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Survey of Recent Developments in Third Circuit Law, Bonenberger v. Plymouth Township, 132 F.3d 20 (3d Cir. 1997)

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Plaintiff-appellant, Cheryl Bonenger, was employed by the Plymouth Township Police Department as a dispatcher from February 1993 until April 1994, when she quit due to alleged sexual harassment by her acting supervisor, Sergeant Joseph La Penta. See Bonenger v. Plymouth Township, 132 F.3d 20, 22 (3d Cir. 1997). Although Sergeant Carbo evaluated Bonenger's work and had the power to hire and fire her, when Carbo was not present La Penta was responsible for supervising Bonenger and other dispatchers by arranging their duties and determining their break schedules. See id. at 22, 25 n.3. Thus, when the other supervisors were off duty, La Penta alone had control over the dispatchers. See id. at 22.

Plaintiff-appellant alleged that she was consistently accosted by La Penta while at work and had to endure unwelcome sexual touchings such as buttock pinching and breast fondling. Several other members of the police department allegedly witnessed the incidents of harassment, including Sergeant Carbo, whose duty it was to investigate such behavior. See id. at 26, 27 n.7. On one occasion, while Bonenger was having a conversation with Sergeant Carbo and although she protested, La Penta touched Bonenger's breasts. See id. at 26. Sergeant Carbo's only reaction was to smile. Later, La Penta grabbed Bonenger's buttocks in front of three other officers, including Sergeant Galetti, who was also responsible for investigating incidents of harassment. See id. at 26, 27 n.7. This incident was confirmed by the police department's own internal investigation. See id. at 22. Shortly after Sergeant Galetti witnessed La Penta's advances, the police department modified its sexual harassment policy to protect dispatchers. See id. at 26-27.

Bonenberger brought both federal and state law claims in the United States District Court for the Eastern District of Pennsylvania against the Plymouth Township Police Department, Plymouth Town-
ship, and Sergeant La Penta. See id. at 22. Specifically, Bonenberger asserted that La Penta violated her rights to equal protection of the law, both officially and as an individual, and that the police department also violated those rights by its failure to discipline La Penta. See id. at 23. The plaintiff-appellant further claimed that the police department violated her rights under Title VII in failing (1) to stem La Penta's quid pro quo behavior and (2) to reform the hostile work environment. See id. Moreover, Bonenberger charged the sergeant with intentional infliction of emotional distress and battery. See id. Finally, Bonenberger brought a claim against the police department under the Pennsylvania Human Relations Act. See id.

The district court granted the motions of the defendants-appellees for summary judgment on each of the federal law claims. See id. at 22-23. The court reasoned that because La Penta did not have the authority to hire or fire Bonenberger, he was not acting under color of state law and thus could not be liable for a § 1983 claim. See id. at 23. The district court also decided that the police department was not liable under § 1983 because it adequately trained and disciplined La Penta by both maintaining a sexual harassment policy and providing regular training to prevent such behavior. See id. at 25. Finally, the district court announced that Bonenberger's Title VII claim had no merit because the respondeat superior element was not met. See id. at 26. Upon the resolution of all claims for which the district court held original jurisdiction, the state law claims were dismissed because the district court refused to entertain supplemental jurisdiction under 28 U.S.C. § 1367(c)(3). See id. at 23 & n.1. Bonenberger subsequently appealed the decision granting summary judgment of the federal claims as well as dismissal of the state law claims. See id. at 22-23.

The United States Court of Appeals for the Third Circuit, examining the record de novo, reversed in part and affirmed in part. See id. at 23. The appellate court reversed the order granting summary judgment for the § 1983 claim against Sergeant La Penta, holding that a police officer acts under color of state law when he sexually harasses a coworker whose shift he supervises, even though the officer lacks any authority to hire, fire, or make employment decisions regarding the coworker. See id. at 22, 23. The Third Circuit also reversed the district court's order granting summary judgment to the police department for the Title VII hostile work environment claim and reversed the dismissal of plaintiff's state law claims. See id. at 23, 29. Finally, the court affirmed the orders granting summary judgment regarding the Title VII claim of quid pro quo harassment and the § 1983 claim against the police department. See id.
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Judge Lewis, writing for a unanimous court, first analyzed the plaintiff's claims brought under 42 U.S.C. § 1983. See id. at 23. The judge began by delineating what is required to maintain a right of action under § 1983. See id. The court explained that liability hinges upon state action; harassment without color of state law empowering the perpetrator fails to meet § 1983 requirements. See id. In essence, the Third Circuit elaborated, a § 1983 claim is about abuse of state authority through a supervisory position. See id. at 24. The court noted, however, that simply being a state employee and committing a tort on duty does not suffice; official authority must be exercised. See id.

