

What does it take to obtain summary judgment in a case involving allegations of hostile work environment sexual harassment by a supervisor or manager?

The answer is the employer must rely on the now familiar "*Faragher/Ellerth*" affirmative defense, which is comprised of two necessary elements: "(a) that the employer exercised reasonable care to prevent and correct promptly any sexually harassing behavior; and (b) that the plaintiff employee unreasonably failed to take advantage of any preventive or corrective opportunities provided by the employer or to avoid harm otherwise." *Faragher v. City of Boca Raton*, 524 U.S. 775, 807, 118 S.Ct. 2275 (1998); *Burlington Industries, Inc. v. Ellerth*, 524 U.S. 742, 765, 118 S.Ct. 2257 (1998).

On this point, employers are well-advised to learn from the mistakes of others. For example, in *Ellis v. Jungle Jim's Market, Inc.*, Ohio App. 12 Dist. No. CA2014-12-254, 2015-Ohio-4226 (October 13, 2015), the plaintiff, a female seafood department supermarket clerk, claimed that her department manager sexually harassed her nearly every day. But the plaintiff admitted she did not inform her employer of her manager's behavior, even though she previously received the supermarket's sexual harassment policy with clear-cut complaint procedure. One day, a co-worker found the plaintiff vomiting and crying at work because of her department manager's behavior, and the co-worker reported this to the store manager. The store manager investigated, concluded there was no corroboration for plaintiff's allegations, and offered to move plaintiff out of the seafood department. Plaintiff chose to remain in the seafood department. A few weeks later, plaintiff filed a charge with the Ohio Civil Rights Commission, and one week after that, the store manager transferred plaintiff back to her

previous bagger position.

The common pleas court granted summary judgment in favor of the supermarket, but the court of appeals reversed because it found genuine issues of material fact. First, the court concluded that a jury must decide whether the employer "exercised reasonable care to prevent sexually harassing behavior" because although the supermarket maintained a well-written sexual harassment policy in its employee handbook, (1) the policy was not kept up to date, i.e., it advised employees to report any sexual harassment complaints to a manager who died years before; and (2) there was no evidence the supermarket provided any harassment training to its employees.

Second, the court of appeals found a genuine dispute as to whether the supermarket conducted an adequate investigation into the plaintiff's complaints because: (1) the store manager only questioned a few employees, who were unable to corroborate the plaintiff's allegations, but there was also evidence that other seafood department employees offered corroboration when they were first questioned; (2) the store manager did not question the co-worker who reported finding the plaintiff vomiting and crying because of her department manager's behavior; and (3) other seafood department employees, who were not questioned during the store manager's investigation, provided corroborating evidence once they were deposed.

Third, the court of appeals found a genuine dispute as to whether the supermarket took prompt and effective remedial action after the investigation was complete. Specifically, the court concluded that despite the supermarket's offer to reassign the plaintiff to another department, reasonable minds could still conclude that permitting plaintiff and the alleged harasser to continue

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working together in the seafood department, while monitoring the situation with periodic walk-throughs by the store manager, was an unreasonable and ineffective response.

Fourth, the court of appeals concluded that although the plaintiff's hours of work and hourly pay rate remained the same after she was transferred to a bagger position, reasonable minds could still conclude that: (1) the transfer "significantly diminished" the plaintiff's duties and responsibilities, which could reasonably dissuade a reasonable employee from filing an OCRC charge in the future; and (2) there is a causal connection between plaintiff's filing an OCRC charge and her transfer to a bagger position one week later, even though the plaintiff presented no evidence of retaliatory motive, other than temporal proximity. The court found that reasonable minds could find an unlawful retaliatory motive because the supermarket waited more than one month after learning of the plaintiff's allegations to "protect" plaintiff by moving her to a bagger position, but then promptly transferred plaintiff to a bagger position just days after learning that she filed an OCRC charge.

Lessons learned.

- Continuously examine and update your company's harassment policy, procedures, and practices;
- Commit to regular and periodic harassment training for all employees, especially supervisors and managers, and keep accurate records of all such training;
- Consult with an experienced labor and employment attorney before, during, and after your company conducts a harassment investigation; and
- Carefully consider all potential employment actions once the investigation is complete.

Please contact a member of our Labor & Employment Law Practice Group at (419) 249-7100.

Justice G. Johnson, Jr.
johnson@marshall-melhorn.com
419.249.7115

David L. O'Connell
oconnell@marshall-melhorn.com
419.249.7135

Ruth Meacham
meacham@marshall-melhorn.com
419.249.7128

Roman Arce
arce@marshall-melhorn.com
419.249.7111

Michael S. Scalzo
Scalzo@marshall-melhorn.com
419.249.7129

Jennifer J. Dawson
dawson@marshall-melhorn.com
419.249.7139

Margaret J. Lockhart
lockhart@marshall-melhorn.com
419.249.7147

Meghan Anderson Roth
roth@marshall-melhorn.com
419.249.7226

Shawn A. Nelson
nelson@marshall-melhorn.com
419.249.7164

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