

# ALERT

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## **FIGHTING HARASSMENT CLAIMS-WHY EMPLOYERS MUST PROPERLY TRAIN THEIR MANAGERS: A CASE STUDY**

In our July 2009 Client Alert we identified important advantages to employers of carefully drafting employment policies, and of ensuring that the policies are understood and carefully followed. A recent federal lawsuit in New York illustrates the difficulties employers can face, even if they have an anti-harassment policy, if either their policies are inadequate or if they fail to implement their policies to a court's satisfaction.

In Burns v. County of Schenectady, et al., 07-CV-0776 (GLS), Suzanne Burns sued the County of Schenectady and two County employees, claiming, among other things, sex discrimination and retaliation under federal (Title VII) and state (New York Human Rights Law) law. The County employed Burns as a Computer Aide. Burns claimed that from September 2001 through May 2004, Donald Mennillo, the Deputy Director of the Department of Information Services, sexually harassed her by, among other things, stroking her hair, rubbing up against her, leering at her body, blowing kisses at her and waiting for her outside the ladies' room. As a result of this alleged harassment, Burns took several leaves of absence from work due to the stress she suffered, and filed an internal complaint with the County.

The County responded that it had an anti-harassment policy in place to correct any sexually harassing behavior, and that the County's Sexual Harassment Committee ("Committee") had investigated the matter. The Committee cleared Mennillo of the charges. When the Chairman of the Committee that investigated the allegations was deposed in the case, he testified that Burns' claim lacked merit because it was not probable that she or any other female could be sexually harassed during regular working hours:

It would seem to me that someone who's looking for sexual gratification wants privacy for something like this. If they were working alone, late at night or if they were alone in an office [it is] conceivable something like that could happen....But when you read about other incidents, and it's in the paper all the time, that's how people do it. They don't do it out in the open. They do it in the parks, at night behind buildings and so on.

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The Court found the Chairman's testimony to be "particularly... troubling" and allowed Burns' hostile work environment claim to go forward. The Court noted that "[t]he mere existence of [an anti-harassment] policy does not necessarily establish that the employer acted reasonably in remedying the harassment."

Thus, the Court determined, even if the County had a policy against harassment, and even if it investigated Burns' internal complaint of harassment, it could still be liable to her for a hostile work environment under both federal and state law. (The Court did dismiss the individual claims Burns filed against Mennillo and Kathleen Flanagan Heap, the County's personnel administrator, for violating her rights under the New York Human Rights Law, but expressly allowed Burns to re-file those claims in state court.)

Burns also claimed that the County retaliated against her for filing a complaint with the United States Equal Employment Opportunity Commission ("EEOC"), changing her employment status from a permanent employee to a temporary employee. The Court ruled that Burns waited too long to bring this retaliation claim under federal law, but permitted her to bring a retaliation claim under state law, which provides a longer period of time to bring such claims.

The Burns decision, dated August 18, 2009, applies and reinforces many of the lessons discussed in our July 2009 Client Alert. While legally compliant policies are necessary, they are not necessarily sufficient if poorly implemented. It is essential that the employer (whether a private company, a not-for-profit organization or, as in Burns, a government employer) also train its managers and take steps to insure that its policies are properly implemented.

The Court in Burns explained why this is so. The employers' obligation under Title VII and the New York State Human Rights Law is not simply to have good policies on paper, but to actually remedy the harassment. The policy is a relevant and important step in that process, but taking the first step is not enough to complete the journey.



*We can assist you in preparing employee handbooks, in reviewing your existing handbooks to determine if they comply with new requirements, and in training your managers on how to implement your policies. We can also discuss with you other provisions that can provide further protection for your company.*