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Employment Policy And Training As An Affirmative Defense To Harassment Cases

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Flooded with employment law claims, it often seems employers are helpless to do anything to stop the deluge. Under federal and state law, an employer who can show that he or she has an effective and efficient policy against harassment, is entitled to raise this fact as a defense.

What is considered an effective and well publicized policy against harassment? The policy should be in writing and include language prohibiting harassment, discrimination, and retaliation. It should include a clear procedure for reporting harassment, so employees know what to do as victims of harassing behavior. The policy should be distributed to company employees and be easily accessible to review.

Most importantly, a policy cannot be mere lip service to preventing harassment. Employees should be trained on the policy and acknowledge such training. They should understand the procedure for making an effective complaint. Employees in supervisory roles must receive training on the policy so that they understand their responsibilities if they receive a report of harassment. The policy should provide for the triggering of an investigation when a complainant brings up facts that indicate harassment, and it should also provide for immediate remedial action in response to a legitimate complaint, including potential discipline of the harasser.

There is a caveat, however. The defense of an effective and efficient policy can only be used where an employee complains of “hostile work environment” harassment. In other words, the employee claims that he or she has suffered from an environment tolerated by the employer in which the employee has been subject to severe or pervasive harassment. In that type of situation, an employee must allow the employer to remedy the situation by “working” the policy. An employee cannot claim harassment without having allowed the employer the opportunity to fix the situation.

If an employee complains of “quid pro quo” harassment, a good harassment policy is also not a defense. Quid pro quo is Latin for “this for that,” and generally occurs in sexual harassment cases where a supervisor offers a reward if a subordinate employee agrees to comply with the supervisor’s demands. For example, a supervisor requiring a subordinate employee to perform a sexual act in order to receive a raise is illegally offering this for that. Moreover, an effective and efficient employer’s policy cannot be raised as a defense where there is an impermissible discharge, demotion or undesirable reassignment of an employee or any other tangible employment action.

TAKEAWAY: get your policies written and training done.

Attorney

- Stephanie D. Gironda