

Delivery Driver Loses Harassment Claim for Failing to Follow Complaint Procedure

2 min read

Mar 2, 2015

It's important for employees to follow company policy, but it's even more important for employers to have those policies in the first place. In this case, the Fifth Circuit dealt a harsh blow to an employee who complained, but complained to the wrong people.

In *Blanton v. Newton Associates, Inc.*, No. 14-50087 (5th Cir. February 10, 2015), the plaintiff was a black pizza delivery driver who claimed that his general manager, who was a Hispanic female, subjected him to repeated harassment based on his gender and race. He complained to others at his restaurant, but claims that he was subjected to retaliation in that his hours were then cut. Not surprisingly, he filed a lawsuit against the manager and the employer, claiming harassment and retaliation. The employer claimed it was not retaliation because it actually had a legitimate business reason for reducing his hours, and that was that his driving record had been compromised, and he needed a clear driving record in order to be a delivery driver. The employer also argued the *Faragher/Ellerth* defense, claiming that it had policies and procedures in place whereby an employee could complain about harassment and that the Company would take preventative and corrective measures, but that the employee failed to avail himself of those processes.

The case actually proceeded to a jury, which found in favor of the employer on its defenses, and in favor of the driver with respect to his claims against the individual manager. The driver filed a motion for judgment as a matter of law and for a new trial, which the lower court denied.

The Fifth Circuit, however, did not agree with the driver. The Court recognized that the jury had concluded that the driver was subjected to harassment by his manager, the evidence did establish that the employer had anti-discrimination policies in place, and that the driver only alerted low-level supervisors about the harassment, even though the policy required that he complain to the manager's supervisor. Once he did actually complain to someone with authority, an investigation was undertaken and the manager was terminated. Had the driver followed the policy and complained to the correct individuals initially, the employer could have taken steps to prevent and correct the alleged harassment.

The Court did note, however, that just because an employer has an anti-sexual harassment policy does not, in and of itself, absolve an employer of liability. Here, however, the employer had a policy which also contained clear, straightforward complaint procedures, contained in the employee handbook. The employer was also able to prove that once it had knowledge of the complaint, it took prompt action and was able to effectuate an appropriate response to the specific complaint. The Court, therefore, found that **the employee did not meet his high burden to show that no reasonable jury could have found that the employer exercised reasonable care to prevent and correct harassment** and that he unreasonably failed to take advantage of the company's corrective measures.

Without the necessary complaint procedures outlined in its employee handbook and the prompt, effective attention to the complaint once articulated, the employer likely would not have prevailed in this case. This case, therefore, serves as an important reminder to employers to ensure that such policies exist and that the employer outlines the appropriate complaint procedures so that employees know what to do and where to go when making such complaints. Employers must also do more than just have the policies, but must also ensure they are implemented and enforced.

If you have questions about your own policies, please contact Hinshaw's San Francisco office.

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