

# **COUNSELING HUMAN RESOURCES MANAGEMENT: LAW, POLICY, AND BEST PRACTICES**

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## **I. COMPREHENSIVE ANTI-HARASSMENT PROGRAMS: A COMPLIANCE OBLIGATION, NOT JUST A GOOD IDEA**

In 1998, the Supreme Court issued its leading decisions in *Faragher* and *Ellerth*, finding among other things that an employer's ability to show that it "exercised reasonable care to prevent and correct promptly any sexually harassing behavior" may, in certain situations, constitute a defense to any later lawsuit alleging harassment. *Burlington Industries, Inc. v. Ellerth*, 524 U.S. 742, 765 (1998); *see also Faragher v. City of Boca Raton*, 524 U.S. 775 (1998). The next year, in *Kolstad v. American Dental Association*, 527 U.S. 526 (1999), the Supreme Court confirmed that an employer's efforts to avoid harassment or discrimination could insulate an employer found liable for harassment from an assessment of punitive damages.

Since then, lower courts have laid increasingly heavy emphasis on the existence (or absence) of training and compliance efforts. Six years of lower court decisions have converted strong training and compliance programs from "good ideas" into compliance obligations. An employer lacking a strong policy, training program, and demonstrable commitment to address misconduct now risks not only the loss of an affirmative defense but also the submission of dangerous claims to a jury and even the imposition of uninsurable, punitive damages. In addition, lower courts have extended these Supreme Court rulings beyond sexual harassment cases to all cases involving discrimination or harassment on the basis of race, national origin, religion, or age. In one court's view, the

failure to train employees and implement an effective anti-discrimination program is, quite simply, an "extraordinary mistake." *EEOC v. Board of Regents of the University of Wisconsin System*, 288 F.3d 296, 304 (7<sup>th</sup> Cir. 2002), citing *Mathis v. Phillips Chevrolet, Inc.*, 269 F.3d 771, 778 (7<sup>th</sup> Cir. 2001).

We discuss below how the "*Faragher/Ellerth* defense" has evolved from a limited, affirmative defense into an accepted "best practice" -- one which, if ignored, can subject the employer to loss of summary judgment, forfeiture of significant affirmative defenses, and liability for significant, punitive damages. The trend in federal courts to require proof not only of a policy and procedure addressing discrimination, but also proof of training on the policy and procedure, makes adoption of an effective training/compliance program no longer a luxury but a *necessity*. Administrators need to make such programs a strong priority.

We also discuss below those compliance practices that the courts have found to constitute sufficient "compliance." The Supreme Court itself has never discussed the level of training and compliance appropriate to gain the benefits of decisions such as *Faragher*, *Ellerth*, and *Kolstad*. Lower courts, however, have clarified that an employer must do much more than simply announce a policy – and that failure to address the training, policy, or investigative aspects of compliance may place the employer at grave risk.

For purposes of this discussion, we use the term "comprehensive compliance program" to mean a coordinated program to prevent and address Title VII violations. Ideally, such a program will include (i) a strong, well-publicized policy against discrimination, harassment, and retaliation; (ii) training of employees and managers; and

(iii) effective investigative/enforcement procedures for ferreting out and addressing possible misconduct. As shown below, an employer cannot afford to be without a compliance program, both to take advantage of the substantial benefits flowing from such programs and to avoid the steadily increasing risks threatening employers who lack a commitment to compliance.

**A. *Faragher* and *Ellerth*: The "Effective Compliance" Defense**

Although employment lawyers have long advocated the adoption of strong anti-harassment policies, including investigation and remediation processes, the issue took center stage when the Supreme Court issued its 1998, twin decisions in *Burlington Industries, Inc. v. Ellerth*, 524 U.S. 742 (1998), and *Faragher v. City of Boca Raton*, 524 U.S. 775 (1998). Both cases arose from sexual harassment claims alleging "hostile environment." And, in both, the primary issue on certiorari was whether the employers were subject to vicarious liability under the circumstances of those cases.

In the course of ruling, the Supreme Court discussed the legal significance of an employer's attempts -- both before and after an alleged episode of harassment -- to prevent harassing conduct. The Supreme Court placed heavy emphasis upon the substantial policy reasons why courts should encourage proactive, anti-harassment activity by employers. As the Court in *Ellerth* noted, Title VII was "designed [by Congress] to encourage the creation of anti-harassment policies and effective grievance mechanisms." 524 U.S. at 764. By providing an affirmative defense and limitation of liability to employers that have developed anti-harassment procedures, the Court sought to "effect Congress' intention to promote conciliation rather than litigation in the Title VII context." 524 U.S. at 764, *citing EEOC v. Shell Oil Co.*, 466 U.S. 54, 77 (1984).

Moreover, "[t]o the extent limiting employer liability could encourage employees to report harassing conduct before it becomes severe or pervasive, it would also serve Title VII's deterrent purpose." *Ellerth*, 524 U.S. at 764, citing *McKennon v. Nashville Banner Publishing Co.*, 513 U.S. 352, 358 (1995).

The Supreme Court concluded that, in limited circumstances, an employer has an "affirmative defense" to liability or damages under Title VII. An affirmative defense compels judgment in favor of the defendant *even if* the plaintiff can prove up the offending harassment or discrimination; it is therefore of substantial value to any employer defending a Title VII claim. The defense envisioned by the Supreme Court, however, appeared to have very limited application. According to the Court in *Ellerth*, this affirmative defense would be available only where (i) "the employer exercised reasonable care to prevent and correct promptly any sexually harassing behavior," *and* (ii) the "plaintiff employee unreasonably failed to take advantage of any preventive or corrective opportunities provided by the employer or to avoid harm otherwise." 524 U.S. at 765. Moreover, this affirmative defense would be completely unavailable, as a matter of law, "when the supervisor's harassment culminates in a tangible employment action, such as discharge, demotion, or undesirable reassignment." *Id.* Thus, the *Faragher/Ellerth* defense was limited to claims of "hostile work environment" where the damage alleged was not an adverse job action but simply "severe and pervasive" impairment of the plaintiff's working environment.

