

Information Database

Supervisor's Remark About Propensity of Men to Harass Is Evidence of Discrimination

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On May 22, 2009, the U.S. Court of Appeals for the Second Circuit held that a supervisor's statement indicating that men have a propensity to commit sexual harassment, coupled with the employer's failure to properly investigate allegations of sexual harassment, are sufficient to infer that the accused harasser was the victim of illegal sex stereotyping. *Sassaman v. Gamache* (2d Cir. 2009). This case is particularly noteworthy because reverse discrimination claims are quite rare and almost never succeed.

In early 2003, plaintiff Carl Sassaman joined the staff of the Dutchess County Board of Elections as an elections administrator working under David Gamache. After an error in printing ballots in October 2004 caused an additional expense for the board, Gamache demoted Sassaman to elections specialist, effective January 1, 2005, and promoted Michelle Brant, an election specialist, to elections administrator. Sassaman and Brant enjoyed a friendly working relationship prior to the reversal of their job positions. But their relationship subsequently soured in late January 2005 following a telephone call Sassaman placed to Brant. The particulars of the call were the subject of sharp debate, but both parties allegedly came away feeling the other was interested in a sexual relationship.

In early March 2005, Sassaman logged into Brant's computer to read an email containing his name that he observed her typing the previous day. Brant reported to Gamache that her email account had been breached. When questioned by Gamache and a deputy commissioner of the Board, Sassaman admitted to accessing Brant's email account. The parties disputed whether Sassaman was warned against continuing the conduct.

Within days of that incident, Gamache called another meeting with Sassaman to inform him that Brant complained that Sassaman was "harassing and stalking her" and, as a result, she stayed out of the office. Sassaman was suspended with pay. On March 10, 2005, Brant submitted a written complaint of harassment and stalking against Sassaman. Without conducting an internal investigation, Gamache referred the complaint to the Dutchess County Sheriff's Office. Upon completing its investigation, the Sheriff's office concluded, in a report dated March 16, 2005, "At this time insufficient evidence exists to support any type of criminal charges."

Less than a week later, on March 21, 2005, Gamache informed Sassaman by telephone that he would be terminated unless he chose to resign. According to Sassaman, Gamache stated, "I really don't have any choice. [Brant] knows a lot of attorneys; I'm afraid she'll sue me. And besides you probably did what she said you did because you're male and nobody would believe you anyway." In response, Sassaman resigned effective April 1, 2005.

After exhausting his administrative remedies, Sassaman brought an action in the district court alleging that Gamache, Dutchess County, and the board terminated him on the basis of sex stereotyping in violation of Title VII. The district court granted summary judgment to all the defendants, finding that Sassaman failed to present a prima facie case, that is, he did not identify "evidence which would permit a rational fact finder to find an inference of discrimination based on sex." The district court discounted Gamache's statements as "stray," "ambiguous," and incapable of demonstrating actionable gender stereotyping.

On appeal, the Second Circuit reversed the grant of summary judgment in favor of Dutchess County and the board and remanded the case to the district court for a jury trial.

Sassaman argued that he met his summary judgment burden by showing (1) Gamache made a statement that could be construed as an invidious comment about the propensity of men to sexually harass their female colleagues, and (2) his employer failed to properly investigate the charges of sexual harassment Brant brought against him. The court of appeals agreed that a reasonable jury could construe Gamache's statement as reflecting stereotypical assumptions about men, in that he appeared to credit Brant's allegations by pointing to the propensity of men, as a group, to sexually harass women. Rejecting the district court's characterization of the Gamache's remark as "stray," the court of appeals determined that the statement is especially probative because it was made close to the alleged discriminatory action-during the same telephone call in which Gamache pressured Sassaman to resign-and emphasized that fear of a lawsuit does not justify reliance on sex stereotypes as the basis for an employment decision.

The court of appeals also agreed with Sassaman that the defendants' minimal efforts to internally investigate Brant's accusations could be construed as further evidence of discriminatory intent. After acknowledging it is not the role of the federal courts to second-guess employment decisions and the processes by which those decisions are made, the court of appeals pointed out that Title VII suits often require consideration of whether an employer's response to an allegation is itself discriminatory. Indeed, just as the lack of investigation of alleged harassment may factor into the determination of an employer's liability for discrimination against the complainant, so too may it indicate discrimination by the employer against the putative harasser. Although, as the court of appeals observed, an insufficient investigation leading to an adverse employment action against the accused is not, on its own, sufficient to infer discriminatory intent, a different picture emerges when a Title VII plaintiff can point to other evidence that could reasonably be interpreted as indicating that discrimination influenced an adverse employment action, such as gender stereotypes.

Employer Notes: The *Sassaman case*, which addressed an issue of first impression in the Second Circuit, offers valuable lessons about how employers should handle harassment claims. All claims of harassment should be investigated promptly and thoroughly. An employer's fear of a lawsuit by the complainant cannot serve as a basis for an unsubstantiated termination of an accused harasser. Investigations should involve extensive, well-documented interviews of both the complainant and the accused. And, of course, the employer should not take any adverse employment action without a valid, justifiable basis for doing so.

Also, managers and other personnel who are charged with handling such investigations should be reminded of the need to eliminate sex-based stereotypes from the analysis and refrain from making verbal or written comments, inferences, or statements or offering their opinions about the matter to *anyone*. Otherwise, the outcome of the investigation could be tainted by an apparent discriminatory bias.

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