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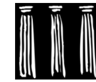

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Training becomes important step to avoid liability

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DRIVEN BY THE explosion of employment litigation, the U.S. Supreme Court has issued three decisions in the past several years emphasizing the need for employers to take preventive steps in order to avoid Title VII liability and punitive damages. In *Burlington Industries Inc. v. Ellerth*,[1] *Faragher v. City of Boca Raton*[2] and *Kolstad v. American Dental Association*,[3] the court altered the legal landscape by implicitly requiring employers to create and implement policies to prevent, deter and rectify complaints of discrimination and harassment.

The logical result of this new emphasis is that an employer's work force should be well aware of, and should abide by, such policies and procedures. Training a work force on a company's anti-discrimination/harassment policy has thus become arguably the most important tool for an employer that wants to protect itself from Title VII liability and punitive damages.

As a brief reminder, under *Ellerth* and *Faragher*, an employer is automatically liable for a hostile work environment created by a supervisor if harassment results in a tangible employment action, such as a demotion, dismissal or denial of a promotion. An employer also is liable for a supervisor's actionable harassment of a subordinate even if no tangible employment action has occurred, unless the employer can establish an affirmative defense. The affirmative defense consists of two necessary elements: The employer exercised reasonable care to prevent and promptly correct any harassment, and the employee unreasonably failed to take advantage of any preventative or corrective opportunities provided by the employer or to avoid harm otherwise.

In *Kolstad*, the court set a new standard for awarding punitive damages under Title VII. The court held that punitive damages can be awarded if the employer has acted "with malice or reckless indifference" to federally protected rights. Significantly, to avoid undermining the prophylactic objectives underlying Title VII, the court held that an employer would not be liable for punitive damages if discriminatory decisions by managerial agents were made contrary to the employer's "good faith efforts" to comply with federal anti-discrimination laws.

To establish the *Ellerth/Faragher* affirmative defense, an employer generally should establish, disseminate and enforce an anti-discrimination/harassment policy. As the Equal Employment Opportunity Commission (EEOC) notes, however, even the best policy and complaint procedure will not satisfy the affirmative defense if the employer fails to implement its policy effectively. The EEOC emphasizes that "if feasible, the employer should provide training to all employees to ensure they understand their rights and responsibilities."[4] In fact, several courts have relied on an employer's sexual harassment training to find that the employer did exercise "reasonable care" to prevent harassment, and therefore, the employer avoided liability.[5]

In *Kolstad*, the Supreme Court indicated that an anti-discrimination policy can prevent an employer from being held liable for punitive damages. However, simply drafting such a policy does not automatically bar the imposition of punitive damages. In *EEOC v. Wal-Mart Stores*,[6] the U.S. Court of Appeals for the 10th Circuit held that "the extent to which an employer has adopted anti-discrimination policies and educated its employees about the requirements of [Title VII] is important in deciding whether it is insulated from vicarious punitive liability." Cautioning that having a written policy is not enough, the court stated that "a generalized policy of equality and respect for the individual does not demonstrate an implemented good faith policy of educating employees."

It is important to note that no matter how successful an employer's training is, the employer may still be in jeopardy of losing a harassment or discrimination case on the merits if, for example, the second prong of the affirmative defense has not been met or when the employee establishes pretext. However, engaging in quality training in conjunction with a well-written policy will likely translate into successfully meeting the good-faith defense of *Kolstad*.

Thus, even if an employer loses summary judgment on the merits, the ability of the employer to show that it made good-faith efforts to comply with Title VII can result in a punitive damage claim being dismissed. When punitive damages are not available, the settlement value of the case drops significantly. Consequently, a case otherwise headed for a trial by jury is more likely to be resolved.

With the monetary value of a lawsuit often hinging on the effectiveness of an employer's preventive policies, there has been a new emphasis during discovery on an employer's reasonable care and good-faith efforts to prevent harassment/discrimination, or the lack thereof. Plaintiffs' attorneys and the EEOC have begun to question employers aggressively as to how much money is spent on training, the expertise of the trainers, the curriculum and employee response to the training. Thus, as training programs have become increasingly important, the quality of these programs has developed into the newest battlefield in the employment litigation wars.

Rules to remember

Therefore, it is more important than ever for employers to implement quality training programs. Structured properly, employee training not only mitigates potential liability and eliminates punitive damage awards, but also adds value to an organization and can

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eliminate problems of harassment and discrimination before they become litigation issues. The following are a few cardinal rules employers should remember when creating an anti-harassment or anti-discrimination training program.

■ *Focus on the company's policy.* Every facet of the policy must be discussed and reviewed. Employers should not simply address what is and is not a violation of the policy, but also should discuss in detail other issues, such as reporting procedures, confidentiality issues, the conduct of investigations and retaliation prohibitions. While employer policies should emphasize zero tolerance with respect to discrimination and harassment, they also must encourage employees to report inappropriate behavior—with many options in which to report a complaint, including the option of reporting a complaint to a person not in the employee's chain of command—to ensure confidential and prompt investigations and to protect victims and witnesses from retaliation.

