Ouch! Fourth Circuit Reminds North Carolina Company Of Its Responsibility To Protect Employees—even From Its Customers

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As lawyers, we regularly train our clients (and their employees) about anti-harassment, anti-discrimination laws—emphasizing their responsibility to protect employees even from the bad behavior of vendors, contractors and customers. Last week, the Fourth Circuit Court of Appeals drove home the lesson of third-party harassment. In other words, we really mean it. The North Carolina-based case of *Freeman v. Dal-Tile Corp., et al*., (4th Cir. 2014) involves a plaintiff employee who claimed years of sexual and racial harassment by an independent contractor of Dal-Tile. The list of misdeeds by the independent contractor is a long one: he called the plaintiff a "black b****," regularly bragged about his sexual exploits, passed gas on the plaintiff's phone, and even used the "n" word in front of the employee. But, the District Court issued summary judgment in favor of the company, finding that the company did not know about the harassment, and that when it knew, its response was appropriate. Not so fast. Represented by Georgetown University's legal clinic, the former employee appealed. In a split decision, the Fourth Circuit *reversed* the summary judgment, finding that "the record is replete with evidence of frequent abusive behavior…" such that the company *knew or should have known* about the third-party harassment, but failed to take prompt remedial action. The Fourth Circuit adopted the same reasoning it applies to co-worker harassment: "an employer cannot avoid Title VII liability… by adopting a 'see no evil, hear no evil' strategy." The dissent acknowledged that the behavior of the third-party harasser was "coarse, crude and ugly," but noted that the company told him to stop, and then, for a lengthy period, the plaintiff and the accused worked well together. When the third-party harasser resumed his bad behavior, according to the dissenting judge, the employer intervened effectively. Based on the majority's ruling, the Fourth Circuit sent the case back to the trial court to determine whether the company is responsible for the third-party hostile environment harassment; that is, to decide if Dal-Tile responded swiftly and decisively enough once it knew of the inappropriate conduct. The eventual victor is largely immaterial; at this point, the battle itself is costly and embarrassing. We don't often see cases of third-party harassment. As employers, we cannot ignore "coarse, crude and ugly" conduct, regardless of the source, because we think it's funny, it doesn't happen often, it would alienate the customer, or (as in this case) the bad-actor is "just an a**hole." On too many levels, tolerating such behavior is bad for business.

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