CAI'S JOURNAL OF COMMUNITY ASSOCIATION LAW

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CONTENTS

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The Cutting Edge

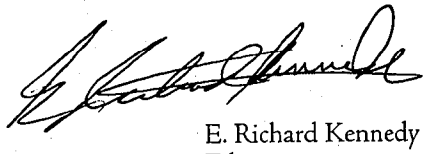
THIS ISSUE OF THE *JOURNAL OF COMMUNITY ASSOCIATION LAW* IS unique because it looks at three areas of the law that aren't often seen in the context of community associations. They are, however, on the cutting edge of the law, and professionals in community associations should be familiar with them and make their clients aware of them as well.

First, Wayne Positan and Christina Silva Lee present a fascinating view of how the interaction of community association members, residents, employees, and independent service providers can create the need for associations, as well as management firms, to have an anti-harassment policy. In "The Value of an Effective Anti-Harassment Policy," they explain that although anti-harassment protections are generally applied to "the workplace," they have application in the community association as well.

Second, Lisa Harrinanan looks at the community association name and its identity as a valuable common asset of the association that boards have an obligation to protect. In her article, "Protecting the Good Name of the Association," Ms. Harananan examines problems such as public confusion of a realty company with a community association or commercial enterprises associated with the association incorporating the association name into their own. She offers detailed and valuable information on trademark protection.

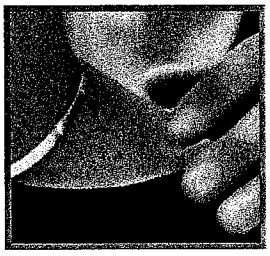
And, third, Candyce D. Cavanagh outlines some interesting comparisons between corporate American and community associations by observing that each manages significant assets and reports to owners concerning financial conditions. In her article, "Enron Issues and the Homeowners Association," she outlines how spoliation of evidence affects homeowners associations. More importantly, she presents practical tips for advising homeowner association clients about document retention policies—the cornerstone of the spoliation issue.

We also have two case notes in this issue. Gary Poliakoff discusses *Woodside Village Condominium Association, Inc. v. Jahren* and the importance of that decision, and Lauren Holmes and Thomas Hindman examine how *Toyota Motor Manufacturing, Kentucky, Inc. v. Williams*—an ADA case—parallels the Fair Housing Amendments Act.



E. Richard Kennedy
Editor

By Wayne J. Positan, Esq. and Christina Silva Lee, Esq.



The Value of an Effective Anti-Harassment Policy

The concept of developing an anti-harassment policy is not a new one. As the law under Title VII of the Civil Rights Act[1] developed, employers were first encouraged by the Equal Employment Opportunity Commission (EEOC) to promulgate anti-discrimination policies. This was followed first by the promulgation of anti sexual harassment policies as hostile work environment claims were held actionable, then broadened to include harassment based on other protected characteristics such as age, race, disability, etc. Two cases decided in 1998 by the Supreme Court of the United States, *Faragher v. City of Boca Raton*,[2] and *Burlington Industries v. Ellerth*,[3] emphasized the need for effective anti-harassment policies in the workplace. In essence, the Supreme Court, while discussing circumstances under which an employer can be found liable for sexual harassment, indicated that the employer may be able to raise an affirmative defense from liability based on the existence and compliance with an effective anti-harassment policy.

In *Ellerth*, a female employee alleged that her supervisor had told her that her job status was conditioned upon her responding to his sexual advances. Although she claimed that she was constructively discharged because of her supervisor's conduct, she acknowledged that her supervisor never actually carried out any of his threats. The Supreme Court held that unfulfilled threats of this nature could not constitute *quid pro quo* harassment, but if sufficiently severe or pervasive, could form the basis for a hostile work environment sexual harassment claim. Nevertheless, the Court went on to address the circumstances under which an employer is liable for *quid pro quo* harassment of its supervisor. The Court, applying agency principles, concluded that an employer is liable if a supervisor sexually harasses an employee and, in conjunction therewith, the employee suffers a "tangible employment action" such as termination, failing to promote, disciplinary action, etc.[4]

In Ellerth, a female employee alleged that her supervisor had told her that her job status was conditioned upon her responding to his sexual advances.

