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Home(/) > Editor's Picks(https://Masslawyersweekly.Com/Category/Editors-Picks/) > Dissent: 1st Circuit improperly 'flipped script' on Delta flight attendant



DEPOSIT PHOTOS

Dissent: 1st Circuit improperly 'flipped script' on Delta flight attendant

Attorneys hope plaintiff seeks en banc review in sexual assault case

Kris Olson (https://masslawyersweekly.com/author/kris-olson/) September 6, 2024 // **8 Minute Read**
Dissent-1st-circuit-improperly-flipped-script-on-delta-flight-attendant
Members of the plaintiffs' side employment bar say they hope en banc review will bring justice that they believe a 1st U.S. Circuit Court of Appeals panel denied to a former Delta flight attendant who claims she was drugged and sexually assaulted by a co-worker during a layover. You can read the content in details following link https://masslawyersweekly.com/2024/09/06/dissent-1st-circuit-improperly-flipped-script-on-delta-flight-attendant/

Members of the plaintiffs' side employment bar say they hope en banc review will bring justice that they believe a 1st U.S. Circuit Court of Appeals panel denied to a former Delta flight attendant who claims she was drugged and sexually assaulted by a co-worker during a layover.

The majority upheld a grant of summary judgment for the airline on the plaintiff's claims under Chapter 151B, Title VII and the Americans with Disabilities Act, prompting a withering dissent from Judge O. Rogeriee Thompson.

From a legal perspective, the issue, according to Thompson, is that the majority improperly effectively shifted the burden of proof to the nonmoving party on a motion for summary judgment.

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In a “factual scrum,” the majority had joined Delta’s side, even though, on its motion for summary judgment, evidentiary conflicts, credibility calls and competing inferences should have been resolved in the plaintiff’s favor, Thompson said.

“Yet in a script-flipping move, the majority relies on Delta’s version rather than hers,” she wrote.

She then listed more than a dozen instances in which that “script-flipping” had occurred.

“A persistent theme in the majority opinion (here and elsewhere) is that [the alleged assailant] told a ‘consistent story’ that, to the extent they had engaged in sexual activity, it had been consensual,” Thompson noted in the first of 13 numbered sections in her opinion.

“If only,” she added.

In addition to not recognizing the existence of genuine fact disputes, the majority misread the law, Thompson said.

The majority was correct that, with Title VII and Chapter 151B claims, courts focus on the reasonableness of the company’s investigatory process, she added.

“But I see no support for the majority’s Kafkaesque suggestion that because [the plaintiff] wasn’t sexually assaulted a second time she can’t defeat summary judgment on her insufficient-investigation theory against Delta,” Thompson wrote.

Both Thompson and the majority found the 1st Circuit’s 2022 decision in *Forsythe v. Wayfair Inc.* on point. But where the majority could see no way a reasonable juror could find Delta’s credibility assessment of the alleged assailant so lacking in support that Delta acted unreasonably, Thompson said she could “see reasons aplenty to question the legitimacy of Delta’s credibility take.”

Thompson concluded by making clear she was not saying that the plaintiff should win.

just saying that – under the facts (properly seen) and the law (correctly understood) – hers is a story of an insufficient investigation that a reasonable jury could believe.”

The 63-page decision in *Caruso v. Delta Air Lines, Inc.* is [Lawyers Weekly No. 01-180-24](https://masslawyersweekly.com/2024/08/27/employment-sexual-assault-investigation/) (<https://masslawyersweekly.com/2024/08/27/employment-sexual-assault-investigation/>).

‘Misogyny alive and well?’

The plaintiff’s attorney, Eric R. LeBlanc of Cambridge, said he and his client were considering their further options. He declined further comment.

Delta’s attorney, Patrick M. Curran of Boston, also declined to comment.

But to Newton employment attorney Valerie Samuels, Judge Thompson “repeatedly hit the nail on the head” with her dissent.

As she read the decision, Samuels said her overarching thought was that “systemic misogyny is still alive and well” and that a woman who claims she was sexually assaulted has to be the perfect victim in order to be taken seriously.

