# Employer's "Reasonable Steps" No Longer Enough in Restaurant Sexual Harassment Case

*Legal Alert*

March 12, 2010

A recent federal court decision highlights the dangers posed to companies, especially restaurant businesses, when supervisors sexually harass their employees. In EEOC v. SDI Athens East LLC d/b/a Sonic, (M.D. Ga., No. 3:08-CV-53, 2/17/10) the court refused to dismiss sexual harassment and constructive discharge claims against a management company and an operating company that ran a Sonic fast food restaurant, despite numerous protective measures implemented by the defendants to sexual harassment claims.

The alleged victim was an 18 year old female who worked as a waitress and carhop, and the alleged harasser was the male general manager of the restaurant. The plaintiff resigned after four months on the job, allegedly because of a hostile work environment. The offensive behavior cited by the plaintiff included inappropriate hugging, slapping her on the buttocks, name-calling, asking her if she was having sex with her boyfriend and, on one occasion, picking her up and threatening to put her in the trash can.

Initially, the court rejected defendants' arguments that the offending behavior was (1) "mere horseplay" unrelated to the plaintiff's gender and (2) not pervasive enough to constitute a hostile work environment. The court found, instead, that the supervisor's behavior was motivated by the plaintiff's sex and exceeded the bounds of appropriate behavior in the workplace. In this regard, the judge found it significant there was no evidence of any similar treatment aimed at any of the male employees. The judge also found that the behavior was physically intimidating in a sexually charged manner and that the supervisor continued with that behavior despite his awareness that the plaintiff found it offensive to her.

The court also rejected the affirmative defense that defendants had taken reasonable care to prevent and then correct the workplace harassment, and that the plaintiff had unreasonably failed to avail herself of the company's reporting and corrective measures. Normally, if an employer has taken reasonable steps to prevent workplace harassment and has created reasonable processes to report harassment and correct it immediately when it is found to have occurred, it will not be held liable for sexual harassment inflicted by its employees. Such measures may include, for example, training sessions about sexual harassment for employees and supervisors; an employee handbook that declares that sexual harassment will not be tolerated and describes the procedures for reporting it; and posting the company's sexual harassment policy and reporting procedures in a prominent place, such as the employee locker or dining room.

In this case, the court acknowledged that the employer had established an adequate written anti-harassment policy with complaint procedures and had published those policies and procedures in an employee handbook and a poster displayed prominently in the workplace. In fact, the plaintiff had signed a statement acknowledging her receipt of the handbook. Nonetheless, the court refused to dismiss the complaint, primarily because the plaintiff swore that (1) she had never seen the poster on the wall and (2), contrary to the document she had signed, she had never actually received a copy of the employee

handbook. As a result, the judge concluded that there were disputed issues of fact about whether the employer had taken sufficient steps to promulgate its anti-harassment policy. The judge also noted that neither the plaintiff nor the offending supervisor had received sexual harassment training at the company before the alleged incidents.

Finally, the judge also expressed concern that the employer had not taken any corrective measures before the plaintiff resigned. The employer argued that it did not take and could not have taken any corrective measures because the alleged incidents had never been properly reported to it. Although the plaintiff testified that she had reported the harassing behavior to an assistant manager, the assistant manager disputed that testimony, and there was no written record of any such report. The judge concluded that there were disputed factual issues about whether the company had responded appropriately, which precluded summary judgment.

**PRACTICE POINTERS:**

**1. The Problem**: The restaurant in this case had gone to the expense and trouble of drafting an anti-harassment policy and publishing it in an employee handbook and elsewhere, but it was unable to prove beyond dispute that this particular employee had been made aware of it.

**Possible Solutions**:

1. Create an employee handbook and include in it an effective anti-harassment policy and procedures. Require every employee to sign a receipt acknowledging actual receipt of a copy of the handbook and have a non-supervisor witness that signature.

2. As a part of each new employee's orientation, explain the company's anti-harassment policy, physically show the employee the handbook and wall poster that describe the policy and then have the new employee and the witness each sign an acknowledgement that verifies that these events occurred.

**2. The Problem:** The plaintiff claimed that she reported the harassment to a manager, but the company took no corrective measures.

**The Solution:** Include in your anti-harassment policy a requirement that complaints be put in writing by the complaining employee to a supervisor and by any supervisor who receives any oral complaint of harassment, so that there is at least one written record of it. Train supervisory employees who receive unwritten reports of harassing behavior to document it and report it to management.

**3. The Problem:** The restaurant employer apparently did not conduct sexual harassment training programs until after this complaint was filed.

**The Solution:** An ounce of prevention is worth a pound of cure. Plan and implement an effective sexual harassment training program now, before a claim has been made. Include supervisors and supervisees in the training program.

Flaster Greenberg's Labor and Employment Group lawyers are skilled at helping employers draft effective employee handbooks, including anti-harassment policies to defeat claims like the ones involved in this case. We can also help clients with strategies for disseminating those policies and developing effective sexual harassment training programs.

For more information or for questions concerning these issues, please contact Phil Kirchner, chair of the Restaurant Industry Group, or any member of the Labor and Employment Department.

## ATTORNEYS MENTIONED

J. Philip Kirchner