

**THIRD CIRCUIT FURTHER EXPLAINS WHEN FIRST AMENDMENT  
PROTECTION IS AVAILABLE FOR REPORTING  
SEXUAL HARASSMENT IN THE WORKPLACE**

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Zelinski v. Pennsylvania State Police, 2004 WL 1799234 (3rd Cir.(Pa.)), is a recent decision of the Third Circuit Court of Appeals, which sets forth certain standards applied to many civil rights claims.

The Court's discussion in Zelinski on whether an individual co-worker can be held liable for violating the civil rights of another worker is a reaffirmation of the court's prior decision in Bonenberger v. Plymouth Township, 132 F.3d 20 (3d Cir. 1997.) In that case, the court looked not only to whether the offending employee had actual supervisory capacity over the plaintiff, but also to whether the employee had acted in a supervisory capacity. In order to determine whether there was de facto supervisory control, the court looked to whether the offending employee could alter the plaintiff's workload and whether the plaintiff could face charges of insubordination for failure to obey the that employee's orders. In the absence of either of these two factors, the claims were dismissed.

In Zelinski, the court overturned a decision of a lower court and permitted a sexual harassment case to proceed. This was based on essentially four incidents of sexual harassment in less than one year. The court found that there was appropriate evidence of a pattern of harassment.

Perhaps most interesting in Zelinski is the fashion in which the court justifies dismissal of the First Amendment retaliation claim. This was a claim that the employer had retaliated against the employee for reporting a civil rights violation. The theory of the claim is that employees have a First Amendment, free speech right to report such misconduct. In a prior case, Azzaro v. County of Allegheny, 110 F.3d 968 (3d Cir. 1997), the Court had determined that a report of sexual harassment could be protected speech on a matter of public concern in certain circumstances. Now, in Zelinski, the Court has distinguished its holding in Azzaro and determined that there was not First Amendment protected speech in this case.

The court distinguished the case on the basis that Zelinski complained about a non-supervisory co-worker. Since neither the individual to whom she complained nor the co-worker worked directly under any elected official, her complaints were not relevant to the "electorate's evaluation of the performance of the office of any elected official."

While it is difficult to see how the Third Circuit can distinguish between the facts in Zelinski and those in the Azzaro case, the decision in Zelinski makes clear that close attention needs to be paid to the particular facts of every case each time a violation of First Amendment rights is alleged.