The Supreme Court's decisions did not clarify many aspects of what is now called the "*Faragher/Ellerth*" defense, leaving to lower courts the questions of what constitutes sufficient "reasonable care" by the employer or "unreasonable delay" by the plaintiff.

But one thing was immediately clear. The Supreme Court had strongly validated the advice that Human Resources personnel (and employment lawyers) had been giving for years: that proactive attempts to prevent and address harassing conduct were "best practices" that would benefit, rather than undermine, the interests of employers in appropriate cases.

**B. *Kolstad*: Using Compliance Programs To Avoid Punitive Damages**

A year later, in *Kolstad v. American Dental Association*, 527 U.S. 526 (1999), the Supreme Court again addressed the significance of compliance in potentially limiting an employer's financial liability for harassment. In *Kolstad*, a female employee of a professional association filed a Title VII action, claiming that she was denied a promotion because of her gender. A jury found in her favor; the case reached the Supreme Court on the question whether an employer with an effective anti-harassment policy and program, once found liable for discrimination, could also be assessed punitive damages. Because punitive damages under Title VII are available only where a defendant is found to have acted with "malice" or "reckless indifference," the ultimate question becomes whether a court should or must consider an employer's commitment to training and other compliance programs in determining the propriety of punitive damages.

Continuing its stated commitment to encouraging private compliance, the Supreme Court in *Kolstad* concluded that an effective compliance program could indeed block punitive damages. As a policy matter, imposing punitive damages in every case -- without regard to whether an employer has engaged in substantial education or compliance efforts -- would "penalize[] those employers who educate themselves and their employees on Title VII's prohibitions." 527 U.S. at 544. Certainly, "[d]issuading

employers from implementing programs or policies to prevent discrimination in the workplace is directly contrary to the purposes underlying Title VII." *Id.* at 545. The statute's "primary objective," according to the Supreme Court, "is a prophylactic one," aiming "not to provide redress but to avoid harm." *Id.*, quoting *Albemarle Paper Co. v. Moody*, 422 U.S. 405, 417 (1975), and *Faragher*, 524 U.S. at 806.

The Supreme Court thus decided to modify common law principles "to avoid undermining the objectives underlying Title VII." *Kolstad*, 527 U.S. at 545. The Court held that, "in the punitive damages context, an employer may not be vicariously liable for the discriminatory employment decisions of managerial agents where these decisions are contrary to the employer's 'good-faith efforts to comply with Title VII.'" *Id.* at 545 (quotations omitted). The Court remanded that particular case for further proceedings to determine, among other things, whether the employer had "been making good faith efforts to enforce an anti-discrimination policy." *Id.* at 546. The Court did not explain what would constitute sufficient "good faith efforts" to block punitive damages.

The decision in *Kolstad*, in conjunction with *Faragher* and *Ellerth*, amplified the potential benefits to an employer instituting an anti-discrimination program. Not only could an employer avoid liability entirely in certain types of cases, but it could also dramatically reduce its liability for punitive damages in all cases. As the dissents in those three decisions correctly noted, the majority of the Supreme Court did not clarify the specific circumstances in which the affirmative defense could be employed or the level of "good faith effort" necessary to block punitive damages. These parameters remained to be established by the lower courts.

**C. Evolving Case Law On The Benefits of Compliance and The Dangers of Noncompliance**

Since 1998 and 1999, the decisions in *Faragher*, *Ellerth*, and *Kolstad* have been interpreted many hundreds of times by federal courts of appeal and district courts. Six years later, it is fair to say that the importance of comprehensive compliance programs has been greatly amplified. They have evolved from simply constituting "good," albeit unusual, ideas to being standard, "best practices" in the world of human resources. Comprehensive compliance programs are now so widespread, and the courts' and agencies' expectations concerning them are so uniform, that any employer choosing not to implement an effective compliance program is significantly more at risk than the *Faragher*, *Ellerth*, and *Kolstad* decisions would seem to have contemplated.

- 1. Benefits of Instituting a Comprehensive Compliance Program**
  - a. Availability of Affirmative Defense To Liability**

The most obvious, litigation-related benefit of instituting a comprehensive compliance program is the prospect of mounting a successful *Faragher/Ellerth* affirmative defense, which is a complete defense to many hostile environment claims. Courts have been quick to reward employers instituting strong programs. Indeed, numerous courts have entered summary judgment in favor of an employer purely on the basis of a *Faragher/Ellerth* defense, thus allowing employers to avert the risk of jury trial.

For instance, in *Swingle v. Henderson*, 142 F. Supp. 2d 625, 634-637 (D.N.J. 2001), summary judgment was granted in favor of the employer in a hostile environment claim on a *Faragher/Ellerth* defense. There, the employer had (i) provided training upon orientation, (ii) posted notices instructing employees about how and where to complain, (iii) reminded employees on a weekly basis about the policy, and (iv) made sexual

harassment the cover story on the company's internal magazine. 142 F. Supp. 2d at 634-37. Likewise, in *Newsome v. Admin. Office*, 103 F. Supp. 2d 807, 819-820 (D.N.J. 2000), summary judgment was granted on the basis of the defense. In *Newsome*, the employer had disseminated a strong policy to all employees, regularly conducted harassment awareness sessions and, most significantly, acted immediately and effectively to stop the offensive conduct once the plaintiff/employee complained. *Accord Hooker v. Wentz*, 77 F. Supp. 2d 753, 757 (S.D.W.Va. 1999) (summary judgment in favor of employer where policy widely disseminated, managers trained, and action taken promptly upon receipt of plaintiff's internal complaint).

