IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF PENNSYLVANIA

AMANDA WHELAN,	:	**CIVIL ACTION NO.: 10-1058**
Plaintiff,	:	
vs.	:	
DOW JONES & COMPANY, INC. AND JOE GERACE,	:	**JURY TRIAL DEMANDED**
Defendants.	:	

ORDER

AND NOW this day of , 2010, upon consideration of Defendants' Motion for Summary Judgment and Plaintiff's Memorandum of Law in Opposition thereto, it is hereby **ORDERED and DECREED** that Defendants' Motion for Summary Judgment is hereby **DENIED.**

BY THE COURT:

_____

J.

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF PENNSYLVANIA

AMANDA WHELAN,	:	**CIVIL ACTION NO.: 10-1058**
Plaintiff,	:	
vs.	:	
DOW JONES & COMPANY, INC. AND JOE GERACE,	:	**JURY TRIAL DEMANDED**
Defendants.	:	

PLAINTIFF'S MEMORANDUM OF LAW IN OPPOSITION TO DEFENDANT'S MOTION FOR SUMMARY JUDGMENT

I. INTRODUCTION:

Presently pending before the Court is Defendants Dow Jones & Company, Inc. and Joseph Gerace's Motion for Summary Judgment which seeks to dismiss the Civil Action filed by Plaintiff, Amanda Whelan, pursuant to Rule 56 of the Federal Rules of Civil Procedure. For the reasons set forth herein below, the Court should deny the Defendants' Motion for Summary Judgment.

II. COUNTER STATEMENT OF FACTS:

Plaintiff Whelan initiated this action pursuant to Title VII of the Civil Rights Act of 1964, 42 U.S.C. §2000(e), et seq., as amended by the Civil Rights Act of 1991, at 42 U.S.C. §1981(a) ("Title VII"), and the Pennsylvania Human Relations Act ("PHRA"), 43

P.S. §951 et seq.[1] Plaintiff Whelan alleges that the Defendants subjected her to a hostile work environment through various instances of sexual harassment.

Plaintiff Whelan was employed by Defendant Dow Jones from on or about November 30, 3007 until on or about June 6, 2008, the date of her termination. (Affidavit of Amanda Whelan, ¶ 1, attached hereto and marked as "Exhibit A" (hereinafter referred to as "Exhibit A, ¶ __"). During the course of her employment, Plaintiff Whelan held the position of Account Executive in Defendant Dow Jones' Philadelphia, Pennsylvania office. (Exhibit A, ¶ 2).

In or about December of 2007, immediately after commencing her employment, Defendant Gerace, Mid-Atlantic Sales Manager, began subjecting Plaintiff Whelan to a hostile work environment through various instances of sexual harassment. (Exhibit A, ¶ 3). At all times, Plaintiff Whelan objected to Defendant Gerace's unwelcome, uninvited, sexually-offensive conduct. (Exhibit A, ¶ 4).

Throughout Plaintiff Whelan's employment with Defendant Dow Jones, Defendant Gerace visually assaulted her with sexually-explicit images sent via electronic mail. (Exhibit A, ¶ 5). Defendant Gerace forced Plaintiff Whelan to view images including, but not limited to, that of a man with abnormally large testicles, fruit and other objects resembling human genitalia, a photo-shopped image of people representing political figures in sexual acts, and a naked woman sitting on Santa Claus' lap. (Exhibit

[1] The Third Circuit analyzes Title VII and PHRA claims under the same framework. See Jones v. Sch. Dist. of Phila., 198 F.3d 403, 409 (3d Cir.1999).

A, ¶ 6). In connection therewith, Plaintiff Whelan registered a complaint of sexual harassment with Defendant Gerace and informed him that his vulgar conduct was sexually-offensive and caused her to feel uncomfortable. (Exhibit A, ¶ 7). Notwithstanding Plaintiff Whelan's complaint, Defendant Gerace refused to cease and desist. (Exhibit A, ¶ 7).

