

## 1st Circuit: Employee's Failure to Notify Employer of Repeat Harassment Fatal to Claim

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By Susan M. Schaecher

An oral reprimand was an adequate response to an initial report of racial taunting, and a complaint of continued harassment made to a nonsupervisory leadperson did not trigger a duty in an employer to take further action or render it liable for harassment, according to the 1st Circuit Court of Appeals.

Employers may be held liable under Title VII of the Civil Rights Act of 1964 if they are responsible for creating or tolerating a hostile work environment. To recover for employee harassment by co-workers, an employee must show the employer knew or should have known of the harassment and failed to take prompt, appropriate remedial action. The answers to the questions of when knowledge is imputed to an employer and what constitutes appropriate remedial action depend on the circumstances.

Shortly after Arthur Wilson began working for the electrical utility contractor Moulison N. Corp., his co-workers began taunting him with racial epithets. The leadperson on the crew overheard and told them to stop, but the conduct continued.

Following the company policy as stated in the employee handbook, Wilson reported the conduct to the company's owner and chief executive officer. The next day, the CEO visited the worksite and berated the harassers, who did not deny making the racial slurs. The CEO warned them that repeat conduct would result in their dismissal. The CEO then apologized to Wilson for their conduct and told Wilson they would be dismissed if the conduct continued and to report any further problems to him without delay.

One of the employees continued to taunt Wilson, and his work relationships with others deteriorated. However, Wilson reported this only to the leadperson, and the leadperson took no action in response.

Wilson brought suit alleging a racially hostile work environment and retaliation. The district court granted summary judgment for the employer, and Wilson appealed only the hostile environment claim.

Wilson argued first that a verbal reprimand and warning was too mild given the nature of the conduct. The 1st Circuit held that an employer must be accorded some flexibility in selecting appropriate sanctions for particular instances of employee misconduct. The court offered that, "barring exceptional circumstances (not present here), a reasoned application of progressive discipline will ordinarily constitute an appropriate response to most instances of employee misconduct."

In this case, the court had before it no evidence that the perpetrators were repeat offenders, that racial discrimination was a long-standing problem for the employer or that the employer had a history of inconsistent discipline. The employer's response was consistent with its anti-harassment policy and the punishment fit the crime. The employer's action need not be such as will satisfy the complainant. The court rejected

plaintiff's argument that the warning was inadequate because it was ineffective as "nothing more than a post-hoc rationalization."

Wilson's second argument—that his second complaint to the leadperson put the employer on notice and created a basis for liability—failed because the court found the leadperson was not a supervisor. The policy directed employees to report harassment to a supervisor or an owner, and neither the CEO nor the policy had designated the leadperson to receive such complaints. Wilson had many opportunities to complain to the CEO and offered no explanation for failing to do so when the CEO had specifically directed him to report any further problems to him without delay.

*Wilson v. Moulison N. Corp.*, 1st Cir., No. 10-1387 (March 21, 2011).

**Professional Pointer** Adequate steps to prevent and correct harassment include addressing the possibility it may continue, despite disciplinary action. In addition to the steps described above, employers should check back periodically with employees who report harassment to ask if it has recurred, follow through on any further complaints and document these efforts.

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**Editor's Note: This article should not be construed as legal advice.**

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