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In this week's SWALU, we review an Alabama Supreme Court decision dealing with a breach of contract claim for violating duties under a power of attorney. We also review an Eleventh Circuit opinion concerning sexual harassment in the workplace.

**Smith v. Wachovia Bank, N.A., No. 1071189, 2009 WL 3152223 (Ala. Sept. 30, 2009); Wachovia Bank, N.A. v. Smith, No. 1071239, 2009 WL 3152223 (Ala. Sept. 30, 2009) (Violation of duties under a power of attorney will not give rise to a breach of contract claim unless the plaintiff can prove that the power of attorney has all of the elements of a contract.)** William Wynn McLeod and Jo Everett McLeod, husband and wife, kept their finances separate during their marriage. In 1996, Mr. McLeod executed a will that granted Mrs. McLeod only the statutory elective share (i.e., the minimum amount required to be granted to a spouse by law). His will granted his niece and nephew everything in the event that Mrs. McLeod died first.

In 2005, Mr. McLeod executed a power of attorney naming Mrs. McLeod as his attorney-in-fact. In 2006, Mr. McLeod moved into a nursing home, and Mrs. McLeod transferred most of her husband's individually held assets into jointly held accounts and accounts in her name only.

Mrs. McLeod died in February 2007, and her will named Fletcher Mitchell Smith as her personal representative. Mr. McLeod died in June 2007, and his will named Wachovia Bank as his personal representative.

Wachovia, on behalf of Mr. McLeod's estate, sued Smith for improper transfer of Mr. McLeod's money. At trial, the jury returned a verdict in favor of Wachovia on a breach of contract claim. Smith appealed.

On appeal, Smith argued that Wachovia failed to prove that Mr. McLeod's power of attorney was a contract. Under Alabama law, a power of attorney usually creates a fiduciary/agency relationship, not a contractual relationship, and breach of fiduciary duty is a tort claim, not a contract claim.

A contract requires consideration. The Alabama Supreme Court held that in this case, the power of attorney lacked sufficient consideration to make it a contract. The Court noted that Wachovia failed to identify any promise that Mr. McLeod made in exchange for Mrs. McLeod's performance. Mr. McLeod executed the power of attorney for his benefit, not for Mrs. McLeod's benefit.

The Court reversed and remanded the case in favor of Smith because Wachovia failed to prove the necessary elements of a breach of contract claim. The Court did, however, instruct the lower court to consider whether Wachovia had the right to recover the improperly transferred assets.

**Quick v. City of Birmingham, No. 08-14972, 2009 WL 3059057 (11th Cir. Sept. 25, 2009) (An employer can be vicariously liable to an employee for sexual harassment committed by a non-supervisor co-worker if the employer has knowledge of the harassment and fails to act appropriately.)** Pamela Quick, a firefighter with the Birmingham Fire and Rescue Service, sued the City of Birmingham for sex discrimination. She argued that her supervisors made gender-biased comments and assigned work to her based on her sex.

At trial, the City presented evidence that Quick was not harassed by her supervisors. The City also claimed that it promptly investigated her harassment claim against co-workers. The jury found that she was sexually harassed by co-workers but that she failed to prove that the environment of harassment was created or permitted by a supervisor. Quick appealed.

Under Title VII, in certain situations, an employer can be vicariously liable for workplace harassment committed by the harassed employee's supervisor. An employer can also be liable for harassment committed by a non-supervisor coworker, if the employer had actual knowledge or constructive knowledge of the harassment and failed to take remedial action. The employee has the burden of proving the employer's liability.

The Eleventh Circuit held that the jury's decision was not against the weight of the evidence. Therefore, it dismissed Quick's appeal and found in favor of the City.



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