Public Sector Employee Liability: Is Your Employee Handbook a Sword or a Shield for Sexual Harassment Claimants?

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A carefully drafted and consistently enforced sexual harassment policy is one of the most important components of employee handbooks prepared and disseminated by public sector employers. In this post-***Ellerth/Faragher*** sexual harassment litigation, public sector employee handbooks play a pivotal role in preventing or minimizing exposure to Title VII liability. This presentation will address the critical need for employee handbooks to contain current, up-to-date sexual harassment policy provisions that (1) address the particular form of harassment involved, (2) provide a reasonable avenue for complaints, and (3) are communicated to affected employees.

EEOC Enforcement Guidance

According to the most recent guidance from the Equal Employment Opportunity Commission, there are several requirements for a valid anti-harassment policy. ***EEOC Enforcement Guidance*** 915.002 (June 18, 1999), BNA EEOC Compliance Manual, N:4081-4082. At a minimum, an anti-harassment and complaint procedure should contain these elements:

1. A clear explanation of the prohibited conduct;

2. Assurance that employees who make complaints of harassment or provide information related to such complaints will be protected against retaliation;

3. A clearly described complaint process that provides accessible avenues of complaint;

4. Assurance that the employer will protect the confidentiality of harassment complaints to the extent possible;

5. A complaint process that provides prompt, thorough and impartial investigation; and,

6. Assurance that the employer will take immediate and appropriate corrective action when it determines that harassment has occurred.

Elements of a Prima Facie Case of Sexual Harassment Based on Hostile Work Environment:

In order to establish a Prima Facie case of liability under Title VII based upon an alleged hostile work environment, a claimant generally must satisfy five elements:

1. The claimant is an employee who belongs to a protected group;

2. The claimant is an employee who was subjected to unwelcome harassment;

3. The harassment complained of was based on sex;

4. The harassment complained of affected a term, condition or privilege of employment; and,

5. The employer knew or should have known of the harassment in question and failed to take prompt remedial action. ***Celestine vs. Petroleos de Venezuella SA***, 266 F. 3d 343, 353 (5th Cir. 2001).

The U. S. Supreme Court has modified the above formulation in Title VII litigation where the harassment is claimed to have been committed by a supervisor with immediate authority over the victim. In ***Faragher vs. City of Boca Raton***, 524 U.S.775, 807, 118 S. Ct. 2275, 141 L.Ed. 2d 662 (1998), the Court held that "when the harassment is illegibly committed by a supervisor with immediate (or successively higher) authority over the harassment victim, the plaintiff employee needs to satisfy only the first four of the elements listed above."

Applicability of the *Faragher/Ellerth* Affirmative Defense:

Before the Supreme Court decided ***Faragher*** and ***Ellerth*** in 1998, it employed a framework for sexual harassment cases based upon "*quid pro quo*" harassment and hostile work environment harassment. In a typical *quid pro quo* harassment case, an employer could be held strictly liable when a supervisor either explicitly or implicitly conditioned job benefits upon the granting of sexual favors by a subordinate, or threatened adverse action for a refusal to participate. In the typical supervisory hostile work environment and harassment case, the harassing comments or actions by a supervisor had to be deemed so severe or pervasive as to alter the terms and conditions of the employee's employment, and liability could be imposed upon the employer only when the employee could show that the employer knew or should have known of the harassment and failed to take the appropriate remedial measures.

A new analytical framework was adopted by the Supreme Court in ***Faragher v. City of Boca Raton*** , 524 U.S. 775, 118 S. Ct. 2275, 141 L.Ed 2d 662 (1998) and ***Burlington Industries, Inc. vs. Ellerth***, 524 U.S. 742, 118 S. Ct. 2257, 141 L.Ed 2d 633 (1998). The ***Faragher/Ellerth*** standard changed the basis for determining a employer's liability for harassment by a supervisor. Under the new standard, the employer's liability was no longer dependant whether the sexual harassment was quid pro quo or hostile work environment, but turned on whether the harassment had culminated in a "tangible employment action." A tangible employment action could include

a discharge, failure to promote, or other significant disciplinary action. Thus, if the alleged sexual harassment culminated in tangible employment action, the employer could be held strictly liable for the supervisor's harassment. If the supervisor's harassment did not result in a tangible employment action, however, but was sufficiently severe or pervasive as to be actionable under Title VII, the employer could be held vicariously liable unless it could prove what is now known as the ***Faragher/Ellerth*** affirmative defense. To assert the defense, the employer must show:

1. It exercised reasonable care to prevent and promptly correct any harassing behavior; and,

2. The employee unreasonable failed to take advantage of any preventive or corrective opportunities provided by the employer or otherwise to avoid harm.

