On June 26, 1998, the Supreme Court issued two opinions that clarified the law regarding employer liability for sexual harassment perpetrated by supervisors. (*Faragher v. City of Boca Raton* and *Burlington Industries, Inc. v. Ellerth*). Both opinions instruct that when a harassing supervisor with immediate (or successively higher) authority over an employee takes a "tangible employment action" (such as discharge, demotion, or undesirable reassignment) against such employee, the defending employer is strictly liable for the supervisor's action under Title VII of the Civil Rights Act of 1964.

However, where the commission of supervisor harassment does not culminate in a "tangible employment action" (as in both *Faragher* and *Burlington*), the employer may raise as an affirmative defense to liability or damages that it (a) "exercised reasonable care to prevent and correct promptly any sexually harassing behavior, and (b) that the plaintiff employee unreasonably failed to take advantage of any preventive or corrective opportunities provided by the employer or to avoid harm otherwise."

In order to fulfill its legal responsibility, your theatre must establish, implement and monitor an effective harassment policy. In the interests of meeting this responsibility, we thought it would be useful to provide a summary of steps that may be taken by the theatre’s managers and supervisors to prevent sexual (or other forms of unlawful harassment). These guidelines are based on the interpretations of the *Faragher* and *Ellerth* standard of liability by various courts around the country.

I. **What is Reasonable Employer Conduct?**

As the Supreme Court outlined, reasonable employer conduct consists of two elements: (i) reasonable care to prevent any sexually harassing behavior, and (ii) reasonable care to correct promptly any sexually harassing behavior. Whether an employer exercised reasonable care to prevent any sexually harassing conduct will be determined based on what actions the employer took prior to receiving a sexual harassment complaint to prevent such behavior in its workplace. Whether the employer exercised reasonable care to correct promptly any sexually harassing conduct will be determined based on what actions the employer took after receiving a sexual harassment complaint to remedy such behavior.

Since *Faragher* and *Ellerth*, courts generally have found that employers exercised reasonable care where they are able to show that they adopted and distributed a policy that clearly communicates that harassment is not tolerated, and that they have a complaint or grievance procedure in place. Proof that its employees received the policy is also effective in establishing the first prong of the affirmative defense.
Courts have refused to find that an employer exercised reasonable care to prevent or correct promptly alleged harassment where:

♦ The employer had prior knowledge of the harasser's history of inappropriate behavior, but took no action to prevent its reoccurrence.
♦ The employer had no policy against harassment in place.
♦ The employer had no complaint procedure in place.
♦ The employer's complaint procedure was ineffective because, for example, employees were directed to complain only to one person such as their supervisor, or it contained strict time limits within which a complaint had to be filed.
♦ The employer was unable to show that its policy was distributed to all employees.
♦ An investigation was not commenced until some time after the employee complained.
♦ The employer's decision to designate a particular person to receive complaints was questionable in light of the complaint-receiver's inappropriate response to complaints.
♦ The employer failed to take any (or effective) action to discipline a harasser after an investigation revealed that an employee's complaint had merit.
♦ The employer failed to provide sexual harassment training to its employees.

II. What is Reasonable Plaintiff's Conduct?

Courts have found that the plaintiff employee unreasonably failed to take advantage of any preventive or corrective opportunities provided by the employer or to avoid harm otherwise where:

♦ The plaintiff failed to complain to his or her employer, despite there being no evidence of threatened retaliation.
♦ The plaintiff failed to follow the procedures provided for in the employer's established harassment policy.
♦ The plaintiff refused to cooperate with the employer's investigation of the plaintiff's harassment complaint.
♦ The plaintiff failed to notify the employer of the harassment in a timely fashion.

III. What is an Effective Harassment Program?

A review of recent court decisions indicates that an effective non-discrimination and anti-harassment program requires an employer to take a number of preventative and remedial measures:

♦ Implementation of a non-discrimination and anti-harassment policy and internal complaint procedures that are in compliance with the law;
♦ Effective avenues for employees to bring complaints forward (not just through their supervisor);
♦ Wide dissemination of the policy (both in an employee handbook and otherwise) throughout the workplace on a periodic basis to make sure all employees know of the policy's existence and how to use the complaint procedure;
♦ Training appropriate parts of the workforce, such as senior management, managers/supervisors, and "complaint-receivers," in understanding and employing the policy;
♦ Prompt response to complaints brought under the policy by thoroughly investigating them to determine if violations of the policy occurred; and
♦ Prompt, appropriate remedial action to enforce the policy if it is determined that violations of the policy have occurred.