In addition, courts have not hesitated to grant summary judgment on the basis of this defense where the plaintiff unreasonably failed to make use of an internal complaint process bolstered by a strong anti-harassment policy. In *Casiano v. AT & T Corp.*, 213 F.3d 278 (5<sup>th</sup> Cir. 2000), summary judgment was granted in favor of the employer because, while the employer had a procedure for facilitating employee complaints, the plaintiff failed to take advantage of these procedures and did not complain of the alleged harassment until after he resigned following 15 alleged incidents. *Id.* at 286-87.

Moreover, courts have rejected many plaintiffs' attempts to "explain away" unreasonable delays. For instance, an employee's subjective fears of retaliation do not justify that employee's failure to complain or raise a jury issue that would block entry of summary judgment in favor of the employer on a *Faragher/Ellerth* defense. *See Walton v. Johnson & Johnson Services, Inc.*, 347 F.3d 1272, 1290-91 (11<sup>th</sup> Cir. 2003), *cert. denied*, \_\_\_ U.S. \_\_\_, 124 S.Ct. 1714 (2004) (plaintiff's unsupported concerns about retaliation did not justify failure to complain); *accord Leopold v. Baccarat, Inc.*, 239 F.3d

243, 246 (2<sup>d</sup> Cir. 2001); *Barrett v. Applied Radiant Energy Corp.*, 240 F.3d 262 (4<sup>th</sup> Cir. 2001). Nor are a plaintiff's unsupported concerns about coworker reaction legitimate reasons to refrain from filing an internal complaint. *Caridad v. Metro-North Commuter Railroad Co.*, 191 F.3d 283, 295 (2<sup>d</sup> Cir. 1999), *cert. denied sub nom. Metro-North Commuter Railroad v. Norris*, 529 U.S. 1107 (2000).

In short, lower courts have enthusiastically implemented the Supreme Court's directive to recognize an affirmative defense in selected hostile environment cases. What constitutes an "effective" attempt to prevent and address harassment will turn upon the comprehensive nature of the anti-harassment policy and program undertaken by the employer -- and, sometimes, upon its proven effectiveness in the particular case. In general, though, the lower courts could not have signaled any more strongly that comprehensive attempts to address Title VII issues will benefit the employer in litigation.

**b. Extension of Affirmative Defense to Other Harassment Claims**

The Supreme Court decisions in *Faragher*, *Ellerth*, and *Kolstad* left open the issue whether their holdings applied with equal force to harassment situations involving race, religion, or other protected categories. Since then, however, lower courts have consistently extended the *Faragher/Ellerth* affirmative defense to cases involving harassment not only on the basis of gender but also on the basis of race, national origin, or other protected categories.

For instance, *Allen v. Michigan Department of Corrections*, 165 F.3d 405 (6<sup>th</sup> Cir. 1999), involved claims of race discrimination and harassment. The Sixth Circuit held, however, that the standards articulated in *Ellerth* and *Faragher* were also fully applicable to a claim of race harassment, explaining that "[a]lthough *Ellerth* and *Faragher* dealt

with claims of sexual harassment, their reasoning is equally applicable to claims of racial harassment." *Id.* at 411-12. Numerous other circuits have also allowed the *Faragher/Ellerth* affirmative defense in cases involving race or other forms of harassment. *See, e.g., Spriggs v. Diamond Auto Glass*, 242 F.3d 179, 186 (4<sup>th</sup> Cir. 2001) (liability standards developed for sexual harassment apply to all forms of harassment); *Deffenbaugh-Williams v. Wal-Mart Stores, Inc.*, 156 F.3d 581, 593 (5<sup>th</sup> Cir. 1998)(race discrimination); *Wright-Simmons v. The City of Oklahoma City*, 155 F.3d 1264, 1270 (10<sup>th</sup> Cir. 1998)(racial harassment); *Wallin v. Minnesota Department of Corrections*, 153 F.3d 681, 687-88 (8<sup>th</sup> Cir. 1998), *cert denied*, 526 U.S. 1004 (1999) (harassment on basis of disability). In short, implementing a comprehensive compliance program now promises to afford the employer a defense not only to sexual harassment but also to a broad range of other harassment and discrimination claims.

**c. Elimination of Punitive Damages**

Since 1999, the lower courts have also fleshed out the *Kolstad* holding that a properly conceived and executed compliance program may save an employer liable for harassment from the additional imposition of punitive damages. A leading case, *Bryant v. Aiken Regional Medical Centers, Inc.*, 333 F.3d 536 (4<sup>th</sup> Cir. 2003), *cert. denied*, 540 U.S. 1106 (2004), demonstrates the courts' willingness to look favorably upon an employer's sincere, good faith attempts to address discrimination and harassment problems. There, a surgical technician filed suit under Title VII and Section 1981, alleging race discrimination and retaliation. The employer lost at trial, and plaintiff was awarded \$40,000 in compensatory damages, \$50,000 for emotional distress, and \$210,000 in punitive damages.