Simultaneously, in the *Faragher* decision, the Supreme Court addressed the appropriate standard for employer liability for a hostile work environment sexual harassment claim (as distinguished from a *quid pro quo* situation.). In *Faragher*, the employer claimed not to have knowledge of a female lifeguard's allegations that her immediate supervisor had engaged

in offensive touching and made lewd remarks. The employer claimed that it had not known and should not have been expected to know about the sexual harassment allegations, and thus, was not liable based upon the supervisor's conduct. The Court held that an employee may state his or her *prima facie* case of employer liability by demonstrating that a hostile work environment was "created by a supervisor with immediate (or successively higher) authority over the employee."[5] It then held that if no tangible action was taken against the employee, the employer can avoid liability by way of an affirmative defense, which it described as follows, "(a) the employer exercised reasonable care to prevent and correct promptly any sexually harassing behavior; and (b) that the plaintiff employee unreasonable failed to take advantage of any preventive or corrective opportunities provided by the employer or to avoid harm otherwise."[6]

In sum, these decisions set forth the following standards: (1) in a *quid pro quo* scenario, the employer is automatically vicariously liable if an employee demonstrates that one of the employer's supervisors has taken a tangible employment action against the employee in connection with the supervisor's sexual advances; (2) an employee can establish presumptive employer liability by demonstrating that the immediate supervisor or someone with higher authority over the employee abused his or her authority by creating a hostile work environment; (3) an employer can raise a defense to liability by demonstrating that it had an effective anti-harassment policy in place and took care to prevent and correct any such behavior, and that the employee failed to take advantage of the employer's preventive or corrective opportunities.

It should be further noted that most states have their own anti-discrimination laws that often supplement federal law in this area, and have enunciated similar statements of the law in this regard. For example, the New Jersey Supreme Court issued a similar set of pronouncements in the landmark case of *Lehmann v. Toys 'R' Us.*[7] Courts have also expanded hostile work environment causes of action beyond sexual harassment into areas of disability discrimination,[8] race discrimination,[9] and other protected characteristic areas.

THE PURPOSE OF AN ANTI-HARASSMENT POLICY

It should be emphasized that an employer is *not* automatically liable for *not* having an anti-harassment policy in place. However, the absence of such a policy takes away the opportunity of asserting a potentially important defense as stated in *Faragher* and *Ellerth*. Further, if an employer has an effective policy that it communicates to its management and employees, complete with training, documentation, fair investigation, and taking corrective action where appropriate, it is in a much better position to, in fact, avoid a work environment that is hostile, or perceived as such, and is in a greatly enhanced position of avoiding claims and lawsuits in the first place. An enlightened employer who takes these steps makes the workplace a better place to work, and strengthens morale among its employees. As an added incentive for the cynical, having an anti-harassment policy provides the employer with a much better chance of avoiding claims and lawsuits, and thus, avoiding the tremendous toll on lost productivity, legal expenses, and disruption of the workforce which arise as consequences of such claims. Furthermore, an employer who guards against harassment and discrimination in the workplace with an effective policy has a greater chance of avoiding potential ultimate liability that can include large compensatory and punitive damage awards and paying the legal fees, which are sometimes enhanced on application to the court, and expenses of the plaintiff(s). The employee of today expects a workforce free of unlawful harassment, and an anti-harassment policy goes far to demonstrate that the employer shares the same goal.

THE IMPORTANCE OF COMMUNICATING AND TRAINING IN AN EFFECTIVE ANTI-HARASSMENT POLICY

A policy can only be effective if the entity makes it clear, from top leadership on down, that it is serious about its policy, will stand behind its policy, and that it will be effectively communicated to all individuals in the workplace, including customers, owners, vendors, and co-employees. In order to do so, all employees must be made aware of the anti-harassment policy upon being hired, and must be reminded of it through regular communication or posting. Simply stated, the employees must be made aware of what the policy provides, what rights they have to be free of harassment and discrimination in the workplace, and what the employer's complaint procedures are. Any deviation from these precepts may prejudice any attempt at relying upon the policy as a defense.

