

THIRD-PARTY SEXUAL HARASSMENT IN CASINOS: HOW TO PROTECT AGAINST LIABILITY

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I. INTRODUCTION

With the rapid expansion of the U.S. gaming industry in recent years, casinos have become major national employers.¹ A large proportion of casino workers, such as dealers and cocktail waitresses, are employed “front-of-house” and have direct contact with the gaming public. In the casino atmosphere, where alcohol and adult-orientated entertainment pervades, such employees are vulnerable to abuse by customers, particularly female staff members who may become the target of sexual harassment. Under some circumstances, casinos themselves can be held liable for the harassing actions of their customers. This article will discuss the potential problem of third-party sexual harassment in the casino industry. It will focus on how employers can be held liable for sexual harassment of their staff by customers, and what actions they can take in order to limit their liability.

II. SEXUAL HARASSMENT CLAIMS UNDER TITLE VII

a) Overview of Title VII

Most sexual harassment claims are brought under Title VII of the Civil Rights Act of 1964.² In order for an employee to be protected under this statute, their employer must

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¹ The casino workforce in the United States increased 79 per cent between 1990 and 2005 from 198,657 to 354,921 respectively, thanks mainly to the introduction of riverboat casinos in several Midwestern states and Indian casinos on tribal lands. *See* American Gaming Industry Fact Sheets: Casino Employment, *available at* http://www.americangaming.org/Industry/factsheets/general_info_detail.cfv?id=28 (last visited Oct. 28, 2008).

² 42 U.S.C. § 2000e (2005).

employ fifteen or more employees and be engaged in an industry affecting commerce.³ Section 703 of Title VII prohibits discrimination against an employee “because of such individual’s race, color, religion, sex, or national origin.”⁴ Although the express language of Title VII does not specifically mention sexual harassment, in 1980 the EEOC issued guidelines which hold an employer liable for sexual harassment under Title VII.⁵ These guidelines distinguish between two types of harassment – “quid pro quo” harassment and “hostile work environment.”

Quid Pro Quo harassment is defined by the EEOC as occurring when “submission to [sexual] conduct is made either explicitly or implicitly a term or condition of an individual’s employment [or when] submission or rejection of such conduct by an individual is used as the basis for employment decisions affecting such individual.”⁶ In other words, the abusive treatment is directly linked to the employee’s economic reward or status. Since this type of sexual harassment is usually perpetrated by a supervisory employee against another employee, quid pro quo harassment is not relevant to this article and will not be discussed further.

The majority of recent sexual harassment cases have involved hostile working environments. This occurs when an employer allows or encourages the existence of an abusive workplace environment based upon a person’s sex, which alters the terms and conditions of employment.⁷ The EEOC guidelines state that conduct is actionable under Title VII if it has the “purpose or effect of unreasonably interfering with an individual’s

³ 42 U.S.C. § 2000e(b) (2005).

⁴ 42 U.S.C. § 2000e-2(a)(1) (2005).

⁵ 29. C.F.R § 1604.11(a) (2003).

⁶ 29. C.F.R § 1604.11(a)(1) and (2) (2003).

⁷ 29. C.F.R § 1604.11(a) (2003).

work performance or creating an intimidating, hostile, or offensive working environment.”⁸

After the EEOC guidelines were issued, lower courts held that a cause of action for hostile work environment based on sexual harassment could be brought under Title VII.⁹ The Supreme Court agreed when it passed its decision in *Meritor Savings Bank v. Vinson* in 1986.¹⁰ In *Meritor*, the court held that in order to prove a case of hostile work environment sexual harassment, the plaintiff must show: (1) they were subjected to unwelcome sexual harassment, including verbal or physical conduct of a sexual nature; (2) the harassment was sufficiently severe or pervasive to alter the conditions of employment and create an abusive working environment; (3) the harassment was based on sex, and; (4) the employer knew, or should have known of the harassment and failed to take prompt, remedial action.¹¹

b) Elements of Hostile Work Environment

i. *Unwelcome*

As one court has stated “[w]elcome sexual harassment is an oxymoron,”¹² and so the offensive conduct that forms the basis of the sexual harassment claim must be unwelcome. Unwelcome means that the victim did not solicit or incite the alleged sexual-harassing conduct, and they must also have regarded it as undesirable and offensive.¹³

Obviously, welcome conduct does not meet the requirements for sexual harassment, and

⁸ *Id.*

⁹ *See e.g.* *Katz v. Dole*, 709 F.2d 251, 254-55 (4th Cir. 1983), *and Henson v. City of Dundee*, 682 F.2d 897, 902 (11th Cir. 1982).