On appeal, the Fourth Circuit upheld the \$90,000 in actual damages but struck down the larger punitive damage award. The court acknowledged the employer's training and prevention efforts, citing the employer's strong policy, continued attempts to publicize its policy and train its employees, and voluntary monitoring of departmental demographics in an attempt to "keep the employee base reflective of the pool of potential employees in the area." 333 F.3d at 548-49. The employer's "widespread anti-discrimination efforts, the existence of which [the plaintiff did] not dispute, preclude[d] the award of punitive damages in this case." *Id.* at 549.

Similarly, other courts have denied plaintiffs the ability to seek or retain punitive damages because of comprehensive and ongoing compliance attempts by the employer. In *Woodward v. Ameritech Mobile Communications*, 2000 WL 680415 (S.D. Ind. March 20, 2000), the District Court granted partial summary judgment in favor of the employer on the question of punitive damages. The court emphasized the employer's strong policy, which contained two different complaint mechanisms; its two-day training sessions for all employees; and its requirement that employees, including the plaintiff, sign a form indicating their receipt and review of the policy. Under these circumstances, there was no jury issue as to whether the employer made a good faith effort to comply with Title VII, and punitive damages were unavailable as a matter of law. *Id.* at \*16. *See also Hatley v. Hilton Hotels Corp.*, 308 F.3d 473, 477 (5<sup>th</sup> Cir. 2002)(no punitives allowed where employer publicized anti-harassment policy, trained all new employees, maintained effective grievance procedure, and promptly investigated plaintiff's complaints); *Fuller v. Caterpillar, Inc.*, 124 F. Supp.2d 610, 618 (N.D. Ill. 2000)(no

punitives allowed where employer extensively publicized policy and trained all employees).

In all such cases, lower courts have applied the *Kolstad* ruling to reward an employer's good faith, legitimate attempts to prevent and address harassment. Such holdings should greatly encourage any employer remaining in doubt about the value of comprehensive compliance from the standpoint of risk management.

## **2. The Dangers of Non-Compliance**

Even more significant than the decisions that reward employers for good compliance programs are those decisions that *penalize* employers for failing to implement a comprehensive compliance program. The danger now is not simply that an employer will be forced to go to a jury trial rather than prevail on summary judgment (although, given the volatile juries in employment cases, that danger is real enough). The real danger is that courts or juries will draw a strong, adverse inference from an employer's unwillingness to implement what is now considered a "best practice" in the world of Human Resources.

As shown below, the inability or unwillingness of employers to adopt a consistent, effective compliance program can now justify forfeiture of the *Faragher/Ellerth* defense. It also permits the imposition of uninsurable punitive damages. Worst of all, failure to implement a comprehensive compliance program may increasingly come to be viewed as additional evidence that the employer *intended* to create a hostile environment. Interestingly, many recent Title VII cases in which plaintiffs have prevailed seemed to turn on evidence that an employer was indifferent to

the need for a compliance program -- an indifference that now borders on recklessness and could come to be seen as intent to discriminate.

**a. Forfeiture of Affirmative Defense**

The Supreme Court in *Ellerth* warned that an employer would only have a defense to liability if, among other things, the employer could demonstrate the exercise of "reasonable care to prevent and correct promptly any sexually harassing behavior." 524 U.S. at 765. This has proven true. While many courts have rewarded employers for serious attempts to comply with Title VII, many other decisions find the affirmative defense entirely inapplicable, or at least refuse to grant summary judgment on this basis, where a compliance program is arguably insufficient.

An excellent example is *Miller v. Woodharbor Molding & Millworks, Inc.*, 80 F. Supp. 2d 1026 (N.D. Iowa 2000), in which the employer argued that it was entitled to assert the defense because it had adopted an anti-harassment policy. The court, however, noted that the plaintiff's supervisors were unfamiliar with the policy, had never received training on how to implement the policy, and had never been informed by the employer about its procedures for reporting sexual harassment. *Id.* at 1030-31. The Court concluded that the *Faragher/Ellerth* defense was unavailable. *Id.* at 1032. *Accord Gordon v. Southern Bells, Inc.*, 67 F. Supp.2d 966, 982-83 (S.D. Ind. 1999) (employer forfeited defense due to its failure to distribute policy or conduct any training); *Booker v. Budget Rent-A-Car Systems*, 17 F. Supp.2d 735, 747-48 (M.D. Tenn. 1998) (employer forfeited defense due to its failure to train managers or distribute policy).

Many courts have focused particularly upon inadequate training in determining that the *Faragher/Ellerth* defense has been forfeited. For instance, in *Baty v. Willamette*

*Industries, Inc.*, 172 F.3d 1232 (10<sup>th</sup> Cir. 1999), a jury awarded more than \$1 million in a sexual harassment and retaliation case; the award was reduced to \$300,000 pursuant to the Title VII statutory cap. The employer argued on appeal that it was entitled to a *Faragher/Ellerth* defense because it responded promptly to the complaint and, after the complaint was received, conducted two 45-minute sexual harassment prevention sessions, which included discussion and a video. But the Tenth Circuit rejected this argument, finding that the "jury could reasonably have concluded that the small amount of training given the employees was inadequate in light of the severity of the problem." *Id.* at 1242. *Accord Miller v. D.F. Zee's, Inc.*, 31 F. Supp. 2d 792, 803 (D. Oregon 1998)(affirmative defense unavailable because of lack of training).

