THOMSON REUTERS
Westlaw®

Perils of bad investigations: Both sides of the sexual harassment story

By Lauren B. Harris, Esq., and Audrie R. Howard, Esq., *Greensfelder, Hemker & Gale*

FEBRUARY 27, 2018

With increased media attention on the topic of sexual harassment, employers should take a closer look at both internal investigation processes and workplace tone. This article discusses an employer's potential liability for failing to investigate claims of sexual harassment fully, from the perspective of both the person bringing the claim and the person accused. It also provides practical tips for improving procedures to avoid liability.

EMPLOYER LIABILITY TO THE COMPLAINANT

Most have heard of Title VII of the Civil Rights Act of 1964, which generally applies to employers with at least 15 employees. The statute protects individuals from employment discrimination based on sex, which includes sexual harassment, and from retaliation for reporting perceived discrimination and cooperating with investigations and litigation.

Additionally, many states and municipalities have enacted similar anti-discrimination laws that may apply to smaller employers not covered by Title VII.

While sexual harassment can take many forms, the most obvious is quid pro quo harassment: "Sleep with me or I will fire you." The more common form of sexual harassment alleged in employment litigation is conduct that creates a hostile work environment — often in the form of a series of lewd jokes, sexual innuendo or sexual overtures, and sometimes over time.

Regardless of the form sexual harassment takes, claims can expose employers to a wide range of damages, including damages for lost wages and future wages, emotional distress damages, punitive damages and attorney fees. Additionally, some state laws permit individual liability against the person accused of harassment.

The employer faces the most significant liability for not investigating the complaint properly or ignoring it altogether. A company that swiftly, fully and fairly investigates each report or complaint of harassment can avoid or significantly reduce liability, even if its investigation does not substantiate the claim.

Poorly investigated complaints have led to some huge verdicts in the past few years. Most notable was the $168 million verdict, later reduced, against Catholic Healthcare West for failing to adequately investigate and address a nurse's multiple complaints of sexual harassment by the physicians she worked with, including complaints about daily lewd comments and inappropriate touching.[1]

Another significant source of liability is retaliation claims. While sexual harassment may be hard to prove because there are no witnesses or the person accused denies the allegations or claims there was a consensual relationship, retaliation claims inherently raise more questions of fact that can preclude pretrial resolution.

The most troubling questions of potential retaliation arise when the person accused remains in the accuser's chain of supervision and accuser is subjected to an adverse employment action soon after the complaint is filed. Additionally, a retaliation claim can survive even if the underlying claim of sexual harassment is found legally deficient.

While not common, employers can also face liability for defamation if the situation is publicly discussed and false statements are made about the person who alleged harassment.

Similarly, if the alleged harassment is discussed internally beyond protections of intracorporate privilege and false statements are made about the person making the complaint, liability for defamation can arise.

While we still do not know the full ramification of the recent media focus on sexual harassment and the #MeToo movement on jury verdicts, these trends do appear to have triggered an increased focus by lawmakers on more comprehensive legislation.

For example, the Illinois Legislature enacted an amendment to the Illinois State Officials and Employees Ethics Act,[2] which now specifically requires public employers and lobbyists to undergo annual anti-harassment training and institute anti-harassment policies with detailed and specific requirements.

Additionally, the U.S. Tax Code includes a new component that prohibits employers from taking a tax deduction for settlements (and related attorney fees) of claims of sexual harassment or sexual abuse, if the settlement includes a nondisclosure agreement.[3]

LIABILITY FROM THE SIDE OF THE PERSON ACCUSED

With the new media and societal focus on sexual harassment complaints, an employer's first instinct may be to side with the person bringing the complaint, taking the allegations as true. But

employers must also realize there is a risk of liability to the alleged harasser if the investigation is not handled properly.

Most common are claims of defamation. An employer that makes false public statements about the accused, such as statements to the media, could be liable for defamation.

A defamation claim may also arise if the employer discusses the harassment investigation internally with people who should not be privy to the information.

In the context of the #MeToo movement, filmmaker Brett Ratner filed a lawsuit claiming "libel per se" against a woman who posted on social media that Ratner had raped her.

The lawsuit claims the rape allegations not only are false but were made with the malicious intent to harm Ratner's reputation.[4]

To avoid lawsuits arising from sexual harassment complaints, employers should maintain thorough policies, conduct good investigations and train employees well.

To avoid defamation claims, employers should avoid making public statements about harassment cases, keep their investigations confidential and take disciplinary action only after the investigation is complete and the harassment has been substantiated.

Employers should also keep the person raising the claims apprised of the progress of the investigation and, to the extent permissible under applicable law, informed about adverse employment actions taken against the harasser.

Other claims an employer may face for acting too swiftly to impose discipline before substantiating the allegations include reverse gender discrimination, hostile work environment and retaliation. These claims might arise if the person accused feels unfairly targeted or is subjected to an adverse employment action before the employer's investigation is completed.

Employers should be especially cautious if the person accused belongs to a protected group under federal or state anti-discrimination laws or has raised concerns that could invoke whistleblower protections, since an adverse employment action could provide a basis for discrimination claims.

