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Practices/Policies, Protection from Harassment Claims

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Perhaps too often we bring you news of situations gone awry in the workplace. In this instance, we present a template that demonstrates how employers can avoid costly litigation. In Crawford v. BNSF Railway, Co., a federal appellate court recently affirmed the entry of summary judgment in favor of an employer asserting the Faragher-Ellerth affirmative defense.

The Faragher-Ellerth affirmative defense is derived from two 1998 United States Supreme Court cases which established that under Title VII of the Civil Rights Act of 1964, an employer may avoid liability for harassment claims that do not involve an adverse employment action if the employer can demonstrate that the employer exercised reasonable care to prevent and correct promptly any sexually harassing behavior, and (b) the plaintiff employee unreasonably failed to take advantage of any protective or corrective opportunities provided by the employer or to avoid harm otherwise. While Crawford v. BNSF was a sexual harassment case, the Faragher-Ellerth defense applies to harassment based on any federal and many state harassment claims.

Because the employer in Crawford had taken the necessary steps in advance to insulate itself from liability, it never had to defend the merits of the plaintiffs' sexual harassment claims. BNSF's policies, employee training and enforcement actions helped secure summary judgment and provide an example of what employers should be doing to protect themselves from harassment claims.

In Crawford, five employees brought suit claiming sexual harassment and racial discrimination by their supervisor. BNSF did not directly dispute the supervisor's alleged conduct, but instead argued, and the courts agreed, that it was entitled to make use of the Faragher-Ellerth defense. The court focused on three issues: (1) the employer's policies, training and reporting procedures; (2) the plaintiffs' delay in reporting the alleged harassment; and (3) the employer's response once it was made aware of the complaints:

First, the court found that BNSF had in place a "zero-tolerance" policy on workplace harassment which extensively described the various types of prohibited conduct including sexual touching, verbal abuse of a sexual nature, graphic or suggestive comments of a sexual nature, use of sexually degrading words and the displaying of sexually suggestive materials. The court noted that each of the plaintiffs, and all other BNSF employees, had been trained to report harassing or offensive conduct through one of five available channels, including reporting to a supervisor or through an anonymous hotline. To help facilitate free reporting of such conduct, the policy contained a non-retaliation provision for reporting discrimination.

Next, the plaintiffs' failure to report their claims could not be excused. There were five avenues through which to register a complaint and there was no basis for delay based on possible retaliation The plaintiffs testified that the superiors to whom they could have reported were professional and approachable, and the court found that each complaint made through the hotline was investigated and eventually closed. The court noted that BNSF even provided some counseling in situations where the allegations of the complaint were not substantiated.

Finally, the court concluded that BNSF took "extremely swift" action once it was notified of the plaintiffs' complaints. The company immediately began an investigation, including interviewing four of the five plaintiffs, placing the supervisor on administrative leave within two days of the start of the investigation and terminating the supervisor within two weeks of first receiving the complaints.

The ultimate take-away for employers is simple yet significant. Spending the time, effort and money to put in place the proper policies and employee training - and enforcing those policies strictly and promptly - may save the employer from costly litigation in the future.

Employers who now have anti-harassment and discrimination policies in place should review them to make sure they are up to date with regard to the types of prohibited harassment, in particular gender identity and sexual orientation discrimination which are evolving areas of the law (see Transgender Discrimination Protection Expands in Maryland). Employers should also update information in the policy having to do with where employees should report any allegations and must make sure that each employee acknowledges having received and read those policies. Employers without current policies on harassment and discrimination should adopt them as soon as possible.

It is critical that employers regularly train their employees to recognize and report harassment through the designated reporting channels. It is particularly important that supervisors to whom such reports may be made understand their roles and duties relating to harassment complaints.

Employers must also act in accordance with their policies; in other words, “mean what you say and say what you mean.” Investigations should begin as soon as possible after a complaint is received and any necessary disciplinary or corrective action should be taken promptly. Records of these investigations, regardless of the veracity of the complaint, are important. The court in this case specifically noted that it appeared as though BNSF investigated every hotline complaint it received.

