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## Importance of Timely Complaint of Sexual Harassment

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*Special to the Legal*

Judy Cacciola raised a genuine issue of material fact as to whether she was sexually harassed by her supervisor during her employment with Work 'N Gear. Moreover, she complained about being subjected to sexual harassment and was subsequently terminated. Nevertheless, because Cacciola's complaint was about behavior that was neither severe nor pervasive (i.e., she complained about behavior other than that which the court found to be harassing as a matter of law), Work 'N Gear was granted summary judgment on Cacciola's harassment and retaliation claims. The case of *Cacciola v. Work 'N Gear*, No. 13-381 (E.D. Pa. May 29, 2014) (Restrepo, J.), illustrates the importance of an employer following its harassment policy to preserve the *Faragher-Ellerth* affirmative defense and, from the employee's perspective, emphasizes the importance of promptly notifying the employer when allegedly harassing behavior occurs.



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### STORE MANAGER REPORTS TO HARASSER

Cacciola began her employment with Work 'N Gear, a clothing and footwear retailer, in early 2007 and was promoted to the position of store manager approximately a year later. As manager, she reported to Michael Hollitt, group manager (and also a store manager in New Jersey). In their roughly three years of working together, Hollitt only visited Cacciola's store on one occasion, according to the opinion. Nevertheless, they spoke on the phone often and Hollitt would often conclude their calls by saying that he was going to give Cacciola a "nipple twister." There appears to be no explanation for this sign-off, nor does the court explain the context of this bizarre behavior. Cacciola

asserted that she felt "invaded" whenever Hollitt would say this and testified that she was usually unable to work for 45 minutes thereafter, the opinion said.

Nine months after Hollitt began using the "nipple twister" sign-off, Cacciola complained to corporate human resources that Hollitt said "disgusting things," but did not describe the "nipple twister" comment specifically. Cacciola never asked HR to take any action based upon the "disgusting things" being said and no investigation was ever performed. Cacciola did complain specifically, however, that the one time she and Hollitt were together, she overheard him ask her assistant manager, George Edelman, when the last time was that he had had sex, the opinion said. The HR representative asked Cacciola whether she wanted to initiate an investigation but Cacciola declined.

### TERMINATION FOR INSUBORDINATION

Cacciola was terminated in August 2011, when she not only failed to respond when her store's alarm was tripped overnight during Hurricane Irene, but also told another employee during the

hurricane that she was going to ignore all telephone calls from Hollitt, that she was not going to go to the store because she did not work on weekends and that she did not care if the store burned down. While Hollitt was involved in the investigation into Cacciola's behavior, the termination decision was made by more senior managers. Cacciola claimed that on the morning she was to be terminated, she called HR and stated that she now wanted to pursue sexual harassment charges against Hollitt. There is no evidence that HR heard the message before Cacciola was terminated, the opinion said.

Cacciola brought suit, claiming that she had been subject to a sexually harassing hostile work environment and had been terminated in retaliation for having complained of the same.

## SEXUALLY HARASSING COMMENT

The court found that Hollitt, when he told Cacciola that he was going to give her a “nipple twister,” was informing her that he was “going to batter her in a sexually explicit way.” The fact that he often closed conversations over at least a year in this way made the comment “pervasive” and her testimony that she felt “invaded” and unable to concentrate for 45 minutes thereafter demonstrated that she had been detrimentally affected by the conduct. Finally, the court concluded that a reasonable person would have been affected by the alleged harassment.

The court applied the Supreme Court's recent *Vance v. Ball State University*, 133 S. Ct. 2434 (2013), decision to find that, although Hollitt did not have final authority to terminate Cacciola, Work 'N Gear had “effectively delegated the power to take tangible employment actions to [him as it relied on his recommendation to do so].” As such, respondeat superior liability attached to Hollitt and his behavior.

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## AFFIRMATIVE DEFENSE

Work 'N Gear prevailed, however, under the *Faragher-Ellerth* affirmative defense. Because Cacciola never described Hollitt's alleged “disgusting” conduct (apparently the “nipple twister” comments), the company had no responsibility for investigating the same. When Cacciola reported Hollitt's “when did you last have sex” question, the HR representative inquired whether she wanted to pursue an investigation, and she declined. As such, Work 'N Gear did all that it could have done to investigate and take remedial action for Hollitt's behavior. The court found that the company had an extensive sexual-harassment policy,

of which Cacciola failed to avail herself. Summary judgment was, therefore, in order.

As to Cacciola's retaliation claim—the court found that her ambiguous complaint of “disgusting” behavior, without more, did not rise to the level of “protected activity” under Title VII. While her complaint about overhearing Hollitt's question was arguably protected conduct, she was unable to establish that Work 'N Gear's legitimate non-discriminatory reason for the adverse action (in this case, her termination for insubordinate behavior following the hurricane) was pretextual.

As noted, the case highlights the importance of an employer having strong sexual-harassment policies and processes in place and then complying with them when a complaint is made. The court emphasized both Cacciola's failure to complain about the “nipple twister” comments in accord with the company's policies and noted that when Cacciola made her complaint about Hollitt's question about having sex, the company offered proactively to conduct an investigation—thereby following through on the processes in place. These events allowed Work 'N Gear to prevail under *Faragher-Ellerth*.