Second Circuit Weakens Employers' Good Faith Defense in Harassment Actions

By Jennifer L. Marquis

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On February 19, 2010, the Second Circuit Court of Appeals revived a lawsuit by a former JetBlue Airways Corporation employee who accused the discount carrier of age and gender bias, creating a hostile work environment, and firing her in retaliation for complaining in a decision that will likely have a far-reaching impact on the ability of employers to avoid sexual harassment suits by drafting comprehensive sexual harassment policies, and to defend against such litigation when it arises.

The plaintiff, Diane Gorzynski, a fifty-four-year-old female, was hired by JetBlue in 2000 as a customer service agent for its operations at the Buffalo International Airport. She was promoted to supervisor just four months later, and remained a customer service supervisor until her termination on July 5, 2002. Gorzynski alleged that over the course of a seven-month period, her supervisor, a thirty-year-old male, made a series of inappropriate remarks of a sexual nature. In addition, other employees testified that the supervisor grabbed female crew members, that he frequently made inappropriate comments and gestures, and that he stared at them. Gorzynski complained to the supervisor about these comments. He did not apologize and the airline took no disciplinary action against him.

Gorzynski also contended that some younger workers were excused from mandatory bag search and screening training after the September 11, 2001 attacks, and regularly violated conduct and time-off policies without being disciplined. Moreover, she claimed to have been fired after expressing support for an African-American colleague who alleged he had been subjected to racial bias.

Gorzynski filed an employment discrimination action asserting claims for age and gender discrimination, as well as retaliation, under Title VII of the Civil Rights Act of 1964, the Age Discrimination in Employment Act, and New York state human rights law. JetBlue moved for summary judgment arguing that Gorzynski was terminated for her "unsatisfactory interpersonal skills" and that because Gorzynski complained of sexual harassment to her supervisor, who was also the harasser, rather than pursing alternative options listed in her employee manual, it was shielded from liability. JetBlue presented evidence that its sexual harassment policy, contained in its employee handbook, stated that: "any crewmember who believes that he or she is the victim of any type of discriminatory conduct, including sexual harassment, should bring that conduct to the immediate attention of his or her supervisor, the People Department, or any member of management." JetBlue argued that Gorzynski was not entitled to proceed on her sexual harassment claim because she failed to take advantage of the policy in the handbook when she complained *only* to her direct supervisor, the harasser, and did not complain to other members of management.

Upon JetBlue's motion, the district court dismissed the case in its entirety, finding that JetBlue was entitled, as a matter of law, to the *Ellerth/Faragher* affirmative defense to Gorzynski's hostile work environment claim.

Prior to the *Ellerth* and *Faragher* decisions, most courts held that employers were vicariously liable for a hostile work environment created by a supervisor under a negligence standard. In other words, liability would be imputed to an employer if it knew or should have known of the alleged harassment and failed to take prompt remedial action.[1] On June 26, 1998, the U.S. Supreme Court handed down the twin decisions of *Burlington Industries v. Ellerth* and *Faragher v. City of Boca Raton*, which dramatically changed the landscape for employers defending against sexual harassment actions.[2] In *Ellerth* and *Faragher*, the Court imposed a new standard for imposing vicarious liability on an employer when sexual harassment is perpetrated by a supervisor. In such cases, an employer is liable for the supervisor's conduct. However, if there is no tangible employment action taken against the employee, the employer may raise an affirmative defense created by the Court: (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 otherwise avoid harm.

Although the initial reaction to the dual decisions was one of fear that employers were going to face strict liability for sexual harassment perpetrated by supervisors, in their wake, employers have continued to obtain favorable judgments in sexual harassment cases, and, in fact, *Ellerth* and *Faragher* helped pave the way—as evidenced by the district court's dismissal of Gorzynski's

claims against JetBlue. The decisions gave employers an incentive to design and enforce policies encouraging prevention.

The Second Circuit's recent remand of the decision, however, may have turned the tide against employers. On appeal from the Western District of New York, the court held 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 sexual harassment policy 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. Notably, the court stated:

> We do not believe that the Supreme Court, when it fashioned this affirmative defense, intended that victims of sexual harassment, in order to preserve their rights, must go from manager to manager until they find someone who will address their complaints. There is no requirement that a plaintiff exhaust all possible avenues made available where circumstances warrant the belief that some or all of those avenues would be ineffective or antagonistic. Considering the courage it takes to complain about what are often humiliating events and the understandable fear of retaliation that exists in many sexual harassment situations, we decline to read the rule so rigidly.