Thereafter, Defendant Gerace made sexually-inappropriate comments to Plaintiff Whelan about the size of various males' genitalia. (Exhibit A, ¶ 8). For example, Defendant Gerace continually referred to the husband of Joyce Dougherty ("Doughtery"), Assistant, as the "angry inch," implying to Plaintiff Whelan that Dougherty's husband's genitals were small. (Exhibit A, ¶ 9). Additionally, Defendant Gerace made hand gestures to Plaintiff Whelan indicating that the genitals of Greg Barlow ("Barlow"), Director, Multimedia Advertising Sales, were small. (Exhibit A, ¶ 10). Furthermore, Defendant Gerace stated to Plaintiff Whelan that "having sex with [Barlow] must be like having sex with a mosquito." (Exhibit A, ¶ 10).

In or about December of 2007, Defendant Gerace's harassment of Plaintiff Whelan escalated to a physical level when he subjected her to unwanted, uninvited touching of a sexual nature. (Exhibit A, ¶ 11). Defendant Gerace, in the presence of Dougherty and Janet Valecce ("Valecce"), Assistant, firmly gripped Plaintiff Whelan's upper thigh in a sexually-suggestive manner while confessing to her that he had an "unhappy marriage" and had been involved in many affairs "over the years." (Exhibit A, ¶ 12). In response

thereto, Plaintiff Whelan objected to Defendant Gerace's sexual advance and visibly, physically recoiled. (Exhibit A, ¶ 13). Rather than cease and desist his non- consensual touching, Defendant Gerace mocked Plaintiff Whelan in front of Dougherty and Valecce, thereby causing her to feel humiliated and helpless. (Exhibit A, ¶ 13).

Notwithstanding Plaintiff Whelan's repeated objections to Defendant Gerace's sexually-offensive behavior, Defendant Gerace continued to make lewd and demeaning remarks directed at Plaintiff Whelan. (Exhibit A, ¶ 14). On one occasion, Defendant Gerace, in the presence of Dougherty and Valecce, stated to Plaintiff Whelan that she "would be skinny if it wasn't for [her] ass." (Exhibit A, ¶ 15). Plaintiff Whelan was severely embarrassed by said comment and broke into a sweat. (Exhibit A, ¶ 15). Immediately thereafter, Plaintiff Whelan demanded that Defendant Gerace cease and desist. (Exhibit A, ¶ 15). However, Defendant Gerace again refused to do so. (Exhibit A, ¶ 15). On yet another occasion witnessed by Dougherty and Valecce, Defendant Gerace speculated out loud as to what size brassiere Plaintiff Whelan wore. (Exhibit A, ¶ 16). Plaintiff Whelan was again humiliated by Defendant Gerace's sexually-offensive remarks. (Exhibit A, ¶ 16). Additionally, Defendant Gerace frequently made obscene gestures toward Plaintiff Whelan as if he were masturbating. (Exhibit A, ¶ 17).

On or about May 5, 2008, Plaintiff Whelan overheard Defendant Gerace deriding her performance to Jack Reddy ("Reddy"), Account Executive. (Exhibit A, ¶ 18). In connection therewith, Plaintiff Whelan questioned Defendant Gerace as to why he was

unjustifiably giving a negative report on her performance. (Exhibit A, ¶ 18). In response thereto, Defendant Gerace stated, "Don't you get it? If I told them you were doing a great job and everything was perfect, they would get suspicious. They would think that we were sleeping together or something." (Exhibit A, ¶ 18). The following day, on or about May 6, 2008, upon learning that Plaintiff Whelan had been romantically involved with a mutual acquaintance, Defendant Gerace stated, "If I knew it was that easy, I would have gotten in line. (Exhibit A, ¶ 19).