¹⁰ 477 U.S. 57 (1986).

¹¹ *Id.* at 66-68, 71-72.

¹² *Carr v. Allison Gas Turbine Div., Gen Motors Corp.*, 32 F.3d 1007, 1008 (7th Cir. 1994).

¹³ *Henson v. City of Dundee*, 682 F.2d 897 (11th Cir. 1982).

some courts have suggested that in order to find that the conduct was welcome, it must be demonstrated that the plaintiff enjoyed, or appeared to enjoy it.¹⁴ Some courts have found that alleged sexually harassing conduct, such as using sexually explicit language, cannot be held to be unwelcome if the plaintiff uses similar language themselves.¹⁵ Others, however, have held that participation in such conduct does not necessarily mean that the victim invited or welcomed the hostile or abusive environment.¹⁶

Perhaps the key factor with the unwelcomeness requirement is the amount of time it takes for an alleged sexual harassment victim to complain of the unwelcome conduct. If a complaint of the offensive behavior is immediately passed on to the employee's supervisor or another person in authority, then questions in the minds of the jury and court concerning the welcomeness of the conduct are less likely to occur.¹⁷ On the other hand, if the employee delays her reporting of the conduct, the jury and court may question whether the conduct was truly unwelcome.¹⁸

ii. *Severe and Pervasive*

In order to prove a Title VII sexual harassment violation, the plaintiff must demonstrate that the offensive behavior is sufficiently severe or pervasive from both an objective and subjective standpoint.¹⁹ With regard to the subjective test, the victim must perceive the conduct to have created an abusive environment which altered the conditions of his or her employment.²⁰ Most courts take the plaintiff's word for this, and attempts to demonstrate

¹⁴ See Reed v. Shepard, 939 F.2d 484, 491 (7th Cir. 1991).

¹⁵ See e.g. Hocever v. Purdue Frederick Co., 223 F.3d 721, 736 (8th Cir. 2000).

¹⁶ See e.g. Gray v. Tyson Foods, Inc. (W.D. Mo. March 23, 1999).

¹⁷ RAYMOND F. GREGORY, WOMEN AND WORKPLACE DISCRIMINATION 140 (2003).

¹⁸ *Id.* at 140-141.

¹⁹ Harris v. Forklift Sys., Inc., 510 U.S. 17, 21-22 (1993).

²⁰ *Id.*

that a plaintiff would not be subjectively offended by certain behavior due to their background, sexual history, or activities in private life have generally failed.²¹ For example, in *Burns v. McGregor*, the Eighth Circuit held that posing nude for a motorcycle magazine is not relevant to the question of whether a woman subjectively finds sexually harassing behavior at work offensive.²² To find such evidence relevant, the court reasoned, would allow the possibility of a complete stranger in the workplace conducting sexual behavior a female employee accepts from her husband or partner.²³

In determining whether the alleged sexual harassment is objectively severe or pervasive, the Supreme Court in *Oncale v. Sundowner Offshore Servs., Inc.*, stated that the standard to be used should be a “reasonable person in the Plaintiff’s position.”²⁴ Furthermore, the conduct must be viewed in the context of whether it was “reasonable under the circumstances,” analyzed on a case by case basis.²⁵ However, the Ninth Circuit continues to use a “reasonable person of the victim’s gender” standard to determine whether the conduct was objectively severe or pervasive.²⁶ This perspective recognizes that behavior which men may find harmless could be offensive to women due to differences in vulnerability between genders.²⁷ For example, the fact that women are more likely to be victims of sexual crime may lead them to view even mild forms of sexual harassment as an indication that a sexual assault is imminent.²⁸

²¹ Ann C. McGinley, *Harassment of Sex(y) Workers: Applying Title VII to Sexualized Industries*, 18 YALE J.L. & FEMINISM 65, 106 (2006).

²² 989 F.2d 959 (8th Cir. 1993).

²³ *Id.* at 963.

²⁴ 523 U.S. 75, 81 (1998).

²⁵ *Id.*

²⁶ See *Fielder v. UAL Corp.*, 218 F.3d 973, 985 (9th Cir. 2000), *citing* *Ellison v. Brady*, 924 F.2d 872, 875-76 (9th Cir. 1991) .

²⁷ *Ellison*, 924 F.2d at 878.

