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Train Your Employees or Risk Trial on Harassment Claim

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In Dulaney v. Packaging Corp. of America, the Court of Appeals for the Fourth Circuit recently reversed summary judgment entered in favor of an employer in a suit alleging gender discrimination and sexual harassment under Title VII of the Civil Rights Act of 1964, and similar state laws. The appellate court found that questions of fact existed regarding (1) whether the Packaging Corp. of America (PCA) took a tangible employment action against its employee, Dulaney, and (2) whether there was a sufficient nexus between Dulaney's harassment and her termination to make the termination actionable. Essentially, PCA's motion for summary judgment was undone by easily correctable policy and training issues.

Among other things, Dulaney alleged submission, or quid pro quo, sexual harassment, whereby in order to keep her job, or to avoid loss of pay, she was required to engage in sexual acts with her nominal supervisor. The nominal supervisor was a co-worker who did not directly supervise Dulaney, but was given additional authority by PCA, including the ability to assign work to other employees, to assess points against them under PCA's progressive discipline policy, and to send employees home early without pay.

When Dulaney reported the harassment to her direct supervisor, he commented that she was "replaceable." When Dulaney expressed her intent to report the issue to a more senior supervisor, her direct supervisor threatened to fire her. Dulaney did register a complaint with the senior supervisor, and some investigatory steps were taken. The situation was not remedied, however, and because Dulaney was attempting to look for a new job, the human resources department proposed that she enter into a severance agreement. The severance agreement listed November 2, 2007 as the termination date. Under PCA's policies, Dulaney's pay was to stop on the termination date, even though she had not signed the agreement and was not even presented with it until November 5. In addition, on November 5, Dulaney was told she had to sign the agreement that day or she would be fired. When she refused, Dulaney was instructed to clean out her locker and return her key and was escorted off the premises.

After Dulaney filed suit, PCA moved for summary judgment, asserting the Faragher-Ellerth defense, arguing that it had taken no tangible employment action against Dulaney and contending that Dulaney had unreasonably failed to take advantage of any preventative or corrective opportunities (for a brief description of the defense, see Practices/Polices, Protection from Harassment Claims). The district court applied the Faragher-Ellerth defense and granted summary judgment for PCA. The appellate court reversed and remanded, finding that issues of fact precluded application of that defense, and thus summary judgment.

The appellate court determined that based on the threat of termination for failure to sign the severance agreement, being told to clean out her locker and leave PCA's premises, and the stopping of Dulaney's pay, a jury could reasonably conclude that she had been terminated. If a jury were to reach that conclusion, PCA would be found to have taken a "tangible employment action" against Dulaney, and the Faragher-Ellerth defense would be unavailable. Equally significant, the appellate court noted that it was for the jury to determine whether Dulaney's nominal supervisor and harasser was, in fact, her supervisor for purposes of imputing liability to PCA for other actions he had taken against Dulaney, such as sending her home early without pay.

Lastly, the appellate court reemphasized that if a harasser's discriminatory intent sets in motion the tangible employment action, the employer may be liable for discrimination under Title VII. Whether a sufficient nexus between the harassment and any tangible employment action existed in Dulaney's case was a question to be decided by the jury, not by summary judgment.

There are four lessons to be learned from PCA's actions, regardless of the ultimate outcome at trial:

- Practices and policies which may seem inconsequential in the abstract can cause an employer to expend significantly more time and money if raised as issues in litigation. Here, PCA's policy and practice of stopping pay before a severance agreement had been signed, and permitting another

employee to act as a supervisor, created issues of fact which precluded summary judgment, and may well preclude the Faragher-Ellerth defense altogether.

- Train, re-train your employees, and continue to train your employees. Training might have prevented the harassment by Dulaney's nominal supervisor. It certainly would have provided guidance to her direct supervisor to properly respond to her complaints. Training would also have benefitted the senior supervisor and human resources personnel who apparently failed to promptly and properly investigate the complaints and correct the offending conduct.
- The appellate court strongly implied that the stoppage of pay for an employee who has not signed a severance agreement is improper and could by itself constitute a tangible employment action, barring the Faragher-Ellerth defense.
- Employers need to focus on the role of co-workers. Even though Dulaney's harasser was not technically her supervisor, because he had some authority over her, the appellate court seemed willing to conclude that he was functioning as her supervisor. If the jury draws the same conclusion, then the harasser's actions will be imputed to PCA, and those limited supervisory actions, such as assessing points against Dulaney under the progressive discipline policy, and sending Dulaney home early without pay, may constitute tangible employment actions sufficient to bar the Faragher-Ellerth defense.

