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Employment Alert: First Circuit Revisits Faragher-Ellerth Defense and Holds Employer Liable for Harassment, Underscoring Importance of Comprehensive Complaint Procedure and Training Programs

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In October 2008, we reported on the case of *Chaloult v. Interstate Brands Corporation*, in which the United States Court of Appeals for the First Circuit held that an employer could not be vicariously liable for sexual harassment where the plaintiff's co-worker who witnessed the incidents failed to report them as required under the employer's policy. In short, the *Chaloult* court found that the employer could successfully defend against an employee's claim for sexual harassment under Title VII using the so-called *Faragher-Ellerth* defense, which may shield a company from liability where (i) its own actions to prevent harassment were reasonable, and (ii) the employee's actions in seeking to avoid harm were not.

Recently, the First Circuit had the opportunity to revisit the *Faragher-Ellerth* defense, in *Monteagudo v. AEELA*.[1] This time, however, the court found the defense did not shield the employer from liability. These are the relevant facts of the case. Michelle Monteagudo was subjected to unwelcome touching and propositioning by her supervisor. The director of human resources, who was a good friend of the supervisor, was aware of, and participated in, the harassment. An AEELA policy required employees to report instances of sexual harassment to the human resources department or, if the alleged harasser was within or close to the department, to the company's Executive Director. Ms. Monteagudo did not report the harassment as required under the policy because the harasser was close to the director of human resources and, she believed, to the Executive Director.

Analyzing the two prongs of the *Faragher-Ellerth* defense, the court agreed with the parties that the employer had taken reasonable steps to prevent harassment by establishing an anti-discrimination policy with a complaint procedure. Turning to the second prong, the court upheld the jury's determination that Ms. Monteagudo did not act unreasonably when she failed to report the harassment because she believed all of the contacts provided in the company's harassment reporting policy were friends with her supervisor. Thus, unlike in *Chaloult*, the Court found the failure to report reasonable because the plaintiff's only avenues for reporting the alleged misconduct were to the harasser or his friends. Adding insult to injury, the court upheld the jury's imposition of punitive damages, which are available only where an employer has not acted in good faith. Here, the court found, AEELA did not act in good faith because it could show neither (i) that it made its employees aware of the anti-discrimination or harassment policies through either specific education programs or periodic re-dissemination of written materials, nor (ii) that supervisors were otherwise trained to prevent discrimination or harassment from occurring.

Action Items for Employers

The plaintiff's success in *Monteagudo*, particularly when compared with the plaintiff's lack of success in *Chaloult*, illustrates the critical importance of having in place good policies and practices for addressing harassment and other discrimination claims, and should remind employers that:

- A complaint procedure with too few points of contact may not be reasonable; therefore, employers should designate several individuals as reporting contacts in a company, and should consider designating an external reporting contact for harassment that involves the company's top managers. Overall, the employer should strive to provide a point of contact for each employee that is far enough removed from the alleged harassment to make reporting reasonable.
- Training is an important tool for employers, both as a means to educate employees and to limit risk. Employers should implement training and awareness programs, or review and revise existing programs, to maximize the impact of anti-discrimination policies and complaint procedures.

Further Information

For our summary of the 2008 *Chaloult* case mentioned above, please see our recent advisory:

First Circuit Reinforces Faragher-Ellerth Defense by Refusing to Hold Employer Liable for Unreported Harassment (Mintz Levin Employment Advisory, October 3, 2008)

Endnotes

[1] *Monteagudo v. Asociación de Empleados del Estado Libre Asociado de Puerto Rico*, No. 07-2341 (1st Cir. Jan. 26, 2009).

For assistance in this area, please contact one of the attorneys listed below or any member of your Mintz Levin client service team.

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