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Speedy response undermines suit claiming hostile work environment

Under federal law, the standard governing employer liability for a hostile work environment depends on whether the alleged harasser is a supervisor of the complaining employee or someone else, such as a co-worker, customer or other third party.

If the alleged harasser is a supervisor, the employer will be strictly liable if unlawful harassment occurred and there was an adverse employment action. However, if the alleged harasser is a co-worker, for example, the employer can avoid liability if it promptly and reasonably responds to the harassment.

The case of *Muhammad v. Caterpillar Inc.*, No. 12-1723 (7th Cir. Sept. 9, 2014), provides an example of an employer that avoided liability (and, in fact, prevailed at the summary judgment stage) for claims of sexual and racial harassment because it reasonably responded to the employee.

In 2006, plaintiff Warnether A. Muhammad, a black male, complained to his employer, Caterpillar Inc., that co-workers had made offensive comments to him (verbally and in writing) about his race and perceived sexual orientation. He cited the actions of three separate employees.

First, the plaintiff complained to the human resources department that a co-worker called him a racial slur. After the plaintiff's complaint, the co-worker in question made no further racial comments to the plaintiff.

Second, the plaintiff reported to his supervisor, Kipp Edwards, that another co-worker said he did not like the plaintiff's "black fat ass." After Edwards brought this complaint to human resources, the plaintiff experienced no further issues with this second co-worker.

Finally, a third co-worker allegedly told the plaintiff her grandchildren were black, that she did not like them or black people generally and that she wished her daughter had ended up with a white man. Once again, Edwards relayed the plaintiff's

complaint to human resources.

The next month, the same employee allegedly told the plaintiff that his "black butt should have stayed fired." The evidence showed that the plaintiff never reported this additional complaint to Caterpillar.

The plaintiff also was subjected to offensive comments written by unknown individuals in a company restroom close to his work station. The comments included: The plaintiff was a "fag"; he has AIDS; and he is a "black n-----" who "should be killed."

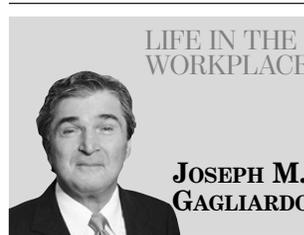
Each time Caterpillar learned about the offensive comments posted in the bathroom, it promptly contracted with a third-party vendor to paint over the graffiti. In addition, the plaintiff's supervisor raised the graffiti issue at a shift meeting.

After additional graffiti appeared, Edwards informed every employee who worked with Muhammad that anyone caught defacing the bathroom walls would be fired immediately. After that meeting, no additional graffiti or offensive comments appeared.

Six weeks later, in October 2006, Caterpillar suspended the plaintiff because he allegedly spent time looking at a job bid board while he was supposed to be working and was insubordinate to Edwards, who had confronted him while he was looking at the board.

After the plaintiff returned to work, he was suspended again and then fired. The settlement of the plaintiff's discharge grievance resulted in him returning to work in July 2008. He then was laid off due to a reduction in force in 2009, was rehired and is currently employed by Caterpillar.

The plaintiff filed charges of racial and sexual harassment and retaliation with the Equal Employment Opportunity Commission. After receiving a right-to-sue letter from the EEOC, he filed suit in federal court. In his complaint, the plaintiff alleged he was harassed based on his sex and race and that Caterpillar suspended him in 2006 because he had reported the offensive graffiti to his supervisor.



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The district court granted summary judgment for Caterpillar. The 7th U.S. Circuit Court of Appeals affirmed.

The first issue was whether the plaintiff's sexual harassment claim should have survived summary judgment because the alleged comments were based on the plaintiff's perceived sexual orientation, not his sex.

Muhammad argued that the alleged comments were based on his sex because "it is conceivable to believe that he was harassed because he was a male who did not, in the mind of the harassers, act like a male."

The court disagreed. First, the plaintiff raised his argument for the first time on appeal, which was improper. Second, his argument was supported by speculation, not the evidence that was needed to survive summary judgment.

The court held that notwithstanding the above, the plaintiff's sexual and racial harassment claims were properly dismissed because Caterpillar reasonably responded to the plaintiff's complaints.

After he complained about the offensive verbal comments from his three co-workers, he experienced no further issues with two of the three individuals. Additionally, his supervisor promptly reported the complaints to human resources.

Furthermore, with regard to the alleged additional comment

from the third co-worker (that the plaintiff's "black butt should have stayed fired"), the evidence showed the plaintiff never reported the alleged comment to Caterpillar. His failure to do so was fatal to his claim because, under the law, employers are not liable for co-worker sexual harassment when the employer provides a mechanism for an employee to report harassment but the employee fails to utilize such a reporting mechanism.

In addition, the court found Caterpillar responded reasonably to the offensive graffiti comments.

The court also held that the district court properly dismissed the plaintiff's retaliation claim. He failed to present sufficient evidence showing that his suspension occurred because he previously complained about harassment.

Prudent employers can take away several valuable reminders from the *Muhammad* case. For one, it is important to train supervisors and managers to promptly report complaints of discrimination, harassment and retaliation up the chain of command. In addition, employers should promptly investigate harassment complaints and, where possible, take steps to remedy the alleged harassment.

In this case, Caterpillar avoided liability because it promptly and reasonably responded to the plaintiff's complaints. If Edwards had not taken the plaintiff's complaints seriously, if he did not promptly report the plaintiff's complaints to human resources or if Caterpillar did not move quickly to paint over the offensive comments, this case could have had a different outcome.

Finally, prudent employers should maintain and publish anti-harassment policies that contain clear reporting procedures. Here, Muhammad was aware of Caterpillar's policy, but he failed to report one of the alleged comments to the appropriate individuals. This fact also prompted the court to rule in Caterpillar's favor.

—Matthew P. Kellam, an associate at Laner, Muchin Ltd. assisted in the preparation of this article.