Relevance of Policy and Complaint Procedure:

While the existence of a sexual harassment policy and complaint procedure is not absolutely required in order to prove the employer's affirmative defense under ***Faragher/Ellerth***, its existence is relevant and usually considered essential to avoid liability where the employer has multiple locations or is a larger employer, as opposed to an employer of a relatively small work force, who may exercise informally "sufficient care to prevent tortious behavior." ***Faragher***, 118 S. Ct. at 2293. Indeed, the Supreme Court in ***Faragher*** held that "while proof that an employer had promulgated an anti-harassment policy with complaint procedure is not necessary in every instance as a matter of law, the need for a stated policy suitable to the employment circumstances may appropriately be addressed in any case when litigating the first element of the defense."

As noted, an employer of a small work force may exercise informally "sufficient care to prevent tortious behavior." ***Faragher***, 118 S. Ct. at 2293. It is not enough for the employer simply to point to an anti-harassment policy of some sort, and the affirmative defense does not "focus mechanically on the formal existence of a sexual harassment policy." ***Hurley vs. Atlantic City Police Department,*** *infra* at 118. In this regard, an effective sexual harassment policy is one that the employer has disseminated to *all* employees, ***Durham Life Insurance vs. Evans,*** 166 F. 3d. 139, 162 (3rd Cir. 1999).

Larger visavis smaller employers

The EEOC has taken a consistent position, noting in its most recent Enforcement Guidance that even if a small employer does not require a formal policy and complaint procedure, a larger employer may not be able to establish the affirmative defense under ***Ellerth/Faragher*** without a policy and complaint procedure:

> It generally is necessary for employers to establish, publicize, and enforce anti-harassment policies and complaint procedures. As the Supreme Court stated, 'Title VII is designed to encourage the creation of anti-harassment policies and effective grievance mechanisms.' ***Ellerth***, 118 S. Ct 2270 While the Court noted that this 'is not necessary in every instance as a matter of law,'failure to do so will make it difficult for employer to prove that it exercised reasonable care to prevent

and correct harassment. ***EEOC Enforcement Guidance*** 915.002 (June 18, 1999), BNA EEOC Compliance Manual, N:4081.

Factors Rendering a Sexual Harassment Policy Vulnerable to Attack:

Bypassing the harassing supervisor

In ***Faragher***, the Supreme Court held as a matter of law that an employer "could not be found to have exercised reasonable care to prevent the supervisor's harassing conduct," where the employer's policy "did not include any assurance that the harassing supervisors could be bypassed in registering complaints." ***Faragher***, 118 S. Ct. at 2293.

Dissemination of policy

Even with a sexual harassment policy in existence, an employer will not be found to have exercised reasonable care to prevent a supervisor's harassing conduct where the employer has "entirely failed to disseminate its policy against sexual harassment" to its employees, ***Faragher,*** 524 U.S. at 809. Further, unless an employer is able to prove that the plaintiff "unreasonably failed to take advantage of preventative or corrective opportunities provided," it will be unable to establish the affirmative defense to liability under ***Faragher/Ellerth***.

Training and protection from retaliation

In ***Williams vs. Spartan Communications Inc.***, 2000 U.S. App. LEXIS 5776 (4th Cir. 2000), the Plaintiff's immediate supervisor sexually assaulted her three times over a three year period, and after the third assault she reported the attacks to her Sales Manager and Personnel Director. *Id.* at *2. Her harasser resigned two days later, after which the Plaintiff resigned voluntarily. The Plaintiff had admittedly received a copy of the employer's harassment policy and had admittedly waited years before complaining of the harassment. Summary judgment was granted to the employer by the District Court on the basis that the employer had established the two elements of the ***Faragher/Elerth*** affirmative defense. Reversing, the 4th Circuit held that the employer's harassment policy was so defective that the employer could not satisfy the affirmative defense's first prong that it exercised reasonable care to prevent and promptly correct the harassment. *Id*. at *5. The employer could not satisfy the affirmative defense, according to the 4th Circuit, since the harassing supervisor had testified in his deposition that he had received no training on sexual harassment at all, the employer's harassment policy failed to assure complainants that they would not be retaliated against and instead warned that "an employee who in bad faith falsely accuses another employee of harassment would be subject to discipline up to and including termination."

