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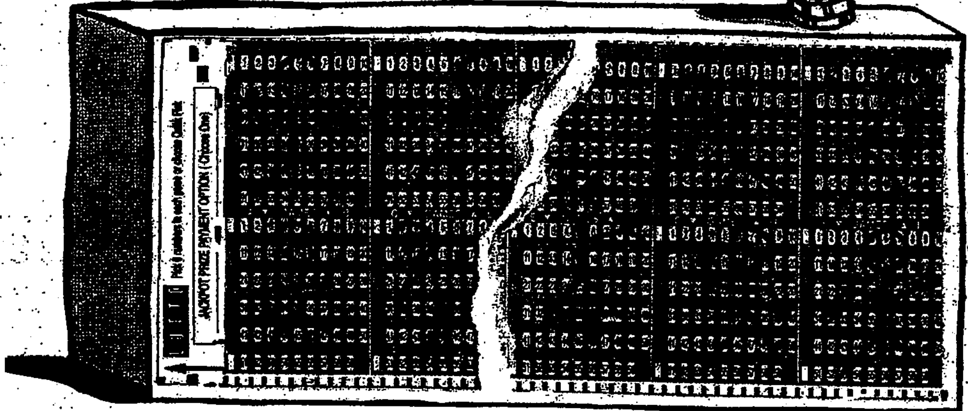
■ **SEX HARASSMENT SUIT**

No windfall after all

By Debra S. Katz and Alan R. Kabat SPECIAL TO THE NATIONAL LAW JOURNAL



KAREN CALDICOTT

THINK FILING A sexual harassment lawsuit is the key to a financial windfall? Consider Lisa Ocheltree's long, unavailing journey, and think again.

At first, it appeared that Ocheltree had triumphed, winning both compensatory and punitive damages.

For 18 months, she worked in the production area of a costume company, Scollon Productions. Her work space was near those of 10 or 11 male co-workers and the male shop supervisor. The men had engaged in some derogatory sexist banter and conduct among themselves before she worked there; after her arrival it escalated.

Male employees continually and graphically discussed their sexual exploits with their wives and girlfriends, including sexually explicit jokes. She was shown a photograph of pierced male genitalia. They often used a female mannequin as a prop to simulate sexual acts. Ocheltree complained repeatedly about the harassment to her co-workers and supervisor to no avail. The more she complained, the worse it became.

The company had no written sexual harassment policy; its handbook prohibited only loud behavior and verbal abuse. It referenced an "open door policy"; employees had to try to resolve problems first with their immediate supervisors before meeting with company executives.

On multiple occasions, the shop supervisor prevented Ocheltree from speaking with the president or vice president. When she managed to see them, she was ignored. At trial, both officials admitted that they rebuffed Ocheltree's efforts to speak with them because they believed that whatever she wanted to talk about "was not important." Ocheltree became depressed and was ultimately terminated.

The jury found not only that the sexist conduct was severe or pervasive, and had taken place because of Ocheltree's sex, but also that Scollon's management knew or should have known of this conduct, yet failed to take reasonable steps to stop it. The jury awarded her $7,280 in compensatory damages and $400,000 in punitive damages (reduced to $42,720 to comply with Title VII of the 1964 Civil Rights Act's statutory cap of $50,000 for employers with fewer than 101 employees).

Verdict reversed

On appeal, the 4th U.S. Circuit Court of Appeals reversed the verdict, stating that "Ocheltree would have been exposed to the same atmosphere had she been male. Of the catalogued offensive behavior, only three incidents were directed toward Ocheltree....The remainder...occurred in group settings as part of the male workers' daily bantering toward one another and was overheard or witnessed by Ocheltree....[T]he men's behavior did not begin or change as of the date Ocheltree began working with Scollon Productions but had been ongoing before she came to work for Scollon Productions."

The court found no hostile work environment could exist "because of" a female employee's gender—a necessary element to a sexual harassment claim—if the male employees had engaged in similarly offensive conduct before the female employee joined the workplace.

The dissent rightly blasted the majority's approach, demonstrating how irrational it would be if applied in the context of a racial harassment claim.

The 4th Circuit granted a rehearing following a round of sharp criticism by civil rights advocates and others. En banc, it held that even though the sexual atmosphere predated Ocheltree's arrival, the remarks and conduct escalated significantly, particularly after she complained during a shop meeting. And several of the acts were directed specifically toward her; they were never directed at her male co-workers. However, the en banc court did not expressly repudiate the panel's questionable holding that because offensive conduct existed in this workplace before women were hired, the conduct did not occur "because of" her gender and, therefore, no claim for sexual harassment existed.

The en banc court also set aside the punitive damages award, bucking applicable precedent, including its own. Under *Kolstad v. American Dental Ass'n*, the U.S. Supreme Court held that an employer is liable for punitive damages if it engages in intentional discrimination "with malice or with reckless indifference to the plaintiff's federally protected rights." The high court explained that (with narrow exceptions) evidence of intentional discrimination also supports potential liability for punitive damages. And in *Anderson v. G.D.C. Inc.*, the 4th Circuit recognized that punitive damages are warranted where the employer's compliance efforts were nonexistent or wholly inadequate.

So where does this leave Ocheltree? After enduring highly offensive and unlawful treatment for 18 months, she will receive only $7,280 (less taxes on that and on the statutory attorney fee). A pending law—the Civil Rights Tax Relief Act of 2003—would exclude the fees and expenses from a plaintiff's tax bill, but it would not apply retroactively to Ocheltree. Any way you look at it, this is an unfair result. Those individuals who insist that civil rights litigants bring frivolous cases because going to court is tantamount to playing the lottery should read this case. NLJ

Debra S. Katz is a partner at Washington's Bernabei & Katz, a civil rights firm. Alan R. Kabat is a senior associate at the firm.