153 DPR 125 2000

(Official Translation)

IN THE SUPREME COURT OF PUERTO RICO

Keyla Rosario Toledo *et al.*,

Plaintiffs and respondents

v. No. CC-1998-388

Distribuidora Kikuet, Inc. *et al.*,

Defendants and petitioners

RESOLUTION

San Juan, Puerto Rico, December 29, 2000

The Motion for Reconsideration filed on July 12, 2000, is hereby *denied*.

We reiterate the test laid down by this Court in *Rosario v. Dist. Kikuet, Inc.*, 151 D.P.R. 634 [51 P.R. Offic. Trans. ___] (2000). By virtue of Act No. 17 of April 22, 1988 (29 L.P.R.A. § 155 *et seq.*), sexual harassment in Puerto Rico has been classified as a type of gender discrimination. Therefore, Act No. 17 was promulgated under Act No. 100 of June 30, 1959 (29 L.P.R.A. §§ 146-151) (general antidiscrimination act) and Act No. 69 of July 6, 1985 (29 L.P.R.A. §§ 1321-1341) (which prohibits gender discrimination). These acts, which are compensatory in nature, are part of a legislative scheme aimed at implementing the State's public policy against discrimination. *Suárez Ruiz v. Figueroa Colón*, 145 D.P.R. 142, 148-149 [45 P.R. Offic. Trans. __, __] (1998). These acts also establish the concept of vicarious employer liability for discriminatory acts by agents, representatives or supervisors. Moreover, a body of rules and caselaw establishing vicarious employer liability in discrimination cases has been formulated in the United States under the provisions of Title VII of the Civil Rights Act of 1964 (42 U.S.C. § 2000a *et seq.*). The concept of employer liability in those cases is vicarious in nature when harassment is committed by the employer's agent or supervisor regardless of whether the acts were authorized, proscribed, or committed without the employer's consent, inasmuch as the employer is responsible for establishing work standards, hiring and discharging personnel, and providing all the conditions that govern not only safety in the workplace, but also employee relations. It is incumbent upon the employer, as the figure who has the highest authority and control over the workplace, to guarantee a risk-free workplace for his or her employees and a work environment in which there is respect and dignity.[1] It is the employer who exerts the greatest control over the workers and who receives the fruits of their collective labor; therefore, he or she must ensure an environment of respect and dignity in the workplace.

[1] Report of the Senate Special Committee on Women's Affairs on S.B. 1437 of March 9, 1988.

There is great debate among the different federal circuit courts over whether individuals can be held personally liable for sexual harassment. Many circuits have determined that Title VII of the Civil Rights Act of 1964 does not provide for individual liability.[2] A considerable number of courts from other jurisdictions have held otherwise.[3] The federal courts that have refused to impose individual liability under Title VII have reasoned that the purpose of the provision on the figure of the *agent* is to incorporate vicarious employer liability in order to make employers liable for the acts of their supervisors. This is so because by limiting liability to employers who have fifteen or more employees, the statute sought to exclude individual liability.

In turn, the courts that have held that individual liability indeed exists under Title VII of the Civil Rights Act of 1964 are mainly grounded on the fact that sexual harassment is a tort to which general *agency* principles are applicable. This means that both the agent and the employer are held liable for these acts. This line of reasoning is supported by the fact that Title VII defines *employer* as a person engaged in an industry affecting commerce who has fifteen or more employees, and *any agent of such a person.* 42 U.S.C. § 2000e (b). Likewise, some commentators believe that in *Meritor Savings Bank v. Vinson*, 477 U.S. 57 (1986),[4] the United States Supreme Court held that general *agency* principles should be applied in Title VII sexual harassment cases,[5] and that under the actual language of Title VII it appears that Congress did intend for individual liability to attach under Title VII.[6]

An interpretation that favors the attachment of individual liability is that the legislative history of Title VII of the Civil Rights Act of 1964 indicates a desire on the part of Congress to eradicate discrimination nationwide by enacting legislation that intends to compensate victims of unlawful discrimination and to deter such discrimination.[7] Some federal courts have described as inconceivable that Congress, by virtue of Title VII, intended

[2] See: *Dici v. Com. of Pa.*, 91 F.3d 542 (3d Cir. 1996); *Haynes v. Williams*, 88 F.3d 898 (10th Cir. 1996); *Tomka v. Seiler Corp.*, 66 F.3d 1295 (2d Cir. 1995); *U.S. E.E.O.C. v. AIC Security Investigations, Ltd.*, 55 F.3d 1276 (7th Cir. 1995); *Smith v. Lomax*, 45 F.3d 402 (11th Cir. 1995); *Birkbeck v. Marvel Lighting Corp.*, 30 F.3d 507 (4th Cir. 1994); *Miller v. Maxwell's Intern. Inc.*, 991 F.2d 583 (9th Cir. 1993); *Busby v. City of Orlando*, 931 F.2d 764 (11th Cir. 1991).

[3] See: *Ball v. Renner*, 54 F.3d 664 (10th Cir. 1995); *García v. Elf Atochem North America*, 28 F.3d 446 (5th Cir. 1994); *Steele v. Offshore Shipbuilding, Inc.*, 867 F.2d 1311 (11th Cir. 1989); *Paroline v. Unisys Corp.*, 879 F.2d 100 (4th Cir. 1989); *Hall v. Gus Const. Co., Inc.*, 842 F.2d 1010 (8th Cir. 1988); *Jones v. Continental Corp.*, 789 F.2d 1225 (6th Cir. 1986).

