Sexual Harassment: Are You Protected?

A COURT DECISION CLARIFIES INSURER'S LIABILITY

by KELLY JEAN BEARD

SAY YOU OWN A SMALL BUSINESS. You've hired a talented supervisor to manage 25 or 30 employees. Business looks great, profits increase, you're thinking about expanding. In fact, you're sitting at the dinner table talking about that very idea when you hear a knock on the front door, where two deputies are standing.

One hands you a summons and complaint. "Have a nice night."

You stare at a complaint filed by four female employees. You read the words over and over—"sexual harassment," "assault," "battery," "intentional infliction of emotional distress," "compensatory," "punitive," "damages," "attorneys' fees." None of them have a pleasing ring. In fact, the plaintiffs demand a million dollars. As you leave a message on your lawyer's voice mail, you're wondering if you'll lose the business, your savings, your house.

The next day your lawyer calls and tells you to bring the summons, complaint, certain corporate records, and all insurance policies by her office. She reviews the documents and sorts out the facts. Maybe your supervisor really did harass these female employees; maybe you didn't take the preventive and corrective measures required under recent decisional law—who knew? She reads your insurance policies, and asks if you have any employment-practices liability insurance. Nope, too expensive. But you've got standard commercial general-liability and umbrella policies. Surely one of those policies will cover sexual-harassment claims?

"Sorry, no coverage." That's what you would have heard had you asked that question a year earlier. And that's what you might hear today, if your lawyer hasn't paid close attention to a recent development in Georgia law. Now, your lawyer might find in your policy language that (according to the Georgia Supreme Court) requires your insurance carrier to defend your business against sexual-harassment claims.

The case, SCI Liquidating Corp. v. Hartford Insurance Co., spent six years winding its way through the judicial system. It started in 1994, when four female employees sued Sunrise Carpet Industries, Inc., alleging that one of Sunrise's managers sexually harassed them. Just like in the scenario above, someone was served with a summons and complaint alleging sexual-harassment claims, in addition to claims of retaliation, assault, battery, intentional infliction of emotional distress, and negligent hiring and retention. Sunrise checked with its insurers, Hartford Fire Insurance Co. and Hartford Casualty Insurance Co. Sunrise had a standard commercial general-liability insurance policy with Hartford Fire and an umbrella policy with Hartford Casualty. At first, Hartford Fire and Hartford Casualty defended the lawsuit under a reservation of rights. But, only for about four months. Then, both companies denied coverage and refused to defend the lawsuit. So, SCI Liquidating Corp. (the company that acquired Sunrise) did what it had to do: it retained counsel and defended the sexual-harassment suit.

When the suit finally went to a jury trial, the jury returned a pittance of a verdict: $4,000 total for all plaintiffs. But, as SCI may or may not have known at the time, that $4,000 verdict hid a much higher price tag. Under Title VII, the prevailing plaintiffs are entitled to attorneys' fees. Plus, of course, SCI had to pay its own attorneys. Plus costs. Plus expenses. In March 1997, after months of negotiations, the SCI tab sat just under $200,000. SCI paid about $81,000 to the plaintiffs to cover the verdict, attorneys' fees, costs, and interest, then paid its attorneys about $111,000 for fees and expenses associated with defending the lawsuit.

But SCI didn't let the Hartford companies off the hook so easily. Two months later, SCI sued Hartford Fire and Hartford Casualty, seeking reimbursement for its attorneys' fees, as well as the money paid to the plaintiffs under the terms of the negotiated settlement. On Aug. 12, 1998, the district court entered judgment in favor of SCI, finding that both the commercial general-liability policy and the umbrella policy provided coverage to SCI for the sexual-harassment claims. The court entered a judgment in favor of SCI for about $187,900, plus interest and costs.

Of course, Hartford Fire and Hartford Casualty raced to confer with their lawyers, who no doubt said, "The judge is all wrong. Let's appeal." And, before the ink could dry on the court's order, Hartford Fire and Hartford Casualty filed an appeal to the Eleventh Circuit Court of Appeals.

The question before the Eleventh Circuit was whether, under Georgia law, SCI's insurance policies covered the underlying sexual-harassment lawsuit. After reviewing the commercial general-liability policy in light of Georgia decisional law, the Eleventh Circuit concluded that Hartford Fire was correct: the commercial general-liability policy did not cover sexual-harassment claims. The policy limited liability to injuries resulting from an "occurrence" defined as an unexpected or unintended "accident." The policy specifically

itemized the categories of conduct contemplated as within the policy's purview as false arrest, malicious prosecution and defamation, and expressly excluded intentional discrimination from the "personal injury" definition.

The umbrella policy was a different story. It expressly *included* "discrimination or humiliation not intentionally committed by or at the direction of the insured" within the specifically itemized categories of conduct contemplated as within the meaning of an "occurrence." However, it expressly *excluded* injuries to "other employees rising out of and in the course of their employment." The court mulled this language and observed that neither the Georgia Supreme Court nor the Georgia Court of Appeals had ever ruled on this exact question: that is, whether sexual harassment by a coworker is conduct "arising out of and in the course of" an employee's employment? Given the lack of guidance by Georgia courts, the Eleventh Circuit certified this question to the Georgia Supreme Court.

The Georgia Supreme Court's answer was "No." The Supreme Court noted that although Georgia courts had not yet construed the terms "in the course of" and "arising out of employment" other than in workers' compensation cases, it made sense to construe those terms the same in the context of sexual harassment.

The Supreme Court explained that the term "in the course of" relates to "time, place and circumstances under which an injury takes place." The term "arising out of" relates to a "casual connection between the conditions under which the work is required to be performed and the resulting injury." In other words, although a sexual harassment "injury" may certainly arise "in the course of" a person's employment, it does not "arise out of" a person's employment because it is not a "risk of employment that a reasonable person could have foreseen due to the nature of the work." A reasonable secretary, for example, would not foresee sexual harassment as a risk of employment in the same way a reasonable firefighter would foresee burns as a risk of employment.

Accordingly, the Georgia Supreme Court concluded that SCI's umbrella policy covered the plaintiffs' underlying sexual-harassment claims.

The goods news for SCI is also good news for employers: even if a company doesn't have employment-practices liability insurance, it may have coverage for sexual-harassment claims under the terms of its commercial general-liability insurance or umbrella policies. At least until one of your insurer's attorneys reads this. ■

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