NOTE: THIS OUTLINE SUMMARIZES GENERAL PROCEDURES AND DOES NOT ADDRESS STATUTORY REQUIREMENTS THAT EXIST IN MANY STATES REGARDING POLICIES, TRAINING, ETC. BE SURE TO CONSULT WITH COUNSEL TO DETERMINE THE STATUTORY REQUIREMENTS IN THE STATE IN WHICH YOUR THEATRE OPERATES.
A. Distribution of the Policy

Once a theatre implements a non-discrimination and anti-harassment policy and an internal complaint procedure, the theatre must widely disseminate the policy to all individuals throughout the theatre workforce, not merely to managers and supervisors.

There are a number of ways by which a theatre can distribute its policy to ensure awareness of it throughout the workforce. In addition to including the policy in the employee handbook (if it has one), theatres should consider the following options:

♦ Posting the policy in prominent places throughout the workplace where individuals would be most likely to see it (e.g., bulletin board, green room, company lounge);
♦ If e-mail is used in the workplace, periodically circulating the policy to each employee through a theatre-wide e-mail message;
♦ Periodically distributing the policy in employee paycheck envelopes;
♦ Circulating the policy during training sessions; and/or
♦ Including the policy in an orientation packet given to new hires.

Theatres should disseminate the policy (independent of the employee handbook) throughout the theatre on a periodic basis (e.g., every year) to make sure all employees know of its existence and understand the complaint procedure. Theatres should also document the distribution method used each time they distribute the policy to their employees.

B. Employee "Receipt"

In addition to distributing the policy to ensure awareness of it throughout the workforce, it is also important for theatres to be able to document that an employee received the policy.

Theatres may wish to include a "receipt," to be signed by each employee when he or she is given a copy of the policy and kept on file by the theatre, which will enable the theatre to prove readily that the employee was aware of the policy. The following is a suggested form of receipt:

By my signature below, I acknowledge that I have received a copy of XYZ Theatre's Non-Discrimination and Anti-Harassment Policy. I agree to read it thoroughly, including the "Complaint Procedure." I also agree that if there is any provision in the policy that I do not understand, I will seek clarification from [e.g., the managing director].

Print Name: _________________________________
Signature: __________________________________
Dated: _____________________

Theatres who have the logistics to collect the "receipt" after its employees have had an opportunity to read and review the policy may want to collect the "receipt" at that point in time. If so, theatres would need to change the suggested form of "receipt" to state that the employee "has read, understands, and agrees to abide by" the policy.

IV. What are Elements of an Effective Harassment Policy?

There is no statutory requirement in New York, for example, that an employer have a sexual harassment policy. Other states (like California), however, require that an employer have a policy in place and some even dictate the specific language that must be included in the policy. Theatres should check with counsel to determine what is required in their state. Even in states that do not require a policy, however, a theatre should adopt one.

The goals of a sexual harassment policy are threefold: (i) to prevent the occurrence of sexual harassment; (ii) to encourage employees to report incidents of sexual harassment at the earliest possible moment - both to allow corrective action and to prevent the gradual development of a hostile work environment; and (iii) to comply with the applicable law so that the theatre will be shielded from liability.

In addition to a sexual harassment policy, theatres should also have a policy of non-discrimination. Often, the two policies are combined. Discussed below are the elements of an effective non-discrimination and anti-harassment policy.
A. Introduction

The theatre may want to state in the beginning of its non-discrimination and anti-harassment policy that it is committed to a work environment in which all individuals are treated with respect and dignity, and where each individual has the right to work in an atmosphere that promotes equal employment opportunities and prohibits discriminatory practices, including harassment.

B. Equal Employment Opportunity

The theatre's non-discrimination and anti-harassment policy should emphasize that it is the theatre's policy to ensure equal employment opportunity without discrimination or harassment on the basis of race, color, national origin, religion, sex, age, disability, citizenship status, or any other characteristic protected by law. It should also state that the theatre prohibits and will not tolerate any such discrimination or harassment.