Finally, a significant line of decisions also rejects the *Faragher/Ellerth* defense where a program looks good on paper but, when tested, utterly fails to address serious complaints. For instance, in *Smith v. First Union National Bank*, 202 F.3d 234 (4th Cir. 2000), a female employee complained of sexual harassment by her supervisor. While the company had a serviceable compliance policy, the ensuing investigation focused solely on the supervisor's management style and the supervisor was never even asked about the accuser's specific allegations. These facts raised a jury question as to the adequacy of the employer's compliance efforts. *Id.* at 245-46. *Accord White v. New Hampshire Department of Corrections*, 221 F.3d 254, 261-62 (1<sup>st</sup> Cir. 2000) (insufficient, untimely investigation blocked affirmative defense and supported large jury verdict on behalf of female employee alleging hostile work environment); *O'Rourke v. City of Providence*, 235 F.3d 713, 736-38 (1<sup>st</sup> Cir. 2001) (plaintiff's internal complaints about hostile environment having largely been ignored, no *Faragher/Ellerth* defense was available and

plaintiff recovered \$275,000, plus significant attorneys' fees and costs, after jury trial); *see also Hafford v. Seidner*, 183 F.3d 506, 513-14 (6<sup>th</sup> Cir. 1999) (where employer's alleged response to complaints about racial harassment was not to investigate complaints but to reprimand complaining plaintiff, plaintiff raised a jury question of harassment). One test of the effectiveness of a program necessarily must be whether, in the plaintiff's case, it worked. *See Walton v. Johnson & Johnson Services, Inc.*, 347 F.3d 1272, 1288-89 (11<sup>th</sup> Cir. 2003), *cert. denied*, \_\_\_ U.S. \_\_\_, 124 S.Ct. 1714 (2004) (plaintiff's challenge to adequacy of investigation of her complaint was rejected, inasmuch as the investigation resulted in termination of the employee against whom she complained).

**b. Imposition of Punitive Damages**

Moreover, now that compliance programs are common and courts and juries expect them to be implemented, employers run a serious risk of the imposition of punitive damages if compliance programs are absent or inadequate. A notable case is *EEOC v. Board of Regents of the University of Wisconsin System*, 288 F.3d 296 (7<sup>th</sup> Cir. 2002). There, the University/employer laid off four employees, ages 46 through 54, to address budget difficulties; the terminated employees sued under the Age Discrimination in Employment Act (ADEA). The case went to a jury, which found that the employer had discriminated willfully. The jury awarded both compensatory and liquidated damages (which are the form of punitive damages available under the ADEA).

On appeal, the Seventh Circuit excoriated the employer for failing to train its decisionmakers in the basics of the age discrimination laws. The two primary decisionmakers had not "been given any employment law training and neither man seemed to know the age at which the protections of the Act arose." 288 F.3d at 304. The

campus layoff expert did not "look at the terminations to see if age discrimination might have been involved." *Id.* And neither the Dean nor the Associate Dean who reviewed the terminations even knew "that the floor age of protection under the ADEA was 40." *Id.*

The Seventh Circuit therefore affirmed the liquidated damage award. The Court stressed that "leaving managers with hiring authority in ignorance of the basic features of the discrimination laws is an extraordinary mistake from which a jury can infer reckless indifference." 288 F.3d at 304. (internal citations omitted).

The Seventh Circuit's decision, though rhetorically dramatic, is not an aberration; numerous courts have affirmed punitive damage awards because of perceived inadequacies in compliance programs, citing defects ranging from inadequate policies to inadequate training. Another such case is *Wagner v. Dillard Department Stores*, 2000 WL 1229648 (M.D.N.C. July 20, 2000), *aff'd in relevant part, vacated in part, reversed in part*, 17 Fed. Appx. 141, 2001 WL 967495 (4<sup>th</sup> Cir. 2001), in which a punitive damage award was upheld because the employer lacked a separate policy on discrimination and limited its training of hiring personnel to "a ten-minute video" and forms giving examples of permissible and prohibited questions. *Id.* at \* 9. The lower court concluded that the "jury could have found this level of training and information to be insufficient and therefore reprehensible." *Id.*

In *Golson v. Green Tree Financial Servicing Corp*, 2002 WL 27104 at \*4-5 (4<sup>th</sup> Cir. 2002), the employer's failure even to mention pregnancy discrimination in its policy or to train managers and supervisors on the issue was held to justify an award of punitive damages. In another case similar to the Seventh Circuit's *University of Wisconsin*

decision, the Tenth Circuit held that an employer could be held liable for punitive damages where it failed to educate its supervisors about the requirements of the ADA. *EEOC v. Wal-Mart Stores, Inc.*, 187 F.3d 1241, 1249 (10<sup>th</sup> Cir. 1999); *accord Romano v. U-Haul International*, 233 F.3d 655 (1<sup>st</sup> Cir. 2000), *cert. denied*, 534 U.S. 815 (2001) (punitive damage award affirmed because employer failed to train supervisors on prevention of discrimination); *Cadena v. Pacesetter Corporation*, 224 F.3d 1203, 1210 (10<sup>th</sup> Cir. 2000) (punitives allowed because employer did not make good faith effort to educate employees).

In short, "every court to have addressed this issue thus far has concluded that" simply adopting an anti-harassment policy is not enough to avoid punitive damages. *Bruso v. United Airlines, Inc.*, 239 F.3d 848, 858 (7<sup>th</sup> Cir. 2001). Employers must both "adopt" and "implement[]" anti-discrimination policies to avoid punitive damages. *Passantino v. Johnson & Johnson Consumer Products, Inc.*, 212 F.3d 493, 517 (9<sup>th</sup> Cir. 2000).

**c. Insufficient Programs As Additional Reasons to Impose Liability**

Finally, as compliance programs become standard across any industry, the diminishing group of employers who continue not to implement effective programs will place themselves at severe risk of having that *omission* be seen as evidence of discriminatory intent, in and of itself. In other words, an employer's failure to make a good faith effort to prevent and control harassment will constitute additional evidence of harassment.