It is important to note that in addition to being responsible for any harassing or discriminatory conduct

by supervisory employees, an employer also bears responsibility for the acts of non-employees who frequent the workplace where the employer knows of the offensive conduct and fails to take corrective action.[10] By way of example, in the case of *Kudatzky v. Galbreath Co.*,[11] the plaintiff, a manager and leasing agent, claimed that while she was employed as an on-site manager of an office building owned by the defendant, she was subjected to degrading and sexual remarks and advances by the vice president of a corporate client. The court held that potential employer liability existed where the plaintiff claimed the building's management employees allegedly witnessed some of the remarks and were otherwise aware of the harassing conduct.

Extending liability to the employer for the conduct of third parties in the workplace is an aspect of the law that may be overlooked if not for an effective policy that trains employees about their rights to be protected from such third-party conduct, and also trains employers about their obligation to take corrective action to remedy such conduct. In any circumstance where employees have occasion to interact with third parties who come in contact with the employer's business, it is necessary for employees to be aware of their right to complain of the conduct even where the alleged harasser is not an employee of the business. Further, the employer is required to address any harassing conduct of which it has knowledge, irrespective of the source of the conduct, provided the conduct occurred within the workplace. Such an obligation would likely extend to members of a condominium association where harassing conduct relating to a protected characteristic was alleged against an employee, manager, or officer of the association. While the EEOC regulations and case law there under relating to employer liability for third party conduct has not addressed this issue as to condominium members and liability in such a scenario, arguably such rights against third parties and employer obligations in that regard could be imputed.

In addition to informing management employees of their obligations to address and promptly remedy harassing or discriminating conduct in the workplace, an effective anti-harassment policy emphasizes the employee's obligation to take preventative and corrective action as well—namely, making a complaint in a timely fashion and adhering to the employer's complaint procedures. When an employer has properly and thoroughly informed its employees of their rights under an anti-harassment policy, any employee who seeks recourse for alleged offensive behavior will be held to the requirements of proactively reporting conduct under the terms of the policy. The reporting of conduct in a timely and thorough fashion is a seminal component of the anti-harassment complaint process regarding which employees should be trained. If an employee fails to report allegedly harassing conduct in a timely manner, then the employer may assert the terms of the complaint procedure and contend that it was the employee, in fact, who failed to take advantage of the remedial measures provided by the employer under the policy. This argument will bolster the position of the employer that it is privy to the affirmative defense of an effective anti-harassment policy not appropriately utilized by the complaining employee.

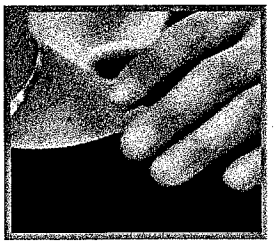
Such was the case in *Caridad v. Metro-North Commuter Railroad*,[12] where an employer who had an anti-harassment policy containing a complaint filing procedure attempted to investigate the complaint, notwithstanding the plaintiff's refusal to provide specific details about the harassment or to otherwise cooperate in the investigation. The court therein determined that while the plaintiff had failed to utilize the preventative and corrective measures provided by the employer's anti-harassment policy, the employer was entitled to assert an affirmative defense to liability in light of its compliance with the complaint and investigation procedure contained in its anti-harassment policy.

In addition to having an effective policy, the employer is under an obligation to provide training as to the terms of the policy to all of its employees at all levels of management and staff.

In addition to having an effective policy, the employer is under an obligation to provide training as to the terms of the policy to all of its employees at all levels of management and staff. Where an employer has an effective anti-harassment policy, and further conducts regular training sessions on harassment and the protections of the policy, the conclusion that an employer took reasonable care to prevent harassment is supported.

In *Shaw v. AutoZone, Inc.*,[13] the evidence demonstrated that the plaintiff, who had alleged sexual harassment, had received a copy of her employer's anti-harassment policy which provided for several

methods of lodging complaints.[14] Despite having an effective anti-harassment policy available with recitation of complaint procedures upon which training sessions were conducted, the plaintiff never complained of any harassing conduct. In these circumstances the court found the employer could avail itself of the affirmative defense.