Depending on the states or cities within which the theatre operates, the theatre may need to include other protected categories. For example, the New York State Human Rights Law prohibits discrimination on the basis of a person's creed, marital status, or genetic predisposition or carrier status, and the New York City Human Rights Law prohibits discrimination or harassment based on a person's creed, marital status, sexual orientation or alienage or citizenship status. In addition, other states or localities may prohibit discrimination on the basis of other protected classes, which would need to be added to the EEO definition above. Accordingly, theatres should discuss with counsel what characteristics are protected from discrimination in their particular city and state.

C. Definitions of Harassment

The policy should contain a definition of sexual harassment. Theatres may want to use the definition of sexual harassment provided in the Equal Employment Opportunity Commission Guidelines, which defines sexual harassment as unwelcome sexual advances, requests for sexual favors and other verbal or physical conduct of a sexual nature when, for example: (i) submission to such conduct is made either explicitly or implicitly a term or condition of an individual's employment; (ii) submission to or rejection of such conduct by an individual is used as the basis for employment decisions affecting such individual; or (iii) such conduct has the purpose or effect of unreasonably interfering with an individual's work performance or creating an intimidating, hostile or offensive working environment. In light of another 1998 Supreme Court decision (Oncale v. Sundowner Offshore Services, Inc.), reference should be made to the policy's application to behavior involving individuals of the same or different gender.

Theatres should consider providing examples of the range of subtle and not so subtle behaviors that may constitute sexual harassment, depending on the circumstances, including, but not limited to: "unwanted sexual advances or requests for sexual favors; sexual jokes and innuendo; verbal abuse of a sexual nature; commentary about an individual's body, sexual prowess or sexual deficiencies; leering, catcalls or touching; insulting or obscene comments or gestures; display or circulation in the workplace of sexually suggestive objects or pictures (including through e-mail); and other physical, verbal or visual conduct of a sexual nature."

Although theatres are not required by law to include such examples in its policy, their inclusion prevents plaintiffs (and their experts) from criticizing the policy on grounds that it did not make clear to employees what behaviors may constitute prohibited harassment.

D. Individuals and Conduct Covered

The policy should state that it applies to all applicants as well as employees and that it applies to conduct by third parties not directly connected to the theatre, such as outside vendors, consultants or even audience members.

It is important to mention that theatres can be held responsible for behavior that occurs outside of the workplace in a work-related setting. The policy should state that the conduct prohibited thereunder is unacceptable in the workplace and in any work-related setting outside the workplace, such as during work-related social events.

E. Retaliation is Prohibited

The policy also should include a statement that retaliation against any individual who reports discrimination or harassment or participates in an investigation of such reports is prohibited. In addition, the policy should emphasize that retaliation against an individual for reporting harassment or discrimination or for participating in an investigation of a claim of harassment or discrimination is a serious violation of the policy, and like harassment or discrimination itself, is subject to disciplinary action.
F. Complaint Procedure

Before issuing its non-discrimination and anti-harassment policy, the theatre should decide who would be responsible for receiving employee complaints of harassment, discrimination, or retaliation. The theatre should designate several different "avenues of complaint" for its employees so that if an employee feels uncomfortable discussing the matter with one of the representatives designated to receive complaints, he or she may bypass that "avenue" and choose another. The theatre should keep in mind when choosing those responsible for receiving complaints that the key to an effective complaint procedure is that it is easily accessible and that employees feel comfortable using it.

1. Reporting an Incident of Harassment, Discrimination, or Retaliation
   a) Provisions to Include:
      ♦ The policy should strongly urge the reporting of all incidents of discrimination, harassment or retaliation, regardless of the offender's identity or position, to the individuals identified by the employer (e.g., the managing director, general manager, or any other ombudsman). Obviously, each theatre is best able to determine the most effective "complaint-receivers" in its organization.
      ♦ The policy should be clear that individuals should not feel obligated to file their complaints with their immediate supervisor first before bringing the matter to the attention of one of the other representatives designated by the theatre.
      ♦ The policy should remind employees that the availability of the theatre's complaint procedure does not preclude individuals who believe that they are being subjected to harassing conduct from promptly advising the offender that his or her behavior is unwelcome and requesting that it be discontinued. Although some policies recommend that employees first make their unwelcomeness known to the offender, such policies fail to realize the difficulty this requirement may entail for many employees. Accordingly, reminding employees - but not mandating - that the reporting procedure does not preclude first speaking to the offender and requesting that the conduct stop is the better policy.
      ♦ Some theatres may also want to include in their policies a statement that the Supreme Court decisions impose an obligation not only on employers, but on employees too, such as, for example, "Employees who have experienced conduct they believe is contrary to the theatre's policy have an obligation to take advantage of the theatre's complaint procedure; an employee's failure to fulfill such an obligation could affect his or her rights in pursuing legal action."
   b) Questionable Provisions:
      ♦ Many standard policies include language to the effect that a person making a false complaint or a complaint not in "good faith" will be penalized. Such language may be viewed as unfriendly and act to deter the bringing forward of complaints. The inclusion of such language also creates a risk that employees penalized for bringing complaints in "bad faith" may bring a successful retaliation suit.
      ♦ A two-tier complaint procedure, for example, giving the employee the option of complaining "informally" versus "formally," is also problematic. A two tier procedure necessarily implies that complaints reported at the first tier - the "informal" tier - will be taken less seriously than the "formal" tier, or that such complaints will go no further than the "discussion" stage and will not be investigated.

