Keep Supervisors Out of Harassment Policy Reporting Procedures

March 2, 2010 by Adam Santucci

Oftentimes, it seems like the requirements of the law conflict with long held workplace beliefs, and in some cases common sense. One staple of workplace dogma is the notion that employees should always bring issues to supervisors first, so that issues can be addressed, and hopefully resolved, at the lowest possible level. According to the law, however, when it comes to discriminatory harassment, supervisors should be left out of the loop.

A recent case, *Gorzynski v. JetBlue Airways Corp.(PDF)*, illustrates this point. In *JetBlue*, the Company had a policy that allowed employees to bring complaints to their immediate supervisor, Human Resources, or any member of management. The plaintiff, a former employee at the time she filed her suit under Title VII, alleged that her former supervisor had created a hostile work environment by, among other things, making sexual comments, grabbing her and other women, and tickling women. While she was employed, the Plaintiff only complained about this alleged harassment to the supervisor.

The Company argued that reporting the harassment only to the supervisor, the same person engaging in the alleged misconduct was not reasonable, and therefore, the Company was entitled to rely on the *Faragher/Ellerth* affirmative defense to discriminatory harassment claims. The *Faragher/Ellerth* defense is a defense against liability that is available to employers in certain circumstances if two conditions are met. First, the employer must take reasonable measures to prevent and quickly correct any harassing conduct; and second, the employee must unreasonably fail to take advantage of the preventative or corrective measures available. The trial court agreed with the Company that the former employee's failure to report the alleged harassment to another point of contact was unreasonable, and dismissed her harassment claim.

The Second Circuit Court of Appeals, however, rejected the Company's argument. The Court of Appeals stated that the former employee's allegations made out an actionable hostile work environment claim based on sex, and went on to hold that employees do not have to shop around for someone to address their complaints. Instead, whether an employee reasonably took advantage of the employer's complaint reporting procedure will be decided on a case-by-case basis. The Court of Appeals determined that in this case, a jury could find that the former employee's actions were not unreasonable because she was following the Company policy by reporting the conduct to her supervisor.

There were some additional facts in this case that were detrimental to the Company's argument. However, it still provides a reminder that insufficient harassment policies will prevent employers from asserting the Faragher/Ellerth affirmative defense, which is a means for having harassment claims dismissed. The Gorzynski decision makes it more difficult to get harassment claims

dismissed early, because the Faragher/Ellerth defense will now be judged on a case-by-case basis, at least in the Second Circuit.

Even though this decision is not controlling in Pennsylvania courts, Pennsylvania employers should take time to review their discriminatory harassment policies, including sexual harassment policies, and ensure that supervisors are not designated as a reporting point of contact. Instead, reporting points of contacts should be limited to Human Resource staff and upper management personnel, and employees should be directed to utilize alternative points of contact if one point of contact is the alleged harasser.