



Expert Analysis

Courts May Be Shifting Outlook On Gender Bias Claims

By Kathryn Barcroft

By Kathryn Barcroft March 21, 2019, 4:43 PM EDT

Law360 (March 21, 2019, 4:43 PM EDT) -- The U.S. Court of Appeals for the Fourth Circuit's holding in *Parker v. Reema Consulting Services Inc.*[1] demonstrates a court's willingness to hold employers liable under Title VII for discrimination based on sex where the discrimination is based on a false workplace rumor that a female employee had sex with her male supervisor to gain a promotion.

The Fourth Circuit's holding is interesting to practitioners inasmuch as a rumor can give rise to Title VII liability and is perhaps indicative of a judiciary moving toward a more sympathetic approach to females in the workplace who have confronted these types of sexual rumors in their ascent into supervisory roles.

The decision also demonstrates that with the #MeToo movement and the hurdles that have been exposed for victims finding their way to trial, courts may be willing to acknowledge a common-sense approach in the determination of what type of conduct is strong enough to indicate discrimination based on gender or other protected status. The Fourth Circuit's opinion should also serve as a reminder to employers that all allegations should be fully investigated without delay, confidentiality should be maintained, employees should be treated similarly, and proper remedial action should be taken in order to avoid liability in situations where an employee who has been promoted becomes a target of false workplace rumors.



Kathryn Barcroft

Parker v. Reema Consulting Services

Evangeline Parker alleged sexual harassment, retaliation and discriminatory termination claims under Title VII. Parker, a clerk in a lower-level position at a warehouse, was legitimately promoted to a supervisory position at her place of employment, Reema Consulting Services Inc., where she had worked since December 2014.[2] Following her promotion, workplace jealousy arose over Parker's ascent within the ranks of the company, when in March of 2016, a male employee in the facility, who started working for RCSI about the same time as Parker, allegedly began circulating unfounded rumors that Parker had obtained her promotion by having a sexual relationship with a higher-ranking supervisor.[3]

The alleged unfounded rumor quickly spread throughout the staff, including to employees that Parker supervised and to the warehouse's highest-ranking manager; Parker confronted the attacks on all fronts at the company.[4] Unfortunately, instead of taking affirmative action or investigating the false sexual rumor that had been spread about Parker, the highest-ranking manager allegedly actively participated in spreading the rumor of the inappropriate sexual relationship.[5] As the rumor spread through the facility, Parker was allegedly "treated with open resentment and disrespect" from many coworkers, including employees she supervised and the supervisors.[6]

In late April of 2016, the same highest-ranking supervisor that had allegedly helped circulate the rumor held an all-staff meeting at which the rumor was discussed. It is alleged that instead of including Parker in the discussion, he intentionally permitted the individual with whom she was allegedly having an affair to attend, while slamming the door in Parker's face and locking her out.[7] Thus, the male supervisor implicated to have engaged in the sexual relationship with Parker was treated differently by the company.

Parker took each of the appropriate steps that an employee confronting sexual harassment should take: She met with RCSI's supervisors on multiple occasions concerning the false rumor, she filed an internal sexual harassment complaint with the human resources manager, and she even met with the company's in-house counsel.[8] Parker, like many workplace victims, seemingly encountered an uphill battle to fight the false rumor, and after reporting the misconduct, faced retaliation from her supervisor and a false counter-complaint from the originator of the rumor.

For example, the same highest-ranking manager who was alleged to have participated in perpetuating the rumor represented that he had "great things" planned for Parker, but that "he could no longer recommend her for promotions or higher-level tasks because of the rumor" and even affirmatively blamed her for the rumor.[9] During another meeting, the same highest-ranking supervisor allegedly said that he should have fired her when she started "huffing and puffing about this BS rumor." [10] Over the course of this meeting, the supervisor also allegedly "lost his temper and began screaming" at Parker.[11]

Unfortunately, as often happens in these cases, the employee who allegedly publicized the unfounded rumor filed a bogus complaint against Parker alleging that she had created a hostile work environment because of her inappropriate conduct.[12] Parker was instructed to cease all contact with the employee who started the unfounded rumor.[13] Parker alleged that the employee who started the unfounded rumor was not provided with a similar instruction and would enter her work area on multiple occasions where he would distract her employees, stare at her at length, smirk and laugh at her.[14]

Parker also reported this issue with her supervisor and human resources, but the issue went unaddressed. Instead, Parker alleges that she was presented with two written warnings related to the hostile work environment report against her by the originator of the rumor, another for insubordination to the supervisor who had participated in publicizing the rumor, and for poor management ability (the company had a "three strikes" policy).[15] Parker was eventually

terminated by RSCI after the two written warnings.[16]

The Fourth Circuit's Opinion

While the district court and the employer purported a distinction between harassment based on “conduct” versus harassment based on “gender,” the distinction was not meaningful, and the Fourth Circuit reasonably concluded that the conduct was gender-based.[17] The Fourth Circuit explained that the lower court had failed to consider the “sex-based nature of the rumor and its effects.”

