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**THE SEVENTH CIRCUIT HOLDS THAT ALLEGED
HARASSMENT AFTER A COMPLAINT OF SEXUAL
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HARASSMENT UNDER TITLE VII:
*BERRY v. DELTA AIRLINES, INC.***

CHARLES C. FLORSHEIM

TITLE VII of the Civil Rights Act of 1964 proscribes workplace discrimination based on an employee's gender.¹ This prohibition does not extend to all hostile or harassing behavior, but focuses only on those terms or conditions of employment that are adversely affected because of the employee's sex.

In *Berry v. Delta Airlines, Inc.*,² the Seventh Circuit examined whether a hostile work environment motivated by an employee's complaint of sexual harassment falls under this proscription against sex discrimination. By correctly applying the reasoning of established Title VII precedent, the court concluded that post-complaint harassment is not a continued form of sex discrimination when it is motivated by a desire to punish the employee for complaining, and not by an anti-female animus. The opinion, however, fails to offer detailed substantive guidance concerning the manner in which the employee could have established that the post-complaint harassment was in fact motivated by an anti-female animus. The court appears to hold that where the post-complaint harassment is not overtly sexual, a plaintiff's only recourse under Title VII is under a claim of retaliation, which must be alleged separately from a claim of sexual harassment.

¹ 42 U.S.C. § 2000e-2(a)(1) (2002). Employers may not "discriminate against an individual with respect to compensation, terms, conditions, or privileges of employment, because of such individual's race, color, religion, sex, or national origin." *Id.*

² *Berry v. Delta Airlines, Inc.*, 260 F.3d 803 (7th Cir. 2001).

Under the facts of the case, the Ninth Circuit found it “likely” that the continued harassment would not have occurred but for the sexual harassment complaint, but that this is “too remote a connection” to gender to convert a retaliation claim into a gender-based discrimination claim.³ The underlying sexual harassment complaint was brought to the attention of Delta Airlines three months before the Title VII suit was filed. Delta employed Elise Berry as a customer service agent at its Chicago O’Hare Airport cargo facilities.⁴ Her job required her to enter the warehouse portion of Delta’s cargo building and interact with Fikret Causevic, an employee of Argenbright Security, a company that Delta contracted to provide baggage handling services.⁵ Berry complained to Roger Blocker, a Delta regional manager, that Causevic had been sexually harassing her, both verbally and physically, for over eight months.⁶ Blocker immediately contacted Delta’s Equal Opportunity Office and followed their instruction on how to handle the claim. After interviewing several Delta and Argenbright employees, including Causevic, Blocker was unable to confirm the allegation.⁷

Blocker did take some corrective measures. Causevic’s schedule was changed, significantly reducing his contact with Berry, and both Delta and Argenbright employees were required to watch a sexual harassment video.⁸ Subsequently, Berry reported to Blocker that other employees mocked her, refused to work with her, were rude, and uncooperative.⁹ This caused Berry so much stress that she would break down and cry at work. However, Berry admitted that the sexual component of the harassment stopped as soon as she made her original complaint to Blocker.

A month after first speaking with Blocker, Berry filed a charge with the Equal Employment Opportunity Commission and received a right to sue letter.¹⁰ Berry thereafter filed a single-count claim against Delta and Argenbright, alleging that they

³ *Berry*, 260 F.3d at 811. Title VII delineates sex discrimination and retaliation claims. The court commented that “holding otherwise would force us to conclude that every claim of retaliation for filing charges of discrimination would be a claim of discrimination.” *Id.* at 809.

⁴ *Id.* at 804.

⁵ *Id.*

⁶ *Id.* at 803.

⁷ *Id.* at 805-06.

⁸ *Id.* at 806.

⁹ *Id.* at 807.

¹⁰ *Id.*

“failed to take prompt and appropriate corrective action to remedy a hostile work environment created by Causevic’s sexual harassment.”¹¹ The complaint did not state that Causevic or any other employee had retaliated against Berry for complaining about the harassment.¹²

After the court dismissed the claims against Argenbright, Delta Airlines was granted summary judgment.¹³ The district court found no liability for the pre-complaint sexual harassment nor any basis for the post-complaint sexual harassment. Delta was not liable for the claimed harassment occurring prior to Berry’s initial complaint to Blocker because upon learning of the harassment, Delta “took steps reasonably likely to prevent” further harassment.¹⁴ Moreover, the district court found that all gender-based harassment ceased after Berry first complained to Blocker, and that the post-complaint harassment, by Berry’s admission, was retaliatory. The court rejected Berry’s argument that this retaliatory harassment was a continued form of sexual discrimination, since nothing in the record suggested that the hostile treatment was motivated by Berry’s gender. As Berry neither alleged a claim of retaliation in her complaint nor argued that theory in opposition to Delta’s summary judgment motion, there was no issue of material fact for trial.