The importance of an anti-harassment policy that speaks not only to employee rights, but also employee obligations, i.e., prompt reporting of complaint is perpetuated by policy language that is effectual. In other words, the policy may not just be promulgated; training must accompany the implementation of an effective anti-harassment policy. Training involves teaching workers, supervisors, and managers how to recognize harassment, and informs the employees of the grievance process available to them under the policy. To this end, periodic publication of the anti-harassment policy, and the information to employees about how to engage in the grievance process, is emphasized so the employer may benefit from the affirmative defense.[15] Moreover, employees should be provided with, and notified of, a complaint mechanism that allows the employee to have the option of complaining to their supervisor or any other company management representative so as to create the "open door" approach essential to an employee-friendly policy.[16]

New Jersey's Supreme Court recently highlighted the importance of implementing an anti-harassment policy that is actually effective in practice. In *Gaines v. Bellino*,[17] the court determined that it was the absence of evidence of the effectiveness of an anti-harassment policy that warranted sustaining plaintiff's claim. In that case, the court observed that it was questionable whether training with respect to the policy was conducted, and further noted that immediately after incidents of harassment took place, higher level officers reacted in such a way that failed to demonstrate support or compliance with an anti-harassment policy.[18] Citing *Lehmann v. Toys 'R' Us, Inc.*,[19] the court in *Gaines* noted that an employer's anti-harassment policy "must be more than the mere words encapsulated in the policy; rather, the [New Jersey Law Against Discrimination LAD)] requires an 'unequivocal commitment from the top that [the employer's opposition to sexual harassment] is not just words, but backed up by consistent practice.'"[20]

It is evident that the crux of consideration lies not just with implementing an anti-harassment policy but ensuring that it is effectual in practice.[21] Such an approach perpetuates the goal of eradicating harassment and discrimination in the workplace and provides a firm foundation for the policy itself.[22]

CONDUCTING AN EFFECTIVE INVESTIGATION WHEN A CLAIM IS MADE

Once an employer has received a complaint of harassing or discriminating conduct from an employee, the employer must act immediately to provide a remedial response to the complaint. In addition to a report from an employee about offensive conduct, an investigation may also be triggered by a formal complaint of lawsuit or even suspicion of misconduct where such an assessment is made in good faith. There are various guidelines for an effective investigation, the first key of which is to commence the investigation promptly. It is in the employer's best interest to establish an investigative schedule with an urgent deadline and to make the investigation a matter of utmost priority. Commencing an immediate investigation in the face of an employee complaint is a critical component to making an anti-harassment policy effective.

Once it is determined that an investigation is warranted, an investigator must be selected with consideration given to the credibility associated with the identity of the investigator. The most important prerequisite in selecting an investigator is to ensure the investigator maintains a position of impartiality at all times and develops a logical and coherent investigation strategy. The investigation process itself consists of the determination of any and all allegations through interview(s) with the complainant, and the identification of, and interviews with, any witnesses to alleged conduct as identified by the parties. Importantly, an interview must also be conducted with the person accused of engaging in the harassing conduct, as in any situation where it is of critical significance to obtain both sides of a story.

In addition to interviewing witnesses, it is necessary to determine whether any documents relate to the allegations or defense in question. For example, the performance evaluations of an employee who claims to have been harassed a short period of time after receiving a negative evaluation may be of probative value with respect to a defense raised by the employer.

All interviews conducted are essentially subject to conditional confidentiality. Employees cannot be guaranteed confidentiality with respect to the substance of their investigative interview where it is necessary to

fully explore the allegations with the complainant, the accused, and any potential witnesses. Employees should be assured that the substance of the allegations and the positions of the accused and the witnesses with respect thereto, are restricted from disclosure on a "need to know" basis, yet be further informed that confidentiality will be maintained to the best extent possible. All individuals interviewed during the course of the investigation must also be advised that they are protected from retaliation of any kind for either complaining about offensive conduct, or for cooperating in the investigation.

