

## ***Strong Evidence Prevents Employer Liability for Sexual Harassment***

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CBS recently defeated what appears to have been a strong claim of sexual harassment in *Hardage v. CBS*. Employers should follow the example CBS set in documenting performance and responses to such complaints.

Hugh Hardage worked for CBS as an advertising account executive. Patty Dean supervised Mr. Hardage, and Kathy Sparks supervised Ms. Dean. Mr. Hardage resigned in August 2001, claiming that he was sexually harassed by Ms. Sparks.

Mr. Hardage stated that Ms. Sparks flirted with him and made inappropriate comments to him. Mr. Hardage contends that the harassment continued outside the work place on five occasions. The harassment consisted of inappropriate statements and unwelcome touching. When Mr. Hardage told Ms. Sparks in spring 2000 that he did not want to go further than friendship with her, she responded, "don't forget who got you to where you are." In October 2000, Mr. Hardage and Ms. Sparks took clients to a baseball game. Ms. Sparks tried to touch him in an inappropriate manner. After the game, Mr. Hardage invited her to join him for drinks with some friends. In response to her demand that he tell her who he had f—ed in here, he jokingly stated that he hadn't done so with anyone but hopefully she's next. Ms. Sparks became very upset and shouted obscenities at him including "Don't f—ing talk to me. You're finished."

Mr. Hardage complained to Ms. Dean the next day. Ms. Dean promptly contacted an executive vice president who in turn called Mr. Hardage to let him know he would be contacted by a representative from the company's human resources department. The HR department contacted him that same day and arranged to meet with him the following week. At that meeting, Mr. Hardage told the HR representative that he did not want the HR department to take any action and he insisted on handling it by himself. The HR department called him approximately two weeks later and he reiterated that he did not want HR to intervene. Eight months later, Mr. Hardage resigned after receiving a memorandum addressed to him and another employee who had failed to meet sales goals.

During his deposition, Mr. Hardage admitted that he is a "flirtatious person by nature", and he also admitted he referred to Ms. Sparks as "Sparkalicious", "Baskin Robbins 32<sup>nd</sup> Flavor" and "Driving Ms. Sparky". He admitted that his love life was a part of the water cooler talk and a big topic of conversation around the office.

The court reviewed the evidence and found that the harassment ceased well in advance of his resignation so he had not been constructively discharged. Additionally, since CBS had offered legitimate, non retaliatory reasons for the adverse performance memorandum

which was addressed to both Mr. Hardage and an other employee whose performance was not up to par, the court stated that this did not appear to be retaliatory action.

In this case, CBS had a strong policy against sexual harassment in the workplace. When Mr. Hardage complained, CBS immediately began a process to investigate it by having human resources representative contact Mr. Hardage. Additionally, the court noted that although Ms. Dean may have had opportunity to observe the harassment on a daily basis in the workplace, Mr. Hardage's playful names for Ms. Sparks as well as his repeated invitations to Ms. Sparks to socialize with him outside of work and his failure to inform Ms. Dean that Ms. Sparks flirtations were unwelcome harassment resulted in Ms. Dean not unreasonably failing to report any flirtatious behavior by Ms. Sparks when she was visiting the Seattle office.

Employers should heed the example of CBS. It is important to have a strong policy against sexual harassment. When a complaint of harassment is made, it is important to document the actions taken by the employer, and to document the employee's response. Finally, it is important to document performance issues so if a termination is necessary, the employer will be able to prove it had a non discriminatory reason for terminating the employment.