FORD & HARRISON LLP
THE RIGHT RESPONSE AT THE RIGHT TIME
LEGAL ALERT

Legal Alert: Court Emphasizes that Evidence of Training Is a Must

4/27/2010

For over 10 years, employers have been able to avail themselves of an affirmative defense to sexual harassment allegations by an employee against a supervisor/manager in those situations where no tangible adverse employment action has been taken against the employee. This defense is known as the *Faragher/Ellerth* defense, and can be invoked where the employer can demonstrate that: (1) it exercised reasonable care to prevent and promptly correct any sexually harassing behavior, and (2) the employee unreasonably failed to take advantage of any preventative or corrective opportunities provided by the employer or to otherwise avoid harm. *Faragher v. City of Boca Raton*, 524 U.S. 775, 807 (1998); *Burlington Indus. v. Ellerth*, 524 U.S. 742, 764-65 (1998). The vast majority of employers have anti-harassment policies including reporting procedures and protocols for employees to follow, have disseminated those policies and procedures to all employees, and have required employees to acknowledge receipt of the policies. However, the adoption, dissemination and acknowledgment of receipt of the policy by the employee may not be sufficient for employer to invoke the affirmative defense.

Recently, in *Bishop v. Woodbury Clinical Laboratory*, No. 3:08-cv-1032 (M.D. Tenn. 2010), the court rejected the employer's *Faragher/Ellerth* affirmative defense despite the fact that the employer had an existing anti-harassment policy that was published and provided to all of its employees. The employee admitted that she had received the policy and had been directed to read it. She claimed, however, that she did not read the policy or understand the reporting requirements. The court noted that there was no evidence offered to demonstrate that the employee or her supervisor received any training on the sexual harassment policy and reporting obligations. Thus, the court concluded that the employer failed to establish that it was entitled to invoke the *Faragher/Ellerth* affirmative defense as it could not demonstrate that it exercised reasonable care to prevent and promptly correct any sexually harassing behavior.

This case clearly highlights the employer's obligations to take reasonable care – not only must the employer have an effective anti-harassment policy and reporting procedures disseminated to its employees, but it should also conduct anti-harassment training for its employees and supervisors to ensure they all understand the policy and procedures. Just passing out the policy is not enough.

While this decision is not binding on courts outside of the Middle District of Tennessee, it is possible other courts will follow the court's reasoning in *Bishop.* In these increasingly litigious times, it is more important than ever for

employers to institute these mechanisms to ensure that its existing policy will be deemed "reasonable," therefore permitting the employer to fully protect itself.

If you need assistance in this area or if you have questions regarding sexual harassment policies, please feel invited to contact Louis Britt, lbritt@fordharrison.com, or the Ford & Harrison attorney with whom you usually work.