Significantly, Plaintiff Whelan was not made aware of any policy regarding sexual harassment in the workplace at any time during her tenure with Defendant Dow Jones. (Exhibit A, ¶ 21). Plaintiff Whelan was not provided with training regarding sexual harassment, nor did she observe any posted signs regarding sexual harassment in the workplace. (Exhibit A, ¶ 21). Defendant Dow Jones' Philadelphia location did not have a Human Resources office. (Exhibit A, ¶ 22). In fact, the Philadelphia location had only three (3) full time employees, including Plaintiff Whelan and Defendant Gerace. (Exhibit A, ¶ 22). During her tenure with Defendant Dow Jones, Plaintiff Whelan did not have contact with the Human Resources department, and had extremely minimal contact with any of Defendant Dow Jones' employees other than those working in the Philadelphia location. (Exhibit A, ¶ 23). Plaintiff Whelan was never provided with contact information for any employees within the Human Resources department. (Exhibit A, ¶ 23). At no time during her tenure with Defendant Dow Jones was Plaintiff Whelan ever

provided with instructions for use of the company intranet, nor was she provided guidance as to its contents, including the alleged sexual harassment policy. (Exhibit A, ¶ 24).

III. LEGAL ARGUMENT:

A. Legal Standard:

Summary judgment may be properly granted only when the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there are no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law. Fed. R. Civ. P. 56. The moving party bears the burden of proving that no genuine issue of material fact is in dispute. Matsushita Elec. Indus. Co., Ltd. v. Zenith Radio Corp., 475 U.S. 574, 586 n.10 (1986). In ruling upon a motion for summary judgment, the Court must view the underlying facts and all reasonable inferences therefrom in the light most favorable to the party opposing the motion. Pennsylvania Coal Ass'n v. Babbitt, 63 F.3d 231, 236 (3d Cir. 1995).

B. Defendant Dow Jones is not entitled to an affirmative defense.

An employer is subject to vicarious liability for a hostile work environment created by a supervisor with immediate authority over the victimized employee. Faragher v. City of Boca Raton, 524 U.S. 775, 807 (1998); Burlington Indus. v. Ellerth, 524 U.S. 742, 765 (1998). An employer is entitled to an affirmative defense only if: (1) "the employer exercised reasonable care to prevent and correct promptly any sexually harassing

behavior," and (2) "the plaintiff employee unreasonably failed to take advantage of any preventive or corrective opportunities provided by the employer or to avoid harm otherwise." Faragher, 524 U.S. at 807. Defendant Dow Jones cannot establish either prong of the Faragher/Ellerth affirmative defense, and thus is not entitled to summary judgment.

1. Defendant Dow Jones did not exercise reasonable care to prevent and correct promptly any sexually harassing behavior.

Contrary to Defendant Dow Jones' contention, the mere existence of a sexual harassment policy does not satisfy the first prong of the Faragher/Ellerth affirmative defense. See Hurley v. Atlantic City Police Dep't, 174 F.3d 95, 118 (3d Cir. 1999) ("Ellerth and Faragher do not, as the defendants seem to assume, focus mechanically on the formal existence of a sexual harassment policy, allowing an absolute defense to a hostile work environment claim whenever the employer can point to an anti-harassment policy of some sort."); EEOC v. Smokin' Joe's Tobacco Shop, Inc., 2007 WL 1258132 (E.D.Pa.) ("While Smokin' Joes had an anti-discrimination policy that was disseminated to its employees in the employee handbook, this alone is not a basis for granting summary judgment to the defendant."). In fact, the Court in Faragher found that the defendant employer, although it had a sexual harassment policy in place, still failed under the first prong of the affirmative defense as a matter of law. Faragher, 524 U.S. at 808.