It is even not outlandish to predict that employers may eventually be accused of common law negligence for failing to implement comprehensive compliance programs.

Significantly, the term used by the Supreme Court in *Ellerth* -- "reasonable care" -- borrows from the language of common-law negligence, and a defendant's conduct falling below the standard of "reasonable care" often forms the basis for state law negligence awards. This risk has become more realistic now that at least three states have passed laws imposing a duty upon employers to conduct anti-harassment training.<sup>1</sup>

The trend toward attributing discriminatory intent to an employer with a substandard compliance program can already be seen in some of the decisions in which punitive damage awards were upheld. For instance, in *Wagner v. Dillard Department Stores*, the court termed the employer's deficient program as something not just insufficient but "reprehensible." 2000 WL 1229648 at \* 9. The court in the *University of*

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<sup>1</sup> See the Maine statute, codified at 26 MSRA § 807, which requires employers with 15 or more employees to "conduct an education and training program for all new employees . . . that includes, as a minimum, the following information: the illegality of sexual harassment; the definition of sexual harassment under state and federal laws and federal regulations, including the Maine Human Rights Act and the Civil Rights Act of 1964 . . . ; a description of sexual harassment, utilizing examples; the internal complaint process available to the employee; the legal recourse and complaint process available through the commission; directions on how to contact the commission; and the protection against retaliation as provided [by statute]." The statute also mandates follow-up training for supervisory and managerial employees. *Id.*

See also the Connecticut statute, codified at CGSA § 46a-54 (15), (16), which empowered that state's Human Rights Commission to require employers with 50 or more employees to provide two hours of training and education to all supervisory employees within one year of enactment of statute and to provide such training to all new supervisory employees within six months of their assumption of a supervisory position. Like the Maine law, the Connecticut law specifies the information to be included in such training. *Id.* See also Regs.Conn.State Agencies § 46a-54-204 (Commission's rules establishing requirements provided by statute).

Most recently, the California legislature enacted a law, codified at West's Cal. Gov. Code § 12950.1, which requires employers with 50 or more employees to "provide at least two hours of classroom or other effective interactive training and education regarding sexual harassment to all supervisory employees who are employed as of July 1, 2005, and to all new supervisory employees within six months of their assumption of a supervisory position" (with ongoing training required for supervisory employees). The statute specifies the subjects to be addressed in training, including "practical examples aimed at instructing supervisors in the prevention of harassment, discrimination, and retaliation, and shall be presented by trainers or educators with knowledge and expertise in the prevention of harassment, discrimination, and retaliation." *Id.* All of these statutes, if violated, could supply the "breach of duty" component of a negligence action. In most states, one's failure to comply with a duty imposed by statute can form the basis for a negligence action. See, e.g., *Quinn v. Sigma Rho Chapter of Beta Theta Pi Fraternity*, 155 Ill.App.3d 231, 238 (4<sup>th</sup> Dist. 1987)(fraternity's violation of state law against hazing was sufficient evidence of breach of duty to justify a negligence action).

*Wisconsin* case termed the absence of training an "extraordinary mistake" from which a jury could infer "reckless indifference." 288 F.3d at 304. There is every reason to believe that, as compliance programs become more standardized, effective, and nuanced, any employer lacking an adequate program will have this fact used against it for *all purposes*, as additional evidence of discriminatory intent.

## **II. ELEMENTS OF AN EFFECTIVE COMPLIANCE PROGRAM**

None of the leading Supreme Court cases discussing harassment articulate precisely what constitutes "reasonable care to prevent and correct promptly any sexually harassing behavior." The lower courts, however, have offered useful guidance in how to structure a truly effective program -- one that will give the employer the best chance to prevent and control harassment, while also placing the employer in the best position to defend itself in court.

### **A. A Strong, Comprehensive Policy Against Discrimination, Harassment, And Retaliation**

The first, essential element of a comprehensive compliance program is a strong policy statement against the offending conduct. The employer must define the prohibited conduct and state unequivocally that the conduct violates its policies and will not be tolerated. This gives the employees fair warning and also sets a standard against which challenged conduct can be evaluated in the future.

Although nearly all employers have now adopted strong anti-harassment policies, a surprising number still limit their policies to *sexual* harassment, failing to mention other types of harassment or discrimination. This is a mistake. An incomplete policy may jeopardize the institution's ability to mount a defense or forestall punitive damages.

*Golson v. Green Tree Financial Servicing Corp.*, 2002 WL 27104 (4<sup>th</sup> Cir. 2002)

(employer's failure to mention pregnancy discrimination in its policy was found to constitute "reckless indifference" and justify punitive damages award); *Wagner v. Dillard Department Stores*, 2000 WL 1229648 (M.D.N.C. July 20, 2000) (employer lacked separate policy regarding discrimination, permitting assessment of punitive damages); *see generally Miller v. Woodharbor Molding & Millworks, Inc.*, 80 F. Supp. 2d 1026, 1029 (N.D. Iowa 2000) (effective policy must include express anti-retaliation provision). To the same effect, the EEOC *Enforcement Guidance* regarding vicarious liability specifically states that, among other things, an effective policy "should make clear that [the employer] will not tolerate adverse treatment of employees because they report harassment or provide information related to such complaints . . ." and warns that a "policy and complaint procedure will not be effective without such an assurance." *Enforcement Guidance: Vicarious Employer Liability for Unlawful Harassment by Supervisors*, EEOC Notice No. 915.002 (June 18, 1999)<sup>2</sup>.

