



LABOR AND EMPLOYMENT UPDATE:

INVESTIGATION AND IMMEDIATE AND APPROPRIATE ACTION IN SEXUAL HARASSMENT CLAIMS

In Albino Agosto v. Angel Martinez, 2007 T.S.P.R. 11, the Supreme Court of Puerto Rico recently spelled out again the employers' obligation to take immediate and appropriate corrective measures upon learning of the occurrence of acts of sexual harassment in the workplace. In this case, the Supreme Court upheld the judgment and award of damages to the employee under Act No. 17 of April 22, 1998 ("Act No. 17") because the corrective measures taken by the employer, although immediate, were not appropriate and did not eradicate and prevent the recurrence of acts of sexual harassment.

Ms. Ada Albino ("Albino") was a manager at a retail store until her resignation in March of 1997. The store was owned by defendant corporation Angel Martínez, Inc., whose president was Mr. Angel Martínez ("Martínez"). Mr. Ramón Orsini ("Orsini") was the corporation's accountant. Albino and Orsini maintained a cordial work relationship and communicated daily. They saw each other weekly when Orsini visited her store and at monthly manager meetings. During the month of August of 1996, Orsini changed the way he treated Albino. According to the findings of the Court of First Instance, Orsini touched Albino's hands, stared at Albino's body while making inappropriate remarks and asked Albino to kiss him. He also touched his genitals in front of her. The Court concluded that this conduct had occurred in more than one occasion. Albino also alleged that on one occasion, Orsini invited her to spend the day with him away from work.

The Court also found that as consequence of these incidents, Albino felt nervous and insecure and feared that Orsini touched her or made inappropriate commentaries to her. She began losing weight, wearing bigger clothes and looked emaciated.

In October of 1996, Albino decided to inform her supervisor about Orsini's inappropriate behavior, not only towards her but also towards another female employee of the store. Albino's supervisor notified Martínez immediately. The following day, Martínez met personally with Albino. Albino reiterated what she had told her supervisor. Martínez acknowledged that the allegations were serious and asked Albino to decide if she wanted Orsini to be terminated from employment. Albino stated that it was not for her to decide whether or not Orsini should be terminated.

Shortly after meeting with Albino, Martínez met with Orsini to inform him of the sexual harassment complaint brought against him and asked for his resignation. Orsini replied that he could not resign because he did not do anything wrong. Martínez, however, did not discipline or terminate Orsini. Martínez did instruct Orsini to channel all matters related to Albino's store, including telephone calls, through Martínez or his secretary. Notwithstanding, Martínez did not verify if Orsini continued visiting Albino's store or if he was following his instructions. A few months after Martínez's instructions, Orsini resumed his prior behavior towards Albino. The Court of First Instance found that Orsini incurred in conduct which constituted sexual harassment. It concluded that Albino's employer, after being put on notice of such conduct, failed to take corrective measures to correct the situation and prevent its recurrence. Consequently, it imposed joint liability on Albino's former employer and former co-worker. The Appeals Court affirmed and the Supreme Court agreed with the lower courts.

The Supreme Court defined immediate and appropriate measures as those which will reasonable and promptly put an end to acts of sexual harassment and will effectively prevent their recurrence. According to the Court, in these cases, the recurrence of sexually harassing conduct will not be determinative of the reasonableness of an employer's corrective measures, but it will be a factor in determining whether the corrective measures were reasonable.

In reaching its conclusion, the Court took into consideration the fact that Martínez did not follow up on the corrective measures that were imposed. The Court held that the corrective measures did not prevent Orsini from visiting Albino's store, did not prevent him from resuming his telephone communications with Albino and did not prevent him from attempting to kiss her. The recurrence of Orsini's behavior could have been prevented through the supervision of the situation and by making sure that the corrective measures were followed.

According to the Supreme Court, when an employer takes measures to correct or prevent sexual harassment, it must provide the victim and the alleged harasser notice of the nature or extent of the corrective measure which were taken. It also mentioned that, according to Act No. 17, employers have to create awareness of the prohibition of sexual harassment in the workplace and give publicity to policies and procedures about how to handle sexual harassment complaints in the workplace.

The Supreme Court noted that in this case, although the company had a manual which set forth the policies and procedures for the handling of sexual harassment acts in the workplace, it did not create awareness and give sufficient publicity about the contents of such policies to the employees. The Supreme Court emphasized that this is more important when the alleged harasser remains in the workplace.

As we can see, it is crucial for the employer to demonstrate that it took appropriate, effective and corrective steps when faced with sexual harassment in the workplace. It is also critical to demonstrate that immediate and effective actions were taken and that the consequences for the perpetrator are severe.

Please feel free to contact any of our labor and employment law attorneys if you have any further questions regarding the aforementioned issues.

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