ShawPittman
A Law Partnership Including Professional Corporations

ALERT

NONPROFIT ORGANIZATIONS / ASSOCIATIONS

May 2000 Number 2

Nonprofit Organizations Should Review Sexual Harassment Policies in Light of Recent Fourth Circuit Decision

Almost all nonprofit organization employers today have implemented a policy against sexual harassment and should understand that such a policy is, in fact, doubly beneficial. By making plain that sexual harassment will not be tolerated, the employer reduces the likelihood that harassing behavior will occur. In addition, a well-drafted sexual harassment policy is a key element of the defense of any sexual harassment complaint that may be brought. However, the issue of what is considered sufficient policy language was recently addressed by the U.S. Court of Appeals for the Fourth Circuit.

Many sexual harassment policies contain a definition of sexual harassment that is drawn directly from the Equal Employment Opportunity Commission's regulations. Those regulations state that "Unwelcome sexual advances, requests for sexual favors, and other verbal or physical conduct of a sexual nature constitute sexual harassment when (1) submission to such conduct is made either explicitly or implicitly a term or condition of an individual's employment, (2) submission to or rejection of such conduct by an individual is used as the basis for employment decisions affecting such individual, or (3) such conduct has the purpose or effect of unreasonably interfering with an individual's work performance or creating an intimidating, hostile or offensive working environment." 29 C.F.R. § 1604.11(a).

Most sexual harassment complaints do involve allegations of sexually charged behavior. But the legal prohibition against sexual harassment actually constitutes a general prohibition against gender-based harassment, which may not involve any sexual behavior at all. The recent decision by the U.S. Court of Appeals for the Fourth Circuit, *Smith v. First Union National Bank*, 2000 U.S. App. LEXIS 683 (4th Cir. January 19, 2000), found that a sexual harassment policy containing language very similar to that quoted above was *deficient as a matter of law because it did not clearly prohibit gender-based harassment as well as harassment that is sexual in nature.*

Breakfast Briefing: Wednesday, June 14

Reducing Employment Risks in the Electronic Age for Nonprofit Associations

Join Shaw Pittman's nonprofit and employment groups from 8:00 - 10:00 a.m. as they discuss how to manage employee use of electronic communication, how to avoid litigation and how to conduct personnel audits. E-mail adrian.moore@shawpittman.com for further information and how to register.

In the wake of *First Union*, nonprofit organization employers should take a second look at their sexual harassment policies to ensure that they contain a sufficiently broad definition of sexual harassment. Although the decision in *First Union* is directly applicable only to employers located within the Fourth Circuit's jurisdiction (Maryland, Virginia, West Virginia, and North and South Carolina), organizations elsewhere would be well advised to conform their sexual harassment policies to the mandate set forth in *First Union*.

The Facts

The plaintiff in *First Union*, Ms. Smith, sued First Union for, among other things, sexual harassment under Title VII of the Civil Rights Act of 1964 and its North Carolina analog. Smith's complaint arose out of the treatment she received from her direct supervisor, Mr. Scoggins. In the Fourth Circuit's words, "Scoggins subjected Smith to a barrage of threats and gender-based insults while she was under his supervision."[1] 2000 U.S. App. LEXIS 683, *3. Among Scoggins' many choice comments were that "women should not be in management because they are 'too emotional to handle a managerial role,'" and that he would have preferred a male in Smith's position as team leader because "males are 'natural leaders.'" Id.

On November 5, 1995, Smith formally complained about Scoggins' harassment to First Union's human resources representative, Mr. Hutto. Although the harassment had been going on for over eighteen months, she had not complained previously for several reasons: (i) Scoggins' boss had told her she should never complain to Human Resources if she "ever wanted to get anywhere;" (ii) Scoggins had threatened that she would lose her job if she complained about his conduct; and (iii) she did not understand that Scoggins' behavior constituted sexual harassment. First Union's policy prohibited only "sexual harassment, sexual advances, requests for sexual favors and other verbal or physical conduct of a sexual nature." Smith understood this to mean that a sexual advance was necessary for the conduct to constitute a violation of First Union's policy.

Hutto contacted several of Smith's coworkers and asked about their work experiences with Scoggins. He was told that another employee had left First Union because of Scoggins' harassment and that Scoggins had made comments to Smith that were threatening and demeaning.

First Union's response was to put Scoggins on a ninety-day probation because of his "inappropriate management style;" he was never reprimanded for, or even questioned about, sexual harassment. Both Scoggins and Smith also were sent to First Union's Employee Assistance Program. The EAP advised Smith not to return to work near Scoggins. First Union did transfer Smith out of Scoggins' team, but moved her to a team located only 100 feet away from him.

Smith never returned to work. Instead, she applied for disability benefits. She later was advised by First Union that she could post for positions outside her department. Although she applied for many openings, she never received a new position, and remained on disability benefits until her employment was terminated in July 1996.

The Court's Analysis

Smith's sexual harassment claim was dismissed by the district court, which granted First Union's motion for summary judgment. The trial court found in favor of the employer because Smith had not claimed that Scoggins had ever "inappropriately touched, propositioned or ogled her," or invited her to have sex or go on a date with him. Smith appealed to the Fourth Circuit.

