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HR Connection

Has the Third Circuit redefined 'reasonable?"

As 2019 begins to unfurl, I find myself wondering what the "hot" issues will be for my clients. I'm confident #MeToo will continue to impact both the reporting of sexual harassment as well as the ways in which employers address allegations of sexual misconduct by employees. I'm also wondering what, if any, impact the Third Circuit's decision in *Minarsky v. Susquehanna County.,* No. 17-2646, slip op. (3d Cir., Jul. 3, 2018) will have on the so-called *Faragher-Ellerth* defense to claims of sexual harassment.

As I explained in my last article, under the *Faragher-Ellerth* affirmative defense, if an employer can show (1) it exercised reasonable care to prevent and promptly correct any sexually harassing behavior, *and* (2) the employee unreasonably failed to take advantage of available preventive or corrective opportunities, then the employer is not liable.

Reasonable. According to the Cambridge Dictionary, in this context reasonable is defined as "based on or using good judgment, and therefore fair and practical." For the last 20 years, employers meeting the two prongs established under *Faragher* and *Ellerth* were found to have taken *reasonable* care to prevent and correct sexual harassment. However, in *Minarsky* the Third Circuit found that may no longer be a *reasonable* conclusion, based in part on #MeToo.

The court acknowledged that the employer maintained a written anti-harassment policy and that Minarsky was aware of the policy. However, the court did not accept that

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those facts alone satisfied the first prong of the affirmative defense. The court questioned whether the employer took reasonable steps to prevent the harassing behavior of the supervisor, Yadlosky, or took prompt remedial action when it was made aware of his prior actions toward other women. According to the court, the county had evidence that "Yadlosky's conduct toward Minarsky was not unique," and had "seemingly turned a blind eye toward Yadlosky's harassment."

In an apparent acknowledgment of the #MeToo movement, the court recognized the "veritable firestorm of allegations of rampant sexual misconduct that has been closeted for years, not reported by the victims." Further noting that, in many instances, "the harasser wielded control over the harassed individual's employment or work environment," and "the victims asserted a plausible fear of serious adverse consequences had they spoken up at the time that the conduct occurred."

What's possibly more troubling for employers, the court also concluded that even though it was undisputed that Minarsky failed to report Yadlosky or otherwise utilize her employer's reporting process, "a mere failure to report one's harassment is not per se unreasonable." Citing studies that show a majority of women who experience sexual harassment fail to report it, the court noted, "there may be a certain fallacy that underlies the notion that reporting sexual misconduct will end it."

According to the Court's opinion: "the passage of time is just one factor in the analysis. Workplace sexual harassment is highly circumstance-specific, and thus the reasonableness of a plaintiff's actions is a paradigmatic question for the jury, in certain cases. If a plaintiff's genuinely held, subjective belief of potential retaliation from reporting her harassment appears to be well-founded, and a jury could find that this belief is objectively reasonable, the trial court should not find that the defendant has proven the second [prong of the *Faragher-Ellerth* defense] as a matter of law. Instead, the court should leave the issue for the jury to determine at trial."

In this case, Minarsky offered several legitimate reasons for not reporting Yadlosky's harassing behaviors: 1) financial dependency on her job with a sick daughter to care for, 2) fear of retaliation based on the harasser's comments and 3) a perceived futility of reporting because the harasser's actions were known to others.

While the facts of this case provide a good lesson on the importance of consistently enforcing sexual harassment policies, there is more employers can learn.

#MeToo has reached the courts. #MeToo has moved from the court of public opinion to a least one federal appeals court, and it will likely reach other courts very soon. While acknowledg-

ing that "case precedent has routinely found the passage of time coupled with the failure to take advantage of the employer's anti-harassment policy to be unreasonable," the Third Circuit may have given us a glimpse into the future.

Simply having a written anti-harassment policy is never enough. As the saying goes, the best defense is a great offense.

Employers can all but eliminate the risk associated with sexual harassment with strong policies and practices to prevent sexual harassment and taking immediate and decisive action when it occurs. Remember, this employer had a written policy prohibiting workplace harassment, including appropriate reporting procedures, and distributed it to all employees.

Train employees and managers to recognize harassing behaviors in themselves and others. Here too, substance is important. The training should be customized to your company, using examples that are company- and industry-specific, and explain your harassment prevention policies and practices. Anything less will not only be a waste of money, it will send a clear message to employees that preventing harassment isn't important.

Promote a work environment that encourages individuals to report harassing behavior they experience or are aware of, regardless of who is involved. Then, fully investigate all allegations. Also, make it clear to everyone that retaliation will not be tolerated.

A reprimand may be insufficient. While the appropriate response will depend on a careful review of the relevant facts, simply reprimanding a supervisor for harassment may not be enough. When an investigation concludes that an employee engaged in unlawful harassment, take strong action, up to and including termination of employment. While not always necessary, anything less than termination may result in significant exposure for any future unlawful harassment by that employee. In *Minarsky* the court noted that Yadlosky had previously been verbally reprimanded for subjecting other women–including individuals designated as reporting contacts–to unwelcomed behaviors.

Don't wait for a complaint before taking corrective action. Imagine ignoring a terrible traffic accident because nobody yelled for help or allowing an elderly relative to be bullied because they didn't ask for help. Management and HR professionals have an obligation to take corrective action when they become aware of harassing behavior, even if no one has complained. The same holds true when the victim doesn't want anything done or doesn't want to "get anyone in trouble." If someone is being harassed, the company has an obligation to stop it. After all, that is the reasonable thing to do.

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