

VEDDER PRICE

# Labor & Employment Bulletin

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A bulletin designed to keep clients and other friends informed on labor and employment law matters

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## WHEN IS AN EMPLOYER LIABLE FOR SEXUAL HARASSMENT: THE EEOC WEIGHS IN

On June 18, 1999, the Equal Employment Opportunity Commission issued an Enforcement Guidance concerning employer liability for harassment by supervisory personnel. The Guidance represents the EEOC's interpretation of last summer's Supreme Court decisions in *Burlington Industries v. Ellerth* and *Faragher v. City of Boca Raton*. Although many of the EEOC's views track the Supreme Court's opinions, the Guidance does contain several significant, new concepts.

As reported in the *Vedder Price* Labor Law Newsletter last year, the Supreme Court held in *Ellerth* and *Faragher* that an employer is always liable for a supervisor's harassment if it leads to a tangible employment action, that is, an action that results in a significant change in an employee's employment status, such as hiring, firing, promotion, demotion, reassignment, compensation, and work assignment. However, if the harassment does not lead to such an action, it is possible for employers to avoid liability or limit damages by establishing that: (1) they exercised reasonable care to prevent and promptly correct any harassing behavior; and (2) the employees alleging harassment unreasonably failed to take advantage of any preventive or corrective opportunities provided by their employers or to avoid harm otherwise.

### All Unlawful Harassment Is Covered

Resolving an open issue, the EEOC intends to apply the vicarious liability standards set forth in *Ellerth* and *Faragher* not just to harassment based on sex, but to all

forms of illegal harassment, *i.e.*, race, color, religion, national origin, age, disability, and retaliation for engaging in protected activity. Thus, as we have been suggesting, employers should make certain their policies prohibit and provide redress for all forms of illegal harassment.

#### **Who Is a Supervisor**

Under the EEOC Guidance, an individual is a supervisor, regardless of job title, if: (1) he has authority to undertake or recommend tangible employment decisions that affect the employee; or (2) he has authority to direct the employee's daily work activities. Significantly, the EEOC also is of the view that a supervisor includes someone who does not have actual authority over the employee if the employee reasonably believes the individual has such power.

#### **Harassment That Does Not Result in Tangible Employment Action**

When harassment does not result in a tangible employment action, the Guidance states the employer is liable unless it took all appropriate steps to prevent it and the employee failed to take advantage of the employer's anti-harassment policy. The EEOC's position (but one the courts may not endorse) is that even when an employer exercises reasonable care to prevent harassment (*i.e.*, by adopting and publishing a no-harassment policy) and takes prompt corrective action when it first learns of harassment, the employer nevertheless will be liable for any actionable harassment occurring before the complaint is made.

As we have advised in the past, the Guidance confirms that employers must establish, disseminate, and enforce anti-harassment policies and complaint procedures. Every employee should be given a copy of the policy and complaint procedure, and employers should redistribute their anti-harassment policies periodically. Further, the EEOC states that employers must investigate any allegation of harassment even if it does not conform to the employer's complaint process, and even when the employee may not want an investigation to ensue. Supervisors must be required to report all complaints of harassment they receive and observe, whether or not the harassment occurs within their areas of responsibility.

The Guidance provides specific recommendations on how

to conduct a harassment investigation, including the questions that should be asked of the complaining employee, the accused, and other witnesses, and examples of remedial measures that can be taken to correct the effects of harassment. Consistent with advice we often provide clients, the EEOC recommends that even when harassment cannot be established, the employer should reiterate its no-harassment policy and consider training and monitoring.

To avoid liability employers must prove that an employee's failure to complain about harassment was unreasonable. The EEOC states an employee's failure to complain may be reasonable when (1) using the complaint mechanism entails a risk of retaliation; (2) there are obstacles to complaints; or (3) the complaint procedure is not effective. According to the EEOC, a prompt complaint by an employee to the EEOC or a state fair employment practices agency while the harassment is ongoing could qualify as an effort on the employee's part to avoid harm and would discharge her obligation to mitigate the harm caused by the harassment.

The EEOC believes that employers should take steps to prevent harassment, not just respond once it occurs. Thus the EEOC even has suggested that employers screen prospective supervisors during the hiring process for prior complaints of harassment.

#### **Harassment That Does Result in Tangible Employment Action**

An employer has no affirmative defense when a supervisor's harassment results in a tangible employment action. This principle applies not only when the employee is subjected to adverse employment action, but also when an employee submits to a supervisor's sexual demands in exchange for a job benefit. Moreover, if a tangible employment action can be linked to prior environmental harassment, an employee may seek relief for both forms of harassment, and the employer will have no affirmative defense available for either.

#### **Conclusion**

Employers should review their existing anti-harassment policies and procedures to ensure they have taken all reasonable steps to prevent and respond to illegal

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harassment in the workplace.

If you have any questions about the EEOC Guidance or updating your organization's anti-harassment policies and procedures, please contact Vedder Price (312/609-7500).

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