2. The Investigation

Theatres should consider including in their policy that any reported allegations of harassment, discrimination or retaliation will be investigated promptly and what that investigation may entail. For example, an investigation may include individual interviews with the parties involved and, where necessary, with individuals who may have observed the alleged conduct or may have other relevant knowledge. Theatres should not, however, provide specific detail as to exactly how the investigation will proceed because in the event the theatre deviates from the steps detailed in the policy, a potential breach of contract action may exist.

3. Confidentiality

With respect to confidentiality, the policy should state that confidentiality would be maintained throughout the investigatory process to the extent consistent with adequate investigation and appropriate corrective action. Absolute confidentiality, however, should never be promised to an employee (and should not be included in any
policy) because once an employee makes a complaint, the theatre is on notice of the complaint and has a duty to investigate it.

4. Responsive Action

Theatres may also want to include a section in their policy stating that "misconduct constituting harassment, discrimination or retaliation will be dealt with appropriately" and that "responsive action may include, for example, training, referral to counseling, and/or other disciplinary action such as warning, reprimand, withholding of promotion or pay increase, reassignment, temporary suspension without pay or termination, as the theatre believes appropriate under the circumstances."

The policy should include a statement that individuals who have questions or concerns about the theatre's policy should speak with a designated representative (such as the managing director or general manager). It is important that the individuals designated in the policy have a comprehensive understanding of the policy and the entire complaint procedure and investigatory process and are trained to handle complaints they receive properly.

V. Sexual Harassment Training

A. Balancing Rights and Responsibilities

Effective training of employees not only helps employers to prevent workplace problems (in the long run) but also assists an organization in defending itself in a discrimination or harassment litigation. Some state laws, in fact, mandate or encourage such training (e.g., Connecticut, Maine, Massachusetts, Rhode Island, Vermont). Theatres should check with counsel to determine whether training is required in their state.

One crucial component in enforcing a theatre's policy against harassment, discrimination and retaliation is ensuring that its designated "complaint-receivers" are well-prepared to handle the complaints they may receive and that whoever is assigned to investigate these complaints has sufficient training and experience to do so properly. Theatres should take steps (such as developing training programs) to educate these employees - on a continuing basis - on how properly to fulfill their responsibilities.

Likewise, theatres should hold periodic training seminars to sensitize employees, particularly managers and supervisors, to issues of harassment, discrimination, retaliation and/or other issues relevant to the work environment. Theatres may also want to consider training non-supervisory employees to educate them about the theatre's policies and complaint procedures.

Theatres must make sure, however, that whatever training is provided to its employees is well planned, comprehensive, and conducted by individuals experienced with the issues involved. If not, theatres face the risk that they may, at some point in time, have to defend the training they provided.

For example, in Hartman v. Pena, a 1995 case, the employees of the Federal Aviation Administration were required to attend a three-day cultural diversity workshop. In an attempt to give the male employees some idea of what it was like to be a victim of sexual harassment, the instructor had the male participants walk between two lines of female participants. The women ogled the men, made comments to them, and touched them (for example, on the arm or on the behind). A discussion followed the "gauntlet," where the women rated the men numerically with their names on a chart subscribed to drawings of male genitalia. The chart illustrated penises in various states of arousal. The plaintiff took offense to the touching (which, he claimed, included touching his genitalia) and to the rating system (where he received the lowest score). The case ultimately settled for $2001 plus legal expenses and a discontinuance of the exercise.

