Supervisor Liability for Sexual Harassment Under Title VII in the 4th Circuit: Continued Uncertainty

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The decisions of the 4th Circuit have a history of engendering confusion and misunderstanding as to whether supervisory employees can be held individually liable under Title VII of the Civil Rights Act of 1964 (Title VII), 42 U SC § 2000e et seq., the federal statute prohibiting employment discrimination on the basis of race, color, gender, religion or national origin. See Bryant v. Locklear, 947 F. Supp. 915, 917 (E.D.N.C. 1996) (lamenting that 4th Circuit precedents had caused confusion among the district courts as to individual liability under Title VII); Turner v. Randolph County, 912 F. Supp. 182, 184-86 (M.D.N.C. 1995) (noting the difficulty in reconciling the discrepancy in 4th Circuit precedent governing supervisory liability). An argument still exists that the 4th Circuit has not definitively resolved the issue of supervisor liability for sexual harassment under Title VII even in the wake of Lissau v. Southern Food Serv., Inc., 159 F.3d 177 (4th Cir. 1998).

In Lissau, a three-member panel of the 4th Circuit comprised of two circuit judges (Wilkinson and Michael) and one district judge sitting by designation held that supervisory employees are not liable in their individual capacities under Title VII despite personally participating in the sexual harassment. The primary underpinning for the Lissau panel's holding was the 4th Circuit's decision in Birkbeck v. Marvel Lighting Corp., 30 F.3d 507 (4th Cir.), cert. denied, 513 U.S. 1058, 115 S.Ct. 666 (1994), which involved the issue of individual liability under the Age Discrimination in Employment Act (ADEA), 29 U SC § § 621 et seq.

The present lack of conclusiveness as to supervisor liability under Title VII in the sexual harassment context stems from the Lissau panel's unexplained failure to deal with the 4th Circuit's prior holding in Paroline v. Unisys Corp., 879 F.2d 100 (4th Cir. 1989), aff'd in pertinent part, vacated in other part, 900 F.2d 27 (4th Cir. 1990) (en banc), and its curious disregard of a crucial footnote to the Birkbeck opinion. In Paroline, a panel comprised of three circuit judges (Wilkinson, Ervin and Murnaghan) unanimously rejected a per se rule against individual liability under Title VII and, instead, concluded that an individual can be held personally liable under Title VII "if he or she serves in a supervisory position and exercises significant control over the plaintiff's hiring, firing or conditions of employment." Paroline was

employed as a word processor at Unisys Corporation. She asserted sexual harassment claims under Title VII against Unisys and a Unisys employee (Moore) based on her claim that Moore made improper sexual advances toward her on and off the job. An issue raised at the summary judgment stage was whether Moore qualified as Paroline's employer within the embrace of Title VII.

The Paroline majority opinion, which was authored by Judge Murnaghan and joined by Judge Ervin, discussed this issue as follows:
An "employer" [under Title VII] includes "a person engaged in an industry affecting commerce who has fifteen or more employees . . . and any agent of such a person . . ." 42 U SC § 2000e(b) (emphasis added). Unisys clearly falls within the statutory definition of "employer." However, the parties disagree as to whether Moore exercised sufficient supervisory authority over Paroline to qualify as an agent of Unisys within the meaning of 2000e(b).

An individual qualifies as an "employer" under Title VII if he or she serves in a supervisory position and exercises significant control over the plaintiff's hiring, firing or conditions of employment. The supervisory employee need not have ultimate authority to hire or fire to qualify as an employer, as long as he or she has significant input into such personnel decisions. Furthermore, an employee may exercise supervisory authority over the plaintiff for Title VII purposes even though the company has formally designated another individual as the plaintiff's supervisor. As long as the company's management approves or acquiesces in the employee's exercise of supervisory control over the plaintiff, that employee will hold "employer" status for Title VII purposes.

The majority went on to find sufficient evidence to prove that Moore was Paroline's supervisor and, therefore, her employer for purposes of Title VII. Thus, the Paroline majority recognized that individual capacity suits may be brought against supervisory employees under Title VII. Judge Wilkinson dissented based on an unrelated issue (whether the plaintiff had satisfied the elements of a "constructive discharge"), but concurred in the portion of the majority's opinion that addressed the question of supervisor liability under Title VII.

