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APPELLATE COURTS CLARIFY EMPLOYER LIABILITY IN SEXUAL HARASSMENT CASES

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There were two appellate court opinions this past summer addressing liability for sexual harassment in the workplace; one under the Michigan Elliott-Larsen Civil Rights Act ("ELCRA") and the other under Title VII (the federal discrimination law).

On June 1, the Michigan Supreme Court issued its long awaited opinion in *Elezovic v Ford Motor Company,* which addressed whether the individual who is accused of sexual harassment may be held personably liable under state law. The court, known for its strict interpretation of laws, explained that "[t]he Legislature is held to what it said. It is not for us to rework the statute. Our duty is to interpret the statutes as written."

The court focused its analysis on the statute's definition of "employer," which means "a person who has one or more employees, and includes an agent of that person." MCL 37.2201(a) (emphasis by court). The court ruled that, unlike Title VII, which does not provide for individual liability, a strict reading of ELCRA requires the conclusion that individuals may be held liable for their sexual harassment in the workplace.

The Supreme Court also addressed the victim's required notice under ELCRA in order to hold the employer liable. The court reiterated that "notice of sexual harassment is adequate if, by an objective standard, the totality of the circumstances were such that a reasonable employer would have been aware of a substantial probability that sexual harassment was occurring." Thus, actual notice to the employer is not required; rather the test is whether the employer knew or should have known of the harassment.

In *Elezovic*, the employee argued she met the standard when she told two supervisors, *in confidence*, about the sexual harassment. Notwithstanding the employer's policy that required supervisors to forward all such complaints to human resources, the court held that, because she made her report in confidence, it did not constitute proper notice to the employer.

Next, in the federal case of *Clark v United Parcel Service, Inc*, the Sixth Circuit Court of Appeals further clarified the employer defense to sexual harassment claims that was first explained by the United States Supreme Court in *Faragher v City of Boca Raton*. In a nutshell, the defense is available where the employer has a policy against sexual harassment (which is made known to the employees), investigates and takes prompt and appropriate action when sexual harassment is reported, and the employee has not been subjected to a tangible employment action (i.e., demoted or promoted for refusing or succumbing to requests for sexual favors, fired, etc.).

In *Clark*, the Sixth Circuit identified the following four minimal requirements for a "reasonable" and effective sexual harassment policy: (1) require supervisors to report incidents of sexual harassment to higher management or human resources; (2) allow for both formal and informal complaints to be made; (3) provide an avenue for the complainant to bypass a harassing supervisor; and (4) provide sexual harassment training to employees.

The court then emphasized that the effectiveness of the policy depends on those charged with its implementation. The court found that the policy had not been effectively implemented because several low to mid-level supervisors had witnessed the offensive conduct and failed to report it to higher management. Fortunately for UPS, the harassment did not rise to the requisite level to create a hostile environment because the court's findings would have precluded the employer from asserting the affirmative defense had the victim been able to prove her claim.

As apparent from the cases above, employers should regularly review their policies and practices to ensure they remain current. Court decisions continuously clarify duties of employers under state and federal laws and affect the defenses upon which they may rely should a lawsuit occur.

If you need further information concerning the cases above or require assistance in updating policies, please contact your Plunkett & Cooney attorney directly, or in the alternative, Plunkett & Cooney's Labor & Employment Law Practice Group Leader Theresa Smith Lloyd at (248) 901-4005.