A limited policy also sends the wrong message to employees, suggesting that other types of discrimination will be taken less seriously by the employer than sexual harassment. This is a disaster in terms of morale and respect within the workplace. To be most effective, a policy should include a clear, broad prohibition against *all* forms of discrimination, harassment, and retaliation.

## **B. Effective Complaint, Investigation, and Appeal Procedure**

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<sup>2</sup> The *Guidance* also recommends that such programs include, at a minimum, the following: (1) a clear definition of the prohibited conduct, (2) a clear statement prohibiting retaliation for making a complaint or for providing information regarding a complaint, (3) a complaint process with accessible avenues for complaints, (4) an assurance of confidentiality, to the extent possible, (5) a complaint process that is prompt, thorough and provides an impartial investigation, and (6) assurance that immediate and effective corrective action will be taken if it is determined that discrimination occurred. *Id.*

As the Seventh Circuit stressed in *Bruso v. United Airlines*, "[e]very court to have addressed this issue thus far has concluded that [implementing] a written or formal anti-discrimination policy is . . . not sufficient in and of itself to insulate an employer from a punitive damages award." 239 F.3d at 858-59. Otherwise, the Court in *Bruso* continued, "employers would have an incentive to adopt formal policies . . . but they would have no incentive to enforce those policies." *Id.*, citing *Passantino v. Johnson & Johnson Consumer Products, Inc.*, 212 F.3d 493, 517 (9<sup>th</sup> Cir. 2000)("purpose of Title VII . . . would be undermined if [anti-discrimination] policies were not implemented, and were allowed instead to serve only as a device to allow employers to escape punitive damages"). The employer must adopt not only a policy but also an "effective" program for implementing that policy. *Reinhold v. Commonwealth of Virginia*, 151 F.3d 172, 176 (4<sup>th</sup> Cir. 1998).

As noted in the EEOC's *Enforcement Guidance*, a truly effective compliance program needs to include specific and workable complaint, investigation, and appeal procedures. *Enforcement Guidance: Vicarious Employer Liability for Unlawful Harassment by Supervisors*, EEOC Notice No. 915.002 (June 18, 1999); *see n.2 above*. For instance, in *Miller v. Woodharbor Molding & Millworks, Inc.*, 80 F. Supp. 2d at 1030-31, the court entered judgment for the plaintiff on a sexual harassment claim after a bench trial; among other things, the court concluded that the employer could not raise a *Faragher/Ellerth* defense. While the employer had adopted a strong anti-harassment policy, the policy was incomplete in that it failed to ensure training of supervisors, failed to prohibit retaliation, and did not provide a formal complaint procedure. *Id.* at 1031. Mere encouragement to complain was not enough because the employer did not identify

to whom a complaint should be made. *Id.* Such decisions indicate that a compliance program cannot be too specific in delineating how to complain, to whom one complains, and the process by which complaints will be investigated and resolved.

### **C. Multiple Complaint Channels For Reporting Conduct**

Not only should such a program include specific procedures, but it also should include what the Supreme Court in *Faragher* termed an "assurance that the harassing supervisor[] could be bypassed in registering complaints." 524 U.S. at 808. This commonsense policy, now a standard "best practice," provides that, should the complaining employee be lodging a complaint against her own supervisor, or should she feel for any reason that she cannot complain to the designated person, she may complain to another identified, alternative supervisory employee. Indeed, in *Miller v. Woodharbor Molding & Millworks, Inc.*, the program's failure to identify an "alternative complaint procedure for reporting the conduct of supervisors" was one factor that, in the Court's opinion, "expose[d] the flaws of Woodharbor's anti-harassment policy, and, ultimately, its ineffectiveness." 80 F. Supp. 2d at 1031 (summarizing cases requiring "multiple complaint channels").

### **D. Publicizing Procedures**

The Supreme Court in *Faragher* itself clarified the importance of effectively *publicizing* the institution's policies and procedures regarding harassment to everyone within the company or relevant campus community. In *Faragher*, the plaintiff was a lifeguard subjected to a hostile environment by fellow beach employees, with her supervisors apparently unwilling to take any action. 524 U.S. at 807-08. Although the defendant City had a policy against sexual harassment, it had "entirely failed to

disseminate its policy against sexual harassment among the beach employees and . . . its officials made no attempt to keep track of the conduct of supervisors." *Id.* at 808.

Furthermore, the policy did not allow the plaintiff to bypass her immediate supervisors even though she sought to complain about those supervisors personally. *Id.*

Under these circumstances, the Supreme Court held "as a matter of law" that the City had not exercised reasonable care. Its words should resonate with any university administrator overseeing a large campus or multiple locations. The Supreme Court warned that the City "could not reasonably have thought that precautions against hostile environments in any one of many departments in far-flung locations could be effective without communicating some formal policy against harassment, with a sensible complaint procedure." *Id.* at 808-09. Numerous lower courts have since agreed that distribution as well as adoption of a policy is essential to showing reasonable care and maintaining an effective compliance program. *E.g., Booker v. Budget Rent-A-Car Systems*, 17 F. Supp. 2d 735 (M.D. Tenn. 1998)(affirmative defense failed because employer did not distribute harassment policy to employees). Effective distribution or publication has been held to include training employees, putting up posters in the workplace, including discussion of the policy in a union contract, and discussing the policy in the company's internal, monthly magazine. *Swingle v. Henderson*, 142 F. Supp. 2d at 634-37. At the very least, employers will want to include the relevant policy in the Employee Handbook and, given the increasing prevalence of web-based communications, post the policy on the institutional website. And the employer should not forget to distribute any modifications to all of its employees and to distribute all such

policies to new employees; in fact, many institutions re-distribute such materials on a yearly basis and obtain signatures memorializing each employee's receipt of the policy.