²⁸ *Id.* at 879.

iii. *Because of Sex*

A further requirement for sexual harassment claim under Title VII is that the plaintiff “must show that ‘but for’ his race [or sex] he would not have been the victim of the alleged discrimination [harassment].”²⁹ Courts have made the distinction between harassment based on sex or gender, which is clearly forbidden by Title VII, and same-sex harassment based on sexual orientation, which is not prohibited.³⁰ Generally, if the harasser is a heterosexual man, the victim is a woman, and the harassment includes sexual comments or touching, then courts have concluded that the harassment occurred because of the victim’s sex.³¹

iv. *Failure of Employer to Take Action*

An employer’s liability for a hostile work environment depends on who the harasser or harassers are. If the harassers are customers, then courts apply a negligence standard, whereby liability will attach if the employer “knows or should have known of the conduct, and fails to take immediate and appropriate corrective action.”³² Thus, an employer who learns about the sexual harassment of an employee by a customer needs to address the situation in a swift and diligent manner. What constitutes sufficient action by the employer depends on the circumstances. For example, corrective action may include making sure that the harasser and employee do not have further contact, or refusing to do business with the harasser.³³ This could be achieved by moving the employee to another

²⁹ Causey v. Balog, 162 F.3d 795, 801 (4th Cir. 1998).

³⁰ Ann C. McGinley, *Harassing “Girls” at the Hard Rock: Masculinities in Sexualized Environments*, 2007 U. ILL. L. REV. 1229, 1263 (2007).

³¹ Oncale v. Sundowner Offshore Ser., Inc., 523 U.S. 75, 80 (1998).

³² 29 C.F.R. § 1604.11(e) (2003).

³³ See Michelle Holman Kerin, *Little Lessons on Sexual Harassment by Nonemployees*, Jun. 1, 2001, at <http://www.farleighwitt.com/showarticle.aspx?Show=287>.

gaming table or area of the casino, or by barring the customer from playing at the casino. Although such a move as excluding a customer could cause great expense for the casino, especially if they are a high-roller, it may be necessary in order to save the expense of litigation and a potentially large damages award.

Another issue which employers need to be wary of is overly-provocative uniforms. There is a small body of case law that recognizes that uniforms which invite sexual harassment can result in an employer being held liable under Title VII. For example, in *EEOC v. Newton Inn Associates*,³⁴ cocktail waitresses were made to wear revealing clothing for such themed events as “Bikini Night,” “P.J. Night,” and “Whips and Chains Night.”³⁵ The EEOC filed suit on behalf of the women, claiming that “[a]s a consequence, the employees were subjected to unwelcome sexual proposals and both verbal and physical abuse of a sexual nature.”³⁶ The case law suggests that if employers require their staff to dress in such uniforms, they must have a well-planned system in place for responding to and remedying sexual harassment complaints that arise as a result.³⁷

III. RELEVANT CASES INVOLVING THE CASINO INDUSTRY

There have been a number of lawsuits brought against casinos by employees for sexual harassment by customers. In *Powell v. Las Vegas Hilton Corp.*, a woman blackjack dealer alleged that she was the victim of unwelcome staring and sexually-explicit verbal

³⁴ 647 F. Supp. 957 (E.D. Va. 1986).

³⁵ *Id.* at 958.

³⁶ *Id.*

³⁷ Gregory J. Kamer & Edwin A. Keller Jr., *Give Me \$5 Chips, a Jack and Coke – Hold the Cleavage: A Look at Employee Appearance Issues in the Gaming Industry*, 7 GAMING L. REV. 335, 344 (2003).

abuse by customers.³⁸ The plaintiff claimed that she complained to management about the incidents on three or four occasions, but no action was taken, and she was eventually fired for rudeness to customers.³⁹ The court denied the defendant's motion for summary judgment, stating that an employer may be held liable for sexual harassment by non-employees.⁴⁰ Furthermore, the court rejected the casino's defense that "it is inevitable in a job that requires constant contact with the public (particularly one in a city that is a 'fun' destination where people sometimes imbibe to excess and often lose more money than they should) that customers will sometimes make inappropriate comments, sexual or otherwise."⁴¹

Hilton were also involved in a sexual harassment claim concerning the activities of the professional basketball player Dennis Rodman. Rodman was a customer at the Las Vegas Hilton when he allegedly grabbed the breast of Gloria Chapa, a 58-year-old cocktail waitress, and also uttered "lewd and offensive words."⁴² When she reported the incident, Ms. Chapa stated that she was held in a security office against her will, fired, and then had defamatory comments published about her.⁴³ Ms. Chapa brought a number of lawsuits against Rodman, and also sued Hilton for several causes of action including sexual harassment and false imprisonment.⁴⁴ Ms. Chapa claimed that the casino tolerated "Rodman's behavior because Hilton desires Rodman's business."⁴⁵ The case did not reach trial, however, as Ms. Chapa died of a heart attack the month prior to the hearing.⁴⁶

³⁸ 841 F.Supp. 1024, 1025 (1992).