Where an employer's sexual harassment policy is not properly disseminated, the court has found that the employer cannot prevail on the first prong of the affirmative

defense. See Faragher, 524 U.S. at 808-809 (finding that the defendant failed the first prong since it "could not reasonably have thought that precautions against hostile work environments in any one of many departments in far-flung locations could be effective without communicating some formal policy against harassment"); Wells v. Happy Times Family Fun Center, Inc., 2005 WL 3111783, *1 (E.D.Pa.) (denying defendant's motion for summary judgment where there remained disputes as to whether the plaintiff was actually aware of the defendant's alleged policy and as to whether the defendant had made reasonable efforts to make the plaintiff aware). Plaintiff Whelan maintains that she was unaware of any alleged sexual harassment policy during her tenure of employment with Defendant Dow Jones and that Defendant Dow Jones utterly failed to make her aware of any such policy. (Exhibit A, ¶ 21). Defendant Dow Jones contends in its Motion that the alleged policy was "available on its intranet system," however this was inadequate since Defendant Dow Jones did not provide Plaintiff Whelan with instructions for intranet use, nor did Defendant Dow Jones provide Plaintiff Whelan with an explanation of the intranet system's contents, including the alleged policy. (Exhibit A, ¶ 24).

Even where an employer properly disseminated the policy, this Court has still found that the employer's failure to provide training beyond distributing the policy in an employee handbook is sufficient to deprive the defendant of the affirmative defense. EEOC v. Smokin' Joe's, 2007 WL 1258132 at *7. Here, Defendant Dow Jones did not

even distribute the policy in the employee handbook, but rather housed it somewhere on the intranet system without notifying employees of its existence or location. Defendant Dow Jones certainly took no further steps to train Plaintiff Whelan regarding sexual harassment. (Exhibit A, ¶ 21). By neglecting to disseminate the alleged policy, provide training regarding sexual harassment, and/or otherwise notify Plaintiff Whelan as to the policy's existence, Defendant Dow Jones failed to exercise the level of "reasonable care" required by the Faragher/Ellerth affirmative defense.

Moreover, Defendant Dow Jones' proffered sexual harassment policy is ineffective as written since it lacks a complaint procedure for instances when the employee's harasser is also the employee's supervisor. See Faragher, 524 U.S. at 808 (finding as a matter of law that the defendant did not satisfy the first prong where the employer's policy "did not include any assurance that the harassing supervisors could be bypassed in registering complaints."). Additionally, although the policy dictates that an employee is to report the harassment to a corporate representative, it does not state the identities of the appropriate individuals or where to find this information. In fact, Defendant Dow Jones never provided Plaintiff Whelan with contact information for other corporate representatives, and Plaintiff Whelan did not have access to a Human Resources department. (Exhibit A, ¶ 23).

Since Plaintiff Whelan and her colleagues at the Philadelphia location were isolated from Defendant Dow Jones' higher management, Defendant Dow Jones could

not reasonably have thought that this policy alone would sufficiently prevent and correct sexually harassing behavior. Defendant Dow Jones' inadequate sexual harassment policy, of which it did not even make Plaintiff Whelan aware, cannot satisfy the first prong of the Faragher/Ellerth affirmative defense. Hence, the Court should deny the Defendants' Motion for Summary Judgment.

2. Plaintiff Whelan availed herself of the preventive or corrective opportunities provided by Defendant Dow Jones.

Assuming arguendo that Defendant Dow Jones did have an effective sexual harassment policy, Plaintiff Whelan's actions were in accordance with the policy by opposing unlawful sexual harassment to her supervisor. Defendant Dow Jones' sexual harassment policy requires that the employee complain to a corporate representative, and lists "the employee's immediate supervisor" as an appropriate representative. Indeed, Plaintiff Whelan followed the policy's procedure by complaining to her immediate supervisor, Defendant Gerace. As discussed above, the policy does not set forth the proper course of action if the employee's immediate supervisor is also the harasser.