**E. Training All Employees Effectively**

Finally, courts have laid increasingly heavy emphasis upon an employer's attempts to train employees – at both the staff and supervisory levels -- about the operation of the company's anti-discrimination policies. In *Bryant v. Aiken Regional Medical Centers, Inc.*, 333 F.3d at 548-49, the employer's "extensively implemented organization-wide" EEO policy included "formal training classes and group exercises for hospital employees." In conjunction with the employer's grievance policy, this was sufficient evidence of "widespread anti-discrimination efforts" to justify reversal of the punitive damages award in that case. *Id.* at 549.

Conversely, courts have not hesitated to penalize employers where training efforts were insufficient or nonexistent. *See, e.g., Gordon v. Southern Bells, Inc.*, 67 F. Supp.2d at 982-83; *Booker v. Budget Rent-a-Car Systems*, 17 F. Supp.2d at 747-48 (both permitting assessment of punitive damages because of employer's failure to train). Inadequate training is also a serious risk. *See Baty v. Willamette Industries*, 172 F.3d at 1238-39 (employer only conducted two, 45-minute prevention sessions for selected employees, and only after the plaintiff's complaint was received). A much better practice, which has been repeatedly approved by courts, is to train all employees when they begin work and before incidents arise. In *An v. Regents of the University of California*, 94 Fed. Appx. 667, 674 (10<sup>th</sup> Cir. 2004), the Tenth Circuit particularly commended the University for having conducted training for all new employees that included requiring employees to pass a test at the conclusion of the training regarding

sexual harassment. *Id.* at 674. *Accord Hatley v. Hilton Hotels Corp.*, 308 F.3d at 477 (punitive damages unavailable where employer trained all employees, including new employees).

Many courts have stressed that appropriate training involves not only the general training of employees but also the more comprehensive training of supervisors and managers who play many different roles in the compliance process. This is only fair. Supervisors need to know how to refrain from harassment, prevent it among the employees they manage, and respond to complaints that are brought to them. Supervisors must also be trained to recognize retaliation and to intervene immediately if retaliation occurs. In *Soto v. John Morrell & Co.*, 285 F. Supp. 2d 1146 (N.D. Iowa 2003), the Court identified training for company supervisors as an important element of an effective policy and noted that the lack of such training raised a jury question of the effectiveness of that employer's policy. *Id.* at 1164-66. *Accord Romano v. U-Haul International*, 233 F.3d 655, 670 (1<sup>st</sup> Cir. 2000) (award of punitive damages upheld where employer did not train supervisors to recognize harassment). *Compare Shaw v. AutoZone, Inc.*, 180 F.3d 806, 812 (7<sup>th</sup> Cir. 1999) (policy was effective where employer regularly trained its managers regarding the policy). To neglect to train managers, supervisors, and decisionmakers is, quite simply, an "extraordinary mistake." *EEOC v. Board of Regents of the University of Wisconsin*, 288 F.3d at 304.

## **CONCLUSION**

The trend in case law strongly indicates that comprehensive compliance programs are now tantamount to obligations, not just good risk management initiatives. The benefits of such programs are many. In the years since the Supreme Court decided

*Faragher, Ellerth, and Kolstad*, the lower courts have stressed that truly effective, comprehensive compliance programs may constitute a complete defense to liability in some cases and a bar to punitive damages in virtually all cases. Many human resources professionals also believe that good compliance programs sharply reduce the incidence and seriousness of harassment over time.

As the value of compliance programs becomes more accepted, however, the risk of doing without such a program increases dramatically. Courts have not hesitated to send employers to trial, without benefit of the *Faragher/Ellerth* defense, where an employer's compliance attempts are absent or inadequate. Courts have not hesitated to affirm punitive damage awards, even against universities, where the employer has failed to implement an effective policy or train personnel in the fundamentals of the policy. And, over time, as such programs become the established "best practice" in human resources, an employer's failure to implement such a program will be seen as "reckless indifference," an "extraordinary mistake," negligence, or even as additional evidence of an intent to discriminate.

The financial risk of doing without a comprehensive compliance program is significant. Punitive damages may not be insurable, depending upon the basis for the award, and many states do not permit insurance of punitive damage awards that are directly assessed against an institution (rather than vicariously assessed due to the conduct of an institutional agent). Where the institution itself is viewed as reckless or negligent for failure to adopt a comprehensive program, it is a prime candidate for the direct assessment of uninsurable, significant punitive damages.

The Title VII statutory cap of \$300,000 also may not save an employer that decides to run the risk of doing without an effective compliance program. Many states have their own human rights laws that track the provisions of Title VII, yet contain no damages caps; even plaintiffs' attorneys who want to litigate in federal court often include pendent state law claims to circumvent the Title VII damages cap. In such situations, courts have held that, if a jury award exceeds the \$300,000 statutory cap, the excess can be allocated as damages for the claim under a state or local statute. *Passantino v. Johnson & Johnson Consumer Products, Inc.*, 212 F.3d at 509-10. This scenario could even jeopardize the interests of a state university, which might be immune from direct liability under Title VII but might not be immune when confronted with state law claims. And, finally, even a fully immune institution can still be sued by the EEOC -- and criticized by the press, campus community, or accrediting agencies -- if its failure to implement a compliance program results in a serious enough incident. For all of these reasons, the comprehensive compliance program should be seen as a necessity, not an option.

