



The GSH 60-Second Memo

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The Benefits of Putting Policies in Place and Pursuing Them Proactively

By Lynn Urkov Thorpe, Esq.

Sexual harassment remains a continuing concern in the workplace. However, as a recent Seventh Circuit decision illustrates, a comprehensive anti-harassment policy and a quick-acting management team can defeat a sexual harassment claim. In *Roby v. CWI, Inc.*, - - F.3d - - , 2009 WL 2615973 (7th Cir., Aug. 27, 2009), the employer took the right steps to avoid liability.

According to Ms. Roby, her supervisor, Mr. Schiavone, made sexually suggestive statements to her and had inappropriate physical contact. Although she did not report her concerns, the General Manager overheard Ms. Roby say that she could inform the corporate office about something Mr. Schiavone had done that it "would not be applauding". Rather than ignore what he heard, the General Manager asked Ms. Roby to explain her comment and brought her to the Retail Sales Manager's office for this purpose. After Ms. Roby described Mr. Schiavone's alleged conduct, the General Manager immediately informed Human Resources.

The Human Resources Manager conducted an investigation.

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She interviewed several witnesses and informed them that the investigation was confidential. She reviewed a written statement that Ms. Roby submitted. She also looked at Mr. Schiavone's personnel file and saw that it did not contain any prior complaints. In addition, while the investigation was ongoing, the General Manager and the Retail Sales Manager attempted to set the schedule so that one of them was in the store when Ms. Roby was scheduled to work, to make her more comfortable and have someone on site if she had issues to report. They could not prevent an overlap in Ms. Roby's and Mr. Schiavone's respective schedules due to the small number of employees, but they did what they could to minimize the times Ms. Roby would close the store with Mr. Schiavone.

While the investigation was pending, Ms. Roby reported that two employees talked to her about her allegations about Mr. Schiavone, and that one of them asked her if she would sue him if he tried to get in the car with her. The Human Resources Manager investigated, confirmed the incident regarding the remark and terminated that employee for breach of confidentiality.

At the conclusion of her investigation, the Human Resources Manager decided that Mr. Schiavone's conduct did not constitute unlawful harassment but that he did make inappropriate remarks. He was disciplined and required to take anti-harassment training. He was also told that if he spoke to Ms. Roby about the incidents or attempted to retaliate, he would be terminated. The Human Resources Manager also sent a note to Ms. Roby thanking her for coming forward, advising her that corrective action had been taken and reiterating that she should report any future inappropriate conduct.

The next month Ms. Roby contacted the Human Resources Manager and told her she did not want to finish her shift because she was scheduled to close with Mr. Schiavone. Although the employer disputes that this was true, the Human Resources Manager accepted Ms. Roby's statement and told her to go home. Ms. Roby was told that she was excused from work for the next week until the General Manager returned from vacation. Ms. Roby subsequently stopped by the store and told the General Manager and Retail Sales Manager she did not want to be scheduled to work the same time as Mr. Schiavone. They told her it was not possible given the small size of the store, but they would make sure that the two of them were not scheduled to close the store together. The Human Resources Manager told Ms. Roby that she was on the schedule and she should contact the Store Managers about her return to work. Ms. Roby claims that she understood that she was on a leave and never returned to work. She was paid for another month, kept on the schedule for a month thereafter and remained on the payroll system as active for another six months. This lawsuit followed.

Because the alleged harassment was by Ms. Roby's supervisor, her former employer would be strictly liable unless she did not incur a tangible employment action, such as a demotion, suspension or termination. Ms. Roby tried to allege a tangible employment

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action through a claim that she was constructively discharged. The Court rejected that argument, as there was no evidence that her work environment was so intolerable that she was forced to quit, such as threats to her personal safety. Nor did her claim that she was required to work in close proximity to Mr. Schiavone after she reported the harassment support a constructive discharge: the company did everything it could to keep them separate and on different schedules, and she was told to report any future problems. Without an adverse employment action, the employer was entitled to raise an affirmative defense that it (a) exercised reasonable care to prevent or correct any harassing behavior; and (b) Ms. Roby unreasonably failed to take advantage of preventive or corrective opportunities to avoid harm.

Having taken the appropriate and necessary actions, beginning with the General Manager acting on a comment that he happened to hear rather than ignoring it and waiting until a complaint was reported, the court was able to conclude, as a matter of law, that the employer exercised reasonable care to prevent or correct harassing behavior. Among the many things that the company did right: it investigated Ms. Roby's complaint; it instructed the employees interviewed that the information was confidential and discharged an employee who breached that confidentiality; it disciplined Mr. Schiavone; it reworked the schedules to minimize contact between Ms. Roby and Mr. Schiavone; and it warned Mr. Schiavone that future acts would result in termination. On the other hand, as the Court found, Ms. Roby failed to take advantage of corrective opportunities. The company had an anti-harassment policy with a complaint procedure that Ms. Roby was aware of, and she failed to report the conduct for at least five months -- an unreasonable delay on her part.

Because the employer followed the policies it had set in place, and acted both proactively and responsively, it was shielded from liability and prevailed without having to go to trial.

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