



March 8, 2010

EMPLOYEE'S HARASSMENT COMPLAINT TO HARASSER-MANAGER PRECLUDES DISMISSAL OF SEXUAL HARASSMENT CLAIM

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The U.S. Court of Appeals for the Second Circuit recently held that an employee's complaint about sexual harassment to the alleged harasser may deprive the employer of a key defense to such claims under Title VII, the federal civil rights law.

While a Second Circuit opinion is not binding on courts deciding claims brought against Michigan employers, it may still be wise to modify sexual harassment policies to exclude reports to an employee's alleged harasser-supervisor.

In *Gorzynski v. JetBlue Airways Corp.*, the General Manager of the defendant's Buffalo Station was accused of sexually harassing female employees, including the plaintiff. After the plaintiff was terminated from her employment, she filed a complaint under Title VII alleging, among other things, sexual harassment.

The defendant sought dismissal because it had a policy which prohibited sexual harassment, and also provided a means for reporting it. The defendant's position is known as the Faragher/Ellerth affirmative defense to hostile work environment claims under Title VII.

The defendant argued that the plaintiff unreasonably failed to take advantage of the corrective measures provided by its policy because, as she admitted, the only manager she complained to about the harassment was the alleged harasser.

The appellate court rejected the defense's argument because the plaintiff reported the harassment to one of the managers specifically identified by the policy deemed as appropriate to receive such complaints and an employee is not required to "go from manager to manager until they find someone who will address their complaints." The court held that "an employer is not, as a matter of law, entitled to the Faragher/Ellerth affirmative defense simply because an employer's sexual harassment policy provides that the plaintiff could have complained to other persons, as well as the alleged harasser."

While the court acknowledged that, in some circumstances, complaining only to the harasser could be unreasonable, it was not in this case because evidence suggested that the other managers identified by the policy were not receptive to complaints.

To avoid this situation, employers are wise to draft policies that not only require employees to report sexual harassment to “higher management,” but also to specify that the individual should be someone who is not the alleged harasser.

If you need any assistance drafting this or any other employment policy, contact the author Claudia D. Orr, an attorney who routinely advises clients on employee handbooks; Theresa Smith Lloyd, the firm’s Labor & Employment Practice Group Leader or any member of the Plunkett Cooney’s Labor & Employment Practice Group. To review a practice group directory, [click here](#).