In the thirty-one-page opinion by a three-judge appeals panel, Judge Guido Calabresi said that the plaintiff had produced ample evidence of mistreatment, which cast "significant doubt" on JetBlue's purported non-discriminatory reason for her termination. The court found that Gorzynski had presented genuine issues of material fact with respect to her hostile work environment claim. Accordingly, it vacated the district court's grant of summary judgment and remanded the case back to the district court.

The decision, no doubt, sets forth a more employee-friendly standard. Employers who have often been met with success in getting cases dismissed on the second prong, namely, that the victim did not take advantage of an employer sexual harassment complaint procedure provided in its sexual harassment policy, either by waiting too long to complain, not complaining at all, or by complaining to the wrong party, may soon face a heightened burden. Since most company policies outline an elaborate procedure for reporting harassment, in the wake of *Ellerth* and *Faragher*, cases have often been dismissed on motions for summary judgment because the plaintiff did not follow the proper procedures.

In the past, courts have granted summary judgment to employers whose policies provided multiple mechanisms for prompt resolution of sexual harassment complaints, were specific and detailed, allowed the complainant to circumvent the supervisory chain of command, and were distributed to all employees.[3] Conversely, courts have held that policies which failed to include anti-retaliation language, to specify to whom reports of harassment should be made, and to indicate that all complaints will be investigated were woefully inadequate.[4]

Employers have also been successful in utilizing the defense in instances where employees have failed to put them on proper notice. For example, in *Morris v. Southeastern Penn. Transp. Auth*., the court found that the plaintiff's complaints were insufficient to charge the employer with notice where the plaintiff claimed that he was unaware of the employer's anti-harassment policy but complained of harassment to a captain, counselors, and a sergeant.[5] The court held that the plaintiff's conduct was unreasonable because the policy was posted at the plaintiff's work location and he could not reasonably have expected the parties to which he complained to respond to the allegations. Similarly, in *Coates v. Sundor Brands, Inc*., the Eleventh Circuit Court of Appeals held that the plaintiff's notice to the employer was insufficient where she made vague, incomplete complaints to various employees and other supervisors about her own supervisor's alleged harassment.[6]

Ms. Gorzynski's success emphasizes the importance for employers of providing multiple avenues for complaints and of encouraging employees to take their complaint further if they do not believe it is being adequately heard and addressed. It also teaches that employers must train managers and supervisors to be receptive to employee complaints and serves as a caution to employers that, when supervisors and managers appear to retaliate against an employee who complains, the employer may lose the opportunity for summary judgment based on the *Faragher/Ellerth* defense.

Labor and employment counsel responsible for drafting harassment policies for clients should continue to draft policies which provide a clear explanation of prohibited conduct, an assurance that employees who lodge complaints or provide information relevant to a complaint will be protected against retaliation, a clearly described complaint process that provides multiple avenues of complaint and allows an employee to circumvent his/her harasser, an assurance that the employer will protect the confidentiality of harassment complaints to the extent possible, a complaint process that provides a prompt, thorough, and impartial investigation, and an assurance that the employer will take immediate and appropriate corrective action when it determines that harassment has occurred. Although the Second Circuit's recent decision makes clear that employers will not necessarily escape liability by drafting and enforcing comprehensive policies, it remains clear that an employer may be able to avoid liability for punitive damages to the extent it can demonstrate a good faith effort to implement such a policy and to comply with the requirements of Title VII.[7] No doubt, such a defense turns on the employer's own commitment to its anti-harassment policies.

The Second Circuit has made clear that while it is critical for those who have been sexually harassed to complain to someone in management, victims of sexual harassment do *not* squander their rights by not complaining to each person designated in a company's sexual harassment policy. **CL**

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Notes

1. *See, e.g., Burrell v. Star Nursery, Inc.,* 170 F.3d 951, 955 (9th Cir. 1999); *Watts v. The Kroger Co.,* 170 F.3d 505, 509 (5th Cir. 1999); *Williams v. General Motors Corp.,* 187 F.3d 553 (6th Cir. 1999).
2. *Burlington Industries v. Ellerth*, 524 U.S. 742 (1998); *Faragher v. City of Boca Raton*, 524 U.S. 775 (1998).
3. *See, e.g., Shaw v. Autozone, Inc*., 180 F.3d 806 (7th Cir.1999); *Pritchard v. Earthgrains Baking Co*., 1999 WL 397910 (W.D.Va. Mar. 5, 1999).
4. *See, e.g., Miller v. Woodharbor Molding & Millworks, Inc*., 80 F.Supp.2d 1026 (N.D. Iowa Jan. 18, 2000); *Lancaster v. Sheffler Enterp*., 19 F. Supp. 2d 1000 (W.D. Mo. Sept. 3, 1998).
5. *Morris v. Southeastern Penn. Transp. Auth*., 1999 WL 820457 (E.D. Pa. Sept. 28, 1999).
6. *Coates v. Sundor Brands, Inc*., 164 F.3d 1361 (11th Cir. 1999).
7. *See Kolstad v. American Dental Association*, 527 U.S. 526, 545 (1999); *Brusco v. United Airlines, Inc*., 239 F.3d 848 (7th Cir. 2001).

