

## **Preventing and correcting sexual harassment is a two-way street**

**By Jennifer N. Warberg**

While an employee must cooperate in the process of preventing and correcting sexual harassment, s/he is not be required to immediately report minor incidents of inappropriate conduct until that conduct continues and rises to the level of a hostile work environment, according to the 10th U.S. Circuit Court of Appeals.

The Colorado Department of Transportation (CDOT) employed Betty Pinkerton from April 1995 to March 2003. She received mediocre performance appraisals as an administrative assistant during her first five years. After David Martinez became Pinkerton's new supervisor in 2000, her performance steadily declined, resulting first in corrective action and then a demotion. In November 2002, Pinkerton agreed to be reassigned in order to avoid disciplinary action and looming termination. Over the next two to three months, Martinez made sexual comments to Pinkerton on approximately five separate occasions. Pinkerton complained about Martinez's comments in February 2003. After an internal civil rights investigation confirmed Pinkerton's complaint, Martinez was demoted.

Shortly after making her complaint about Martinez, Pinkerton changed her mind on accepting reassignment in lieu of discipline and possible termination. As a result, her supervisors resumed disciplinary action against her, which ultimately resulted in Pinkerton being terminated in March 2003. Pinkerton sued CDOT for sexual harassment and retaliation under Title VII. After the district court granted summary judgment in favor of CDOT on both claims, Pinkerton appealed.

On appeal, the parties agreed that Martinez had created a hostile work environment. Thus, the only issue on appeal related to the sexual harassment claim was whether CDOT was liable. First, the 10th Circuit considered whether Martinez caused Pinkerton's termination, in which case CDOT would be automatically liable. However, the appellate court concluded that CDOT should not be found liable per se because the termination decision was made by another, unbiased, supervisor based on consideration of Pinkerton's long history of poor performance.

Second, the 10th Circuit also had to consider (a) whether CDOT exercised reasonable care to prevent and promptly correct sexual harassment and, if so, (b) whether Pinkerton unreasonably failed to take advantage of those preventative or corrective opportunities. As to the first element, the appellate court held that CDOT met its obligations by having a sexual harassment policy in place, providing training to employees, promptly investigating Pinkerton's complaint and disciplining Martinez appropriately following that investigation.

As to the second element, the appellate court agreed with CDOT's contention that Pinkerton had waited too long to complain and as a result had unreasonably failed to utilize preventative and corrective opportunities. The 10th Circuit noted that to promote Title VII's objective to avoid harm employees need to make a "concerted effort to inform the employer that a problem exists" so that the employer can remedy the conduct. Nevertheless, the appellate court also stated that an employee will not be required to complain immediately following one or two relatively minor incidents that only later prove to be part of a hostile work environment. Applying this to

Pinkerton, the 10th Circuit found that her two to three month reporting delay was unreasonable because she felt physically ill after the first incident and was well aware of CDOT's sexual harassment policy.

Finally, the appellate court determined that Pinkerton had not shown CDOT's stated reason for her termination (poor performance) to be unworthy of belief. Therefore, the 10th Circuit also upheld the district court's ruling against Pinkerton's retaliation claim.

*Pinkerton v. Colo. Dep't of Transp., 10th Cir., No. 07-1494 (Apr. 16, 2009).*

**Professional Pointer:** This case highlights the value of three: policies plus training plus process. CDOT had clear anti-harassment and anti-retaliation policies and provided all employees with training on those policies. Moreover, CDOT also had a process to promptly address complaints. By taking these three steps, CDOT both stopped Martinez's harassing conduct and avoided liability. While policies, training and process have an up-front cost, they pay off in the end.

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