

## **WHEN IS HARASSMENT AN ACTUAL COMPLAINT OF HARASSMENT FROM AN EMPLOYER'S PERSPECTIVE?**

While the holidays are upon us and I would like to write about something more timely, I feel the need to review a recent federal Seventh Circuit Court of Appeals determination on the issue of what an employee must do to notify the employer of harassment to invoke an obligation on the employer to investigate and remediate. This is the fundamental quandary that employers find themselves in these days working the mine fields of harassment claims.

In this case, *Bernier v. Morningstar, Inc.*, Bernier sued the company, Morningstar, under Title VII, claiming sexual harassment and retaliation. The claim included allegations that the company had not properly responded to his complaint of same sex harassment (remediation) and that it terminated him in retaliation for filing his discrimination complaint.

The Plaintiff, Bernier, had been employed with Morningstar since 1999. The alleged perpetrator in this case, Christopher Davis, was an openly gay co-worker of the Plaintiff's. Bernier alleged that sometime in January 2003, Davis started staring at him when they passed in the hallway, in a manner that suggested to Bernier that Davis was sexually interested in him. Bernier claimed this made him feel uncomfortable but admitted he never reported his alleged concern. In January 2004, Bernier claimed that Davis escalated his behavior and took "an overt, purposeful and glaring look" at Bernier while they were both standing at the urinals in the men's room. Not to be too crass, but it certainly does seem that a lot more is going on in the men's bathrooms these days, then in the women's bathroom!! With that said, we will return to our case. After the urinal incident, Bernier reported the incident to management.

In this factual scenario, the company did have an anti-harassment policy that included instructions on how to report allegations of harassment. The policy basically told a concerned employee to speak immediately with management or Human Resources and specifically stated that reporting an issue to a co-worker was not sufficient to put the company on notice of any problem. Instead of reporting the situation to management, Bernier decided to confront Davis on his own. Bernier sent an anonymous text message that commanded Davis to stop staring and that the guys on the floor didn't like it! We have all dealt with the perils of email versus face to face communication and this is further complicated by an anonymous text message.

When Davis received this message, he felt he was being harassed by someone at the company because of his sexual orientation. It is also important to note that Davis had a lazy eye to a medical condition that made it seem that he was looking off at something that he was not actually looking at. Davis followed company policy and filed a complaint with Human Resources. Human Resources investigated Davis' complaint and determined that the message came from Bernier's computer. When Bernier was confronted, he denied sending the text

message. Management fired Bernier. Only after Bernier's termination did he admit to sending the text message.

Bernier believed that after the company read the text message, that they should have realized it was a complaint of sexual harassment. Bernier argued that because management ignored his complaint of harassment contained within the text message, that they fired him in retaliation for objecting to workplace sexual harassment.

Ultimately the Seventh Circuit did find in favor of the company, but only after summary judgment was filed, which as some of you may know is a very costly process. The Seventh Circuit determined that the company was not put on proper notice of Bernier's claims of harassment that were contained in a policy that was received by Bernier. The Court determined that the employer could not be held accountable for claims it was not made aware of.

What would have happened if the company had not had a written policy that clearly defined reporting procedures for harassment complaints? This case could have gotten a lot murkier. But ultimately, Bernier did lie during the investigation which enabled the company to assert that as a basis for his termination, so long as this was clearly asserted at the time.

Any investigation needs to be fully evaluated. All text message and email content requires a thorough review. Make sure your employees and management are trained on how to report sexual harassment and how to deal with any such claims, no matter how ambiguous they might seem.

With that said, have a Happy Thanksgiving!!!