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Labor and Employment Alert: Fifth Circuit Reminds Us That an Unpublicized Harassment Policy Isn't Worth the Paper It's Written On

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CLIENT ALERT | 8.5.2016

Most employers have a sexual harassment policy, usually contained in an employee handbook. A recent case from the Fifth Circuit Court of Appeals reminds employers that an effective sexual harassment policy must be actively disseminated to employees and not simply posted on a backroom bulletin board.

In *Kandace Pullen v. Caddo Parish School Board*, the plaintiff, Pullen, was sexually harassed by her supervisor (Graham) several times. The harassment included inappropriate conversations and touching. She never told anyone at work about the harassment when it happened. Later, another employee complained that Graham was sexually harassing her and identified Pullen as another potential harassment victim. After an investigation, the school board found the complaint to be well-founded and disciplined Graham. During this time, Pullen contacted the EEOC and later filed a lawsuit alleging that she had been subjected to a hostile working environment.

An employer usually is strictly liable for a supervisor's harassment of an individual whom he or she supervises. The United States Supreme Court established an exception to this rule in the *Ellerth/Faragher* cases. Under *Ellerth/Faragher*, an employer may assert an affirmative defense where a plaintiff alleges sexual harassment by a supervisor but does not claim that the harassment resulted in a tangible employment action. To establish this defense, the employer must show that it exercised reasonable care to prevent and correct sexual harassment and that the employee unreasonably failed to take advantage of preventive or remedial opportunities provided by the employer.

Here, the district court held that the first prong of the test was satisfied because the school board showed that it had a sexual-harassment policy, it was posted on bulletin boards and available online, and it had trained the majority of its employees on the policy. The court held that the second prong was satisfied because Pullen's failure to report the harassment for over two years was unreasonable. Given this, the court granted the school board's motion for summary judgment and dismissed the case. The Fifth Circuit, however, reversed.

The Court explained that the first element of the *Faragher/Ellerth* test focuses on the company's conduct in implementing institutional policies and educational programs regarding sexual harassment. Both the harasser's knowledge of the policy and complaint procedures and the victim's awareness of it are relevant to whether the company acted reasonably. Here, the Court found conflicting evidence on whether the school board had promulgated an effective sexual harassment policy.

Pullen admitted that the school district had a sexual harassment policy, and other employees had testified that they had received copies of the policy. But Pullen claimed she had never received a copy and argued that the sexual harassment policy "was not sufficiently publicized." Multiple employees (some of whom had worked for the school board for 16 to 30 years) testified that they had never received any training about sexual harassment, did not know of a duty to report sexual harassment, were unaware of any complaint procedures, were not told of the sexual harassment policy, and had never seen or reviewed a copy of the policy. This evidence, if believed, also showed that the supervisor-harasser Graham was never given a copy of the policy, never saw it, and was never trained on it. The Court found that "this would be a sufficient basis for a reasonable jury to find that the company did not take reasonable steps to prevent and remedy sexual harassment." Because of this conflicting evidence, the Court reversed summary judgment and remanded the case for trial.

This case reminds employers that an effective sexual harassment policy requires that employees have a copy of the policy (preferably with a signed acknowledgment in their personnel file), that employees and supervisors are trained on the policy, and that appropriate reporting procedures be available and publicized. Contact your Vorys lawyer if you have questions about implementing sexual harassment policies or providing harassment training to employees and supervisors.