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EMPLOYMENT LAW UPDATE

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On March 5, JetBlue Airways Corporation ("JetBlue") moved for reconsideration of a decision recently issued by the United States Court of Appeals for the Second Circuit in *Gorzynski v. JetBlue Airways Corp.*, Case No. 07-4618-cv (2d Cir. Feb. 19, 2010); a decision with which many employers do and should disagree. Specifically, in *Gorzynski*, the Second Circuit held, *inter alia*, that an employee may have properly reported sexual harassment or discrimination within the meaning of his or her employer's policy and relevant federal law requirements where:

(1) The employer's policy directs an employee to report claims of sexual harassment or discrimination to a list of specified individuals;

(2) The alleged harasser/wrongdoer is among those listed in the policy; and

(3) The employee *chooses* to report *only* to the harasser/wrongdoer.

Among other things, the Second Circuit's decision largely ignores important policy considerations underlying well-established federal law, which generally provides that an employee who is an alleged victim of sexual harassment or discrimination must take advantage of his or her employer's corrective measures that provide for the reporting of such claims, or else either be barred from asserting these claims in a federal action or from receiving damages. This bar, which the employer may raise as an affirmative defense where no "tangible employment action" has been taken against the employee ("the Faragher/Ellerth affirmative defense"), is clearly intended to provide the employer with an opportunity to investigate, take remedial action and protect the integrity of its workplace. (See *Faragher v. City of Boca Raton,* 524 U.S. 775 (1998); *Burlington Industries, Inc. v. Ellerth*, 524 U.S. 742 (1998).)

In *Gorzynski*, the plaintiff, a customer service supervisor at JetBlue's station in Buffalo International Airport, brought an action against JetBlue in the United States District Court for the Western District of New York under the Age Discrimination in Employment Act of 1967, Title VII of the Civil Rights Act of 1964, and the New York Human Rights Act. The plaintiff alleged, *inter alia*, that her supervisor discriminated against her based on her age (58 at the time of her termination), and created a sexually hostile environment. The plaintiff also alleged retaliation based on her complaints to supervisors about her own circumstances, as well as race discrimination committed against African American crewmembers. Furthermore, the plaintiff claimed that she was terminated by JetBlue based on the foregoing.

After extensive discovery, JetBlue moved for summary judgment based on the Faragher/Ellerth affirmative defense on the grounds that:

(1) JetBlue had a policy which provided that "'any Crewmember who believes that he or she is the victim of any type of discriminatory conduct, including sexual harassments [sic] should bring that conduct to the immediate attention of his or her supervisor, the People Department or any member of management;'" and

(2) The plaintiff had failed to report pursuant to the policy.

The District Court agreed that the plaintiff had failed "to complain to anyone" pursuant to JetBlue's "simple and understandable policy," and granted JetBlue's motion. The plaintiff subsequently appealed the decision. (See *Gorzynski v. JetBlue Airways Corp.*, Case No. 03-cv-0774E (U.S.D.C. Sept. 20, 2007).)

In vacating the District Court's decision, the Second Circuit found that evidence in the record demonstrated that the plaintiff had, in fact, complained to her supervisor, who was the alleged harasser/wrongdoer. The Second Circuit held, *inter alia*, that it is not "unreasonable as a matter of law for an employee to complain of sexual harassment to his or her harasser if that person

is designated in the employer's plan as one of several persons with whom to lodge complaints," and that "whether a plaintiff's complaints to the harasser constitute reasonable availment of an employer's sexual harassment policy is to be determined by the specific facts and circumstances of each case." The Second Circuit stated that:

"… we hold that an employer is not, as a matter of law, entitled to the Faragher/Ellerth affirmative defense simply because an employer's sexual harassment policy provides that the plaintiff could have complained to other persons as well as the alleged harasser. Instead, we conclude that the facts and circumstances of each case must be examined to determine whether, by not pursuing other avenues provided in the employer's sexual harassment policy, the plaintiff unreasonably failed to take advantage of the employer's preventive measures. In some instances, it may be unreasonable for a victim of harassment to complain only to the harasser because, as a realistic and practical matter, there are other channels that are adequately indicated and are accessible and open. But, in other cases, there may be reasons why the plaintiff failed to complain to those other than the harasser, who are listed as available. And in such cases, a genuine issue of fact may be raised as to whether it was reasonable not to pursue other options."

In concluding that a fact question exists in the *Gorzynski* case, the Second Circuit found that another manager at the Buffalo airport was not "receptive to receiving complaints" and was regarded as being "intimidating," and that one of the plaintiff's co-workers had been suspended within days of making a complaint to "the People Department, JetBlue's human resources department."

As set forth above, the Second Circuit's decision ignores the important principle underlying federal law that an employer should have the opportunity to investigate responsibly claims of sexual harassment or discrimination allegedly occurring within its workplace. Generally, an employee is excused from reporting sexual harassment or discrimination only where the employer fails to provide reporting procedures or the employee demonstrates that such reporting would have been clearly futile. Where, as here, a court sanctions an employee's supposed report only to the harasser/wrongdoer based on workplace innuendo about other individuals designated to receive complaints (including an entire human resources department), the possibility of any investigation is likely frustrated. An employee simply should not be permitted to circumvent the reporting procedures contained in an employer's policy by subjectively deciding that a particular individual designated therein (or an entire human resources department) will not be receptive to a complaint. In light of the *Gorzynski* decision, however, employers are well served by directing employees to report complaints of sexual harassment or discrimination to individuals (among those listed in their policies) who are not involved in the alleged incidents of sexual harassment or discrimination.

If you have any questions regarding the foregoing or would like to receive copies of any of the cases referenced herein, please contact:

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