

# Everybody talks about sex—but can employers be held liable?

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*Imagine this: Two individuals start a job at the same time. Quickly, management recognizes one employee's hard work and dedication and promotes her. In a short time, the employee ascending the corporate ladder becomes the superior of the employee with whom she had onboarded. The nonpromoted employee becomes jealous and resentful. To this employee, there must be some reason not based on merit why the other employee has advanced. Whether true or not, the nonpromoted employee starts spreading a rumor—the promoted employee "slept" her way to the top.*

## **Facts**

The above-mentioned scenario is far from hypothetical. Accusations and unsubstantiated rumors like this unfortunately exist in the workplace. Indeed, this exact fact pattern recently played out in a case arising out of Sterling, Virginia.

In December 2014, Evangeline Parker was working for Reema Consulting Services, Inc. (RCSI), at its warehouse facility. By March 2016, after a series of promotions, she became an assistant operations manager. Within two weeks, another RSCI employee who had started working for the company at the same time began spreading a rumor she had been promoted only because she had a sexual relationship with a higher-ranking manager.

As the rumor spread, Parker alleged she "was treated with open resentment and disrespect" by coworkers, including her subordinates. She was also told by the highest-ranking manager at RSCI, Larry Moppins, that he would be unable to promote her

any further because of the rumors, and in May 2016, he fired her.

## **Lawsuit**

Believing her termination was unjustified and unfair, Parker filed suit against RCSI in federal district court. Among her legal claims was a hostile work environment claim for sex discrimination in violation of Title VII of the Civil Rights Act of 1964.

In assessing the legal merit of Parker's suit, the district court considered the cause of the hostile work environment to which she had allegedly been subjected. Specifically, were her coworkers, superiors, and subordinates harassing her because she was a woman, or were they doing so because of her alleged conduct? And was it even possible to separate the two considerations?

The federal court decided to focus on Parker's conduct. Although it empathized with her situation, it noted "that her complaint as to the establishment and circulation of this rumor is not based upon her gender, but rather based upon her alleged conduct." Thus, it reasoned the "same type of rumor could be made in a variety of other contexts involving people of the same gender or different genders alleged to have had some kind of sexual activity leading to promotion." Because the district court found the cause of the purported hostile work environment couldn't be attributed to her sex, it dismissed her claim.

## **Appeal**

Parker appealed to the U.S. 4th Circuit Court of Appeals (which is based in Richmond and whose decisions apply to employers not only in Virginia

but also in West Virginia, Maryland, and North and South Carolina). In analyzing her discrimination claim, the 4th Circuit disagreed with the district court's view that the rumor wasn't related to her sex. Rather, it characterized the rumor as a female subordinate having sex with her male superior to obtain a promotion, "implying that Parker used her womanhood, rather than her merit, to obtain . . . a promotion."

To the 4th Circuit, the stereotype "that generally women, not men, use sex to achieve success" clearly persists in today's world. It also pointed out that Parker's lawsuit, in addition to inferentially invoking sex stereotyping, explicitly alleged only males started and spread the rumors about her and that she was treated differently than the male manager with whom she was alleged to have had a sexual relationship.

Accordingly, the 4th Circuit found that any distinction between harassment "based on gender" and harassment "based on conduct" wasn't one of substance "because the *conduct* is also alleged to be gender-based." Thus, it held that the district court was wrong to have ruled she had failed to state a valid claim for a hostile work environment. It reversed the dismissal of her Title VII claim and sent the case back to the district court for further proceedings. *Parker v. Reema Consulting Services, Inc.*, 2019 WL 490652 (4th Cir., Feb. 8, 2019).

### ***Bottom line***

The 4th Circuit's decision provides important lessons for all employers. Although we as a society may be working to combat negative stereotypes, they still exist in many workplaces. In this case, the 4th Circuit made clear that any attempt to masquerade sex discrimination as discrimination based on conduct will fail when it perpetuates a discriminatory negative stereotype. Although Parker's case dealt with the stereotype of women using sexual promiscuity to gain advancement in the workplace, the principle applies equally to negative stereotyping based on race, religion, national origin, or some other legally protected category.

As an employer, you can avoid being in the position RCSI now finds itself of facing a jury trial on Parker's hostile work environment claim. Make sure you have policies in place to identify workplace misconduct, and when problematic situations arise, launch proper and expedient investigations with the oversight and guidance of experienced employment counsel.

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