



DATE: April 19, 2010
TO: Our Valued Client Partners & Friends
FROM: HIB Account Team
RE: **EMPLOYER ALERT 2010-08**
No Training? Go To Trial

We are pleased to bring you our **Employer Alert 2010-08: No Training? Go To Trial**. This Alert addresses the need for employers to consider training employees on sexual harassment prevention policies.

We hope you find this useful and please, if you have any questions, contact your HIB Account Team for assistance.

NO TRAINING? GO TO TRIAL

A U.S. District Court in Tennessee recently ordered a case of sexual harassment to proceed to trial – despite the fact the complainant never told her harasser to stop, nor did she complain to management.

BACKGROUND

Shortly after starting work at the Woodbury Clinical Laboratory in Tennessee, Bridget Bishop says her supervisor, Larry Butler, began giving her occasional hugs around the shoulders. Over the next few months the hugging escalated until Butler was hugging Bishop "around the waist" numerous times on a daily basis. According to Bishop, Butler often kissed her on the cheek or forehead, occasionally picked lint from her work scrubs, and once touched her breast on Christmas Eve as he placed a \$100 bill Christmas gift into the pocket of her scrubs. Plus, he told her he loved her and that he needed her.

Initially Bishop wasn't bothered by Butler's occasional hugs. But she found his conduct during her last four months of employment to be unwanted and offensive. However, she never told Butler to stop and she never reported his unwanted behavior to management. She ultimately sued Woodbury, accusing the laboratory of tolerating a sexually hostile workplace in violation of Title VII.

In response, Woodbury asked the Court to dismiss the lawsuit, based on the "*Faragher / Ellerth* affirmative defense" (Supreme Court, 1996). This "defense" shields employers from liability for harassment if (1) the employer used reasonable care to prevent harassment, and (2) the employee unreasonably failed to complain. Since Woodbury had an anti-harassment policy and Butler failed to follow the policy's reporting procedures, the laboratory argued it shouldn't be liable for Bishop's misconduct.

COURT DECISION

The Court disagreed. It ruled that Woodbury could be liable for sexual harassment, primarily **because it hadn't trained its staff on its policy nor on preventing harassment**.

The Court stated: "In order for a defendant employer to [use] the *Faragher/Ellerth* affirmative defense," the Court explained, "the mere existence of an anti-harassment policy is not enough. [Instead, the question is] whether the policy was effective in practice in reasonably preventing and correcting any harassing behavior."



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"While there is no exact formula for what constitutes a reasonable sexual harassment policy, an effective policy should at least: (1) require supervisors to report incidents of sexual harassment; (2) permit both informal and formal complaints of harassment to be made; (3) provide a mechanism for bypassing a harassing supervisor when making a complaint; and (4) provide for training regarding the policy," the Court declared.

"Although Woodbury's anti-harassment policy as published in its employee handbook arguably satisfies the first three requirements, **the Court finds no evidence in this record that plaintiff Bishop, defendant Butler, or any other Woodbury employee received any training** regarding the company's anti-harassment policy," the Court observed.

"For these reasons, the Court finds that defendant Woodbury's motion for summary judgment must be DENIED," and it ordered Bishop's sexual harassment case to proceed to trial. [*Bishop v. Woodbury* (USDC MDTN 2010) no. 3:08-1032]

Source: LawRoom Weekly Briefing

WHAT EMPLOYERS SHOULD DO

Although there is no federal requirement to train all employees regarding their sexual harassment prevention policy and reporting procedures, employers would be well advised to follow the results of this case closely. EEOC frequently responds to substantiated complaints of harassment with mandated training requirements (and a fine). Additionally, some states such as California requires all employers with 50 or more employees to conduct supervisory training on sexual harassment prevention. Other states are considering similar legislation. Employers may find it prudent to train all employees now, rather than wait until required to do so after a complaint – or lawsuit – is filed.

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