FAILING TO TRAIN ALL EMPLOYEES DEFEATS HARASSMENT DEFENSE

Resolve to Double Down On Regularly Training All Employees

By Chris Thrutchley
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Two seminal Supreme Court decisions, *Burlington Industries v. Ellerth* and *Faragher v. City of Boca Raton*, held that an employer may avoid liability for a supervisor's harassment by first proving it exercised reasonable care to prevent and correct promptly any harassing behavior. As a result many employers began rolling out policies to limit liability for employment claims. Some also started training and educating managers. But is having a policy and training some employee's enough? The U.S. Court of Appeals for the Fifth Circuit recently joined the Tenth Circuit and the First Circuit in saying not necessarily. ***Training all employees is essential to your defense.***

In *Pullen v. Caddo Parish School Board*, 830 F.3d 205 (5th Cir. 2016), a clerk complained to HR of harassment by a supervisor. She identified other possible victims. The Board interviewed the possible victims, including Kandice Pullen. Pullen had been harassed for two years but never reported it. After the investigation, the Board disciplined the harasser. Pullen filed a charge of harassment against the Board with the EEOC and later filed suit.

The Board moved for summary judgment, asserting the *Ellerth/Faragher* defense and arguing it exercised reasonable care to prevent harassment. The Board adopted and issued a detailed, eight-page anti-harassment policy, posted it on bulletin boards and online, and regularly provided harassment training to most of its 6,000 employees. The alleged harasser had attended eight to 10 training sessions during the two-year period. The lower court granted summary judgment for the Board, finding it did indeed exercise reasonable care.

But the Fifth Circuit reversed. The Court recognized "[a]n employer can satisfy the first prong of the *Ellerth/Faragher* defense by [1] ***implementing suitable institutional policies*** and [2] ***educational programs*** . . . ." *Id*. at 210 (emphasis added). However, "Pullen produced evidence that, if believed, would show that employees at the central office were ***not trained*** on sexual harassment, ***were not informed*** of the existence of a policy, ***were not shown*** where to find it, and ***were not told*** whom to contact regarding sexual harassment." *Id*. at 211 (emphasis added) (following *Harrison v. Eddy Potash, Inc*., 158 F.3d 1371, 1377 (10th Cir. 1998) (policy posted on bulletin board but plaintiff unaware and never given a copy) and *Marrero v. Goya of Puerto Rico, Inc*., 304 F.3d 7, 21–22 (1st Cir. 2002) (posters hung describing harassment policy, but employees testified they were never given the policy, never saw the posters, and never received training on the policy)).

STEPS TO TAKE

- **Review and Update Your Harassment, Discrimination, and Retaliation Prevention Policies**
  - "Suitable" policies are essential, but by themselves are likely not enough to avoid liability.
  - Make sure you can prove all of your employees, including temps, have received them.
- **Regularly Train <u>All</u> of Your Employees Regarding Your Policies and Procedures**
  - The Fifth Circuit likely would have affirmed summary judgment if the Board could have proved Pullen received its policy and had received training and education on how to comply with it.
  - Provide regular training for all employees, not just managers and supervisors.
- **Engage Counsel to Audit Your Prevention Practices and Assist with Your Training**
  - Having counsel audit your policies and practices is another reasonably prudent step to take in minimizing your risk of costly employment claims.
  - GableGotwals has a team of experienced employment lawyers who are ready to assist.

Chris Thrutchley is an attorney of GableGotwals who assists and represents clients in the area of Labor and Employment Law, ERISA and general litigation. For help auditing and updating your employment practices and your intellectual property protection strategies contact **GableGotwals**. We will be glad to assist you.

1100 ONEOK Plaza
100 West Fifth Street
Tulsa, Ok 74103
(918) 595-4810

cthrutchley@gablelaw.com
www.gablelaw.com

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