Employers should also be aware of written employment contracts with those accused to avoid breach-of-contract claims. Case law suggests these claims tend to arise when a management or supervisory employee is demoted following a sexual harassment investigation.[5] Courts, however, have not been very sympathetic to these claimants when the harassment allegations prove to be true.[6]

In addition, employees in unionized workforces may file grievances, claiming their terminations violated an applicable collective bargaining agreement.

Finally, in the absence of written contracts, those accused of harassment may have claims for wrongful or tortious interference with business expectancies or wrongful interference with business contracts if the accuser had improper and malicious motives for making complaints that affected the business interests of the person accused.

For example, one tortious interference claim survived summary judgment where the person accused denied all wrongdoing and the court found the complaining employee's statements were not entitled to a conditional privilege because substantial issues of fact existed as to whether the complaints were false.[7]

PRACTICAL TIPS

How can employers avoid lawsuits by both the person filing the complaint and the person accused? Maintain thorough policies, conduct good investigations and train employees well.

(1) Employers should review their anti-harassment policies to ensure they lay out thorough reporting and investigation processes. This includes the important issue of what to do with the person accused during the investigation. Most often, suspension with pay is appropriate. However, if rape or serious sexual assault is alleged, unpaid suspension or immediate termination may be justified. The policies should be all-encompassing, prohibiting discrimination not only by other employees but also by vendors, clients, customers, etc.

(2) All employees should be required to attend regular sexual harassment training, which should include, at a minimum, an explanation of prohibited conduct and reporting procedures. The employer should document and retain both the training provided and employee attendance at the training.

(3) Human resources professionals and supervisors should have regular retraining on how to conduct sexual harassment investigations properly. In some circumstances, retaining an outside investigator may be preferable to ensure a complete and unbiased investigation. Investigations should start as soon as possible after the complaint.

(4) Ultimately, the employer should take no final disciplinary action until a thorough investigation substantiates the sexual harassment allegations. At the same time, "substantiated" does not mean proven beyond a reasonable doubt. Employers that require eyewitnesses or fail to consider previous similar reports about the same person may unwittingly invite additional problems. All investigations and disciplinary decision-making should be well-documented. If the person accused is a direct supervisor, even absent a finding of harassment,

employers should consider changing the direct reporting relationship without penalty to the person who made the claims.

(5) Employers should also think about the tone of the workplace. All workplace dynamics are unique, but employers should encourage employees — men and women alike — to stand up against harassment and speak up about harassment concerns. Management can accomplish this through frequent and frank discussions with employees about company policies and reporting procedures. Employees should also be reminded that, ultimately, regardless of their relationship with their co-workers, they are still in a workplace. Inappropriate jokes, touching and the like should be consistently discouraged.

(6) Employers should enact and enforce policies that strictly prohibit intimate relationships between direct reports. If a workplace permits fraternization (even among direct reports), employers should also consider "love contracts," which are legal contracts intended to protect the company if consensual relationships go awry.

(7) Employers should seek legal advice when needed to provide clear road maps for training, policy enforcement, procedures and investigations.

CONCLUSION

While no employer can completely eliminate exposure to liability for sexual harassment, taking proactive steps to ensure that employees understand behavioral expectations, feel comfortable speaking out about perceived harassment, and understand that the employer will address all complaints thoroughly will potentially lessen the sting.

In the end, there will always be two sides to the story, as well as differing perceptions and motivations. Employers should keep all of this in mind when handling claims of any kind of unfair treatment.

NOTES

[1] *Chopourian v. Catholic Healthcare West*, No. 09-cv-2972, 2012 WL 1551728 (E.D. Cal. Apr. 30, 2012).

[2] 5 ILL. COMP. STAT. ANN. 430/5-5, 5 ILL. COMP. STAT. ANN. 430/5-10.5.

[3] 26 U.S.C.A. §162(q).

[4] *Ratner v. Kohler*, No. 17-cv-542, *complaint filed*, 2017 WL 4976547 (D. Haw. Nov. 1, 2017).

[5] *Rodgers v. Flint Journal*, 779 F. Supp. 70 (E.D. Mich. 1991), *aff'd*, 948 F.2d 1290 (6th Cir. 1991).

[6] *Scherer v. Rockwell Int'l Corp.*, 975 F.2d 356 (7th Cir. 1992).

[7] *Lawson v. Boeing Co.*, 792 P.2d 545 (Wash. Ct. App. 1990).

This article first appeared in the February 27, 2018, edition of Westlaw Journal Employment.

ABOUT THE AUTHORS

Lauren B. Harris (L) is an associate with the employment and labor group of **Greensfelder, Hemker & Gale** in St. Louis. She focuses her practice on defending employers in all facets of employment discrimination litigation and advises clients on day-to-day employment issues. She can be reached at lharris@greensfelder.com. **Audrie R. Howard** (R) is an associate with the firm in St. Louis. She works with employers to find practical solutions to legal problems, and she defends a variety of employment-related matters ranging from discrimination lawsuits to employee benefits claims. She can be reached at ahoward@greensfelder.com.