Based on this discussion, the Third Circuit determined that Sergeant La Penta, although not technically Bonenberger's supervisor, could be held liable for a violation of 42 U.S.C. § 1983. See id. The court emphasized the degree of control that the defendant-appellee exercised over the plaintiff-appellant when no other supervisors were present, noting that disobedience on Bonenberger's part would have resulted in insubordination and would have been grounds for discipline. See id. Judge Lewis distinguished the instant fact pattern from cases relied on by the trial court that addressed similar situations. See id. In one case, the court wrote, the dispatchers were employed by a private company and not by the police department itself, so that the harassing police officers did not wield any authority over them. See id. (citing Woodward v. Worland, 977 F.2d 1392 (10th Cir. 1992)). The Third Circuit found another case where the officers were of the same rank to be equally inapposite. See id. (citing Rouse v. City of Milwaukee, 921 F. Supp. 583 (E.D. Wis. 1996)). Unlike either of those cases, the court reasoned, La Penta was the equivalent of Bonenberger's supervisor and utilized such authority to harass her. See id.

Judge Lewis noted that to hinge arguments of authority on the label of being a supervisor would create a "perverse incentive" for governments to create supervisors without titles in order to avoid liability. See id. at 25. Substantively, the judge wrote, such adherence to form over function would defeat the purpose of the statutory protections. See id. Finally, the Third Circuit created a test for determining who acts under color of state law, writing that, when the state "places an official in the position of supervising a lesser-ranking employee and empowers him or her to give orders which the subordinate may not disobey without fear of formal reprisal, that official wields sufficient authority to satisfy the color of law requirement of 42 U.S.C. § 1983." Id. at 24-25. Applying this principle, the appellate court determined that Sergeant La Penta could be considered
Bonenberger's supervisor and thus reversed the grant of summary judgment in the sergeant's favor. See id. at 25.

The Third Circuit continued the § 1983 analysis by rejecting Bonenberger's argument that the police department failed properly to train and discipline its members. See id. The court agreed with the district court's decision that the Plymouth Police Department did not act with the "deliberate indifference" that is required for § 1983 to apply. See id. Judge Lewis noted that a municipality will only be liable if supervisors both know of the harassment and act in such a way as to encourage the employee's behavior. See id. Thus, the judge wrote, because the Plymouth Police Department maintained a sexual harassment policy that included training for all officers, including Sergeant La Penta, the district court's grant of summary judgment was appropriate. See id.

Judge Lewis next addressed Title VII issues, beginning with Bonenberger's claim of a hostile work environment against the Plymouth Police Department. See id. Addressing one of the elements for a prima facie case of sexual harassment, the Third Circuit determined that respondeat superior liability exists where the state entity knows of the harassment and does not take sufficient remedial measures against it. See id. at 26. In this case, the court reasoned, Bonenberger's direct supervisor, Sergeant Carbo, had actual knowledge of the harassment by La Penta and implicitly approved of it by taking no remedial action against him. See id. Judge Lewis explained that in granting the motion for summary judgment, the district court focused solely on the police department's investigation and on the letter of reprimand issued to La Penta after Bonenberger left. See id. The judge found the lower court's analysis to be incomplete. See id. The court emphasized the differences between Bonenberger's account of the harassment and that of the police department's and determined that a genuine issue of material fact remained as to Title VII liability. See id. at 27. The Third Circuit further elaborated that merely having a sexual harassment policy in place, without a grievance procedure, is not enough to avoid liability for a hostile work environment. See id.

Finally, the court examined the issue of quid pro quo sexual harassment. See id. Judge Lewis reiterated the traditional view of quid pro quo harassment, which normally entails some threat of job loss or decisionmaking based on submission vel non to the harassment. See id. In this case, the judge explained, the plaintiff-appellant knew that the defendant-appellee did not have the power to fire her or the authority to make decisions regarding her em-
ployment, even if he made statements to that effect. See id. at 27-28. More specifically, the appellate court noted that La Penta never suggested that Bonenberger's employment depended on accepting his sexual advances, and thus no exchange of sex for a job occurred. See id. at 28. Although the plaintiff-appellant proposed a creative theory of quid pro quo harassment based on constructive discharge, the Third Circuit reiterated the need for a demand for sexual favors in return for employment. See id. Judge Lewis thus upheld the decision to dismiss the quid pro quo claim. See id.

Clearly this is a difficult and conflict-prone area of the law, as evidenced by the number of sexual harassment cases the United States Supreme Court will be hearing this Term. On one hand, taxpayers will despise this case, as it expands the number of state employees who fit under the aegis of civil rights law. Accordingly, it is the taxpayers who will be forced to compensate victims of harassment propagated by coworkers regardless of supervisory titles. After all, it is never just the officer who is sued, but the deep-pockets employer as well.

Conversely, the decision is a logical progression and a boon to women in the workplace who may be harassed by coworkers with power but without official supervisory titles. To hold otherwise would defeat the purpose of 42 U.S.C. § 1983, which seeks to prevent the abuse of power granted to state officials. As the court noted, to exempt employees lacking a title but possessing supervisory power from the protections afforded by § 1983 would indeed be a "perverse" effect. Sergeant La Penta clearly commanded power over Bonenberger, and the Third Circuit made a logical, sound decision by allowing the plaintiff-appellant the chance to prove her case.

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