The three-member panel's opinion in Paroline was not the final word in that case, as the full membership of the 4th Circuit sitting en banc reviewed the panel's earlier decision. Paroline v. Unisys Corp., 900 F.2d 27 (4th Cir. 1990) (en banc), aff'g in pertinent part, vacating in other part, 879 F.2d 100 (4th Cir. 1989). Although the full panel vacated the earlier decision in Paroline for reasons previously expressed by Judge Wilkinson in his dissent, it acknowledged that, "the remainder of Judge Murnaghan's opinion for the panel continues in effect." Thus, the full membership of the 4th Circuit consisting of Circuit Judges Ervin, Wilkinson, Murnaghan, Russell, Widener, Hall, Phillips, Chapman and Wilkins agreed with the conclusion that supervisors could be held individually liable under Title VII.

In addressing the question of supervisor liability under Title VII, the three-member panel in Lissau did not explain or attempt to distinguish the ruling on supervisor liability previously expressed by the en banc court in Paroline. Inexplicably, the Lissau court failed to mention the Paroline case at all. This oversight is perplexing given that the author of the opinion in Lissau was also among the judges of the en banc court in Paroline which previously ruled that supervisors can be held individually liable under Title VII.

The prospect for continued confusion within the district courts exists not only because of the Lissau panel's failure to acknowledge Paroline, but because of its extremely narrow reading of the decision in Birkbeck, which the Lissau court cited as support for its per se rule that supervisors cannot be held individually liable under Title VII. The Birkbeck case involved claims for age discrimination under the ADEA, which the court described as Title VII's "closest statutory kin." The same two circuit judges who sat on the panel which decided Lissau also sat on the three-judge panel (along with a district judge sitting by designation) that decided the Birkbeck case. The same judge authored the court's opinions in Birkbeck and Lissau.

In Birkbeck, the plaintiffs held salaried, supervisory positions with a manufacturing company. They were part of a group of 15 individuals that the company terminated as part of layoffs made ostensibly due to economic difficulties. The plaintiffs sued the company for age discrimination along with one of its vice-presidents who was responsible for the layoff decisions. The court held that the vice-president was not the plaintiffs' employer within the meaning of the ADEA. The court further stated that "the ADEA limits civil liability to the employer and . . . [the vice-president], as an employee, is not a proper defendant in this case." The Birkbeck court expressly acknowledged that its ruling was not an absolute or per se bar to suits against employees in their individual capacities and gave the following explanatory footnote to its holding:

An employee, however, may not be shielded as an employer's agent in all circumstances. We address here only personnel decisions of a plainly delegable character. See Paroline v. Unisys Corp., 879 F.2d 100, 104 (4th Cir. 1989) (disputed issue of fact with respect to personal liability under Title VII in a sexual harassment setting), vacated on other grounds, 900 F.2d 27 (4th Cir. 1990).

The precise implication of the Birkbeck footnote is baffling as recognized by various district courts within the 4th Circuit. See Stephens v. Kay Management Co., 907 F. Supp. 169, 173-75 (E.D. Va. 1995); Cortes v. McDonalds Corp., 955 F. Supp. 531, 536-38 (E.D.N.C. 1996). At the very least, the footnote suggests that individual employees can be held liable under the ADEA (and correspondingly under Title VII) in certain circumstances-i.e., when the employee's conduct does not involve "personnel decisions of a plainly delegable character." Moreover, it shows that the court attempted to illuminate its decision involving individual liability under the ADEA by specifically holding out its opinion in Paroline, a Title VII sexual harassment case, as

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an example of a factual scenario in which an employee would not be shielded from individual liability. A reasonable reading of the court's opinion in Birkbeck is that the decision to layoff employees is a personnel decision that is plainly delegable in nature, whereas a supervisor's sexual harassment of a subordinate employee is not.

