

8.49 SUPERVISORY SEXUAL HARASSMENT (Approved 10/97)¹

A. Strict Liability (Subheadings are for judges' guidance only)

If you find that plaintiff *[insert name]* has proved all the elements of sexual harassment, the employer is automatically liable for such things as hiring or reinstating the plaintiff, disciplining, transferring or firing the harasser, providing back pay and/or front pay and for taking preventative and remedial measures at the workplace.²

B. Agency Principles Governing Compensatory Damages

1. Within the Scope of Employment

As to other money damages, employers' liability for supervisory hostile work environment is not automatic, but instead, is governed by the following considerations:

- (1) Did the employer delegate the authority to the supervisor to control the situation of which plaintiff *[name]* complained?

- (2) Did the supervisor exercise that authority?

¹ Pursuant to *Lehmann v. Toys 'R' Us, Inc.*, 132 N.J. 587 (1993).

- (3) Did the exercise of authority result in a violation of the Law Against Discrimination (LAD)?
- (4) Did the authority delegated by the employer to the supervisor aid the supervisor in injuring the plaintiff?

If the answer to all of these questions is yes, you must hold the employer liable for the full extent of damages caused by the supervisor's harassment.

If the answer to any of those questions is no, you cannot hold the employer liable for the supervisor's harassment, unless you find that the employer has been negligent. You can consider the following in determining whether an employer was negligent:

- (1) Did the employer have well-publicized and enforced policies against harassment in place?
- (2) Did the employer have effective formal and informal complaint structures, training or monitoring mechanisms in place?
- (3) Did the employer have mechanisms to prevent sexual harassment in place?
- (4) Did the employer know about the conduct or should the employer have known about it and if so, do anything about it?

² This assumes plaintiff is no longer employed. Plaintiff still must prove the quantum of damages, and, for example, whether reinstatement and/or hiring is an appropriate remedy.

2. Outside the Scope of Employment

If you find that the supervisor did create a hostile work environment, but did so outside the scope of his/her employment, then you must consider certain other factors.

For example, if the employer delegated the authority to control the work environment to the supervisor and he/she abused that delegated authority, then the employer is liable for any hostile work environment created by the supervisor. In making this determination, you must decide:

- (1) Did the employer delegate to the supervisor the authority to control the situation of which the plaintiff complains?
- (2) Did the supervisor exercise that authority?
- (3) Did the exercise of authority result in a violation of the Law Against Discrimination (LAD)?
- (4) Did the authority delegated by the employer to the supervisory aid him/her in injuring the plaintiff?

If you answer yes to all of these questions, the employer is liable for any hostile environment created by the supervisor even if he/she acted outside the scope of his/her authority.

Another basis for employer liability, when the supervisor acts outside the scope of his/her employment, is negligence.

Someone suing for a hostile environment may show that an employer was negligent by its failure to have in place well-publicized and enforced anti-harassment policies, effective formal and informal complaint structures, training, and/or monitoring mechanisms. However, the existence of effective preventative mechanisms provides some evidence that the employer was not negligent. Because it is foreseeable that sexual harassment may occur, the absence of effective, preventative mechanisms will present evidence of an employer's negligence. However, the absence of such mechanisms does not automatically constitute negligence, nor does the presence of such mechanisms demonstrate the absence of negligence.

Employer liability for conduct outside the scope of employment may also be found if the employer intended the conduct. For example, if a plaintiff can show that upper management had actual knowledge of the harassment by the supervisor and did not take prompt and effective remedial action to stop it, you may find the employer liable. Effective remedial actions are those reasonably calculated to end the harassment. The reasonableness of an employer's remedy will depend on its ability to stop harassment by the person who engaged in harassment.

To summarize, an employer's liability for compensatory damages resulting from a supervisor's sexual harassment will depend on the facts of the case. A company will be found liable if the supervisor acted within the scope of his or her

employment. Moreover, even if the supervisor acted outside the scope of his or her employment, the employer will be liable if it contributed to the harm through its negligence, intent, or apparent authorization of the harassing conduct, or if the supervisor was aided in the commission of the harassment by the agency relationship. Thus, an employer can be held liable for compensatory damages stemming from a supervisor's creation of a hostile work environment if the employer grants the supervisor the authority to control the working environment and the supervisor abuses that authority to create a hostile work environment. An employer may also be held vicariously liable for compensatory damages for sexual harassment that occurs outside the scope of the supervisor's authority, if the employer had actual or constructive notice of the harassment, or even if the employer did not have actual or constructive notice, if the employer negligently or recklessly failed to have an explicit policy that bans sexual harassment and that provides an effective procedure for the prompt investigation and remediation of such claims.