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High Court Asked To Weigh Scope Of Sexual Harassment

By **Alexis Shanes**

Law360 (November 13, 2020, 7:04 PM EST) -- A former used car sales associate who claims she was subjected to sexual harassment and misogyny by a supervisor before being fired has urged the U.S. Supreme Court to consider whether the Eighth Circuit set the legal bar too high when it tossed her claims.

In a brief supporting her certiorari request on Thursday, Jennifer Paskert, a former employee at Auto\$mart Inc. in Spirit Lake, Iowa, asked the high court to find that sexual harassment is unlawful if a reasonable person would view it as it hostile, a move that would blunt the Eighth Circuit's "extreme" comparison standard that it applied to her claims.

Paskert had complained she was sexually harassed and fired for purported insubordination, but the circuit court said she had not alleged behavior severe or pervasive enough to prevail on her claims, nor had she exhausted her administrative options before filing suit.

"This case is an excellent vehicle for resolving the question presented," the reply brief said. "The issue before this court is only the correctness of the legal standard that both parties agree was applied — at the urging of respondents — by the Eighth Circuit."

Paskert initially filed suit in January 2017 under Title VII, alleging she was subjected to hostility, discipline and demotion and that she was terminated because of her sex. She claimed her supervisor at the car dealership tried to touch her inappropriately, made crude and suggestive remarks and called women derogatory names.

The district court granted summary judgment for the dealership in November 2018. And in February, the Eighth Circuit said it **wouldn't revive Paskert's case**, basing its decision on a single longstanding benchmark Paskert now claims is too stringent.

In her filing, Paskert said the issue presented a "clear and important" conflict at the appellate level because different circuits have different standards for harassment claims.

Many circuits maintain that their decisions letting harassment claims proceed do not create a baseline for later rejection or approval, according to the filing. But the Eighth Circuit and the Fifth Circuit have held that harassment is actionable only if it is worse than the most egregious harassment ever held lawful in the circuit in question.

Both parties cited two Eighth Circuit cases with "extreme harassment" as controlling precedent, but Paskert said those cases create rigid benchmarks that only allow similarly extreme harassment disputes to survive.

That standard, Paskert added, can make some instances of harassment-fueled workplace hostility essentially legal. She pointed to nearly two dozen harassment cases involving racial epithets that the Eighth Circuit dismissed.

"Respondents point out that 'the same standards generally apply to both race-based and sex-based hostile environment claims,'" the brief said. "That is correct, and it illustrates the stark consequences of the Eighth Circuit's comparison-precedent standard."

In an Oct. 16 brief opposing certiorari, the dealership argued that Paskert had not raised the precedent issue in the two lower courts, denying her the chance to address at the high court whether the standard was correct.

But in Thursday's brief, Paskert said she could not pose the question to the lower courts because they did not have the authority to overturn the long-established precedent.

Eric Schnapper, an attorney for Paskert, told Law360 on Friday that when the first of the "extreme" Eighth Circuit cases came down 18 years ago, it was seen as a one-of-a-kind decision that wouldn't be used as precedent.

"And then, it became exactly that," he said. "Nobody could have foreseen that."

Bret Dublinske, who represents the dealership, said Paskert was overstating the magnitude of how circuits treat precedent in harassment cases.

"These cases are so individual in terms of their facts and arguments that those differences account for much of the difference in outcomes from case to case, within and between circuits, making this an unlikely issue for the court to take up," Dublinske told Law360 on Friday.

Paskert is represented by Eric Schnapper of the University of Washington School of Law and Paul Deck Jr. and William Deck of Deck & Deck LLP.

The dealership and its manager are represented by Bret Dublinske, Bridget Penick and Brandon Underwood of Fredrikson & Byron PA.

The dealership supervisor is represented by Kerrie Murphy and Julie Bittner of MWH Law Group LLP.

The case is Paskert v. Kemna-ASA Auto Plaza Inc., et al., case no. 20-27, in the U.S. Supreme Court.

--Additional reporting by Hailey Konnath. Editing by Haylee Pearl.