[4] In *Meritor Savings Bank v. Vinson*, 477 U.S. 57 (1986), respondent Vinson included the employer and her supervisor, in his personal capacity, in her Title VII claim. However, the case was not reviewed on those grounds and, therefore, that issue was not specifically addressed.

[5] Elizabeth R. Koller Whittenbury, *Individual Liability for Sexual Harassment Under Federal Law*, 14 Lab. Law. 357, 359 (1998).

[6] *Id.* at 359-360.

[7] *Id.* at 360-361.

to exclude from liability those who have directly caused the discriminatory acts.[8] Moreover, the classification of an *employer as a person* may also indicate that Congress intended to hold people, as well as organizations, liable for sexual harassment. Otherwise, Congress would have defined "employer" as *an entity with fifteen or more employees.*[9]

It bears mentioning that the United States District Court for the District of Puerto Rico has held that a cause of action against individual employees is not supported by Act No. 69 or Act No. 17.[10] The court grounded its ruling on an *in pari materia* analysis of Act No. 100, *supra*, which does not support a cause of action for individual liability under the definition of employer provided therein.[11] However, the United States Court of Appeals for the First Circuit has not resolved this controversy.

Section 2(2) of Act No. 17 of April 22, 1988 (29 L.P.R.A. § 155a (2)) defines *employer* as any natural or juridical person of any kind, the Government of the Commonwealth of Puerto Rico, including each of its three Branches and its instrumentalities or public corporations, among others, which employ persons for any kind of compensation, for profit or non-profit purposes, *and their agents and supervisors*. As we can see, the figure of the *agent* is present just like in Title VII of the Civil Rights Act of 1964.

Act No. 17 formulates the public policy against sexual harassment in employment. To such ends, it imposes liability upon employers for the acts of their agents and supervisors. This, however, does not preclude the actor from being civilly liable for said acts. In this regard, sec. 11 of Act No. 17 provides:

> *Any person* responsible for sexual harassment in employment as defined by §§ 155-155*l* of this title shall incur civil liability:
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> > (1) For a sum equal to double the amount of the damages that the action has caused the employee or job applicant, or
> >
> > (2) for a sum of not less than three thousand (3,000) dollars at the discretion of the court, in those cases in which pecuniary damages cannot be determined.

29 L.P.R.A. § 155j. (Emphasis added.)

Section 2(3), in turn, provides that the term *person* shall mean "any natural or juridical person." 29 L.P.R.A. § 155a (3). In other words, under both subsections of sec. 2,

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[8] See *Robinson v. Jacksonville Shipyards, Inc.*, 760 F. Supp. 1486, 1527 (M.D. Fla. 1991) (citing *Dague v. Riverdale Athletic Ass'n*, 99 F.R.D. 325, 327 (1983)).

[9] Koller Whittenbury, *supra*, at 361-362.

[10] *Matos Ortiz v. Com. of Puerto Rico*, 103 F. Supp. 2d 59 (D. P.R. 2000); *Canabal v. Aramark Corp.*, 48 F. Supp. 2d 94 (D. P.R. 1999).

[11] *Santiago v. Lloyd*, 33 F. Supp. 2d 99, 104-105 (D. P.R. 1998); *Figueroa v. Mateco*, 939 F. Supp. 106, 107 (D. P.R. 1996).

any person responsible for sexual harassment in employment shall incur civil liability as provided in Act No. 17, sec. 11. This legislative intent becomes evident upon an analysis of the legislative history of Act No. 17.

During the House floor debate, Representative Hernández Torres argued the following about the scope of this section: "Because it was implied here that the person who brings a sexual harassment case only needs to go to court and report that he or she was sexually harassed and that it will suffice for *the court to impose a sanction on the presumed harasser, and on the presumed harasser's employer.*" (Emphasis added.) Likewise, on page 74, Representative Vélez de Acevedo stated that this legislative piece not only intended to prohibit sexual harassment in employment, but also that "we are giving those who are harassed the tools to defend themselves, and we are giving the harassers, or the potential harassers, a forum in which they can elucidate their specific situation."

Likewise, during the Secretary of Justice's appearance before the Senate on March 10, 1988, it was argued that under the United States Civil Rights Act of 1964, in certain specific circumstances, both the person who engaged in sexual harassment and his or her supervisor and employer are civilly liable. These statements are deemed supported by the *Meritor* ruling.

Therefore, in keeping with the decision of this Court in the Opinion of which reconsideration is sought, the application of sec. 11 of Act No. 17 is not limited to the real employer or owner of the company but extends to any person responsible for the conduct in question, without distinctions or exceptions. *Rosario v. Dist. Kikuet, Inc.* This conclusion is supported by the fact that this section specifies the penalties that may be imposed on *all persons* liable for committing sexual harassment, and its second paragraph specifically provides that the *employer* may be ordered to hire, promote, or reinstate the employee in his or her job. In other words, it is clearly shown that the lawmakers intended to provide relief to all persons—including the employer—as well as relief specifically intended for the employer. Had the lawmakers intended to exclude individual liability, they would not have made a distinction with regard to the possible obligation of the employer to hire, promote, or reinstate the employee.

To be published.

It was so agreed by the Court and certified by the Clerk of the Supreme Court. Justice Rivera Pérez would reconsider. Justice Fuster Berlingeri took no part in this decision.

(Sgd.) Isabel Llompart Zeno
Clerk of the Supreme Court

WBR/bab