Complaint falling on deaf ears

The policy directed employees to report complaints of harassment to one of four managers, moreover, one of whom was the plaintiff's harasser, the other three including the Vice President and General Manager who was a good friend of the harassing supervisor, and two managers who reported to the harassing supervisor. *Id*. at *7-8. Evidence in the record that the employer's managers had tolerated and actively participated in lewd conversations in the work place included the following: One of the managers identified in the policy to receive reports of harassment noted that a secretary had been fired because "she didn't give him a blow job," and in

discussing female participants in a management training program had said "boys, I have stepped over better than that just to jack off," and, finally, after a sexual harassment training meeting, had asked "does this mean we can't fuck the help anymore." *Id*. at *7.

The 4th Circuit concluded that on the basis of this evidence, an employee reasonably could fear that a sexual harassment complaint would not only "fall on deaf ears" but could even result in discharge, *Id*. at *9, and thus as a matter of law the Court could not find that the employer's harassment policy was reasonably designed to prevent and correct unlawful harassment.

Defective or dysfunctional policy

Similarly, an employer's harassment policy was disapproved by the 4th Circuit in ***Smith vs. First Union National Bank***, 202 F.3rd 234 (4th Cir. 2000), where it was "defective or dysfunctional" and therefore not reasonable, particularly in light of the fact that the policy was worded in such a way that it implied that a sexual advance was required in order to constitute sexual harassment. *Id*. at 245. The 4th Circuit also found that the policy gave no indication that harassment because of gender was prohibited and that a genuine issue of material fact precluded the granting of summary judgment in favor of the employer on the first element of the affirmative defense, that it exercised reasonable care to prevent and remedy sexual harassment.

Lack of effective implementation

In ***Gentry vs. Export Packaging Company***, 238 F.3rd 842 (7th Cir. 2001), the employer's sexual harassment policy was held not to have been effectively implemented where there was no consensus among the employer's management as to who held the position of human resources representative. The employer failed to inform its employees of who held that position, although it's policy indicated that employees may report sexual harassment to "the human resources representative."

No express anti-retaliation provision

In ***Miller vs. Woodharbor Molding and Millworks***, 80 F. Supp 2nd 1026 (N.D.I 2000), affirmed, 2001 WL 388809 (8th Cir. 2001), the court found that the employer's sexual harassment policy and training were deficient were its policy contained no express anti-retaliation provision, no formal procedure for bringing complaints, and did not identify a person to whom employees were supposed to direct the complaints.

Recent Decisions Addressing the Adequacy of Sexual Harassment Policies

1. ***Leopold vs. Baccarat,*** 239 F. 3d 243 (2nd Cir. 2001)

The second circuit expressed a preference for anti-harassment policies that contained non-retaliation clauses and guaranteed confidentiality, but held such clauses are not mandatary and the lack thereof is not sufficient to defeat the first prong of the ***Faragher/Ellerth*** affirmative defense.

2. ***Breda vs. Wolf Camera & Video,*** 222 F. 3d 886 (11th Cir. 2000)

The clear policy published to employees was followed by the employee. The employer's notice of the harassment was established by the terms of the policy, under which the employer had given a designated person explicit actual authority to handle complaints.

3. ***Dayes vs. Pace University,*** 2001 WL 99831 (2nd Cir. 2001)

The first element of the affirmative defense was met where the employer had a grievance procedure set forth in its employee handbook and a policy of prohibiting sexual harassment.

4. ***Barrett vs. Applied Radiant Energy Corp.***, 243 F. 3d 262 (4th Cir. 2001)

The employee failed to avail herself of a complaint mechanism designed by the employer, whose anti-harassment policy directed employees to lodge complaints with supervisors. In the event they felt uncomfortable bringing the matter to the attention of their supervisor, they could discuss the situation with any member of the company management, including the president.

