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The Danger of Not Monitoring the Effectiveness of Your Harassment Policies

By Michael Mishlove

After her position of deputy director of the Cook County Sheriff's Department's Day Reporting Center (a supervision program for non-violent defendants who have been released from jail pending trial) was eliminated due to budget cuts in March 2007, Kimberly Passananti sued Cook County and her former supervisor, John Sullivan, alleging that she was fired because of her sex and that Sullivan subjected her to sexual harassment from 2003 until 2006 when he left the department for health reasons. A jury agreed and awarded her over $4 million.

The district court set aside the jury's verdict, holding that Cook County was entitled to judgment as a matter of law based on the *Ellerth/Faragher* affirmative defense (hereafter "affirmative defense"), which shields an employer from liability for unlawful "hostile work environment" sexual harassment perpetrated by supervisory/managerial level employees if it proves by a preponderance of the evidence both (i) that it exercised reasonable care to prevent and correct promptly any sexually harassing behavior, and (ii) that the employee unreasonably failed to take advantage of any preventive or corrective opportunities provided by the employer or to avoid harm otherwise. Because the evidence at trial established that the Sheriff's Department had a harassment policy, which provided procedures through which employees should make complaints of harassment, and that Ms. Passananti did not follow those procedures when she made her harassment complaint, the district court held that Cook County met this burden and was entitled to judgment as a matter of law. In a recently issued opinion, *Passananti v. Cook County, et al.*, the Seventh Circuit disagreed and reinstated the jury verdict on liability.

As recounted by the Seventh Circuit, the evidence at trial showed that the Sheriff's Department had a facially sufficient harassment policy, which provided procedures through which employees should make complaints of harassment, and that Ms. Passananti was fully knowledgeable about the policy. Ms. Passananti admitted, however, that she did not follow the proper procedures for reporting harassment as set out in the policy. Instead, she brought her complaint by sending a letter detailing the harassment to the Sheriff's Department's outside special counsel, who forwarded the letter to the Department's internal affairs office, which passed it on to the Inspector General's office - which, under the Department's policy, is the office responsible for reviewing harassment complaints and conducting harassment investigations. Contrary to the Department's harassment policy, no investigation into Ms. Passananti's complaint was opened by the Inspector General's office. In addition, Ms. Passananti reported the harassment orally to the executive director of the Sheriff's Department's training academy, who responded by telling Ms. Passananti that "Passananti needed to 'take one' for the Sheriff, which Ms. Passananti interpreted as meaning that she needed to 'shut up and take it.'" The jury also heard testimony by one of Ms. Passananti's coworkers, who testified that she had filed a complaint using the procedures set out in the employer's harassment policy and no action was taken by the Department. Based on this evidence, the Seventh Circuit found that, although the Department had a facially adequate harassment policy, a jury could reasonably have found both that the policy was not effective in preventing or correcting harassment and that Ms. Passananti did not act unreasonably by submitting her complaint through a letter to the Department's outside counsel rather than through the procedures set out in the Department's harassment policy.

There are several important lessons to draw from this opinion. First, when courts evaluate the adequacy of employers' efforts to prevent and correct harassment, it is substance, not form, that counts. Simply stated, employers who fail to meaningfully and effectively implement their harassment policies will find no safe harbor in the *Ellerth/Fargher* affirmative defense.

In *Passananti*, there appears to have been a complete breakdown in the Sheriff's Department's implementation of its harassment policy. In addition to the Department's non-responsiveness to Ms. Passananti's complaint, the jury also heard testimony by a coworker who filed a complaint using the procedures set out in the Department's harassment policy and still no action was taken. Notably, the court's opinion contains no indication that the Department presented any evidence as to the effectiveness of its policy and enforcement efforts. Indeed, there are a number of judicial decisions denying employers' motions for summary judgment predicated on the *Ellerth/Faragher* affirmative defense and citing as a reason the absence of any evidence demonstrating the effectiveness of the employers' harassment policies. It bears emphasis that when employers assert the *Ellerth/Faragher* affirmative defense, they necessarily place in issue the effectiveness of their harassment policies

and their enforcement of those policies. Thus, by asserting this defense, employers open the door to the admission of evidence concerning the employer's responses to other harassment complaints and/or evidence of incidents of harassment that are entirely unrelated to the plaintiff's claim (evidence that might otherwise be excluded due to the prejudicial effect of such evidence) - and, they must be prepared to establish the reasonableness of their anti-harassment measures and to rebut testimony about their non-responsiveness to harassment. The point to take home here is that it is critically important for employers to ensure mechanisms are in place for tracking harassment complaints and monitoring the enforcement and effectiveness of their harassment policies and training.

Second, employers are well-advised to take heed of the Seventh Circuit's treatment of Ms. Passananti's exchange with the executive director of the Sheriff's training academy. Although the court's opinion contains no indication that this executive director was someone to whom complaints could properly be made in accordance with the Sheriff's Department's harassment policy, the court treated this exchange expressly as "another internal complaint" brought by Ms. Passananti - and, implicitly, as further evidence of the ineffectiveness of the employer's harassment policy. The fact of the matter is that employees frequently report harassment to managerial employees other than those identified by their employer's harassment policy as the proper recipients of harassment complaints. As is also demonstrated by *Passananti*, there is a very real possibility that - for any one of a number of reasons and under a wide range of circumstances which can not be predicted with any reliability - courts will find such reports to adequately place employers on notice of the employee's complaint and will impute the responses of those managerial employees to the employer. Accordingly, the importance of providing appropriate harassment training to *all* managerial employees and ensuring that they receive express guidance on how to appropriately respond to harassment complaints and channel employees presenting such complaints to the appropriate personnel cannot be over emphasized.

The *Passananti* opinion provides good reason for employers to step back and do a reality check as to the adequacy and effectiveness of their harassment policies and complaint procedures. Employers should ask themselves, "What measures do we have in place to ensure that no harassment complaint falls through the cracks or is otherwise not appropriately addressed?" and "What evidence do I have that our harassment policy and enforcement procedures are effective?" If satisfactory answers to those questions do not immediately come to mind, it is probably advisable to conduct a compliance audit of your policies and practices in this area.

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