The Fourth Circuit went on to state that the female victim had “plausibly invoke[d] a deeply rooted perception — one that unfortunately still persists — that generally *women*, but not men, use sex to achieve success.”[18] Because of this “double standard,” women are susceptible to being labeled as “sluts” or worse, prostitutes selling their bodies for gain.”[19]

The Fourth Circuit concluded that “because ‘traditional negative stereotypes regarding the relationship between the advancement of women in the workplace and their sexual behavior stubbornly persist in our society,’ and ‘these stereotypes may cause superiors and coworkers to treat women in the workplace differently from men,’ it is plausibly alleged that Parker suffered harassment because she was a woman.”[20]

The Fourth Circuit also took issue with the district court’s conclusion that the behavior was not sufficiently severe or pervasive. The district court determined that the rumor had only circulated for “a few weeks,” and there were only “a few slights.”[21] The Fourth Circuit, however, determined that the harassment was “all-consuming” from the time it was circulated up until Parker was terminated, that the rumor had physically threatening aspects, was humiliating, and the harassment interfered with Parker’s work and impacted her ability to manage her staff.[22]

The language included by the Fourth Circuit that Parker had “plausibly invoked a deeply rooted perception” could be used to invoke protections and assist victims in surviving the motion-to-dismiss stage of litigation and perhaps create a path to court for more victims. The district court provided a strict interpretation of the facts in Parker in holding that the rumor was based on her alleged conduct and not her gender.

In reversing the District Court’s decision with respect to these allegations, the Fourth Circuit permitted a plaintiff, whose career was decimated by a false sexual rumor, to pursue hard-fought claims that had been dismissed by the district court. The decision is significant because it illustrates how female employees in the workplace can be damaged by rumors and recognizes that unfounded rumors based on gender perhaps should be litigated.

One part of the decision that is less favorable to litigants asserting federal claims sheds light on the importance of careful inclusiveness of all claims when filing a U.S. [Equal Employment Opportunity Commission](#) charge of discrimination. Allegations that are not included in an EEOC charge may later be procedurally barred. The Fourth Circuit did not reverse the district court’s dismissal of Parker’s discriminatory termination claim because she failed to exhaust administrative remedies prior to filing in court.

While Parker had properly alleged facts relating to the false rumor and the subsequent retaliatory conduct in the EEOC charge, she did not specifically reference the fact that she was terminated without three warnings, as required by the company’s “three strikes” policy, or that the company treated men and women differently in the application of the policy. The court found that the claims in Parker’s complaint on this point were broader than the discrete acts that she had included in her EEOC charge.[23] The Fourth Circuit noted that Parker should receive credit for allegations stated in the EEOC charge as well as allegations that would naturally arise from an investigation of those allegations.[24]

However, given that Parker’s EEOC charge did not provide adequate notice of broader claims relating to the company’s requirement of a three strikes policy or that the company treated men and women differently in the application of the policy, the district court’s dismissal of these allegations was upheld by the Fourth Circuit. Given that an EEOC charge is filed in a relatively short time frame after misconduct has occurred, well prior to a complaint being filed, practitioners should be mindful of exploring all allegations of wrongdoing with their client, because if they are not stated in the initial EEOC charge, the claims may later be procedurally barred for failure to exhaust administrative remedies. The Parker case is cautionary to all members of a protected class and their attorneys who should be certain that all legal claims are asserted in the initial EEOC charge.

#MeToo and Employer Takeaways

The Fourth Circuit’s decision raises questions in light of the #MeToo movement. With #MeToo and the large number of allegations of sexual misconduct reported in the press, has there been any significant increase in sexual harassment cases resulting in federal trials and in significant verdicts?

The #MeToo movement went viral in October 2017, and in July 2017 there was a study by Lex Machina that found “very few employees who file federal job discrimination, harassment, and retaliation claims even make it to court, and only 1% of those claims eventually succeed in court.”[25] The study found that “a majority of cases are settled, employers prevailed on summary judgment roughly 13 percent of the time, and only 192 damage awards out of 72,000 cases included punitive damages.”[26] It would be interesting to revisit these statistics, given that a few years have passed since the viral #MeToo movement began.

In the meantime, the significance of the Fourth Circuit’s decision for employers is to take great care when rumors and gossip in the workplace are reported, to stop the rumors as soon as possible, and prevent retaliatory conduct as a result of the rumors. HR departments and in-house counsel should know how to properly process complaints concerning rumors and gossip — to train supervisors concerning their responsibility to enforce sexual harassment policies and prevent gossip, advise them not to participate in or spread rumors, and to treat men and women similarly when a rumor does arise that needs to be investigated by the company.

Employees should be aware that in circumstances where rumors and gossip remain unchecked by a company despite reports, supervisors participate in spreading the false gossip, and a company retaliates, they may have another avenue to sue under Title VII. Employees and their attorneys should also carefully review any charge to ensure that all of their legal claims are included prior to filing it with the EEOC.

Kathryn Barcroft is special counsel at [Solomon Law Firm PLLC](#).

Law360 is owned by [LexisNexis Legal & Professional](#), a [RELX Group](#) company, which owns Lex Machina.

The opinions expressed are those of the author(s) and do not necessarily reflect the views of the firm, its clients, or Portfolio Media Inc., or any of its or their respective affiliates. This article is for general information purposes and is not intended to be and should not be taken as legal advice.

[1] 915 F.3d 297 (4th Circuit Feb. 8, 2019)

[2] See Parker, 915 F.3d at 300.

[3] Id.

[4] Id.

[5] Id.

[6] Id.

[7] Id.

[8] Id. at 300–01.

[9] Id. at 300.

[10] Id.

[11] Id. at 300–01.

[12] Id. at 301.

[13] Id.

[14] Id.

[15] Id.

[16] Id.

[17] Id. at 303

[18] Id.

[19] Id.

[20] Id. (citing [Spain v. Gallegos](#), 26 F.3d 439, 448 (3d Cir. 1994)).

[21] Id. at 302.

[22] Id. at 305.

[23] Id.

[24] Id.

[25] Sean Captain, Workers Win Only 1% of Federal Civil Rights Lawsuits at Trial, Fast Company (July 31, 2017).

[26] Id.