5. ***Hargrave vs. County of Atlantic,*** 2003 U.S. Dist. LEXIS 7952 (D.N.J. 2003)

A Title VII claim based on racially and sexually hostile work environment against a county and a supervisor and a §1983 sexually hostile environment claim against a supervisor and a racially hostile environment claim against three supervisors withstood summary judgment in this case. The District Court followed the Third Circuit's five-factor test for proving the existence of actionable hostile work environment under Title VII:

a. The plaintiff must have suffered intentional discrimination because of her race or sex.
b. The discrimination must be pervasive and regular
c. The discrimination must have detrimentally effected the plaintiff
d. The discrimination must be such that it would detrimentally effect a reasonable person of the same race or sex in that position, and
e. Sufficient evidence to establish the existence of respondeat superior liability must be presented.

Some of the statements made to women by the supervisors in this case included "you look so good, baby, I could put you on a place and slop you up with a biscuit," and "the sushi tasted better than a woman" a supervisor had. *Id.* at 402. Other sexually offensive remarks included one of the supervisors often telling jokes about a blind man who passed a fish market, the point of which was that female genitalia smells like raw fish. *Id.* at 403. The court found summary judgment to be inappropriate and that the county was not entitled to invoke the affirmative defense set forth in ***Faragher/Ellerth***, emphasizing that:

a. The affirmative defense is not an element of the plaintiff's case, and "while the county claims to have had formal sexual harassment and discrimination policies and procedures in place during plaintiff's employment, it has not provided the court with a copy of those policies and procedures." *Id.* at 429.
b. The record contained no evidence that the policies were communicated to the supervisors and staff, the court noting that the affirmative defense does not "focus mechanically on the formal existence of a sexual harassment policy, allowing an absolute defense to a

hostile work environment claim whenever the employer can point to an anti-harassment policy of some sort," citing ***Hurley vs. Atlantic City Police Department,*** 174 F. 3d 95, 118 (3rd Cir. 1999).

c. With respect to the sexual harassment hostile work environment claim asserted by the plaintiff, the county had made no reference to "any evidence indicating that plaintiff failed to avail herself of the preventative or corrective opportunities made available to her." *Id.* at 429.

6. ***Mancuso vs. City of Atlantic City,*** 193 F. Supp. 2d 789, 802 (D.N.J. 2002)

Atlantic City's Motion for Summary Judgment was denied as to sexual harassment claims where the employee, the second female lifeguard hired by the city's beach patrol, offered sufficient evidence of genuine issues of material fact as to whether the city had exercised reasonable care to prevent and correct sexual harassment.

Reasonable care to prevent and correct harassment

Throughout the period of time that the plaintiff was being harassed, the Atlantic City Beach Patrol (ACBP) promulgated an "Operations Manual" in which detailed rules and regulations of the agency were set forth, including a copy of the city's sexual harassment policy applicable to all beach patrol employees. At the start of each beach season, beach patrol employees were given a policy of the rules handbook including its sexual harassment policy and were asked to read, sign and return the policy.

No personal copies of policy given to ACBP employees

Individual employees of the beach patrol were not given personal copies of the sexual harassment policy, but the plaintiff admitted she was aware generally of the existence of the policy and contended that she did not comply with its requirements with regard to most of the incidents of alleged harassment because she "had gone through the chain of command previously and... didn't get anywhere" and because she "didn't believe there was a place that you could go to make a complaint to where you weren't going to experience some type of hostility." *Id.* at 794.

Well-publicized policy not enough to discharge duty of care

Atlantic City argued that it was entitled to summary judgment based on the beach patrol's promulgation of an explicit policy against sexual harassment, and contended that the existence of this well publicized policy, coupled with the plaintiff's unreasonable failure to take advantage of the preventative or corrective opportunities offered to her by the beach patrol, provided an affirmative defense precluding her claims against the city. *Id.* at 797-98. In denying summary judgment, the court emphasized that there was substantial issues of material fact relating to the city's exercise of reasonable care to prevent and correct instances of sexual harassment within its workplace and to the reasonableness of the efforts of the plaintiff to avoid that harassment. *Id.* at 801.