Once all necessary information is obtained, the investigator prepares a report of findings to be provided to management. Such a report provides a summary of the complaint, a list of individuals interviewed, the documents reviewed (if any), the information obtained from each individual, along with the investigator's conclusion(s) as to whether the complainant's allegations are corroborated or otherwise supported. In any event, the complainant should be informed of the outcome of the investigation as promptly upon its completion as possible.

The issue of timeliness and effectiveness of an investigation is of particular import in light of the fact that investigative materials, documents, interview notes, and investigative report, are discoverable in litigation. In *Payton v. New Jersey Turnpike Authority*,[23] the plaintiff argued that the defendant had not conducted a timely investigation, and sought discovery of the investigative materials in order to determine the timeliness and effectiveness of the investigation. While the defendant attempted to block their disclosure on the basis of certain evidentiary privileges, the court concluded that where a claim exists as to an employer's response to a complaint, and an issue arises concerning the effectiveness of the employer's investigation, then the material relating to the employer's internal investigation are discoverable. For this reason, it is imperative that any investigation undertaken upon an employee's complaint be commenced as soon as possible after a complaint is raised, and that any such investigation be conducted in a prompt, thorough, and responsive fashion to raise the potential for assertion of defenses to a claim of harassment.

TAKING CORRECTIVE ACTION WHERE APPROPRIATE

The ultimate result of any investigation where allegations are corroborated is to effectively remedy conduct that has violated the policy and ensure that such conduct does not reoccur in the workplace. To this end, it follows that where it can be determined that an employee's harassment allegations are substantiated, that immediate disciplinary action be taken against the harasser. Consistency with respect to an employer's imparting of disciplinary action is important, as is the necessity for documenting the timing and nature of the disciplinary action taken. The complainant should also be promptly notified of the corrective action taken by the employer to address his or her complaint.

If, in fact, it is determined after the conclusion of an investigation that the allegations are not corroborated, or that findings are inconclusive, then the complainant should be promptly advised of the determination. Moreover, the employer should reiterate its policy against harassment and retaliation, and encourage the complainant to come forward if he or she needs to report any incident of harassment. If upon the end of the investigation it is then learned that the complainant raised false allegations, then the complainant employee should be met with disciplinary action accordingly. As with the other elements of an anti-harassment policy, pursuing false complaints and dealing with them in a direct and responsive manner, goes a long way toward protecting the integrity of an anti-harassment policy.

CONCLUSION

As an employer, if you do not yet have an anti-harassment policy, one should be implemented immediately. If you do have such a policy, it is critical that you make it clear that all levels of employees, from the top of the management hierarchy to all members of support staff, that the policy is one of critical importance and that it will be followed to the letter. Employees should be made aware of the anti-harassment policy from the first day of hire and reminded of its provisions regularly thereafter. It is imperative that you have the policy posted in a conspicuous location in the workplace and have it otherwise available for inspection and review.

As an employer, you are required to provide initial and updated regular anti-harassment training to your employees, that you update the training from time to time as the law evolves, that you encourage employees to come forward if they feel the anti-harassment policy has been violated, and that you ensure that when an employee complains of any harassing or discriminatory conduct that the policy will be followed and the complaint taken seriously. As an employer addressing an employee's harassment complaint you must further

ensure that you promptly conduct a neutral and effective investigation, giving fair consideration to the positions of those who are accused, and that where warranted you take effective corrective action and stand behind it. If you do these things, you will have taken important steps to foster a positive and constructive work environment, and will greatly increase your chances of avoiding claims and lawsuits in the first instance, or if they are lodged, you will greatly improve your chances in defending against them.

Of course, condominium associations, as employers, clearly should take the steps recommended above. Those efforts should be geared to the mixed aspects of the environment in which they function: the interaction of members, residents, employees, and independent service providers of one type or another. The policies will be generally applicable to association members, employees, and those who directly supervise or work with employees of the association. The benefits of having and enforcing such policies far outweigh the risks. While the responsibilities of defining and administering such a policy appear to be significant, they provide an excellent blueprint for dealing with these perplexing problems of avoiding conduct that runs afoul of the protections of the anti-discrimination laws. By doing so, a better work environment will result, and the association and its members will be in a much better posture to avoid, or minimize, serious potential liabilities.