The Defendants erroneously argue in their Motion that Plaintiff Whelan was required to complain to someone other than her supervisor. Contrary to the non-precedential case law on which the Defendants rely, Plaintiff Whelan had no obligation to complain to any corporate representative other than her supervisor. See Hurley, 174 F.3d at 118 (finding that the plaintiff had no obligation to try other reporting mechanisms and that an "employer cannot 'use its own policies to insulate itself from liability by placing

an increased burden on a complainant to provide notice beyond that required by law"); Gares v. Willingboro Township, 90 F.3d 720, 724, 733 n. 9 (3d Cir. 1996) (finding that while the defendant's formal sexual harassment policy permitted employees to complain directly to the township manager, the policy conflict with the "chain-of-command procedure" of the township's police department excused the plaintiff's failure to complain beyond her direct supervisor); Faragher, 524 U.S. at 808-809 (where the plaintiff only complained to the harassing supervisors, the plaintiff's workplace was isolated from the employer's higher management, and no policy was in place to bypass the harassing supervisors, the Court found that the affirmative defense was not available to the defendant). Therefore, the Court should find that Plaintiff Whelan did reasonably take advantage of the preventive or corrective opportunities provided by Defendant Dow Jones' sexual harassment policy. Accordingly, the Defendants' Motion for Summary Judgment should be denied.

III. CONCLUSION:

For the foregoing reasons, Plaintiff Whelan respectfully requests that this Honorable Court deny the Defendants' Motion for Summary Judgment in its entirety.

Respectfully submitted,

SIDNEY L. GOLD & ASSOCIATES, P.C.

/s/Sidney L. Gold, Esquire

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Dated: June 22, 2010

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF PENNSYLVANIA

AMANDA WHELAN, ***Plaintiff***, vs. DOW JONES & COMPANY, INC. AND JOE GERACE, ***Defendants***.	:	**CIVIL ACTION NO.: 10-1058** **JURY TRIAL DEMANDED**

AFFIDAVIT OF AMANDA WHELAN

I, Amanda Whelan, state that I am authorized to make the following Affidavit and that the following facts set forth herein are within my personal knowledge, and are true and correct to the best of my knowledge, information and belief:

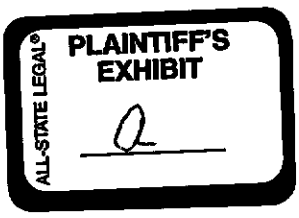
1. I was employed by Defendant Dow Jones from on or about November 30, 2007 until on or about June 6, 2008.

2. During the course of my employment, I held the position of Account Executive in Defendant Dow Jones' Philadelphia, Pennsylvania office and at all times maintained a satisfactory job performance rating in said capacity.

3. In or about December of 2007, immediately after commencing my employment, Defendant Gerace, Mid-Atlantic Sales Manager, began subjecting me to a hostile work environment through various instances of sexual harassment.

4. At all times relevant hereto, I objected to Defendant Gerace's unwelcome, uninvited, sexually-offensive conduct.

5. Throughout my employment with Defendant Dow Jones, Defendant Gerace visually



assaulted me with sexually-explicit images sent via electronic mail.

6. By way of example, Defendant Gerace forced me to view images including, but not limited to, that of a man with abnormally large testicles, fruit and other objects resembling human genitalia, a photo-shopped image of people representing political figures in sexual acts, and a naked woman sitting on Santa Claus' lap.

7. In connection therewith, I registered a complaint of sexual harassment with Defendant Gerace and informed him that his vulgar conduct was sexually-offensive and caused me to feel uncomfortable. Notwithstanding my complaint, Defendant Gerace refused to cease and desist.

8. Thereafter, Defendant Gerace made sexually-inappropriate comments to me about the size of various males' genitalia.

9. By way of example, Defendant Gerace continually referred to the husband of Joyce Dougherty ("Doughtery"), Assistant, as the "angry inch," implying to me that Dougherty's husband's genitals were small.

10. By way of further example, Defendant Gerace made hand gestures to me indicating that the genitals of Greg Barlow ("Barlow"), Director, Multimedia Advertising Sales, were small. Furthermore, Defendant Gerace stated to me that "having sex with [Barlow] must be like having sex with a mosquito."

