

Second Circuit Holds That Employer Could Be Liable for Sexual Harassment Even Though Plaintiff Complained Only to Harasser

BY ZACHARY D. FASMAN AND ALEXANDER W. WOOD

Ever since the United States Supreme Court decided *Faragher v. Boca Raton*, 524 U.S. 775 (1998) and *Burlington Indus., Inc. v. Ellerth*, 524 U.S. 742 (1998), employers have had recourse to an affirmative defense to liability (the “*Faragher/Ellerth* defense”) in cases where a supervisor is guilty of sexual harassment but where no “tangible employment action” is taken against the plaintiff (e.g., demotion or discharge). In such cases, assuming that the plaintiff has otherwise proven sexual harassment (or a *prima facie* case on a motion for summary judgment), the employer’s defense requires proof by a preponderance of the evidence that (1) it exercised reasonable care to prevent and correct any harassment, and (2) the plaintiff unreasonably failed to make use of any preventive and corrective mechanisms provided by the employer or otherwise avoid the harm. The nature of the employer’s harassment policy is a key issue to both prongs of this defense, as an appropriate policy both shows the employer’s reasonable care to prevent or correct harassment, and such a policy also can form the basis for a claim that the plaintiff’s failure to use the employer’s “preventive and corrective mechanisms” was unreasonable.

In considering *Faragher-Ellerth* defenses, lower courts have often concluded that an effective anti-harassment policy must provide multiple options for submitting complaints that include individuals other than the plaintiff’s immediate supervisor (who may be guilty of the harassment in question), but have not faulted policies that also allow reporting to the immediate supervisor as one option. On February 19, 2010, however, the United States Court of Appeals for the Second Circuit reversed a district court’s grant of an employer’s motion for summary judgment and held that an employer is not, as a matter of law, entitled to the *Faragher/Ellerth* defense simply because the employer’s policy allows the plaintiff to complain to other persons besides the plaintiff’s supervisor and the plaintiff fails to do so. The court, in *Gorzynski v. JetBlue Airways Corp.*, No. 07-4618-cv, 2010 WL 569367 (2d Cir. Feb. 19, 2010) (“*JetBlue*”), citing the courage it takes for employees to complain about harassment, held that the reasonableness of an employee’s use of an employer’s complaint procedures must be determined by the specific facts and circumstances of each individual case and cannot be resolved in the abstract on the basis of a policy providing multiple avenues for complaint.

The plaintiff in *JetBlue* alleged that she was the victim of a hostile work environment created by her supervisor, and argued that she complained effectively by raising this issue only to her immediate supervisor, even though he was responsible for the conduct in question and did nothing to alter his

behavior. Significantly, Jet Blue's policy provided that complaints of harassment could be lodged with (1) the employee's immediate supervisor, (2) any member of management, and (3) the employer's human resources division. The plaintiff did not contend that Jet Blue's policy was improper, but maintained that Jet Blue could not meet the second prong of the defense by showing that her failure to complain to others was unreasonable. The court found that the plaintiff, having reported the issue to her supervisor without resolution, raised a genuine issue of material fact as to whether it was reasonable not to pursue the other options listed in the policy. The court relied upon anecdotal evidence, common in many cases, to reach this conclusion: it noted that the plaintiff claimed she previously had complained to another manager about suspected age discrimination and that, instead of investigating the complaint, the manager had admonished the plaintiff, and that one of plaintiff's coworkers allegedly was suspended within days of making a complaint about her manager to a human resources vice president. Based on such allegations, the Second Circuit characterized these alternative avenues as "ineffective or even threatening" and concluded that the facts and circumstances of the case raised a material issue of fact regarding the reasonableness of the plaintiff's decision not to complain through these avenues.

JetBlue raises an issue of significance to employers because it calls into question an employer's ability to obtain summary judgment based on the *Faragher/Ellerth* defense even with a perfectly appropriate policy. While Jet Blue's employee handbook appeared ironclad due to its multiple avenues of reporting, each identified in very broad terms, the Second Circuit seemingly ruled out summary judgment on the basis of anecdotal claims of alleged retaliation in the workplace, a commonplace in virtually every harassment case.

Is there any way for employers in the Second Circuit to revise harassment policies to surmount this problem? Employers with discrimination and harassment policies might consider the following actions:

- Ensure that there is a specific and clear reporting policy which offers multiple and distinct avenues of reporting for employees complaining about harassment.
- Include specific language that instructs the employee not to complain to a manager or supervisor if that individual is the alleged harasser, and in such instances to complain elsewhere.
- Consider including one "failsafe" avenue of reporting (*e.g.*, an ombudsman or 800 telephone number) that the reporting employee would have a difficult time portraying as "ineffective" or "threatening."
- Specifically preclude any retaliation against any employee raising a complaint, and provide multiple avenues for raising retaliation complaints.
- Train all managers regarding the consequences of retaliation, and take immediate and effective action to rectify all retaliation complaints.
- Ensure that the avenues for employee complaints are easily accessible and lead to individuals or departments that have received training in the responsive and appropriate handling of discrimination complaints.
- If the company has multiple locations, ensure that the listed avenues are available in all applicable locations, so as to maximize the available avenues to which all complaining employees have access.

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If you have any questions concerning these recommendations or would benefit from a review of your company's personnel policies, please do not hesitate to contact any of the Paul Hastings New York lawyers listed below:

Allan S. Bloom
212-318-6377
allanbloom@paulhastings.com

Patrick W. Shea
212-318-6405
patrickshea@paulhastings.com

Zachary D. Fasman
212-318-6315
zacharyfasman@paulhastings.com

Stephen P. Sonnenberg
212-318-6414
stephensonnenberg@paulhastings.com