> The touchstone of the first element of the affirmative defense articulated in ***Ellerth*** and ***Faragher*** is the employer's exercise of reasonable care to prevent and correct any sexually harassing behavior in its workplace. As the Supreme Court noted, "while proof that an employer had promulgated

> an anti-harassment policy with complaint procedures is not necessary in every instance as a matter of law, the need for a stated policy suitable to the employment circumstances may appropriately be addressed in any case when litigating the first element of the defense." ***Ellerth,*** at 765; ***Faragher,*** at 807. In this case, there is little question that, given the work environment at the ACBP, Atlantic City's duty of reasonable care included an obligation to promulgate and disseminate an effective anti-harassment policy. Indeed, the workplace at issue in this case appears to be very similar to that involved in ***Faragher***, a case also involving a beach patrol. In ***Faragher,*** the court held that the affirmative defense articulated in that case was unavailable to the defendant as a matter of law, as "the city had entirely failed to disseminate its policy against sexual harassment among the beach employees and... its officials made no attempt to keep track of the conduct of [its] supervisors.... 524 U.S. at 808.

Effective precautions and sensible complaint procedure

The Court also addressed the employer's responsibility for communicating a formal policy against sexual harassment, noting that "those responsible for city operations could not reasonably have thought that precautions against hostile environments in any one of many departments in far-flung locations could be effective without communicating some formal policy against harassment, with a sensible complaint procedure." *Id.* at 808-09.

General environment of discrimination and harassment

The Court in ***Mancuso*** found a further basis for its conclusion that Atlantic City could not exercise reasonable care without the promulgation and dissemination of an effective anti-harassment policy, noting that under ***Hurley,*** "in this matter, plaintiff has provided evidence regarding not only the harassment to which she herself was subjected, but also of a general environment of discrimination and harassment persisting at ACBP since it first accepted women in its workplace."

History of substandard treatment

The Court also noted that there was an apparent history of substandard treatment to which female lifeguard had been subjected before she was employed by the city, including the treatment of the first female lifeguard hired by the beach patrol during the previous decade, who had been subjected to harassment that included male lifeguards painting her lifeguard stand pink and with the term "C1 which stood for "cunt number one", and had also urinated on and then frozen her bathing suit. The highest ranking officers in the beach patrol had ignored these incidents, which "indelibly colored" the plaintiff's faith in the beach patrol's commitment to eliminating sexual harassment. *Id.* at 802. Thus, while the city beach patrol undisputedly had in place a formal anti-harassment policy, "there was substantial evidence which indicates that the ACBP's policy was, in fact, defective and which therefore could support a conclusion that it failed to exercise reasonable care in implementing that policy."

Components of an effective policy

In ***Mancuso,*** the New Jersey Supreme Court relied on ***Lehmann vs. Toys "R" Us***, 132 N.J. 587, 626 A. 2d 445 (N.J. 1993), a pre-***Faragher/Ellerth*** sexual harassment case under the New Jersey Law Against Discrimination (LAD), to identify these components of an "effective" anti-harassment policy:

> Employers that effectively and sincerely put five elements into place are successful at surfacing sexual harassment complaints early, before they escalate. The five elements are: policies, complaint structures, and that includes both formal and informal structures; training, which has to be mandatory for supervisors and managers and needs to be offered for all members of the organization; some effective sensing or monitoring mechanisms, to find out if the policies and complaint structures are trusted; and then, finally, an unequivocal commitment from the top that is not just in words but backed up by consistent practice." ***Lehmann,*** 132 N.J. at 621; ***Mancuso,*** *supra* at 803.
>
> Thus, while the city's anti-harassment policy expressly prohibited sexual harassment and provided a general description of conduct prohibited by that policy and described a basic procedure for an employee to follow in order to file a complaint, "what the policy does not contain, however, is any sort of assurance that an employee filing a complaint will not be retaliated against for doing so. Such assurances are an important part of any effective sexual harassment policy." *Id.* at 803.

Clarity and detail with which complaint processes are communicated to employees

The city's defense to this was that the plaintiff had unreasonably failed to take advantage of the preventative or corrective opportunities provided by the employer. The complaint process provided by an employer is indeed relevant to such an inquiry, and here the city's policy did contain an explicit formal complaint procedure, but the Court insisted that "examination of a policy's complaint processes must go beyond the question of the existence of such processes to a consideration of the clarity and detail with which the terms of those processes are communicated to employees and of the ability of employees to invoke that process and rely on its result." *Id.* at 805.

