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Employment Law

Conducting and Attacking Employment Investigations

An inadequate investigation can give rise to employer liability to the alleged harassment victim, or the alleged harasser

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Merely adopting a policy on unlawful harassment is not enough. In addition to creating effective policies and training employees to help prevent incidents of harassment, employers must promptly and thoroughly investigate complaints and take other remedial measures as well.

In its landmark sexual harassment decision, *Lehmann v. Toys 'R' Us, Inc.*, 132 N.J. 587 (1993), the New Jersey Supreme Court established standards of employer liability for sexual harassment and required that employers create effective preventative and remedial measures when dealing with sexual harassment.

In many cases, if an employer implements effective preventative and remedial measures, it will minimize the potential for the liability and, most importantly, limit the possibility that punitive damages will be imposed.

For example, if sexual harassment is alleged against a co-worker, assuming that the employer had no prior knowledge of any harassment, a prompt and thorough investigation will help to limit the employer's liability for such a claim.

Moreover, even in instances in which the employer may otherwise be held liable because the harassment is by a supervisor, the employer's prompt and thorough investigation will minimize exposure to punitive damages (again, assuming that it had no prior knowledge of the harassment) as the employee must demonstrate that the employer either knew of the harassment and/or showed willful indifference with respect to it.

Conversely, an employer's failure to investigate promptly and thoroughly a sexual harassment complaint exposes the employer to liability for punitive damages.

While *Lehmann* involved allegations of sexual harassment, it is certainly advisable for employers to investigate all claims of unlawful harassing actions in the workplace. There are several reported cases in which claims have been brought for harassment on the basis of other statutorily protected statuses including race, sexual orientation, creed, age and disability.

The courts in these instances have determined that there is no reason to limit the hostile work environment cause of action only to sexual harassment claims. Therefore, it is reasonable to assume that employers will also be subjected to the preventative and remedial aspects of *Lehmann* in cases involving harassment on the basis of criteria other than sex.

The most recent development in New Jersey law regarding employer investigations of sexual harassment is the recognition of a common law wrongful discharge cause of action for employees who are fired as a result of unfair or slipshod employer investigations. *Grasser v. United Healthcare Corp.*, Docket No. MID-L-12026-99 (Law Div. Aug. 30, 2002).

Clearly, any complaint of sexual harassment, whether filed internally or externally, must be investigated. However, informal indications of harassment in the workplace should also be investigated, even if no formal complaint has been made.

The employer's investigation is triggered by such warning signs as a supervisor's observations of inappropriate commentary or conduct, general office knowledge of harassing

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behavior or a request that inappropriate conduct cease.

In most cases, an employer has a duty to investigate reported instances of harassment even where the alleged victim does not request the investigation and/or indicates that she does not want the allegations to be investigated.

Selecting the Investigator

The person chosen to investigate the allegations of harassment should be someone who will be open-minded and impartial during the investigation and who will consider all of the evidence.

To maintain impartiality and lend credibility to the investigation, it is often advisable for the company to hire investigators experienced in the particular area at issue from outside of the company.

In choosing an investigator, employers also should keep in mind that the investigator might very well be called later as a witness. Therefore, the investigator should be someone who will be a credible witness and will be able to communicate effectively.

The following are among the types of investigators typically considered:

- member of the human resources department;
- in-house equal employment opportunity officer;
- in-house attorney;
- member of high-level management;
- member of the internal audit, ethics or security department;
- private investigator or other outside consultant;
- regular outside counsel; or
- special outside counsel.

When selecting an investigator. consider:

- who is being investigated — if the allegations are against the chief executive officer, it is best to have an outside investigator;
- competence and ability to understand the purpose of the investigation and the issues involved such that the interviewer can formulate appropriate follow-up questions when new facts or issues arise during the interview;
- knowledge of company policies, procedures, practices and rules;
- interviewing skills;
- effectiveness as an interviewer in view of the personalities and background of the potential inter-viewees — ability to develop rapport, press for admissions and understand interviewees;
- credibility — no criminal conviction record, no history of termination for misconduct or incompetence, no history of harassing or discriminatory behavior;
- objectivity and impartiality;
- ability to take thorough and accurate notes that can be used as evidence;
- ability to maintain confidentiality to the extent appropriate; and
- ability to instill confidence in and work with the complainant.