What do I tell people who walk into my office? ‘I’m sorry you don’t remember the event. That means the court is going to credit your assailant’s opinion about what happened that night.’



REBECCA PONTIKES

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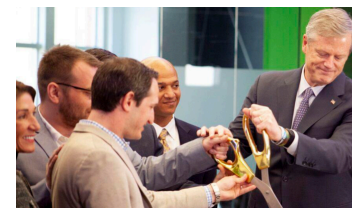
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If she were representing the plaintiff in *Caruso*, Samuels said she would absolutely ask for an en banc hearing at the 1st Circuit, giving her a greater chance to highlight all the material facts that are in dispute.

In Samuels’ view — shared by many of her colleagues in the plaintiffs’ employment bar — Delta was obligated to go further with its investigation, especially once the alleged assailant’s description of the night in question began to shift.

Boston employment attorney Rebecca G. Pontikes said the majority’s narrative of the facts shows that it made credibility conclusions it is not supposed to make and embodied “a very outdated notion of what a proper rape victim does and what a credible rape victim does.”

“What do I tell people who walk into my office?” Pontikes asked rhetorically. “I’m sorry you don’t remember the event. That means the court is going to credit your assailant’s opinion about what happened that night.”

Pontikes said she found particularly galling the majority burying in a footnote the suggestion that it was not condoning the alleged assailant’s actions.

“I’m going to flat out say that when we don’t condone behavior and when we feel strongly about the behavior being poor, we tend to express it in ways that aren’t buried in a footnote,” she said.

The “victim shaming” and improper burden shifting in the majority opinion, such as the negative inferences drawn from the plaintiff’s delay in filing a police report, were “really shocking,” Boston attorney Allison L. Williard agreed.

Delta — and by extension, the court’s majority — adopted the alleged assailant’s narrative that his encounter with the plaintiff was consensual when the overwhelming evidence indicated that the plaintiff was inebriated and therefore unable to give consent, Williard noted.

In a reasonable investigation, Delta would have pressed the alleged assailant for more information, that it knew he was in the plaintiff’s room on the night in question, Williard suggested.

In addition to echoing his colleagues’ concerns about the improper burden shifting and credibility determinations, Somerville attorney Robert S. Mantell said the majority’s opinion is also inconsistent with [guidance recently issued by the EEOC on harassment](https://www.eeoc.gov/laws/guidance/enforcement-guidance-harassment-workplace#_ftn356) (https://www.eeoc.gov/laws/guidance/enforcement-guidance-harassment-workplace#_ftn356).

“[The majority] takes the position that after a person complains of harassment, that the employer is not responsible for harassment unless some more harassment happens after that,” he said. “The EEOC says, ‘No, that’s not true. If the employer receives a report of harassment and failed to respond adequately, then, in a sense, they have ratified the harassment, and they are responsible for it.’”

Even employer-side attorney Kathleen A. Berney recognized the force of the dissent. Berney said what she would be taking from *Caruso* is a reminder of the need to push back when a client has the understandable inclination to reach a quick conclusion to an investigation and get back to business.

“They’re messy, and they’re time consuming, and they can be expensive and stressful for everybody involved,” she said of investigations.

Even if it would reopen or raise some hard questions, the employer should ask those hard questions, Berney said.

“The point here isn’t that you have to be right,” she said. “The bar isn’t really very high. [The investigation] just has to be reasonable.”

Perilous layover

On Aug. 3, 2018, plaintiff Sara Caruso flew with three other flight attendants, First Officer James Lucas and Capt. Randall McCormick from Atlanta to Dallas, where they had an overnight layover. It was the first time that Caruso and Lucas had ever interacted with each other.

Lucas, Caruso and two of the other flight attendants made plans to meet in the hotel lobby at 4 p.m. to hit Dallas’ arts district for a night of dinner and bar hopping.

The group arrived at their final bar of the night around 9 p.m., where one of the other flight attendants “passed out.”

Caruso has no memory of what occurred after she and Lucas escorted the flight attendant who had passed out to her room.

In an Aug. 9, 2018, statement, Lucas made no mention of any sexual contact between the two of them, however he would later acknowledge that they engaged in what he said was consensual sexual contact that stopped short of penetrative sex.