7. ***Cavuoti vs. New Jersey Transit Corporation,*** 161 N.J. 107, 735 A. 2d 548 (1999)

An employer who promulgates and supports an active anti-harassment policy should be entitled to a form of safe haven from vicarious liability for an employee's harassing conduct of others. This case provides a road map for getting that protection

Factors relevant to extending protection to employer

The Court in ***Cavuoti*** emphasized that in order for an employer to enjoy the benefit of this protection, a number of circumstances would be relevant, including:

a. Periodic publication of the employer's anti-harassment policy,

b. The presence of an effective and practical grievance process for employees to use, and
c. Training for workers, supervisors and managers concerning how to recognize and eradicate unlawful harassment.

8. ***Gaines vs. Bellino,*** 173 N.J. 301, 801 A. 2d. 322 (2002)

An employee complaining of sexual harassment successfully overturned the lower court's summary judgment in favor of her supervisor and her employer, Hudson County Correctional Facility, where a supervisor had subjected the plaintiff to unwanted kissing. The plaintiff did not file a formal complaint since she perceived that she would not be believed.

Realistic preventative and protective measures

The New Jersey Supreme Court held that genuine issues of material fact existed as to whether the employer had implemented an anti-sexual harassment workplace policy that provided realistic preventative and protective measures for employees in the event harassment occurred, and that the employee had raised sufficient factual disputes to show that her subjective perception of the workplace and the complaint mechanisms was based on more than mere assertion. Citing ***Lehmann***, the Court reasoned that "an employer's sexual harassment policy must be more than the mere words encapsulated in the policy," and that there must be an "unequivocal commitment from the top" that the employer's opposition to sexual harassment is not just words but is backed up by consistent practice. In addressing an employer's due care in a sexual harassment context, the Court also emphasized that merely implementing and disseminating anti-harassment procedures with a complaint procedure does not by itself constitute evidence of due care. As the Court had stated earlier in ***Lehmann,*** "existence of effective preventative mechanisms provides some evidence of due care on the part of the employer" but "given the foreseeability that sexual harassment may occur, the absence of effective preventative mechanisms will present strong evidence of an employer's negligence [in this case under the N.J. Law Against Discrimination]. *Id.* at 333. The plaintiff was held entitled to a jury's evaluation of the alleged facts, in view of factual issues as to whether the county had an effective policy.

9. ***Velez v. City of Jersey City,*** 358 N.J. Super. 224, 817 A. 2d 409 (N.J. App. 2003)

A city employee successfully appealed from a summary judgment which had been granted in favor of the city and a councilman on a claim for sexual harassment under the New Jersey Law Against Discrimination, the Appellate Court holding that the employee had sufficiently demonstrated a genuine issue of material fact as to whether the city had violated the LAD by failing to process her immediate complaint of sexual harassment and by violating its own policy in handling her allegations. Summary judgment was avoided by factual issues concerning the reasonableness of the city's dissemination, implementation, monitoring and enforcement of its sexual harassment policy, and triabal issues of fact concerning negligence on the part of the city for failing to adequately enforce its own policy thereby creating the hostile work environment alleged by the former city employee.

No training or enforcement evident

The Court, citing ***Gaines*** and ***Lehmann***, concluded that while the city's sexual harassment policy was in effect at the time of the incident complained of, the plaintiff and other city employees and officials had not been trained, and there was significant doubt as to whether the policy was enforced, the Court noting that "after the alleged incident, plaintiff promptly complained to both her direct supervisor and her supervisor's supervisor,...who in turn reported the complaint to his direct supervisor, as well as the person who had direct responsibility for conducting investigations pursuant to the city's sexual harassment policy. Nevertheless, no investigation was conducted and no effort was made to remediate past conduct or prevent future similar conduct." *Id.* at 416. It also noted that "the nature of the alleged harassment was so severe and offensive that one could assume that a reasonable employer would not stand by, even if requested to do so by a terrified employee," particularly where the alleged violator was a councilman who by virtue of his position was a policy- maker for the city employer. *Id.* at 416.