11. In or about December of 2007, Defendant Gerace's harassment of me escalated to a physical level when he subjected me to unwanted, uninvited touching of a sexual nature.

12. Defendant Gerace, in the presence of Dougherty and Janet Valecce ("Valecce"), Assistant, firmly gripped my upper thigh in a sexually-suggestive manner while confessing to me that he had an "unhappy marriage" and had been involved in many affairs "over the years."

13. In response thereto, I objected to Defendant Gerace's sexual advance and visibly, physically recoiled. Rather than cease and desist his non- consensual touching, Defendant Gerace mocked me in front of Dougherty and Valecce, thereby causing me to feel humiliated and helpless.

14. Notwithstanding my repeated objections to Defendant Gerace's sexually-offensive behavior, Defendant Gerace continued to make lewd and demeaning remarks directed at me.

15. On one occasion, Defendant Gerace, in the presence of Dougherty and Valecce, stated to me that I "would be skinny if it wasn't for [my] ass." I was severely embarrassed by said comment and broke into a sweat. Immediately thereafter, I demanded that Defendant Gerace cease and desist. However, Defendant Gerace again refused to do so.

16. On yet another occasion witnessed by Dougherty and Valecce, Defendant Gerace speculated out loud as to what size brassiere I wore. I was again humiliated by Defendant Gerace's sexually-offensive remarks.

17. Additionally, Defendant Gerace frequently made obscene gestures toward me as if he were masturbating.

18. On or about May 5, 2008, I overheard Defendant Gerace deriding my performance to Jack Reddy ("Reddy"), Account Executive. In connection therewith, I questioned Defendant Gerace as to why he was unjustifiably giving a negative report on my performance. In response thereto, Defendant Gerace stated, "Don't you get it? If I told them you were doing a great job and everything was perfect, they would get suspicious. They would think that we were sleeping together or something."

19. On or about May 6, 2008, upon learning that I had been romantically involved with a mutual acquaintance, Defendant Gerace stated, "If I knew it was that easy, I would have gotten in line."

20. The Defendants continued to subject me to a hostile work environment through various instances of sexual harassment until on or about June 6, 2008, when Defendant Dow Jones terminated my position of employment due to the closure of its Philadelphia location.

21. I was not made aware of any policy regarding sexual harassment in the workplace at any time during my tenure with Defendant Dow Jones. I was not provided with training regarding sexual harassment, nor did I observe any posted signs regarding sexual harassment in the workplace.

22. Defendant Dow Jones' Philadelphia location did not have a Human Resources office. In fact, the Philadelphia location had only three (3) full time employees, including myself and Defendant Gerace.

23. During my tenure with Defendant Dow Jones, I did not have contact with the Human Resources department, and had extremely minimal contact with any of Defendant Dow Jones' employees other than those working in the Philadelphia location. I was never provided with contact information for any employees within the Human Resources department.

24. At no time during my tenure with Defendant Dow Jones was I ever provided with instructions for use of the company intranet, nor was I provided guidance as to its contents, including the alleged sexual harassment policy.

Amanda Whelan

NOTARY
Sworn to and subscribed before me
this 19 day of June, 2010.

Notary Public

COMMONWEALTH OF PENNSYLVANIA
NOTARIAL SEAL
BRYN W. FOX, Notary Public
Tredyffrin Twp., Chester County
My Commission Expires May 15, 2013

CERTIFICATE OF SERVICE

I hereby certify that on this date I caused a true and correct copy of **Plaintiff's Memorandum of Law in Opposition to Defendants' Motion for Summary Judgment** to be served by first class regular mail, postage prepaid and/or via electronic mail (available for viewing on the Court's ecf system) upon the following:

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and

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Respectfully submitted,

SIDNEY L. GOLD & ASSOCIATES, P.C.

/s/Sidney L. Gold, Esquire

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Dated: June 22, 2010