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TRACKING DEVELOPMENTS IN EMPLOYMENT LAW

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A Harassment Policy Itself Is Meaningless Without Enforcement

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Establishing a reasonable enforcement policy, conducting employee meetings to respond to plaintiffs' complaints, but failing to enforce the policy in the face of persistent harassment is insufficient to establish a defense to a harassment claim.

In *Bailey v USF Holland Inc*, #07-5304, the African-American plaintiffs made numerous complaints over several years concerning co-workers referring to them as "boy," "hey, boy," "dammit, boy" and being subjected to racially offensive graffiti and cartoons. They filed suit under Title VII and the trial court concluded that as African Americans, the plaintiffs were part of a protected class and were subjected to unwelcome harassment based on their race. Consequently, the first three elements of their cause of action were met. The fourth element required that they show that the harassment affected them or a condition of their employment. Although the defendant correctly argued that "merely offensive" conduct does not establish harassment, the trial court correctly concluded that the plaintiffs' reported complaints over almost six years established that they suffered harm from their co-workers' persistent abuse.

The final element of plaintiffs' claim required that they establish that the defendant knew or should have known about the harassment and failed to take action. The trial court found that it was beyond question that the defendant knew or should have known about the harassing conduct. The defendant, however, argued that it took reasonable, prompt and appropriate corrective action. As examples of its corrective action, the defendant noted it consistently had a reasonable harassment policy, conducted employee meetings to respond to plaintiffs' complaints, and disciplined employees responsible for

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Employers cannot rely on the fact that appropriate policies and guidelines have been established prohibiting harassment, even when coupled with employee training. A failure to consistently enforce those policies and guidelines will not be viewed as reasonable corrective action. Each offense must, therefore, be evaluated as to the specific incident and evaluated in terms of consistent enforcement of the company harassment policy. Action may have to be taken for even minor infractions to establish consistency in the enforcement of the policy.

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graffiti. The Court of Appeals, however, held that the trial court correctly rejected these actions as insufficient, stating that, “a harassment policy itself means nothing without enforcement.” The persistent harassment of plaintiffs over an extended period of time caused the district court to conclude that the policy was not consistently enforced. Although the defendant conducted employee meetings, plaintiffs’ co-workers stated that they did not consider the use of “boy” to be offensive and insisted that they would continue to use it. The author of the graffiti was discharged but was reinstated soon thereafter, and the defendant was unable to stop the graffiti until it installed security cameras after the lawsuit was filed.

Those actions did not constitute reasonable, prompt and appropriate corrective action.

The Court of Appeals affirmed the trial court’s judgment of \$350,000.00 for each of the plaintiffs and remanded the case to the trial court to address plaintiffs’ request for attorney fees.

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