The Fourth Circuit reversed the lower court's grant of summary judgment. The appeals court faulted the lower court for failing to recognize that "a

woman's work environment can be hostile even if she is not subjected to sexual advances or propositions." 2000 U.S. App. LEXIS 683, *16. As the appellate court noted, "[a] work environment consumed by remarks that intimidate, ridicule and maliciously demean the status of women can create an environment that is as hostile as an environment that contains unwanted sexual advances." Id. Given Scoggins' threatening behavior and barrage of discriminatory remarks, the Fourth Circuit had no problem finding that his behavior was sufficiently severe and pervasive so as to create a hostile work environment.

The next issue for the court to decide was whether First Union should be held liable for Scoggins' behavior. The Fourth Circuit looked to the U.S. Supreme Court's rulings in *Faragher v. City of Boca Raton*, 524 U.S. 775 (1998), and *Burlington Indus., Inc. v. Ellerth*, 524 U.S. 742 (1998) for guidance. The Supreme Court there stated that where sexual harassment is committed by a supervisor, but no tangible employment action is taken against the victim, the employer may raise an affirmative defense by showing that (i) the employer exercised reasonable care to prevent and correct promptly any sexually harassing behavior, and (ii) the plaintiff employee unreasonably failed to take advantage of any preventative or corrective opportunities provided by the employer or to avoid harm otherwise.

In the *First Union* case, Smith did not allege that she suffered any tangible employment action. First Union therefore was free to raise the two-part affirmative defense. The Fourth Circuit, however, found that First Union had not exercised reasonable care either to prevent Scoggins' harassment or to correct it promptly once it had occurred. The court faulted both First Union's policy and the bank's response to Smith's complaint. First Union's policy was defective because it nowhere mentioned discrimination on the basis of gender. In the court's view, "[it] merely prohibits unwanted sexual advances and other sexually provocative misconduct." 2000 U.S. App. LEXIS 693, *25. Smith's failure to recognize that Scoggins' behavior was a violation of the policy therefore was entirely reasonable.

The court acknowledged that a deficient policy does not inevitably negate an employer's affirmative defense. Here, however, First Union did not take any additional steps to prevent sexual harassment. In fact, just the opposite was true: Scoggins' supervisor had warned Smith against bringing complaints to human resources.

The Fourth Circuit also faulted First Union's investigation of Smith's complaint. In particular, the court noted that Hutto had never before investigated a sexual harassment complaint, and had failed to ask Scoggins whether he made any of the sexually harassing remarks alleged by Smith. To add insult to injury, First Union allowed Scoggins to remain in his position, counseled him only to improve his management style and "smile more," and failed to transfer Smith so that she would not encounter Scoggins on a regular basis. The Fourth Circuit therefore ruled that First Union could not make out the first prong of its affirmative defense, and reversed the trial court's grant of summary judgment in First Union's favor.

Lessons to be Learned

First and foremost, this case shows the importance of a well-drafted sexual harassment policy. In the wake of the U.S. Supreme Court's rulings in *Faragher* and *Ellerth*, the viability of the employer organization's policy will be an essential component of any sexual harassment case involving supervisory misconduct. Every organization should review its sexual harassment policy carefully to ensure that the policy defines sexual harassment to include gender-based harassment as well as harassment that is sexual in nature. The definition of sexual harassment can be supplemented by providing a non-exhaustive list

of examples of prohibited behavior, such as making derogatory and stereotypical comments about members of a particular gender, as well as behavior that has a sexual component such as inappropriate touching or pressuring an employee for sexual favors.

No sexual harassment policy exists in a vacuum. *First Union* shows that even a well-drafted policy can be fatally undermined by non-supportive comments from management. Attempting to discourage an employee from using the organization's complaint procedure will destroy its ability to rely on the affirmative defense to liability. In contrast, an organization can bolster the efficacy of its sexual harassment policy by providing training programs for all employees in how to recognize and avoid sexual harassment, and what steps to take if an employee believes harassment has occurred.

Finally, once a complaint has been received it must be investigated promptly and thoroughly, and appropriate remedial action taken. The very limited investigation and disciplinary action taken in *First Union* resulted in the court's finding that First Union had not exercised reasonable care to correct the harassment: the final nail in the coffin of the employer's defense.

Savvy nonprofit organizations and associations will take all due care to minimize the risk that sexual harassment will not happen in their workplace, and to have in place a viable complaint, investigation and remedial procedure. The *First Union* decision provides a valuable -- and cautionary -- roadmap as to how not to handle these issues.

Endnote

[1] The matter was before the Fourth Circuit on appeal from the district court's grant of summary judgement to First Union. In accordance with federal procedural rules, the court was required to deem the plaintiff's allegations to be true.

For further information concerning the issues addressed in this Client Alert, please contact:

Jerry Jacobs
jerry.jacobs@shawpittman.com - 202.663.8011

Jeff Glassie
jeff.glassie@shawpittman.com - 202.663.8036

Tom Arend
tom.arend@shawpittman.com - 202.663.8070

Karen Cipriani
karen.cipriani@shawpittman.com - 202.663.8069

Joyce Oliner
joyce.oliner@shawpittman.com - 202.663.8178

Christine Kearns
christine.kearns@shawpittman.com - 202.663.8488
