

EMPLOYER NOT LIABLE WHEN EMPLOYEE FAILS TO FOLLOW POLICY

The Eighth Circuit recently ruled against an employee after more than two and a half years of sexual harassment by her supervisor. The employer, arguing the Ellerth/Faragher affirmative defense, was able to show that it exercised reasonable care to avoid and eliminate the harassment, but that the complaining employee failed to reasonably take advantage of the preventive and corrective opportunities it provided.

Facts

Rebecca Adams worked as a store associate at O'Reilly Automotive, Inc. During her employment, she claims the store manager, Harold Schroeder, began sexually harassing her. The harassment allegedly continued for more than two and a half years, during which time Adams admittedly never reported Schroeder's actions to the company. She eventually called the company hot line and made a complaint. Two days later, Schroeder was fired. Adams continued to work for O'Reilly but filed suit against the company for the sexual harassment she had suffered.

At trial, O'Reilly relied on the *Ellerth/Faragher* affirmative defense, which derives its name from the two U.S. Supreme Court cases that established it. To escape liability, the employer must show that (1) it exercised reasonable care to avoid and eliminate sexual harassment and (2) the employee unreasonably failed to take advantage of any preventive or corrective opportunities the employer provided or to otherwise avoid harm. The trial court found that O'Reilly satisfied those requirements and ruled in its favor. Adams appealed to the Eighth Circuit.

Eighth Circuit's Decision

The Eighth Circuit began by stating the first requirement of the *Ellerth/Faragher* defense: The employer must demonstrate it "exercised reasonable care to prevent and correct promptly any sexually harassing behavior." The court noted that distribution of a valid anti-harassment policy was sufficient to show that O'Reilly exercised reasonable care. The parties didn't dispute that the company had promulgated and distributed an adequate anti-harassment policy. Instead, they disagreed on whether the policy was reasonable and properly

enforced. If it wasn't reasonable and properly enforced, it couldn't be used to maintain the defense.

The court noted that O'Reilly's anti-harassment policy was more than reasonable for purposes of meeting the *Ellerth/Faragher* defense. First, it was a zero-tolerance policy, requiring investigation and documentation of any reported instance of sexual harassment. Additionally, it provided multiple channels for reporting harassment. O'Reilly promised that all complaints would be kept confidential and that no action would be taken against an employee for

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making a complaint. The policy was thoroughly explained in videos and handbooks for all new employees and was displayed on posters in every store.

Adams argued that although the policy may have been reasonable, it wasn't properly enforced because it required her to have a witness to corroborate her allegations before the company would take action. She contended that this requirement nullified the policy's purpose because most sexual harassment occurs surreptitiously.

O'Reilly responded that it had never required corroboration and would, when appropriate, "infer that harassment occurred from an accumulation of uncorroborated allegations." The court agreed and concluded that O'Reilly had done just that, stating that it wasn't illegal or even objectionable for the company to require some kind of confirmation of the alleged harassment before taking action.

Adams then argued that regardless of O'Reilly's anti-harassment policy, Schroeder's harassment was so pervasive that the company must have had constructive notice of it. The court stated that the evidence didn't support a finding that Schroeder's behavior was so frequent that it could be considered pervasive. It added that, by promulgating a reasonable policy, O'Reilly had fulfilled its obligation to know what was going on within the company. As a result, it was able to successfully establish the first part of the *Ellerth/Faragher* defense.

The second element of the defense required O'Reilly to show that Adams unreasonably failed to take advantage of the company's preventive or corrective measures to avoid harassment. The court stated that the company could satisfy this element if it could prove that Adams didn't avail herself of the proper complaint procedure. The parties didn't dispute that she waited more than two and a half years to complain about Schroeder's behavior. According to the court, that fact alone created a strong inference that she unreasonably failed to use the established proper procedures.

Adams argued that she delayed making her complaint because she was waiting until she had a corroborating witness – an excuse the court didn't buy. In addition, her claim that she was waiting out of fear of retaliation wasn't supported by the evidence, especially given O'Reilly's promise in its policy not to take action against complaining employees. Therefore, O'Reilly was able to establish the second element of the *Ellerth/Faragher* defense.

Because O'Reilly successfully established both elements of the *Ellerth/Faragher* affirmative defense, the Eighth Circuit upheld the trial court's decision, ruling in favor of the employer. *Adams v. O'Reilly Automotive, Inc.*, U.S. App. LEXIS 17313 (2008).

Bottom Line

Even when you take reasonable precautions to avoid sexual harassment and promulgate a proper anti-harassment policy, a supervisor may still behave inappropriately and create problems. However, as this case shows, the *Ellerth/Faragher* defense may protect you. So long as your policy is sufficient and has been distributed to employees, you won't be liable for harassment when an employee fails to take advantage of the policy's safeguards. Adams failed to take advantage of O'Reilly's reasonable policy. As a result, she failed in the courtroom.

