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Alert

April 15, 2010

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Westfield Office

P. O. Box 2369
53 Cardinal Drive
Westfield, NJ 07091
908-233-6800

Summit Office

480 Morris Avenue
Summit, NJ 07901
908-273-1212

Rumson Office

20 Bingham Avenue
Rumson, NJ 07760
732-741-7777

New York Office

26 Broadway
Suite 2300
New York, NY 10004
212-742-3390

Pennsylvania Office

Two Penn Center Plaza
Suite 200
Philadelphia, PA
215-854-4090

www.lindabury.com

Is It Time to Revise Your Sexual Harassment Policies?

By John H. Schmidt, Jr.

In 1993, the New Jersey Supreme Court determined that an employer could be liable to its employee for the sexually harassing conduct of another employee if the employer acted negligently in failing to establish an effective anti-harassment policy in its workplace.¹ The Court noted that the following factors would constitute strong evidence of due care and the absence of negligence by the employer in establishing an anti-harassment program: (i) the existence of formal policies prohibiting sexual harassment in the workplace; (ii) the establishment of a complaint procedure for employees to bring forward harassment complaints; (iii) periodic mandatory anti-harassment training for supervisors and managers, and available for all other employees; (iv) implementation of effective monitoring mechanisms to check the trustworthiness of the policies and complaint structures; and (v) evidence of an unequivocal commitment from the highest levels of management that sexual harassment will not be tolerated. If these factors are present, an employer can potentially avoid liability for the sexually harassing conduct of its employee.

In response to that edict from the Court, employers throughout New Jersey rushed to develop sexual harassment policies, to incorporate those policies within their employee handbooks, and to provide sexual harassment training to their employees. However, in light of another recent opinion from the New Jersey Supreme Court, prudent employers will broaden their anti-harassment policies, training and other programs beyond sexual harassment to include all other forms of unlawful harassment under state and federal anti-discrimination laws.

In *Cutler v. Dorn*², the Supreme Court considered whether the plaintiff could pursue an unlawful harassment claim for discriminatory remarks about his religion in the workplace. Initially, the Court reaffirmed that New Jersey has a strong interest in maintaining "discrimination free" workplaces for workers. The Court went on to state that a prohibited form of employment discrimination is harassment arising not only as a result of a person's sex, (*cont'd* ➔)

but arising as a result of any of the statutorily protected categories— race, creed, color, national origin, nationality, ancestry, age, sex (including pregnancy), familial status, marital status, domestic partnership status, affectional or sexual orientation, atypical hereditary cellular or blood trait, genetic information, liability for military service, and mental or physical disability, perceived disability, and AIDS and HIV status.³

As a result of the *Cutler* decision and its progeny, it may no longer be legally sufficient for employers to implement anti-harassment programs that focus solely on sexual harassment. We strongly recommend that employers amend their sexual harassment policies, complaint procedures, training programs and monitoring

¹ *Lehmann v. Toys 'R' Us, Inc.*, 132 N.J. 587 (1993).

² *Cutler v. Dorn*, 196 N.J. 419 (2008)

³ *N.J.S.A.* 10:5- 1, et seq.

mechanism to address all forms of unlawful discrimination and harassment in the workplace of employees whose status is protected under state or federal discrimination laws. All anti-harassment policies should reflect that you, as the employer, will investigate all complaints of unlawful workplace harassment and will take appropriate disciplinary action when necessary. Prompt amendments of your anti-harassment policies and programs may minimize the risk of potential workplace harassment that could fester unchecked until the employee seeks legal advice and redress through litigation.

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The information provided here is necessarily general and is not intended as legal advice or a substitute for legal advice. If you have any questions regarding this Alert, please contact John Schmidt at jschmidt@lindabury.com.



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Before making your choice of attorney, you should give this matter careful thought. The selection of an attorney is an important decision.

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