On appeal, the Seventh Circuit affirmed the holding of the district court.¹⁵ Writing for the court, Judge Bauer first addressed Delta’s liability for the claimed harassment that occurred prior to Berry’s complaints to Blocker.¹⁶ Judge Bauer reasoned that Delta satisfied its obligations under Title VII because it neither knew nor should have known of the problem before Berry complained, and it took prompt action reasonably calculated to end the harassment and reasonably likely to prevent it from recurring when the sexual harassment was reported.¹⁷

Next, the court addressed the hostile workplace that occurred after Berry complained to Blocker.¹⁸ The court began its analysis by providing that Title VII proscribes only workplace discrim-

¹¹ *Id.*

¹² *Id.* at 808.

¹³ *Id.*

¹⁴ *Id.*

¹⁵ *Id.* at 804.

¹⁶ *See id.* at 811.

¹⁷ *Id.* at 813.

¹⁸ *See id.* at 808.

ination on the basis of sex, race, or some other protected status.¹⁹ Inappropriate conduct inflicted regardless of sex is outside the statute's ambit and an employer cannot be held liable for creating or condoning a hostile work environment unless the hostility is motivated by one of the proscribed characteristics.²⁰ Applying this reasoning to the facts, the court pointed out that Berry had offered nothing suggesting that gender motivated the post-complaint harassment rather than a sole desire to punish her for her complaint.²¹

The court rejected Berry's argument that even though the instances of post-complaint harassment were not overtly sexual, they should be considered along with Causevic's earlier, obviously sexual actions as part of a single, ongoing gender-based harassment campaign made possible by Delta's failure to take prompt and appropriate corrective action in response to her complaints.²² Berry cited a string of cases intended to support her argument that Title VII's coverage is broad and remedial, embracing much more than patently obvious sexual behavior in the workplace and that harassing conduct need not be motivated by sexual desire to support an inference of discrimination on the basis of sex.²³ But the court responded by pointing out that while the cases cited by Berry correctly stressed that gender-based harassment need not be overtly sexual and may include ridicule, ostracism, and other forms of hostility motivated by an anti-female animus, they do not hold that hostile behavior by co-workers is actionable as sexual harassment if not based on gender.²⁴ Even if Delta was partly responsible for the abusive post-complaint atmosphere by not doing enough to stop it, the court believed that this would not alone make them liable for sexual harassment.²⁵

¹⁹ *Id.*

²⁰ *Id.*

²¹ *Id.* at 811.

²² *Id.* at 810.

²³ *See id.*; *see also* Oncale v. Sundowner Offshore Serv., Inc., 523 U.S. 75, 80 (1998) ("harassing conduct need not be motivated by sexual desire to support an inference of discrimination on the basis of sex"); O'Rourke v. City of Providence, 235 F.3d 713, 729-30 (1st Cir. 2001) (ruling that "where a plaintiff endures harassing conduct, although not explicitly sexual in nature, which undermines her ability to succeed at a job, those acts should be considered along with overtly sexual abusive conduct in assessing a hostile work environment claim," and that "incidents of non-sexual conduct such as work sabotage, exclusion, denial of support, and humiliation can in context contribute to a hostile work environment").

²⁴ *Berry*, 260 F.3d at 810.

²⁵ *Id.*

In concluding that incidents occurring after Berry's complaints to Blocker were not actionable as sexual harassment under Title VII, the court reasoned that while Title VII may impose liability on an employer for creating or tolerating a hostile environment motivated purely by the plaintiff's filing of a complaint of sexual harassment, this is a form of retaliation, and it must be argued as such.²⁶ Since Berry did not plead retaliation in her complaint, nor did she argue a theory of retaliation to the district court in resisting Delta's motion for summary judgment, her claims of retaliatory post-complaint harassment were deemed irrelevant to the analysis of her sexual harassment claim.²⁷