³⁹ *Id.*

⁴⁰ *Id.* at 1027-28.

⁴¹ *Id.* at 1029.

⁴² See Joseph M. Kelly, *Casino Gaming Disputes*, 2 Ann.2001 ATLA-CLE 1851 (2001).

⁴³ *Id.*

⁴⁴ *Id.*

⁴⁵ *Id.*

⁴⁶ See *Waitress' Death May Kill Lawsuit Against Rodman*, SANTA MONICA DAILY PRESS, Jan 17, 2002 at 4.

Perhaps the most cited third-party sexual harassment case involving a casino is *Folkerson v. Circus Circus*.⁴⁷ In this case the plaintiff was a mime employed by a casino as a living doll.⁴⁸ To allay concerns about being touched by customers to see if she was real, the casino provided Ms. Folkerson with a sign saying “Stop, Do Not Touch” and a large male escort dressed in a clown suit.⁴⁹ Despite this, a man approached the plaintiff as if to hug her, and she responded by hitting him in the mouth.⁵⁰ After being fired by the casino, Ms. Folkerson brought a Title VII suit against Circus Circus alleging that she was sexually harassed and subsequently fired in retaliation for her rejection of the harassment.⁵¹ The Ninth Circuit held that “an employer may be held liable for sexual harassment on the part of a private individual, such as the casino patron, where the employer either ratifies or acquiesces in the harassment by not taking immediate and/or corrective action when it knew or should have known of the conduct.”⁵² However, the court affirmed the district court's grant of summary judgment against the plaintiff on grounds that she failed to present any facts demonstrating that the casino ratified or acquiesced in the harassment.⁵³

Sexual harassment cases concerning casino customers have also been brought in gaming jurisdictions outside of Nevada. In *Oliver v. Sheraton Tunica Corporation*, a cocktail waitress was working in the “high-roller” area of a Mississippi casino when a customer “squeezed her buttocks.”⁵⁴ Upon reporting the incident to her supervisor, Ms.

⁴⁷ 107 F.3d 754 (9th Cir. 1997).

⁴⁸ *Id.* at 755.

⁴⁹ *Id.*

⁵⁰ *Id.*

⁵¹ *Id.*

⁵² *Id.* at 756.

⁵³ *Id.*

⁵⁴ Not Reported in F.Supp.2d, 2000 WL 303444 (N.D. Miss.), at 1.

Oliver was told to serve the customer his next drink “at as great a distance as possible.”⁵⁵

When the customer nearly fell out of his chair trying to grope Ms. Oliver again, he was asked to leave the blackjack table.⁵⁶ This action was still not considered sufficient to allow the defendant’s motion for summary judgment, however, in part because the offensive behavior of the customer had been reported by other waitresses earlier, but the casino had taken no action to restrain him.⁵⁷

IV. SEXUAL HARASSMENT CLAIMS IN INDIAN CASINOS

While most employers can be held liable for sexual harassment claims brought under Title VII, Indian tribes are explicitly exempt from the definition of “employer[s]” within the statute. Title VII states that “‘employer’ does not include...the United States, a corporation wholly owned by the government of the United States, Indian Tribe, or any department or agency of the District of Columbia.”⁵⁸ This exemption was included by Congress in order to encourage self-government by the Indian tribes and to allow them to control their own economic development.⁵⁹ The exclusion of Indian tribes from the statute became particularly significant following the passing of the Indian Gaming Regulatory Act in 1988, which led to an explosion of casino development on tribal property. By 2004 Indian gaming employed 220,000 people, 75 percent of whom were non-Indians.⁶⁰

⁵⁵ *Id.*

⁵⁶ *Id.*

⁵⁷ *Id.*

⁵⁸ 42 U.S.C. § 2000e(b)(1) (2005).

⁵⁹ See Shivani Sutaria, *Employment Discrimination in Indian-Owned Casinos: Strategies to Providing Rights and Remedies to Tribal Casino Employees*, 8 J. L. & SOC. CHALLENGES 132, 139-140 (2006).