Theatres, at other times, may need to rely on the sexual harassment training they provided, among other things, to support an argument that they took appropriate action to prevent instances of sexual harassment.

B. Making Sure Training is More Than Window Dressing

Effective training programs should be more than merely telling employees that the theatre prohibits discrimination and harassment and handing them the theatre's policy. The most effective training programs combine a discussion of the legal principles of sexual harassment with practical examples of prohibited conduct. The theatre also should communicate its particular policy of prohibiting sexual (and other forms of unlawful) harassment, as well as the proper procedures for handling such complaints - to whom should it be reported, what should the victim be told to do, how should the accused be handled - to the employees at the training programs. Finally, it should be clear to all employees that offenders will be severely disciplined.
Theatres should strongly consider an interactive training program, which makes the training more enjoyable and worthwhile for all involved. An interactive training program might combine some (or all) of the following elements: lectures, discussion groups, role-playing, videos, workshops, and/or any other method believed to be effective to enforce a theatre's policy and prevent prohibited conduct.

A more expensive but highly entertaining and effective training session may also include the use of a live performance involving sexual harassment incidents. There are groups that specialize in plays for use in training seminars and act out a play or scripted vignettes, which are then discussed by the trainer and the group of employees. This training program is interactive and utilizes a group problem solving approach.

A training program might include four fundamental issues with respect to sexual harassment: (i) why is sexual harassment a matter of concern?; (ii) what is sexual harassment?; (iii) under what circumstances can the employer (i.e., theatre) be held liable as a result of claims of sexual harassment?; and (iv) what is the role of managers/supervisors in carrying out the theatre's legal responsibilities and its anti-harassment policy?

We think it is important to provide further detail with respect to the last issue. In carrying out a theatre's policies, managers and supervisors should do the following:

1. Managers/supervisors should be aware of the manner in which they conduct themselves - both in terms of avoiding conduct that may lead to liability for the theatre and in terms of serving as role models.
2. Managers/supervisors should be sensitive to the potential effects of power disparity (e.g., the perceived meaning of their words and actions, such as a social invitation, may be greater than they think).
3. Managers/supervisors should be instructed on how to be effective recipients of employee complaints (e.g., listen carefully; demonstrate familiarity with policy; do not promise absolute confidentiality; take detailed notes of the complaint, advise employee that he or she will not be punished for bringing complaint; promptly refer complaint to the appropriate person or group so that it can be investigated).
4. Managers and supervisors are the theatre for purposes of notice of sexual harassment and for purposes of ratifying unlawful harassment. Accordingly, it is critical that if a manager or supervisor witnesses any inappropriate behavior (by any employee), he or she should address it immediately (if warranted) and report it to the appropriate person or group.
5. If a manager/supervisor does not take immediate action in response to a complaint of harassment, or after observing harassment, the consequences may be severe (e.g., leaves impression that the theatre condones behavior, creates view that making an internal complaint of sexual harassment would be futile; may lead to liability).

VI. Consensual Relationship Policies

Because consensual relationships in the workplace often form the basis of employee complaints of harassment, discrimination and/or retaliation, as well as morale problems and concerns about lowered productivity, theatres may wish to implement a policy regarding consensual relationships in the workplace.

A policy could include a general statement discouraging such relationships, a statement requiring reporting of such relationships to supervisors, and/or a statement prohibiting such relationships between supervisors and subordinates. Theatres should not implement a policy with absolute prohibitions that are difficult to police and/or enforce.

No matter the policy chosen, the establishment of a policy governing romantic relationships between employees implicates laws concerning an individual's right to privacy and right of freedom of association. Therefore, before implementing a consensual relationship policy, theatres should check with counsel to determine if their state laws directly or indirectly address consensual relationship policies.

L. Robert Batterman is a partner and Sheri L. Gilbert is a fourth year associate in the labor and employment law department at Proskauer Rose LLP, one of the nation's largest law firms. With over 115 lawyers based in New York, Boca Raton, Los Angeles and Washington, D.C., the labor and employment group represents employers, including TCG and a number of other not-for-profit organizations, in connection with all the various problems and issues involving their relations with their employees. If you would like a copy of a model non-discrimination and anti-harassment policy, or would like additional assistance regarding the issues discussed in this Centerpiece, please contact L. Robert Batterman, Esq. at 212.969.3010.