



**NEW MILWAUKEE CASE SIGNALS URGENT NEED TO
REVIEW HARRASMENT COMPLAINT PROCEDURES**

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Most companies have adopted written anti-harassment policies and procedures to allow employees to bring complaints of harassment to the attention of management. These policies and procedures are essential requirements of programs designed to limit an employer's exposure to claims of sexual and other forms of harassment. However, it appears that some employers have failed to examine their policies to see if they truly satisfy the requirements for such policies, and have failed to adequately test their policies to see if they actually work. A new decision issued by our Seventh Circuit court of appeals sends a strong message that existing harassment complaint procedures must be reviewed and updated to ensure that the procedures are clear and understandable by the workforce, with due regard to their age, education, sophistication and language abilities. A harassment complaint policy which fails to meet these criteria will expose the company to heightened legal liability.

The case involved a Burger King restaurant, located in Milwaukee. The restaurant employed, as many fast food restaurants do, a number of part-time high school students under the age of 18. One of those part-time student employees found herself continuously harassed by a 35 year old manager. She complained of the harassment to various employees at the restaurant and to the manager, but received no relief. Ultimately her mother came to the store and complained to one of the managers. Shortly after that complaint, the part time employee was fired.

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The EEOC, on behalf of the employee, sued the restaurant for sexual harassment and retaliation. The trial court dismissed the claims, explaining that the employee had failed to follow the written procedures of the restaurant's sexual harassment complaint procedure, and dismissed the retaliation claim because the complaint leading to the termination had been made by her mother, not by the student. The Seventh Circuit court of appeals, in a strongly worded decision, reversed the trial court and reinstated the employee's claims. EEOC v. V & J Foods, Inc. et al., No. 05-C-194 (Decided 11/7/07).

The Court proclaimed that the restaurant's harassment policy was confusing and outdated. It referred to a "district manager" as the person to whom complaints should be raised, but there was no such person located in the restaurant. Most of the employees believed that the "district manager" was the same as the store manager, who in this case was the alleged harasser. There was no alternate person identified to bring complaints to. The policy indicated that if the store manager was the subject of the complaints, he was to "turn himself in" to the corporate headquarters (which of course he did not do in this case). There was a phone number listed on the cover of the employee handbook for the corporate headquarters, but that number led to a recorded message or to a receptionist, not to the Human Resources office.

Significantly, the Court stated that an employer's written complaint mechanism must be "reasonable" and what is "reasonable" depends on the employment circumstances. This includes the age of the workforce, the education of the workforce, the sophistication of the workforce and the language they speak. The Court expressly warned that if a class of employees cannot speak English, than a policy that is provided only in English would be unreasonable. In the present case, the restaurant knew that it would be hiring minors yet its harassment procedures were confusing even to an adult. The Court detailed many different

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provisions that the company could have included to simplify the process, to provide alternative avenues to raise complaints, and to involve the Human Resources department at an early stage. Its failure to take these easy steps precluded its ability to rely on its policy to avoid the harassment claims, exposing the company to significant monetary exposure. (The Court also held that the employee's retaliation claim was also a valid claim, even if the complaint had been raised by the mother, since the mother was the legal guardian of the child.)

As a result of the V & J case, all employers should review their harassment and complaint policies and the composition of their workforce to ensure that the policies can be understood by their employees. The EEOC has issued an Enforcement Guidance (6/18/99) to assist employers in understanding what information needs to be included in an effective harassment and complaint policy. These include:

- A clear explanation of the prohibited conduct
- Protections from retaliation
- A clear complaint process with “accessible avenues of complaint”
- Assurance that confidentiality will be protected to the extent possible
- A prompt, thorough and impartial investigation, and
- Assurance that immediate and appropriate corrective action will be taken if harassment is found to have occurred.

A copy of the Enforcement Guidance can be obtained at www.eeoc.gov and a copy of the V & J case can be obtained from the author at grobe@lcojlaw.com .