

## GENERAL STATEMENT TO HUMAN RESOURCES MAY PUT EMPLOYER ON NOTICE OF SEXUAL HARASSMENT BY CO-WORKER

In *Howard v. Winter*, the U.S. Court of Appeals for the Fourth Circuit—the federal appeals court with jurisdiction over the Carolinas—recently determined that an employee’s conversation with a “Human Resources Specialist” for her employer may have put the employer on notice of sexual harassment by a co-worker.

While an employer is vicariously liable for the actions of supervisors, subject to affirmative defenses, an employer can be found liable for harassment by a co-worker only if the employer had actual or constructive notice of the harassment. The question of actual knowledge is usually fairly straight forward, but, as the *Howard* case illustrates, whether an employer had constructive notice may be difficult to determine.

### Alleged Harassment

Stephanie Howard was a group secretary with the Naval Air Systems Command (NAVAIR). She was responsible for assisting 55 staff members in the Air Assault and Weapons Division, including Randy McCall.

Howard alleged that McCall sexually harassed her starting in June 1995. On March 5, 1996, McCall allegedly engaged in particularly offensive sexual conduct toward Howard. After that incident, Howard wrote and personally delivered to McCall a letter stating that his advances were unwanted and that he had gone too far.

### Conversation with HR Specialist

On March 19, Howard spoke with an employee of NAVAIR’s HR Division and requested a transfer. When asked why, Howard replied that she was being “assail[ed]” at work, but she was not specific and she did not name McCall.

The same day, Howard was referred to an HR Specialist. Howard told the HR Specialist that McCall had “put his hand on [her].” The HR Specialist told Howard to draft a letter to McCall, which she had already done, and to “tell your supervisor or ... come back to me” if McCall harassed her again.

Following a further alleged unwelcome physical advance in November 1996, Howard went to a friend and co-worker, who informed her own supervisor of the history of events. That supervisor immediately met with both of Howard’s supervisors. Howard’s supervisors, who had not heard of her allegations, immediately informed NAVAIR’s Office of General Counsel and reassigned McCall. Howard did not complain of any further harassment.

## Co-worker or Supervisor?

Howard sued the Navy for hostile environment sexual harassment.

The trial court granted summary judgment to the Navy, implicitly finding that McCall was Howard's co-worker, not her supervisor. The trial court ruled that the Navy acted promptly in November 1996 when it was put on notice of Howard's allegations, and that the Navy was justified in not acting earlier because Howard failed to give "adequate information to trigger the kinds of response [she was] requesting."

On appeal, the Fourth Circuit rejected Howard's argument that McCall was her supervisor, concluding that although McCall had some supervisory authority over Howard, he did not have the power to take a tangible employment action against her, such as a demotion or termination. Accordingly, the appeals court was unwilling to extend supervisor-based vicarious liability to the Navy.

## No Notice Imputed Before Conversation with HR Specialist

The Fourth Circuit then addressed whether the Navy was on notice of McCall's alleged harassment.

Howard argued that McCall's behavior prior to her March 19 communications with HR was imputable to the Navy because its sexual harassment policy was "per se inadequate." She based her argument on the Fourth Circuit's 2003 ruling in *Ocheltree v. Scollon Prod., Inc.*, in which the court imputed notice and liability to the employer because its sexual harassment policy was nearly nonexistent.

The Fourth Circuit differentiated *Ocheltree*, however, noting that the Navy had an 11-page sexual harassment policy that made it clear sexual harassment would not be tolerated.

Additionally, the court rejected Howard's argument that McCall's display of inappropriate pictures and use of inappropriate language was enough to put the Navy on notice that he was an alleged sexual harasser.

## Conversation with HR Specialist May Constitute Notice

The Fourth Circuit found, however, that Howard's conversation with the HR Specialist may have been enough to put the Navy on notice of McCall's behavior. The court stated:

While a reasonable juror could find that [the HR Specialist]'s response to Howard was sufficient given the lack of details in her allegation, we believe a reasonable juror could also conclude otherwise.... At the very least, a juror could conclude that it was unreasonable for [the HR Specialist] to not ask follow-up questions in an effort to determine [what happened].

Finally, the appeals court agreed with the Navy that once it became officially aware of Howard's allegations, it acted reasonably to end the harassment and, therefore, the Navy's potential liability to Howard was cut off at that time.

## Implications for Employers

The *Howard* case serves as a reminder to employers that having and communicating an anti-harassment policy is the best way to avoid constructive notice of harassment that is not brought to an employer's attention. This case also illustrates the importance of training HR personnel to respond immediately and adequately to all allegations of harassment.

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### **N|P** Employment and Labor Law Group

#### **CHARLESTON** 843.577.9440

George Finnan  
Molly Hughes

#### **CHARLOTTE** 704.339.0304

Alex Barrett  
Beth Langley

#### **COLUMBIA** 803.771.8900

Mike Brittingham  
David Dubberly  
Susan Edwards  
John Emerson  
Vickie Eslinger  
William Floyd  
Joan Hartley  
Roshella James  
James Leventis  
Regina Lewis  
Angus Macaulay  
Susi McWilliams  
Nikole Mergo  
Sue Odom  
Sam Painter

#### **GREENSBORO** 336.373.1600

Alex Barrett  
Brian Clarke  
Beth Langley  
Peter Pappas  
Bill Wilcox

#### **GREENVILLE** 864.370.2211

Grant Burns  
Jamie Hedgepath  
Leon Harmon  
Rusty Infinger  
Will McKibbin  
Michael Pitts  
Tom Stephenson

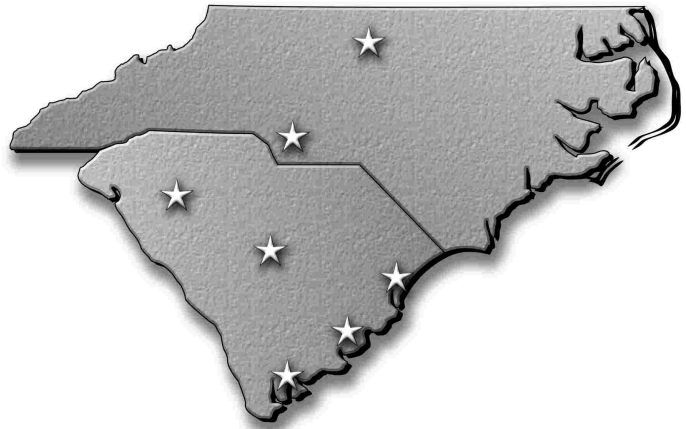
#### **HILTON HEAD** 843.689.6277

Melissa Azallion

#### **MYRTLE BEACH** 843.720.1724

Molly Hughes

## NEXSEN | PRUET ADAMS KLEEMEIER



The Carolinas Law Firm