After a night of erratic behavior that included banging on doors in her bra and underwear, Caruso did not show up for the employees’ scheduled shuttle to the airport for the next flight.

She failed a breath test and was removed from duty and suspended pending further investigation, evaluation and potential treatment.

Upon returning to Boston, Caruso went to a local hospital to complete a sexual assault kit. A report on her physical exam noted that she had a bruise on her right hip, pain around her chin, and petechiae — small red spots — around her eyes.

The following morning, Caruso emailed a Delta company official an “additional statement,” in which she relayed for the first time that she may have been drugged and assaulted at the Dallas airport, though she did not identify Lucas as her possible attacker.

After completing a 30-day residential rehabilitation program for alcohol abuse disorder, Caruso on Sept. 26 filed her first police report related to the alleged sexual assault with her local police department, which prompted the Dallas Police Department to begin an investigation.

By Jan. 7, the detective concluded there was “no evidence to support that an offense occurred” but also relayed to Delta that, contrary to an earlier indication, Lucas had not cooperated with the investigation.

Caruso filed a complaint with the MCAD on Dec. 18, 2018, alleging several counts of retaliation and discrimination in violation of Title VII and Chapter 151B against Delta and one of its officials.

In response, three Delta employees interviewed Lucas on April 3, 2019, finding “credible” his statement that his sexual contact with Caruso had been consensual.

After being on leave for months, Caruso requested disability accommodations for post-traumatic stress disorder. Delta offered a modified plan, which Caruso accepted.

But she worked fewer than 10 flights before being admitted to a specialty hospital due to a suicide attempt. Caruso then requested — and was granted — a “hardship transfer” to Salt Lake City, where her family lived.

Two days after she had apparently accepted another job, Caruso’s attorney sent a letter to Delta demanding its “wholesale reversal and its unequivocal grant of the accommodations” Caruso had sought.

Delta asked for more time to respond to Caruso’s demand, but she declined, considering herself constructively discharged.

Caruso filed a nine-count complaint in Massachusetts state court on Dec. 30, 2019, which Delta removed to federal court. After 18 months' worth of discovery, Delta moved for summary judgment on all claims on Aug. 3, 2021, which the District Court granted on March 9, 2022.

Majority's view

To survive summary judgment on her sex discrimination claims under both Title VII and Chapter 151B, Caruso needed to show a genuine issue of material fact both as to a causal connection between Delta's action and the harassment she allegedly experienced and that those actions by Delta amounted to negligence.

"We hold she has failed to carry her burden on both points," Lynch wrote.

In the brief period she had returned to work, Caruso had never encountered Lucas, nor had she needed to swap flights or obtain alternative lodging or transportation to avoid him, the majority noted.

To the majority, that meant there was no causal connection between the hostile work environment Caruso alleged she experienced and any actions by Delta.

The majority also found no facts to allow the plaintiff to contest the notion that Delta's investigation was anything but reasonable. In reaching that determination, the majority placed great weight on the passage of time between the date of the alleged assault on Aug. 5, 2018, and Oct. 3, "the earliest possible date that Delta knew or should have known that Caruso believed Lucas had been the person who assaulted her."

The majority also attributed the unavailability of video footage from the hotel to Caruso's delay in filing a police report.

Though entitled to rely to some degree on the decision of the Dallas police not to bring charges, "Caruso continued to 'take action' by interviewing Lucas, the majority noted. However, in her dissent, Thompson said Lucas was told at the outset that the interview was not disciplinary, laying bare Delta's preconceived notions about him as a "truth-teller."

The majority analyzed Caruso's state law claim under Chapter 151B separately from the Title VII claim, given the "similar but not identical" standards involved. But it cited some of the same facts to reach the same conclusion, that Caruso had failed to demonstrate a genuine issue of material fact as to whether Delta's response to her allegations of sexual harassment was inadequate under Massachusetts law.

"This case presents, at most, 'a difficult personnel matter on a contested complaint' on which the employer declined to impose discipline, a circumstance in which Massachusetts courts decline to impose employer liability," Lynch wrote.

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