PCBs

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year delay on the project and a cost increase of about $2 million.

6. Soren Jensen, "The PCB Story," *Ambio*, Vol. 1, No. 4 (Sept. 1972), pp. 123-131.
7. As Dr. Joren noted, it was much easier to find a connection between the use of substances such as DDT and mercury and negative effects because these chemicals were directly used on seeds or sprayed on plants. However, PCBs did not have this direct use in the environment—it enters nature through the "back door," e.g., through unintended releases to air or the ground. In the end, Dr. Jensen cautioned that given that the presence of PCBs in nature was discovered by accident, the only way to ensure that the accumulation of other chemicals is found is to have close cooperation between ecologists, chemists and other scientists to facilitate an "unbiased search for pollutants at an early stage by systematic analysis." Soren Jensen, "The PCB Story," *Ambio*, Vol. 1, No. 4 (Sept. 1972), pp. 123-131.
8. Although EPA banned the use of PCBs in 1979, the studies that concluded that PCBs cause cancer were done more recently—in 1987 (with data limited to Aroclor 1260) and 1996 (data on Aroclors 1016, 1242, 1254). Health Effects of PCBs, EPA Guidance.
9. Quoted in "PCB Risk Feared at Older N.E. Schools," *supra* at A11.
10. The PCB Mega Rule, 63 Fed. Reg. 35384 (June 29, 1988) (codified at 40 CFR §§ 750 and 761(1998)). There were subsequent technical revisions to the PCB Regulations in 1999.
11. *See* 40 C.F.R. 761.1(b)(3).
12. *See* 40 C.F.R. 761.20(a)(1)-(4); *see also* definition of "Excluded PCB products" at 40 C.F.R. 761.3. "Excluded PCB products" means "PCB materials which appear at concentrations less than 50 ppm…" *Id*.
13. "Bulk product waste" is defined at 40 C.F.R. § 761.3.
14. *See* 40 C.F.R. 761.62.
15. 15 U.S.C. § 2615(a); Civil Penalty Inflation Adjustment Rule; 40 C.F.R. 19.4.
16. 15 U.S.C. § 2615(b).
17. *See* EPA Fact Sheet—PCBs in Caulk available at http://www.epa.gov/pcbsincaulk/caulk-fs.pdf; *see also* "PCB Risk Feared at Older N.E. Schools," *supra* at A11.
18. *See* PCBs in Caulk—QA (Sept. 2009) ("Caulk Q&A") available at http://www.epa.gov/pcbsincaulk/caulk-faqs.pdf.
19. Quoted in EPA News Release entitled "EPA Announces Guidance to Communities on PCBs in Caulk of Buildings Constructed or Renovated Between 1950 and 1978; EPA to gather latest science on PCBs in caulk," Sept. 25, 2009, *supra*.
20. *See e.g.*, "Current Best Practices For PCBs in Caulk Fact Sheet: Removal and Clean-up of PCBs in Caulk and PCB-Contaminated Soil and Building Material" (Sept. 2009), available at http://www.epa.gov/pcbsincaulk/caulkremoval.pdf; see also "Current Best Practices For PCBs in Caulk Fact Sheet: Interim Measures for Assessing Risk and Taking Action to Reduce Exposures" (Oct. 2009), available at http://www.epa.gov/pcbsincaulk/caulkintermin.htm.
21. See Caulk Q&A at p. 13.
22. Id. at p. 14.
23. See 40 C.F.R. 761.20(a)(1)-(4).
24. See Caulk Q&A at p. 13.
25. EPA Fact Sheet, PCBs in Caulk.
26. PCBs can enter the air through both dust and volatilization. However, the primary pathway seems to be through particulates similar to lead and asbestos.
27. Clean-up and disposal requirements for waste contaminated by spills of PCBs currently at concentrations greater than or equal to 50 ppm PCBs are found at 40 C.F.R.762.61.