While apparently overlooking the Paroline case, which would seem to be controlling, the Lissau panel seized upon Birkbeck to support its holding that supervisors are not liable under Title VII. According to Lissau, the Birkbeck court "rejected the claim of individual liability under the ADEA." However, the Lissau panel's declaration that Birkbeck categorically rejected individual liability for supervisors under the ADEA appears to be an overly narrow reading of the decision in that case. Nowhere in its opinion did the Lissau panel acknowledge or discuss the important footnote to the Birkbeck opinion recited above which cited Paroline with approval. This omission is particularly striking given that the facts in dispute in Lissau, where a supervisor had allegedly sexually harassed a subordinate employee, suggest that it is the very type of case that the Birkbeck court contemplated when it qualified its holding and referred to Paroline, a Title VII case involving sexual harassment by a supervisor, in the footnote to its opinion. Indeed, while juxtaposing and trying to reconcile the holdings in Paroline and Birkbeck, several district courts in the 4th Circuit in cases decided prior to Lissau had specifically recognized that a supervisor could be held individually liable under Title VII in the sexual harassment setting because harassment is not a "personnel decision of a plainly delegable character." See Speight v. Albano Cleaners, Inc., 21 F. Supp.2d 560, 564-65 (E.D. Va. 1998); Shoemaker v. Metro Information Servs., 910 F. Supp. 259, 264-65 (E.D. Va. 1996); Crosten v. Kamauf, 932 F. Supp. 676, 680-81 (D. Md. 1996).

Given the above circumstances, the current status of supervisor liability in the 4th Circuit in the context of sexual harassment cases under Title VII is less certain than might appear upon a cursory review. Although Lissau categorically rejected individual liability under Title VII, the panel in that case failed to address prior 4th Circuit precedent holding to the contrary. Consequently, an argument exists that the holding in Lissau contradicts the prior holding of the en banc panel in Paroline and violates the rule of interpanel accord, which provides that only the Court of Appeals sitting en banc, and not a panel, may overrule a precedent set by another panel of the same circuit. Smith v. Moore, 137 F.3d 808, 821 (4th Cir. 1998). Moreover, the fact that the Lissau panel expressly relied upon the reasoning and holding of Birkbeck, which cited Paroline with approval, further supports the contention that Paroline remains good law even after Lissau.

Because the Lissau panel failed to confront the inconsistent holding in Paroline, a split was created among those members of the 4th Circuit who specifically analyzed the issue of supervisor liability under Title VII, further punctuating the lack of a definitive resolution of the issue. Indeed, a tally of the votes cast in the 4th Circuit's published opinions addressing the

supervisor liability question suggests that a majority of the circuit judges who participated in those cases favored an outcome adverse to Lissau.

Judges Wilkinson and Michael were the only circuit judges who sat on both appellate panels that decided the Birkbeck and Lissau cases, the latter case recognizing a per se rule against individual liability under Title VII. Interestingly, Judge Wilkinson was a member of the en banc panel in Paroline that unanimously adopted Judge Murnaghan's holding that supervisors could be held individually liable as stated in his first Paroline opinion.

Prior to Lissau, at least nine other circuit judges had apparently accepted the view that a supervisor could be held individually liable under Title VII in certain circumstances. In addition to the en banc opinion in the Paroline case, in which Circuit Judges Ervin, Murnaghan, Russell, Widener, Hall, Phillips, Chapman and Wilkins agreed that supervisors could be held individually liable, Judge Murnaghan joined in the majority opinion written by Judge Hamilton in Reinhold v. Commonwealth of Virginia, 135 F.3d 920, 934 n.4 (4th Cir. 1998), which was decided only eight months before Lissau and which observed that the Paroline case was still good law even though other courts had criticized it. 2 LABOR AND EMPLOYMENT LAW FOR SOUTH CAROLINA LAWYERS I-64 (M. Malissa Burnette et al. eds., 1999) (discussing Lissau's departure from the prior holdings in Paroline and Reinhold). Circuit Judge Niemeyer's dissenting opinion in Reinhold did not specifically address the Paroline case or the issue of supervisor liability.

In the 4th Circuit's only published opinion rendered after Lissau that has addressed the issue of individual liability, Circuit Judges Wilkins and King cited Lissau in the context of dismissing a claim brought against an individual defendant under the Americans with Disabilities Act (ADA), 42 U SC § § 12101 et al. Baird ex rel. Baird v. Rose, 192 F.3d 462, 472 (4th Cir. 1999). However, neither judge discussed the prior holdings in Paroline or Birkbeck. Circuit Judge Ervin, the other member of the Baird panel participating in that case, died before the case was decided.

Despite the decision in Lissau, an argument can be made that the 4th Circuit has not definitively foreclosed the possibility of individual liability under Title VII in the context of cases alleging sexual harassment by a supervisor. Hopefully, the en banc panel of the 4th Circuit will revisit this issue in the near future and clarify its prior decisions to alleviate the present uncertainty.

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