management matters

Supreme Court Cases Offer Employers Guidance on Sexual Harassment

By Jonathan A. Wexler, Esq.

Editor's Note: Management Matters is a new ongoing feature of The Trusted Professional that offers CPA firms and companies advice on employee and other human resources issues. If you have suggestions for future topics, please contact Managing Editor Danielle D'Angelo at (212) 719-8356, (800) 633-6320, or ddangelo@nysscpa.org.

During the past 18 months, the U.S. Supreme Court has handed down three decisions that offer guidance to employers on avoiding liability for sexual harassment claims, and the possibility of related awards of punitive damages, arising from the actions of supervisory and managerial personnel. These decisions highlight the importance of having well crafted anti-harassment policies and of requiring all employees to attend training sessions at which the employer explains the firm or company's policy in detail.

What Is Sexual Harassment?

Sexual harassment is a form of sex discrimination and is unlawful under Title VII of the Civil Rights Act of 1964 (a federal statute), as well as under the New York State Human Rights Law and the New York City Human Rights Law. Unlawful sexual harassment consists of unwelcome sexual advances, requests for sexual favors, and other verbal or physical conduct of a sexual nature, when submission to these acts is a basis for employment decisions regarding the employee or when such conduct creates an intimidating, hostile, or offensive work environment.

The Supreme Court Cases

In 1998, the Supreme Court handed down two cases—*Burlington Industries, Inc. v. Ellerth* and *Faragher v. City of Boca Raton*—that did much to clarify legal issues regarding the extent to which employers will be held liable for sexual harassment by supervisors and managers. In *Faragher* and *Ellerth*, the Supreme Court held that an employer has absolute liability for a severe or pervasive hostile environment created by a supervisor with immediate or successively higher authority over the employee if a "tangible employment action" such as discharge, denial of a promotion, or refusal to give a salary increase occurs. Where there is no such action, the employer will not be liable if it can prove that it exercised "reasonable care" to prevent and correct promptly any sexually harassing behavior, generally by proving the existence of an anti-harassment policy with an adequate complaint procedure, and that the alleged victim unreasonably failed to take advantage of any preventive or corrective opportunities provided by the employer or to avoid harm otherwise.

In the third case, *Kolstad v. American Dental Association* (1999), the Court held that, with respect to punitive damages, an employer may not be held vicariously liable for the discriminatory employment decisions of managerial agents where these decisions are contrary to the employer's good-faith efforts to comply with Title VII.

While the Supreme Court did not explain which "good-faith efforts" might protect against a punitive damages award, several lower courts after *Kolstad* have held that an employer's issuance of an anti-harassment policy is insufficient by itself.

What Should Employers Do?

The Supreme Court's clear message in these cases is that employers should distribute and enforce effective anti-harassment policies and educate their employees about the meaning and operation of those policies.

While the policy must clearly prohibit "sexual harassment," it should not be limited to prohibiting illegal sexual harassment but should proscribe all unwelcome sexual conduct.

The policy must also have a very clear and effective complaint procedure. It is important that employers assign the tasks of investigating and remedying complaints to high-level officials, or at least that someone at a high level be given the authority to enforce remediation recommended by others. It is also necessary to avoid forcing employees to bring complaints to their immediate supervisors, or to anyone else who may be responsible for the harassment, and there should be a choice of individuals who can receive complaints. In addition, employers should require all supervisors and managers to report any behavior that appears to violate the anti-harassment policy.

Because Title VII and the other civil rights statutes prohibit harassment based on all protected characteristics and categories, employers must have policies that expressly prohibit harassment on any protected basis, such as race, religion, age, disability, or sexual orientation.

No policy can be effective unless retaliation for bringing complaints and cooperating in investigations is absolutely prohibited and prevented.

The policy is useless as a management tool and as a legal defense unless both the employees it protects and the supervisors it guides read and understand the procedures. Accordingly, employers should include the policy in all handbooks and personnel policy manuals, post it widely, and distribute it to each employee and new hire. Employers should require employees to sign an acknowledgment that they have received and read the policy. In addition, employers should conduct training sessions for all employees (with sign-in attendance sheets) to assure that the policy is understood.

Watch next month's column for advice on conducting sexual harassment investigations.

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