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ARE EMPLOYERS PROPERLY PROTECTING THEMSELVES FROM HARASSMENT CLAIMS?

Recent harassment cases should serve as a warning to employers regarding the effectiveness of their harassment policies, especially in hostile work environment cases.

In 1998, the United States Supreme Court recognized an affirmative defense that employers may raise against a Title VII claim alleging a hostile work environment created by a supervisor's harassment. If there is no tangible employment action against the employee, an employer may assert the defense that: (1) it exercised reasonable care to prevent and correct promptly any harassing behavior; and (2) that the complaining employee unreasonably failed to take advantage of preventive or corrective opportunities provided by the employer or to avoid harm otherwise. This is commonly known as the *Ellerth/Faragher* defense.

It is the first prong of this defense that is problematic. While most employers have anti-harassment policies, they may not be doing enough to establish that they have exercised reasonable care to prevent or correct promptly any harassing behavior. In a case decided last month in the Northern District of Texas (*Winchester v. Nationwide Mutual Insurance Company*, 2011 U.S. Dist. LEXIS 26880), the employer asserted its *Ellerth/Faragher* defense by pointing to its Code of Business Conduct, which included a policy against harassment and required employees to promptly bring harassment to management's attention. The employer also relied on its anti-harassment policy in a handbook which defined the prohibited harassment. These policies were available to all employees through an intranet website.

In denying the employer's summary judgment, the *Winchester* court found no evidence that the employer took specific action to make the plaintiff or other employees aware of its policies against harassment. There was no evidence that the employer reviewed the policies with its employees and supervisors when they were hired or at any time thereafter, nor was there any indication that the employer trained its employees on the anti-harassment policies. The court thus held that the defendant could not prove "beyond peradventure" that it exercised reasonable care to prevent or correct promptly any harassing behavior.

The *Winchester* court cited a string of Fifth Circuit decisions that had previously rejected the argument that the "mere presence" of an anti-harassment policy satisfies the first prong of the *Ellerth/Faragher* defense, noting that most cases that allowed the defense for the employer found that there was evidence of some form of employee training on the policy.

In sum, an employer takes a risk by simply having a policy in a handbook without doing more. In addition to regular supervisor training, employers should: (1) cover the anti-harassment policy during orientation; (2) make sure that each and every employee is given a copy of the policy, either individually or through a handbook; and (3) periodically discuss the policy in regularly scheduled safety or production meetings – and have proof of attendance.

The regular discussion of an anti-harassment policy may also uncover problems before they get out of hand and save the employer from potential costs and liability.

—*Sidney F. Lewis, V*

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Remember that these legal principles may change and vary widely in their application to specific factual circumstances. You should consult with counsel about your individual circumstances. For further information regarding these issues, contact:

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