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RISK SERVICES

PUBLIC ASSETS BLANKET COVERAGE

We have received a number of requests from our members and agents to provide our Public Assets coverage for mobile equipment and personal property on a blanket coverage basis. For our members not familiar with blanket coverage, the simplest explanation is that you are provided one coverage limit to cover all items in that class of property (similar to the Fire and Tornado Fund's contents coverage) and you do not have to report new acquisitions during the coverage period. At renewal, a review should be made of your current property and the Limit of Coverage adjusted in accordance with your current values.

We have available coverage for four classes of property you own, lease, or rent.

Coverage A - Computers and software: This coverage is provided on and off premises.

Coverage B - Mobile equipment and trailers: This coverage is provided on and off premises.

Coverage C - Personal property: This includes all personal property you own, lease, or rent. Coverage under this option is intended **ONLY** for those members that do not have contents coverage with the North Dakota Fire and Tornado Fund or with another insurance carrier.

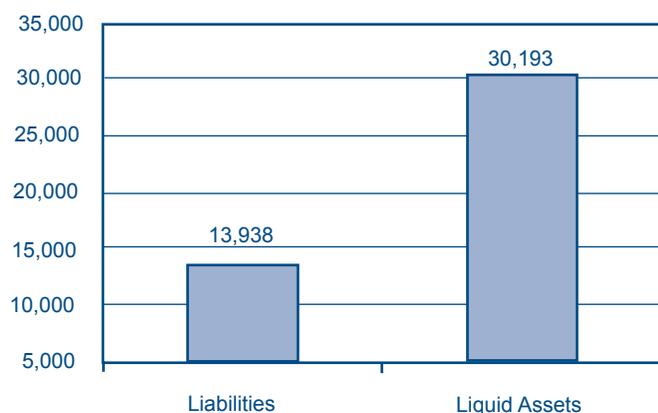
Coverage D - Limited personal property: This option is provided to pick up three situations where coverage for contents is excluded by the North Dakota Fire and Tornado Fund. These exclusions are:

- a. Personal property primarily stored in or on a vehicle;
- b. Emergency management equipment while off premises; and
- c. Personal property off your premises more than seven (7) days.

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FINANCIAL INSIGHTS

**Liabilities to Liquid Assets Ratio (000 omitted)
As of June 30, 2009
Ratio= 46%**



This ratio is a measure of a company's ability to pay its financial obligations. The ratio is calculated by dividing liabilities (primarily loss reserves) by liquid assets (cash and marketable investments). A ratio less than 105% is desirable. As this graph indicates, NDIRF, with a 46% ratio, is in a very strong position, with liquid assets more than twice as large as liabilities. ■

FROM THE CEO

Well, it's August and once again summer is jumping to its conclusion faster than a political pundit and certainly more quickly than most of us would like – I say “most” because I actually prefer autumn but realize that is a minority view.

In addition to the cooler weather, another reason I enjoy the fall is that it's a time to renew acquaintances at the statewide association annual conferences. Over the years, I have gotten to know many of you through our mutual attendance at these events and look forward to seeing you again this year – and to meeting those who may be making the trip your first time. The conferences are an excellent means by which to stay current on the issues faced by local officials and discuss solutions to common problems.

As you have heard from me and others at NDIRF many times, appropriate training is a very important factor in keeping our liability costs under control. A fundamental gateway to providing that training is the exposure elected decision-makers receive to these opportunities at the state conferences. I hope to see you there! ■

RISK SERVICES

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In addition, we have available coverage for two classes of coverage for personal property you do not own, lease, or rent.

Coverage F - Personal property of officials, employees or volunteers: This covers such personal property that is required by you to be used as a part of an individual's duties for your entity.

Coverage G - Personal property of others in your care, custody or control: This would cover property you borrow, are provided gratis to use, or items that have been confiscated or impounded.

Lastly, we have available:

Coverage E - That allows covered property to be scheduled. This option is likely still the best coverage choice for many of our members.

If one or more of these blanket coverage options are desired, we request that all changes be made on your Public Assets Memorandum of Coverage renewal date. If a blanket coverage option is desired at renewal, all we will need is the limit of coverage total for each blanket coverage option desired. Remember, an 80% coinsurance applies.

The information provided here is a synopsis of the Public Assets Mobile Equipment and Personal Property Coverage Forms. For coverage form details, it can be accessed at www.ndirf.com under Risk Services, Sample Forms, Mobile Equipment and Personal Property Coverage Form PA 10 06 06 2009.

If there are questions on this information, please contact Brenda Flesness brenda.flesness@ndirf.com or Ross Warner ross.warner@ndirf.com by email or call our office. Local 224-1988, WATS 1-800-421-1988, Fax 1-701-224-0609. ■

Mark Your CALENDAR

Sept

17: NDIRF Board of Directors Meeting
NDIRF offices, Bismarck

22-24: ND Recreation and Parks Assoc.
Annual Conference,
Holiday Inn, Minot

24-26: ND League of Cities
Annual Conference,
Grand International Inn, Minot

Oct

11-13: ND Association of Counties
Annual Conference & Expo
Ramkota Inn, Bismarck

30-31: ND School Board Association
Annual Convention,
Ramkota Inn, Bismarck

North Dakota Insurance Reserve Fund Board of Directors

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