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ESPN Got it Right: Next Generation Employment Law

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While watching SportsCenter the other day, I thought to myself that male anchors and play-by-play announcers will probably think long and hard before making any demeaning or derogatory comments about their female colleagues after ESPN terminated Ron Franklin on January 4, 2011. For those who missed it, Franklin, who had been with ESPN for over 25 years, was let go after a female colleague complained about remarks Franklin made to her off-the-air while the two were preparing for the Chick Fil-A Bowl game. According to sideline reporter Jeannine Edwards, Franklin condescendingly referred to her as "sweetcakes." When she protested, he responded by calling her an "asshole." The comments were reported to ESPN management, and Franklin was pulled from announcing the Fiesta Bowl. Four days later, ESPN fired him.

This was not the first time Franklin was warned about his behavior toward female co-workers. In 2005, he responded to an observation by a female sideline reporter by sarcastically calling her "sweetheart" on the air. He eventually apologized, and ESPN issued a statement calling Franklin's tone "demeaning," "disrespectful" and "mean-spirited."

There is nothing earth-shattering or precedent-setting about ESPN's decision. Franklin made several ill-advised comments that violated his employer's personal conduct policy after a similar incident several years earlier, and he was terminated. Happens all the time you say? Absolutely. But I would argue that it does not happen enough. Before you fire off a critical e-mail lambasting me for being overly sensitive or too politically correct, understand that I am not saying that Franklin deserved to be fired (or deserved to keep his job), only that this is the sort of decision that employers like ESPN need to make in order to ensure that they are getting the most bang-for-the-buck from the policies they promulgate and the training they provide. Moreover, if your company is one that actually has been taken to court over such employment issues, or at least has fought through summary judgment, it is essential that you be able to point, whether in discovery, dispositive motions, or before the jury, to instances where you fired people who were found to have violated your nondiscrimination and/or harassment policies.

In other words, if you tout your company as having a zero tolerance for such shenanigans, you had better be able to back that up. Think of it as Employment Law Version 3.0. It used to be that if an employer had all the right policies bound together in a shiny handbook, or distributed on its intranet, it was seen as having exercised the reasonable care necessary to prevent inappropriate and illegal conduct. That was Version 1.0. Then, a number of courts concluded that merely having good policies was not enough; if you did not train your employees, particularly your managers, you were not doing all that you could to remain harassment-free.[1] In *Monteagudo v. Asociacion de Empleados Del Estado Libre*, the court affirmed an award of $300,000 in punitive damages because, while the company had an anti-sexual harassment

policy in place, it had not proved that it "had an active mechanism for renewing employees' awareness of the policies."[2] Plaintiff testified she had never been offered a seminar on sexual harassment, and she was unaware if her supervisors had ever attended such a seminar.[3] Version 2.0 had arrived.

This is not to suggest that the development of the law in this area has been linear. To be sure, the courts are constantly revisiting the adequacy of employer policies and training, finding fault where employers fail to provide translated versions of policies to multilingual workforces[4] or rejecting an employer's defense to a sexual harassment claim because the policy was not sufficiently tailored to the demographics of the particular workforce.[5]

So, how did we arrive at Version 3.0? Nearly every company has a lawyer who specializes in, or at least understands the basics of, employment law. Most companies have knowledgeable human resources professionals who, through the benefit of seminars, online training, and continuing education classes, stay on top of the latest legal developments involving policies and procedures. As a result, most companies have good policies. Most companies also realize the importance of training, hiring outside consultants, trainers or attorneys to develop a comprehensive training program for management and staff. In some cases the training is live; for others it is done online or by DVD. And, after years of being reminded to document their efforts, I have found most employers are conscientiously retaining the training materials used and recording who attended which class and when. I cannot recall the last time a plaintiff denied, in his or her deposition, receiving employer-provided harassment training.

This means that the bar has been raised. Juries are no longer impressed simply because you have all the right policies, no matter how nice the paper on which they are printed. The jurors expect you to have these policies, so pointing them out at trial means only that you likely met their minimum expectations; it does not mean you have a good story to tell.

If you want to have a good story to tell, to confidently tell the jurors (and the court) that you do things the right way, you have to be able to show that your company walks the talk, that your company takes seriously its stated commitment to equal opportunity and a harassment-free workplace. The best way to do this is by pointing to instances where people complained, investigations were promptly conducted, and decisive action was taken. Not a slap on the hand. That will not suffice. It has to hurt. It has to be something that will force the jurors to sit up and take notice; a week-long suspension, a demotion, no salary increase for one year, or a termination – especially for someone like Ron Franklin, who previously had been warned.

And if you can show that you instill these values into your managers such that action was taken without the victim even having to complain, you put yourself in an even better position.

For the cynics out there, this is not only about putting your company in a better position to defend against discrimination charges and lawsuits. Hardly. If your company adheres to these values, and routinely takes decisive action when complaints are made or concerns raised, chances are that employees who might otherwise have been unwilling or afraid to come forward will do so readily in the future, secure in the knowledge that their company practices what it preaches. And, just as importantly, it may reshape the corporate culture such that other employees will see that this sort of behavior is not acceptable and will refrain from making sexist (or other offensive) comments in the future. Of course, it does have the added benefit of enabling you to better counter claims made by employees who never complained and argue that they knew doing so would result in no action on behalf of the company.

Finally, understand that I am not advocating blindly disciplining and discharging the employees who are

the subject of such complaints. I know full well that there are disingenuous employees who may see a false complaint as a sure-fire way to protect themselves from termination or get rid of a demanding manager. To the contrary, it is imperative that your company conduct comprehensive, detailed investigations, taking action if, and only if, you reasonably conclude that it is merited given the findings of an investigation. Which brings us back to Mr. Franklin. Should you fire a 25+ year employee for calling a female colleague "sweetcakes"? When he has a history of prior problems, having been warned for similar conduct, the answer is an unequivocal yes; especially when your company has had a spate of such problems with other male employees who have demeaned or devalued their female colleagues. To do otherwise would send the absolute worst signal to these women, and make it next to impossible for you to convince a future jury that you believe the nice words written in the fancy handbooks you distribute.

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[1] *Monteagudo v. Asociacion de Empleados Del Estado Libre*, 554 F.3d 164, 176-77 (1st Cir. 2009) (citing *Romano v. U-Haul Int'l,* 233 F.3d 655, 670 (1st Cir. 2000)); *Bruso v. United Airlines, Inc.,* 239 F.3d 848, 858 (7th Cir. 2001) ("Every court to have addressed this issue thus far has concluded that, although the implementation of a written or formal antidiscrimination policy is relevant to evaluating an employer's good faith efforts at Title VII compliance, it is not sufficient in and of itself to insulate an employer from a punitive damages award.").

[2] *Id.*

[3] *Id*. at 177.

[4] *Lopez v. Aramark Uniform & Career Apparel, Inc.,* 426 F. Supp. 2d 914, 964 (N.D. Iowa 2006) (granting punitive damages after testimony at trial showed sexual harassment training was not taken seriously – the video could not be heard and it was not available in Spanish despite the high number of Spanish-speaking employees).

[5] *EEOC v. V & J Foods, Inc.,* 507 F.3d 575, 578 (7th Cir. 2007) (company's complaint mechanism was unreasonable as it was not tailored so that its employees – in this case teenagers – could understand it).