Having a Policy is Good Policy

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A recent New Jersey Appellate Division decision is a potent reminder that employers both public and private must have policies and procedures in place for dealing with sexual harassment in the workplace. In Upchurch v. City of Orange Township, No. A-0236-16T4 (N.J. Super. Ct. App. Div., Sep. 14, 2018), a panel of the Appellate Division held that an employer cannot escape liability simply by arguing that it was unaware of harassment towards an employee, but rather must have policies and procedures in place aimed at preventing and correcting such behavior.

The plaintiff, Deborah Upchurch, has been employed with the Orange Police Department since 1992, and currently serves as a lieutenant. She alleged that at some point in 2013 or 2014, her direct supervisor, also the Department's Director of Police, began making unwanted sexual advances towards her. After she rebuffed his advances, he allegedly retaliated by treating her differently from her male colleagues, transferring her from an administrative role to patrol work, and commencing an internal affairs investigation against her. Although Upchurch apparently shared her concerns with a colleague, she did not make any formal complaint with the Department regarding her supervisor's conduct.

Upchurch filed a complaint against the City of Orange and the Orange Police Department, alleging violations of the New Jersey Law Against Discrimination (LAD). Before the matter proceeded to trial, the City and the Police Department filed a motion for summary judgment, arguing that they could not be liable under the LAD because they had no knowledge of the supervisor's misconduct. The trial court granted the motion and Upchurch then appealed.

In reversing the trial court's grant of summary judgment, the appellate panel stated that an employer's argument of "'we didn't know and plaintiff didn't tell us' is not a defense." Rather, defendant employers must show they exercised reasonable care to prevent and to correct sexual harassment, such as through the use of a sexual harassment policy, and that the plaintiff employee unreasonably failed to take advantage of those preventative or corrective measures. Accordingly, the City's and Police Department's failure to provide any information regarding policies aimed at preventing sexual harassment was "fatal" to their argument. The panel thus reversed the order granting summary judgment and remanded the matter to the trial court for further proceedings.

The Takeaway

Employers will not be able to escape liability for sexual harassment claims simply by stating that they were unaware of any potential misconduct. Instead, employers must be proactive and have anti-harassment policies and procedures in place, on which they train their employees.