



# In the Affirmative

## Affirmative Defense Can Shield Against Harassment Claims

Imagine two businesses, Business A and Business B, each striving to make a profit and enjoying a measure of success. But, despite sound staffing procedures, both companies hire male supervisors whose behavior toward females is deplorable: they comment about employees' bodies, hint that sexual favors are prerequisites for promotion, and continually make racial innuendos toward subordinates. Ultimately, the harassed employees sue their employers for the supervisors' behavior. However, the similarities end here. Relying on its efforts to prevent harassment, Business A establishes the "Affirmative Defense" and avoids liability. Business B, having failed to undertake the steps required for the Affirmative Defense, faces a jury and potential liability for compensatory damages, punitive damages and attorneys' fees. This example illustrates the consequences businesses face regarding having the necessary policies and procedures to defend against sexual harassment claims.

### The Affirmative Defense

The Supreme Court created the Affirmative Defense in two 1998 decisions: *Farragher v. City of Boca Raton*, and *Burlington Industries v. Ellerth*. By establishing the Affirmative Defense, employers guard against a host of employment claims based on the conduct of supervisors. Post-*Farragher*, Affirmative Defense is

**By establishing the Affirmative Defense, employers guard against a host of employment claims based on the conduct of supervisors.**

applied to harassment or discrimination cases based on race or age, and claims of constructive discharge or retaliation.

Under *Farragher/ Ellerth*, two requirements must be met: (1) the employer must show that he or she exercised reasonable care to prevent and promptly correct the harassing or discriminatory behavior, and (2) the employer must show that the employee unreasonably failed to take advantage of the preventive or corrective opportunities provided.

An employer's reasonable care can be demonstrated by prevention and correction.

### The Written Word

While some courts find having a written policy is reasonable care per se, Utah's courts have not so held, but one Utah judge called a written policy "a powerful indication that the employer is at least taking reasonable preventative measures."

*Disseminate the Policy:* Employees must be aware of the policy and its complaint procedures, so employers should post the policy on employer bulletin boards and publish it in employee handbooks.

New employees should receive a copy as part of orientation, and should acknowledge receipt in writing.

*Conduct Regular Training:* One Utah employer lost a motion for summary judgment based on the Affirmative Defense despite having a written policy. While all three plaintiffs acknowledged receiving the policy, the employer could not show that adequate training had been provided to ensure employees understood the complaint process.

### Corrective Measures

*Timely, Detailed Investigation:* Delays can prolong an intolerable situation and frustrate the parties involved, while witness recollections can fade. An investigation should promptly begin with interviews of the complainant, the accused and all relevant witnesses.

*Corrective Action:* If the investigation corroborates the claim of inappropriate

conduct, appropriate steps must be taken to ensure the actions do not happen again. Termination or discipline of the harassing supervisor, consistent with the employer's published policies, must be considered. If the supervisor is not terminated, a transfer will reduce the likelihood of a repeat offense. At all phases of the process, the complainant should be informed of the status of the investigation and the corrective action the employer proposes to take.

### *Designate Complaint Recipients:*

Problems arise when employees complain to lower level supervisors who are not trained to address complaints, or who fail to involve upper management and human resources. To ensure that complaints reach the proper recipient and are promptly addressed, smaller companies should require they be made to the CEO or president, while larger companies should designate a single human resources contact as the initial recipient. The policy should provide an alternative if the designated recipient is the harasser. A good policy might make a supervisor subject to discipline for failing to promptly forward a complaint received to the party specified.

*Document the Complaint and Investigation in Writing:* The scope and severity of the complaint determine the reasonableness of an employer's response. Without written documentation, what originated as a complaint about inappropriate language may morph at the litigation stage into accusations of sexual assault. Some employers require that a complaint be submitted in writing. Others collect a written statement from the complaining employee as part of the initial witness interview.

Employers following these suggested steps may prevent harassment and avoid litigation altogether. If, as in the case of Business B, litigation is filed, the employer will be better prepared to defend. **UB**

*Michael D. Stanger is a shareholder with the law firm Callister Nebeker & McCullough. He can be reached at mstanger@cnmlaw.com*