's belief that Nicolai was sexually attracted to plaintiff." Under this scenario, a cause of action for gender discrimination exists because it can be inferred that Nicolai was motivated to discharge her by his desire to appease his wife's unjustified jealousy. Thus, the motivation to terminate plaintiff's employment was sexual in nature. The interesting thing here is how the New York appellate court reached a completely different result than the Iowa court in *Nelson*, cases with similar facts, decided just a few years apart. From this writer's perspective, it underscores how public awareness to social issues can shape jurisprudence.

In another recently decided case, a California appellate court tackled the issue of when and whether an employer can be held liable for its failure to prevent sexual assault of one of its employees, see *M.F. v. Pacific Pearl Hotel Management*, No. D070150, Ca. Ct. App., Fourth Appellate District, Division One (Oct. 26). The plaintiff, a housekeeper for a hotel, was sexually assaulted by hotel trespasser. On the morning of the assault, the hotel's engineering manager observed the drunk trespasser wondering the property, however, he did not ask the man to leave, nor report the trespasser's presence to housekeeping management or the police. Per the opinion, the trespasser approached different housekeepers cleaning hotel rooms three times while he walked around the hotel property. It was reported that the trespasser propositioned multiple housekeepers for sex in exchange for money.

In another instance, the trespasser tried to enter a hotel room on the third floor of another building and offered the housekeeper who was cleaning the room money for sex. Eventually, he made his way to the hotel room where plaintiff was cleaning. The trespasser pushed the plaintiff's cart aside and pushed the door open, forced the

plaintiff back into the room, and raped and assaulted her for over two hours. After he left, the plaintiff called the police and was eventually hospitalized.

The plaintiff sued the hotel for hostile work environment sexual harassment and for failure to prevent sexual harassment (i.e., the assault). The gravamen of the complaint, according to the published opinion, was that the employer failed to take reasonable steps to prevent the sexual harassment from occurring after it knew, or had reason to know, that the trespasser posed a threat to the safety of the employees. The trial court dismissed the case, however, an appellate court allowed the case to proceed because there were sufficient allegations that the hotel had been placed on adequate notice of the problem before the assault occurred. This was particularly true after the hotel became aware that the trespasser was confronting and aggressively propositioning housekeeping employees for sexual favors. The court held that the hotel had a duty to act and could be found liable for sexual harassment based on its failure to take prompt corrective action to immediately end the harassment by the trespasser.

The court also reasoned that the trespasser's initial harassment need not have been directed at the plaintiff in order for the employer to be responsible for protecting her from the sexual assault. "If an employer knows a particular person's abusive conduct places employees at unreasonable risk of sexual harassment, the employer cannot escape responsibility to protect a likely future employee victim merely because the person has not previously abused that particular employee," the court wrote. Borrowing the rationale from the *Faragher*/*Ellerth* line of cases, the court emphasized the need to take adequate remedial measures including immediate corrective action that is reasonably calculated to end the current harassment and to deter future harassment.

Of note here is the inclusion of the word "immediate." Look no further than the facts of this case as to why action needed to be taken immediately. All too often employer's think the obligation is only to remediate previous harassment, without paying attention to the harm that may still be going on, or has yet to even occur. The obligation to keep employees safe, as evidenced by what happened to this housekeeper, cannot be subject to a wait-and-see approach. Sexual harassment and sexual assault are real problems that need real solutions.

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