



Your Sexual Harassment Policy: Use It or Lose Its Protection

Karen D. Adinolfi, Esq.
Roetzel & Andress, LPA

Your company prides itself on what it views as a comprehensive sexual harassment policy. It's been in place for years, was developed by consultants and attorneys, and figures prominently in your employee handbook. When a female employee sues you for sexual harassment, you are confident that your policy will provide you with a defense to those claims.

Confident, that is, until the plaintiff takes the depositions of your employees. Your employees testify that aside from receiving their handbooks on their first day of employment, they are unaware of the details of the policy, cannot describe the complaint procedure, and would have no idea what to do if they observed harassment in the workplace. Needless to say, the plaintiff makes these statements one of the highlights of her case.

Far-fetched? No. While the United States Supreme Court has said that an employer has an affirmative defense to a charge of hostile environment sexual harassment if it exercises reasonable care to prevent and promptly correct any sexually harassing behavior, courts will not hesitate to deny the defense to an employer who does little to carry out its policy beyond the initial enactment.

The Affirmative Defense: The United States Supreme Court's Decisions in *Burlington Industries v. Ellerth* and *Faragher v. City of Boca Raton*

In 1998, the United States Supreme Court articulated the framework for dealing with federal hostile work environment sexual harassment claims, that is, sexual harassment that does not result in a tangible job consequence for an employee (such as a firing or a demotion). The result was the pronouncement that an employer is subject to vicarious liability for a hostile work environment created by a supervisor, but that employer has an affirmative defense if it 1) exercised reasonable care to prevent and promptly correct any sexually harassing behavior, and 2) that the aggrieved employee unreasonably failed to take advantage of any preventive or corrective opportunities provided to her. *Burlington Industries, Inc. v. Ellerth*, 524 U.S. 742, 118 S.Ct. 2257, 141 L.Ed.2d 633 (1998); *Faragher v. City of Boca Raton*, 524 U.S. 775, 118 S.Ct. 2275, 141 L.Ed.2d 662 (1998). The first element of the *Burlington/Faragher* framework usually encompasses a comprehensive sexual harassment policy and complaint procedure for aggrieved employees. While the Supreme Court did not set out exactly what an employer needs to do, at the very least, it must have such a policy and complaint procedure in place.

But merely having a policy, as our fictitious employer did above, is not sufficient. A court will look unkindly upon the employer who waves an anti-harassment policy around, seeking to invoke the affirmative defense, but cannot provide any evidence that its employees knew about it, or that the company took the policy seriously. Indeed, that is exactly what the Supreme Court predicted would happen to the employer in *Faragher*, stating that:

While the City would have an opportunity to raise an affirmative defense if there were any serious prospect of its presenting one, it appears from the record that such avenue is closed. The District Court found that that the City had entirely failed to disseminate its policy against sexual harassment among the beach

employees and that its officials made no attempt to keep track of the conduct of [the allegedly harassing supervisors]. The record also makes clear that the City's policy did not include any assurance that the harassing supervisors could be bypassed in registering complaints. Under such circumstances, we hold as a matter of law that the City could not be found to have exercised reasonable care to prevent the supervisors' harassing conduct.

Faragher, 524 U.S. at 808-09, 118 S.Ct. 2275, 141 L.Ed.2d 662.

So How Should Your Company or Organization Protect Itself?

Even if you have a policy in place, now is always a great time to sit down and re-evaluate it and the efforts your organization has made to make your employees aware of it. At the minimum, your policy should:

- **Be Written.** Almost every employer could say that it has some oral policy or “understanding” prohibiting sexual harassment. However, when challenged, you want to be able to produce a tangible document. A written policy is also easier to distribute.
- **Be Broadly and Visibly Distributed.** You should distribute your policy in as many ways as possible. The obvious way is to include it in your employee handbook, but think about periodic memoranda with employee paychecks or bonuses, posting it prominently in the break room or lounge, or sending around company-wide e-mails. Make sure you document your efforts to distribute the policy. Have all employees sign an acknowledgement when they receive their employee handbook.
- **Clearly Explain the Company's Position and What Conduct is Prohibited.** While this may sound obvious, a policy is of no use to anyone if your employees cannot understand it. Begin by clearly stating that your company seriously discourages any type of harassment. Define what harassment is, and give examples (making clear that it is a non-exclusive list and that all behavior falling under the definition is prohibited).
- **Institute a Consistent Complaint Procedure.** Every policy should have a procedure by which an employee who believes he or she has been harassed can make the company aware. The procedure should explain:
 1. When and how to report conduct prohibited by the policy
 2. To whom the employee should report these violations
 3. What the reporting procedure will entail after the complaint is made. Institute alternative avenues for complaints (for instance, you do not want an employee to have to make a complaint to the supervisor allegedly harassing her).
- **Provide for Disciplinary Consequences.** State the consequences for violation of the policy in a general way, such as “violations of the company's anti-harassment policy will result in disciplinary action, up to and including discharge from employment.”
- **Require Cooperation.** Inform your employees that each has a duty to cooperate with the company in preventing harassment, reporting violations of the policy, and assisting during investigations of alleged violations.

- Assure Non-Retaliation. Your policy must clearly prohibit any retaliatory conduct toward anyone who files a complaint or who cooperates with investigations of alleged violations. Tell employees that all “good faith” complaints of harassment will be investigated.
 - Include all forms of harassment.
 - Be reviewed by an employment attorney so that you ensure it meets the current legal standard.
 - Be Taken Seriously. Have the people in charge of carrying out the policy speak of it seriously to subordinates. If the powers-that-be mock the policy, why would rank-and-file employees do otherwise?
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Karen D. Adinolfi

330.849.6773 | kadinolfi@ralaw.com

Karen is a Partner in Roetzel Akron office. She focuses her practice on labor and employment litigation, regulatory compliance and union matters. She has represented her clients in matters such as discrimination, harassment, and retaliation litigation, arbitration proceedings, and appeals and administrative proceedings before the Ohio Department of Job and Family Services (ODJFS), the Equal Employment Opportunity Commission (EEOC), the Ohio Civil Rights Commission (OCRC), the Unemployment Compensation Review Commission (UCRC), and the Department of Labor (DOL).