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Combatting Hostile Environments: Risks of “Workplace Civility” Policies

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COMBATting HOSTILE ENVIRONMENTS: RISKS OF “WORKPLACE CIVILITY” POLICIES¹

Current Environment

Over 50 years ago, Robert F. Kennedy gave a speech in which he said that there is a Chinese curse which translates to “may he live in interesting times.”

As we can all attest to, employment lawyers and Human Resource professionals are among those who are cursed to live in truly interesting times. We stand at the convergence of the #metoo movement and a presidential administration that decries and defies political correctness. The country is as divided as at any time in modern history and the deep, passionate views of the citizenry often find their way into the workplace.

Until there is some person or event that reunites the country, employers will have to grapple with the issues that this divide brings into the workplace. To maintain productivity, avoid attrition, and to avoid potential liability, employers must take steps to ensure that the workplace is not a hostile work environment.

Policies Against Hostile Work Environments

Virtually every employer maintains a policy against sexual and other forms of harassment. More than 20 years ago, the United States Supreme Court laid out the rules for employer liability for sexual harassment and created an affirmative defense for employers who acted reasonably to prevent and remedy sexual harassment in the companion cases of *Faragher v. City of Boca Raton*, 524 U.S. 775 (1998) and *Burlington Industries, Inc. v. Ellerth*, 24 U.S. 742 (1998).

To establish the defense, an employer must show: (1) that the employer exercised reasonable care to prevent and promptly correct the harassing behavior; and (2) the plaintiff-employee

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unreasonably failed to take advantage of preventative or corrective measures established by the employer or to otherwise avoid harm. An employer can satisfy the first prong of the *Faragher/Ellerth* defense by implementing suitable institutional policies and educational programs regarding sexual harassment. *E.E.O.C. v. Boh Bros. Const. Co.*, 731 F.3d 444, 462-63 (5th Cir. 2013).

Minimum Requirements of a Policy Against Harassment

What is a suitable policy regarding sexual harassment?

Some jurisdictions have mandated certain minimum requirements for anti-harassment policies. The state of New York, for example, recently overhauled its sexual harassment law and identified minimum requirements for a policy, specifically dictating that the policy must:

1. prohibit sexual harassment consistent with guidance issued by the Department of Labor in consultation with the Division of Human Rights;
2. provide examples of prohibited conduct that would constitute unlawful sexual harassment;
3. include information concerning the federal and state statutory provisions concerning sexual harassment, remedies available to victims of sexual harassment, and a statement that there may be applicable local laws;
4. include a complaint form;
5. include a procedure for the timely and confidential investigation of complaints that ensures due process for all parties;
6. inform employees of their rights of redress and all available forums for adjudicating sexual harassment complaints administratively and judicially;
7. clearly state that sexual harassment is considered a form of employee misconduct and that sanctions will be enforced against individuals engaging in sexual harassment and against supervisory and managerial personnel who knowingly allow such behavior to continue; and

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