⁶⁰ *Id.* at 136.

The courts have upheld the language of Title VII, determining that employees cannot bring claims under the statute against Indian tribes. For example, in *Hartman v. Golden Eagle Casino*,⁶¹ the plaintiffs, who alleged they were constructively discharged after being subjected to discrimination and a hostile work environment, claimed entitlement to Title VII protection.⁶² They argued that “the Casino was an economic enterprise or commercial activity of the Tribe,” and that Title VII should apply because the exemption only covers “‘purely internal matters’ related to the tribe’s self-governance.”⁶³ The court rejected this argument, however, stating that it was unsupported by the legislative history and case law interpreting Title VII.⁶⁴ The same principles would also prevent an employee from suing an Indian casino for sexual harassment by a customer.

An exception to the Title VII employer exemption regarding Indian tribes occurs when a tribe contracts with a private corporation to manage or operate a casino on its land. In such circumstances, the private corporation can be held to be an employer for Title VII purposes and hence be found liable for claims under the statute. In *Hines v. Grand Casinos*,⁶⁵ the plaintiff was a security guard at a casino owned by an Indian tribe, but she brought a Title VII claim for sex discrimination against Grand Casinos, which financed, operated, and managed the casino. The court utilized a “hybrid economic realities/common law control test,” which examines various factors to determine if there is an employer-employee relationship, and concluded that Grand Casinos was indeed

⁶¹ 243 F.Supp.2d 1200, 1202 (D. Kan. 2003).

⁶² *Id.* at 1202.

⁶³ *Id.* at 1203.

⁶⁴ *Id.*

⁶⁵ 140 F.Supp.2d 701 (W.D.La. 2001).

Hines' employer, and was therefore liable under Title VII.⁶⁶ The ruling is important for companies such as Harrah's Entertainment, which operate on Indian lands,⁶⁷ but offers only limited relief to victims of employment discrimination and harassment since the vast majority of Indian casinos are managed by tribes.⁶⁸

Although tribe-owned casinos are not liable under Title VII, recent changes in labor law with regard to Indian enterprises may threaten this exemption. In 2004, the National Labor Relations Board (NLRB) abandoned nearly 30 years of precedent when it held that the National Labor Relations Act (NLRA) does apply to a casino wholly owned and operated by a tribe on its own land.⁶⁹ Three years later, the decision was upheld by the U.S. Court of Appeals for the District of Columbia in *San Manuel Indian Bingo & Casino v. NLRB*.⁷⁰ The effect of the decision is to subject tribes to federal labor laws despite the fact that the NLRA makes no mention of Indian tribes.⁷¹ It allows labor unions to organize in tribal commercial enterprises, and conflicts with laws promoting tribal sovereignty.⁷² Furthermore, it has been suggested that the NLRA may provide a means by which to apply Title VII to Indian-owned casinos, since the NLRB has found that discrimination or sexual harassment under Title VII could violate the NLRA.⁷³

⁶⁶ *Id.* at 703-705.

⁶⁷ Sutaria, *supra* note 59, at 146.

⁶⁸ *Id.* at 149.

⁶⁹ *San Manuel Indian Bingo and Casino*, 341 N.L.R.B. No. 138 (2004).

⁷⁰ 475 F.3d 1306 (D.C. Cir. 2007).

⁷¹ D. Michael McBride, III & H. Leonard Court, *Labor Regulation, Union Avoidance and Organized Labor Relations Strategies on Tribal Lands: New Indian Gaming Strategies in the Wake of San Manuel Band of Indians v. National Labor Relations Board*, 40 J. MARSHALL L. REV. 1259, 1260 (2007).

⁷² *Id.*

⁷³ *Id.* at 1287.

V. CONCLUSION

Casinos in the United States provide entertainment to millions of customers every year who enjoy visiting these establishments. The operators of casinos, however, need to be constantly aware that the mixture of alcohol, gambling, and other adult-oriented entertainment they provide can create an atmosphere in which the possibility of sexual harassment of their staff by a small minority of customers can be a problem. Such third-party sexual harassment can leave employers open to liability under Title VII. In order to protect themselves from expensive lawsuits, casinos need to ensure that when allegations of sexual harassment by customers are reported by employees, these complaints are dealt with quickly and appropriately. This requires casinos to develop training schemes and employment policies in order to make managers and other staff members aware of the problem. Such measures are a relatively inexpensive way for casinos to protect both themselves and their employees from the actions of abusive customers.