10. ***Tarr vs. Bob Ciasulli's Mack Auto Mall, Inc.,*** 360 N.J. Super. 265, 822 A. 2d 647 (N.J. App. 2003)

Where the plaintiff prevailed on her hostile work environment sexual harassment claim but was awarded no damages, the Appellate Court remanded in part for a new trial on damages, where the employee had left her job due to continuous sexual explicit remarks from male coworkers and had been subject to intense humiliation and embarrassment.

Lack of well-publicized and enforced policy

The Court noted that although the owner claimed that he did not have personal knowledge of the workplace sexual harassment and that the plaintiff had never complained to him directly about it, liability of management did not require personal knowledge of sexual harassment, and under ***Lehmann, Gaines,*** and ***Velez***, a plaintiff may show that an employer was negligent by its failure to have in place well-publicized and enforced anti-harassment policies, effective formal and informal complaint structures, training and/or monitoring mechanisms. In this case, the employer's negligence was shown by the following:

> during the time of plaintiff's employment... there was no employee handbook of any kind and no formal written policy respecting sexual harassment. Rather, [the owner] communicated company policies and directives to his employees by individual memoranda, none of which addressed the subject of sexual harassment. There was no complaint mechanism in place. Although the Mack Auto Mall, as all the other franchises, had a poster with a number to call in the case of complaint, there was contrary evidence as to whether the invitation was extended to employees as well as to customers, at least some employees believing that it was not. There was no designated person to take personnel complaints. There was no monitoring and no training. *Id.* at 278.

This evidence, coupled with testimony that the owner had referred to the actions of five other women who had ultimately filed discrimination complaints against him and companies as "bottom feeding and screwing up the whole economy," and that the owner had exhorted his sales

people to take money away from female decision makers because "women are stupid," persuaded the Appellate Court that there was abundant evidence from which a jury could have concluded that the owner was the ultimate supervisor, the top management, "whose acts both of omission and commission could have been found by the jury to have contributed to the creation of the hostile workplace."

11. ***Durkin v. City of Chicago,*** 2003 U.S. App. LEXIS 17541 (7th Cir. 2003)

A police academy trainee sued the city for equal protection violations, sexual discrimination, sexual harassment and retaliation under Title VII, claiming that she had been spoken to in an offensive and demeaning manner during her training. The trial court, and 7th Circuit in affirming summary judgment, concluded that the city could not be held liable for sexual harassment since no tangible employment action, including alleged denial of training, was taken against the trainee, who was actually afforded more training than was customarily given. Further, the city was not negligent in discovering and remedying the harassment since the trainee had failed to use the proper mechanism for reporting the harassment. Addressing the question of whether the city was negligent in discovering or remedying the harassment, the 7th Circuit reasoned that an employer may defend against harassment charges by showing that it has exercised reasonable care to discover and rectify any sexually harassing behavior. "Since an employer is not omniscient, it must have notice or knowledge of the harassment before it can be held liable. We determine whether an employer had notice of sexual harassment by considering the channel for complaints of harassment.... When an employer designates a "point person" to accept complaints, as the city did here, "this person becomes the natural channel for the making and forwarding of complaints, and complainants can be expected to utilize it in the normal case."

Failure to use existing mechanism to report

The Court then turned to the plaintiff's burden of proof in her attempt to survive summary judgment, noting that she had to show she had provided her employer with enough information so that a reasonable employer would think there was some probability she was being sexually harassed. The plaintiff claimed that the city was negligent because it failed to properly investigate her complaints about harassment, arguing that the city had made a "meager effort" because it merely questioned one individual and no one else, and never corrected any of the sexually harassing behavior since it did not punish or fire anyone. The Court noted, however, that the city had a proper system for making and forwarding complaints about sexual harassment, that the plaintiff's training had included a lesson on the city's sexual harassment policies and complaint procedures, and that sexual harassment policy provided for an effective grievance mechanism and had a meaningful process for employees to seek redress for their concerns. The Court concluded: "the city has a reasonable mechanism for detecting and correcting harassment. However, Durkin did not avail herself of the procedure. Probationary officers at the Academy are directed to make complaints of sexual harassment to their home room instructor. Durkin failed to tell her home room instructor, Officer Smith, about the sexual harassment because he was Peck's friend and she believed it would be "futile." Durkin's feelings of futility or unpleasantness did not alleviate her duty to bring her mistreatment to the city's attention.... An employer is not liable for co-employee sexual harassment when a mechanism to report the harassment exists, but the victim fails to utilize it. *Id.* at *12-13.