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2. 524 U.S. 742 (1998).
3. 524 U.S. 775 (1998).
4. 524 U.S. at 753-754.
5. 524 U.S. at 807.
6. *Id.*
7. 132 N.J. 587 (1993).
8. *See, e.g., Enriquez v. West Jersey Health Systems*, 342 N.J. Super. 501, 777 A.2d 365. (App. Div. 2001) Termination of a handicapped employee, whose condition does not prevent the employee from doing her job, is actionable under the New Jersey Law Against Discrimination (LAD). Termination of an employee for a condition covered by the broad language of N.J.S.A. 10:5-5(q), which condition does not prevent the employee from doing her job, is actionable under the LAD. *Gimello v. Agency Rent-A-Car Sys., Inc.*, 250 N.J.Super. 338, 365, 594 A.2d 264 (App.Div.1991). However, nothing in the LAD is construed to prevent the termination of any person who in the opinion of the employer, reasonably arrived at, is unable to perform adequately the duties of employment. *See Svarnas v. AT&T Communications*, 326 N.J. Super. 59, 740 A.2d 662 (App. Div. 1999). *See also Wheeler v. Marathon Printing, Inc.*, 974 P.2d 207 (1998) where evidence that co-worker repeatedly referred to employee as mental, delusional and paranoid, knew that employee attempted suicide, continued to harass employee following his suicide attempt, and called employee a "crazy lunatic faggot" before employee was terminated, raised fact issue for jury as to whether co-worker, who created a hostile work environment under statute governing disability discrimination, was motivated by employee's disability.
9. E.g. *Taylor v. Metzger*, 152 N.J. 490 (1998) wherein the Supreme Court of New Jersey found that a single racial epithet could form the basis for a hostile work environment claim under the New Jersey Law Against Discrimination. *See also Bell v. Cuyahoga Community College*, 717 N.E.2d 1189 (Ohio App. 8 Dist. 1998), setting forth elements to establish a claim for hostile-work-environment racial or sexual harassment.
10. 29 C.F.R. § 1604.11(e).
11. 1997 WL 598586 (S.D.N.Y. 1997) .
12. 191 F.3d 283 (2d Cir. 1999), *cert. denied*, 120 S.Ct. 1959 (2000).
13. 180 F.3d 806 (7th Cir. 1999).
14. *Id.* at 811.
15. *Cavuoti v. New Jersey Transit Corporation*, 161 N.J. 107, 120-21, 735 A.2d 548 (1999).
16. *See Madray v. Publix Supermarkets, Inc.*, 208 F.3d 1290 (11th Cir. 2000), *cert. denied*, 531 U.S. 926 (2000).
17. 173 N.J. 301 (2002), *see also Dillard Department Stores, Inc. v. Gonzales*, 72 S.W.3d 398, 410 (Tex. App.-El Paso 2002), in determining whether an employer's action in response to a sexual harassment claim is sufficient. It necessarily depends on the particular facts of the case—the severity and persistence of the harassment, and the effectiveness of initial remedial steps. *Wal-Mart Stores v. Davis*, 979 S.W.2d 30, 37 (Tex. App.-Austin 1998, *pet. denied*). Even where the employer takes some remedial steps, it will still be liable if its actions were not reasonably calculated to stop the harassment. *Id.*
18. *Id.* at 10.
19. 132 N.J. 587 (1993).
20. *Gaines, supra*, at 319, citing *Lehmann, supra*, 132 N.J. at 621.
21. *See Brown v. Perry*, 184 F.3d 388 (4th Cir. 1999) (holding that an employer's policy must be both "reasonably designed and reasonably effectual"; the mere promulgation of a policy is not adequate in all situations).
22. *See e.g., Savino v. C.P. Hall Co.*, 199 F.3d 925 (7th Cir. 1999) (finding sufficient evidence for establishing an affirmative defense where the employer posted its sexual harassment policy; provided procedures for reporting harassment; promptly investigated the plaintiff's complaint and sought to remedy the situation by reprimanding and suspending the supervisor; and relocated the plaintiff to an area away from the harasser).
23. 148 N.J. 524, 691 A.2d 321 (1997).