The *Berry* court correctly refused to apply Berry's interpretation of Title VII cases such as *Oncala v. Sundowner Offshore Services, Inc.* and *O'Rourke v. City of Providence*, and instead properly applied the reasoning and rules in those cases to the facts of the dispute in holding that the actions of Delta's contractors after Berry had complained to Blocker failed to constitute actionable sexual harassment under Title VII. Title VII provides, in relevant part, that "it shall be unlawful employment practice for an employer. . .to discriminate against any individual with respect to his compensation, terms, conditions, or privileges of employment, because of such individual's race, color, sex, or national origin."²⁸ The Supreme Court has held that when the workplace is permeated with discriminatory intimidation, ridicule, and insult, sufficiently severe or pervasive to alter the conditions of the victim's employment and create an abusive working environment, Title VII is violated.²⁹ Courts have long recognized that sexual harassment is a "form of gender discrimination prohibited by Title VII."³⁰ Thus, the critical issue for the determination of sexual harassment claims under Title VII is whether members of one sex are exposed to disadvantageous terms or conditions of employment to which members of the other sex are not exposed.³¹ Whatever evidentiary route the plaintiff chooses to follow, he or she must always prove that the conduct at issue actually constituted discrimination because of sex.³²

²⁶ *Id.*

²⁷ *Id.* at 809-10.

²⁸ 42 U.S.C. § 2000e-2(a)(1) (2002).

²⁹ *Harris v. Forklift Systems, Inc.*, 510 U.S. 17, 21 (1993).

³⁰ *Provencher v. CVS Pharmacy*, 145 F.3d 5, 13 (1st Cir. 1998).

³¹ *Id.* at 25 (Ginsburg, J., concurring).

³² *Id.* at 81.

Upon an initial reading of these cases, the arguments that Berry relied upon before the court appear persuasive and applicable to the instant dispute. In general, the overwhelming majority of courts examining claims under Title VII believe that courts should avoid disaggregating a hostile work environment claim, dividing conduct into instances of sexually oriented conduct and instances of unequal treatment, and then discounting the latter category of conduct.³³ The prevailing belief is that such an approach of disaggregating prevents courts from considering the totality of circumstances in each case and “robs the incidents of their cumulative effect.”³⁴ Moreover, such an approach not only ignores the reality that incidents of nonsexual conduct—such as work sabotage, exclusion, denial of support, and humiliation—can in context contribute to a hostile work environment.³⁵ Therefore, the concern underlying this line of cases is that an employer might escape liability, even if it knew about certain conduct, if that conduct is isolated from a larger pattern of acts that, as a whole, would constitute an actionable hostile work environment.³⁶

In light of these arguments, the ultimate conclusion of the *Berry* court—that the actions against Berry after her complaints to Blocker were purely retaliatory, and not gender-based—at first seems difficult to comprehend. Common knowledge and experience render it unlikely that such behavior can be separated entirely from the undeniably gender-based sexual harassment that occurred prior to the complaints by Berry to Blocker. However, a careful reading of the opinion indicates that the court does not say that gender did not motivate these post-complaint actions. Rather, the critical factor in this analysis is that established precedent in the area of Title VII sexual harassment provides that the plaintiff must always prove that the conduct at issue actually constituted discrimination because of sex.³⁷ In its opinion, the *Berry* court pointed out that Berry had offered nothing suggesting that the post-complaint harassment was motivated by gender rather than a sole desire to punish her for her complaint.³⁸ The court thus provided that although Berry was

³³ See *O'Rourke*, 235 F.3d at 730.

³⁴ See *id.* (citing *Williams v. General Motors Corp.*, 187 F.3d 553, 561 (6th Cir. 1999)); *Meritor Sav. Bank, FSB v. Vinson*, 477 U.S. 57 (1986).

³⁵ *Id.*

³⁶ See *id.*

³⁷ *Id.* at 810.

³⁸ *Id.*

likely to show that the post-complaint harassment would not have occurred but for her complaining of sexual harassment, this was too remote a connection to gender to itself convert the retaliatory harassment into gender-based harassment. Therefore, even if Delta was partly responsible for the abusive post-complaint atmosphere by not doing enough to stop it, the court believed that this would not alone make them liable for sexual harassment.

In conclusion, while this opinion correctly applies the established Title VII precedent to arrive at its holding, the court fails to offer any guidance concerning the manner in which Berry could have established that the post-complaint harassment was in fact motivated by an anti-female animus. Under these facts, where the post-complaint harassment was not overtly based on sex, Berry appeared to make the only argument that was available to her, one based on the cumulative effects of the harassment. However, absent the presentation of evidence clearly evincing an anti-female animus, evidence that was simply not available to Berry, such a claim of sexual harassment apparently cannot be maintained. Thus, this case stands for the proposition that in similar cases, where the post-complaint harassment is not overtly sexual, a plaintiff's only recourse under Title VII is under a claim of retaliation, which must be alleged separately from a claim of sexual harassment.