12. ***McCurdy vs. Arkansas State Police,*** 203 U.S. Dist. LEXIS 13854 (E.D. Ark. 2003)

The Court in this sexual harassment case held that the first element of the ***Faragher/Ellerth*** affirmative defense was satisfied, where an employee had taken an advantage of the state police's sexual harassment policy and promptly reported her allegations. The employer showed, however, that it had an established sexual harassment policy and grievance and investigatory procedure, promptly responded to insulate the employee from further harassment, and promptly and thoroughly investigated the allegations. The Court declined to impose vicarious liability on the employer for a supervisor's hostile environment actions, and held the employer was entitled to a judgment as a matter of law.

Reasonable care demonstrated

At the heart of this case was the plaintiff's allegation that one Sergeant Hall had engaged in objectively and subjectively offensive conduct that, in the Court's view, constituted a hostile work environment. The sergeant, whom the plaintiff had only met one time before this incident, approached her from behind, grabbed her breast, fondled her hair and made sexually suggestive comments. Concluding that no reasonable jury could conclude that the employer failed to satisfy the first element of the ***Faragher/Ellerth*** defense, that the employer exercised reasonable care to prevent sexual harassment by its employees and took prompt steps to avoid any further harassment of the plaintiff by the sergeant, the Court reasoned that "the employer had in place a detailed sexual harassment policy and a procedure for reporting misconduct," and that the plaintiff had received a copy of the policy when her employment began and understood that she could promptly report the challenged conduct, which she in fact did. Furthermore, sexual harassment training was provided to employees, and the offending sergeant had attended such a seminar in 1996. The Court emphasized the level of care exhibited by the employer:

> [T]he focus for the Court is whether the Arkansas State Police's response was prompt and appropriate. Clearly, there organization responded promptly and took reasonable care to ensure that the plaintiff was insulated from Sergeant Hall. This insulation continued even after the plaintiff's allegations were not wholly substantiated. The Court is mindful that Title VII does not obligate an employer to terminate an employee who engages in sexual harassment... Rather, what an employer must do is take prompt remedial action reasonably calculated to end the harassment.... This is precisely what the Arkansas State Police did in the instant case. No reasonable jury could conclude otherwise.

Nipping hostile environment in the bud

The Court in ***McCurdy*** further noted that to impose vicarious liability under those circumstances would amount to strict liability, even though the plaintiff had not suffered a severe or pervasive change in her working conditions or any adverse employment action. The Court concluded "a standard imposing vicarious liability not withstanding the employer's having nipped a hostile environment in the bud would also conflict with the premise of ***Ellerth/Faragher***, founded in agency law, that a supervisor who creates a hostile environment is aided by his agency status with the employer in doing so." *Id.* at *38.

Conclusion

A properly drafted sexual harassment policy will certainly not bar Title VII claims if an employer gives no more than lip service to the policy, has a lackadaisical attitude toward training and meaningful enforcement, fails to keep in place an effective monitoring mechanism, or disregards the need for a formal as well as informal complaint structure by which an employee is given a clear an understandable avenue to voice complaints other than through an immediate supervisor who may be the source of the harassment. The employer's burden of proving that it exercised reasonable care to prevent and promptly correct any sexually harassing behavior is not a light one, but the presence of widely publicized and effectively communicated policies and procedures designed to prohibit or minimize sexually harassing behavior will provide a major linchpin for the affirmative defense under ***Faragher/Ellerth***. Coupled with an effective training and prevention program, an employer must think proactively so that it will be in the position to demonstrate that a complaining employee, notwithstanding what may amount to a hostile work environment, has indeed unreasonably failed to take advantage of preventive or corrective opportunities provided by the employer. Thorough and systematic distribution of a sexual harassment policy, moreover, will provide "compelling proof" that the employer has exercised reasonable care in preventing and promptly correcting sexual harassment, ***Barrett vs. Applied Radiant Energy Corporation,*** 85 Fair Empl. Prac. Cas. (BNA) 253 (4th Cir. 2001), which proof can only be rebutted by a showing that the employer adopted or administered the policy in bad faith, or the policy was in some way defective or dysfunctional. *Id.*, citing ***Faragher,*** 524 U.S. at 808.

**********v**********

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