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March 11, 2022

Sixth Circuit Decision Provides Guidance on Properly Managing Workplace Harassment and Discrimination Complaints

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A recent Sixth Circuit reported decision provides guidance for employers on the corrective actions necessary to respond to employee harassment allegations under Title VII of the Civil Rights Act.

In *Burns v. Berry Global, Inc.*, the Court recognized that Berry Global's former night shift maintenance technician, Burns, was the victim of "heinous racial harassment." On four separate occasions, racially discriminatory notes and items were placed in the victim's locker or toolbox. After each incident, Berry Global promptly responded and progressively increased its remedial action to end the harassment. Among the remedial actions taken, Berry Global diligently reviewed security footage, interviewed 19 employees on two separate occasions, held a refresher training for all employees, and improved safety measures by relocating security cameras and requiring supervisors to inspect the locker rooms before and after shifts. Throughout the investigation, Berry Global continuously updated and communicated with the victim.

In this case, the harasser was never identified. Thus, the Court analyzed the case under the co-worker harassment standard (not supervisor). Under that standard, an employer is liable for harassment committed by a victim's coworkers when the employer is negligent in controlling working conditions. The negligent standard requires the employee to prove the employer "tolerated or condoned" the harassment in light of facts the employer knew or should have known. Courts have recognized that a base level of reasonably appropriate corrective action includes "promptly initiating an investigation to determine the factual basis for the complaint, speaking with the specific individuals identified by the complainant, following up with the complainant regarding whether the harassment was continuing, and reporting the harassment to others in management." Ultimately, an employer's response is generally adequate if it is reasonably calculated to end the harassment.

The victim argued that Berry Global's response permitted the harassment to continue because the response was not prompt, the investigator was unqualified, and the refresher training did not address the company's harassment policy. The Court disagreed, finding that, generally, a response within the "next week" is considered prompt, a human resource

generalist is typically qualified to investigate even when the investigation is not conducted perfectly, and no case law requires additional harassment, discrimination, or sensitivity training.

There are two major takeaways in this case for employers. First, employers are generally not required to hire an outside investigator to handle harassment complaints. Although the human resources generalist was not a perfect investigator, she started reviewing the security footage within a day of the initial harassment incident and set up employee interviews as soon as possible without interfering with company operations. All of the available information was thoroughly reviewed and the victim was regularly updated. Second, it is crucial to maintain an onboarding procedure for all employees that includes information about the employer’s anti-harassment and anti-discrimination policies and requires employees to attest to their understanding of the policies. Berry Global’s strong onboarding procedure and employee handbook acknowledgement made it unnecessary for the Court to resolve a factual disagreement about whether refresher training was necessary to adequately address the company’s harassment and discrimination policies because employees were already on notice.

Employers who need guidance on creating or revising anti-harassment and anti-discrimination policies, or who need help investigating harassment or discrimination complaints in their workplace, should contact any member of **Bodman’s Workplace Law Group**. Bodman cannot respond to your questions or receive information from you without first clearing potential conflicts with other clients. Thank you for your patience and understanding.

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