■ *It is not just about sexual harassment.* Training should not be restricted to a discussion of sexual harassment. Although *Ellerth* and *Faragher* dealt with issues of sexual harassment, courts and the EEOC have reasoned that the affirmative defense applies to harassment by supervisors based on race, color, gender (whether or not sexual in nature), religion, national origin, age or disability.[7] Many states and policies also cover sexual orientation. Thus, employers should establish anti-harassment policies, complaint procedures and training covering all forms of unlawful harassment. Although sexual harassment issues are often the emphasis of a training program, the program also should stress that the employer's policy covers harassment based on other protected characteristics.

■ *Do not forget management.* Training programs must focus on giving managers and supervisors the tools they need to implement a policy successfully. The key to a successful policy is directly linked to how well management responds to and abides by the policy. In addition, because there likely will be aspects of the policy that are specific to managers and supervisors—such as a heightened duty to report potential harassment or discrimination even if no complaint is made, or a method for responding to complaints immediately—it may be prudent to conduct a separate training session for management. Further, managers and supervisors need to know how to interview for hiring and promotion and how to manage performance in a way that does not discriminate against anyone on the basis of protected characteristics.

■ *This is no time for legalese.* Training should not be a symposium on the history of harassment or Title VII, recent case law or scholarly debates. Simply put, discussion of *Kolstad, Ellerth, Faragher* or an interesting EEOC development is not the way to go and will only tend to confuse employees and waste time. Employers should focus on what employees most need to know: what is and isn't harassment, how to report it and how to maintain a retaliation-free workplace.

■ *Training should be memorable.* More and more frequently, employees are being deposed and asked about a company's training program. Often, even though they attended, they do not remember anything about the training. Employers should strive to make the training interesting and entertaining. They should use learning devices, such as props and interactive tools. The trainer(s) should be able to communicate comfortably with the audience—whether upper-level executives or the rank and file. Only if the participants remember the training will it have any beneficial effect—from either a legal or training perspective.

■ *Emphasize the primary reason for training.* Training should emphasize that its true goal is to help create a productive workplace where employees can function in a safe environment and are valued and treated with respect.

Avoiding training mistakes

Mishandled training not only may fail to insulate an employer from discrimination and harassment claims and punitive damages awards, but also can create its own legal problems. Accordingly, employers should seek to create training sessions that are "jury worthy" in tone and language. Training materials should be drafted and reviewed with an eye toward possible discovery during litigation. To further lessen the risk of litigation, a company's training program should take the following additional steps:

■ *Managers should not be asked to discuss their own stereotypes or biases.* Some training programs ask managers and supervisors to be open and discuss their feelings about diversity or protected class issues. Whether this type of self-examination is effective in addressing bias and prejudice is unclear. What is clear is that courts recognize no "soul-searching" privilege for comments made in training sessions. Any stereotypes voiced by managers can be used later against the company.[8]

■ *Do not rely on promises of confidentiality in training sessions.* As a legal matter, there is no such thing. Trainers may promise that all that is said or done in the training session will be confidential and stay within "these walls." In fact, all that is said and done can be used as evidence in later litigation.

■ *Avoid legal conclusions.* Trainers should resist reaching legal conclusions such as "This type of conduct is sexual harassment." The conclusion may be wrong. And, more important, the conclusion may compromise future legal defenses. Instead, trainers should focus on and emphasize the company's own policies. Describing conduct as inappropriate or in violation of the company's policy will go a long way toward better explaining the policy, and will also leave defense doors open in future litigation.

With the recent Supreme Court rulings, the case for instituting an anti-discrimination/harassment training program is compelling. Employers, however, must carefully structure and audit training programs in order to ensure that they do not create legal headaches, can be used as protection against legal liability and punitive damages and create a more harmonious workplace.

(1) 524 U.S. 742 (1998).

(2) 524 U.S. 775 (1998).

(3) 527 U.S. 526 (1999).

(4) EEOC Enforcement Guidance: "Vicarious Employer Liability for Unlawful Harassment by Supervisors" (June 18, 1999), EEOC Compliance Manual (BNA).

(5) Newsome v. Administrative Office of the Courts of the State of N.J., 103 F. Supp. 2d 807 (D.N.J. 2000); Masson v. School Board of Dade Co., Fla., 36 F. Supp.2d 1354 (S.D. Fla. 1999). See also Miller v. Woodharbor Molding and Millworks Inc., 80 F. Supp.2d 1026 (N.D. Iowa 2000).

(6) 187 F.3d 1241, 1248-49 (10th Cir. 1999).

(7) See Breeding v. Arthur J. Gallagher and Co., 164 F.3d 1151, 1158 (8th Cir. 1999); Wallin v. Minnesota Dept. of Corrections, 153 F.3d 681, 687 (8th Cir. 1998); "Vicarious Employer Liability," supra n.4.

(8) See Stender v. Lucky Stores Inc., 803 F. Supp. 259 (N.D. Cal. 1992).

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