Prompt and Thorough Investigation

Once the company receives a harassment complaint, the investigator must immediately begin to gather evidence that will help ascertain whether the allegations of harassment can be corroborated.

No instructive definition of "prompt" has emerged or is possible given the variables that impact each investigation such as the number and availability of witnesses, the length of time the complainant takes to recount the wrongdoing alleged and the complexity of the corrective action required in response. However, the employer should act as expeditiously as possible.

The victim should be interviewed and asked to state all of her allegations and name any witnesses or individuals who may have relevant knowledge. Typically, the harasser should then be interviewed and confronted with all of the allegations and asked to address whether the incidents occurred.

The harasser should also provide names of witnesses or persons with relevant knowledge. In certain instances, the investigator may want to have the victim and the harasser sign certifications setting forth their claims and defenses.

All witnesses and persons with knowledge should also be interviewed, and the company, depending on the circumstances, may want the witness to sign a certification describing the conduct that occurred, including all of the specifics. The investigator should keep detailed notes of all interviews with the victim, the harasser and any alleged witnesses.

Maintaining confidentiality during harassment investigations is crucial, and any individual interviewed in connection with the investigation should be instructed that the investigation is to be kept confidential. Any employee who unnecessarily compromises the confidentiality of an investigation should be subjected to appropriate discipline.

Interviewees should be instructed that the investigator and company intend to maintain confidentiality to the fullest extent possible, including the confidentiality of the identities of all persons involved or alleged to be involved in the incident, revealing only those particulars of the matter to the extent necessary for a thorough investigation. However, employers should be cautious not to promise interviewed employees that their identities, or the facts they provide, will not be revealed in any instance, as such revelation may be necessary to conduct a thorough investigation.

In many investigations, numerous employment documents will need to be reviewed as well. For example, an investigator will need to review the employer's policies and procedures regarding harassment, discrimination, complaints, grievances and investigations. Personnel files and other documentation pertaining to the relevant individuals may also need to be reviewed.

Sometimes job postings and policies regarding promotions and job positions will be relevant. Further, if any of the individuals involved are under a union contract or private contract, the investigator should be aware of this and become familiar with the

terms contained therein.

It is very important that employers not only perform prompt and thorough investigations of harassment, but that they be extraordinarily careful in conducting and documenting such investigations. If an employee ultimately brings a lawsuit against the employer, materials pertaining to the internal remedial investigation will likely have to be produced even if created by an attorney.

Concluding the investigation with a report of the findings and recommendation for implementation of appropriate action may or may not be advisable. Sometimes a summary of the interviews with no "formal findings" is advisable. If no findings can be made, the employer does not have to make formal findings, but still can take remedial action as needed.

Cessation and Retaliation

In conjunction with, and simultaneous to, conducting a prompt investigation, the employer should engage in immediate and appropriate corrective action.

Such corrective action generally consists of three elements:

(1) immediately halting ongoing harassment;

(2) taking appropriate disciplinary action against the wrongdoer; and

(3) taking any other actions appropriate to minimize the risk of another occurrence or retaliation.

It is crucial that employers do not retaliate (or allow other employees to retaliate) against complainants alleging harassment or any persons who assist in the investigation of such allegations.

One compelling reason for employers to be extremely cautious and forceful in enforcing their anti-retaliation policies is that an employee who alleges retaliation for filing a harassment complaint does not have to establish that the harassment occurred. In other words, even if an employee who files a lawsuit for harassment ultimately fails to state a claim for harassment under the law, the employee nevertheless may be able to establish that she was retaliated against for complaining about such harassment.

Improperly Conducted Investigations

In *Grasser*, the court denied an employer's motion for summary judgment on a common law wrongful-discharge claim brought by an employee who had been fired for sexual harassment based on an unfair and slipshod employer investigation.

In so doing, the court held that "the public policy of New Jersey mandates employers conduct fair and thorough investigations when they know of potential sexual harassment in the workplace" and that "an employer violates clear public policy by firing an employee for alleged sexual harassment based on the employee's consensual romantic relationship with a co-worker."

Grasser presented an issue of first impression under New Jersey law: whether an employee who was terminated for alleged sexual harassment based on an undisputedly consensual out-of-work romantic relationship with a co-worker — where no complaint of sexual harassment was ever made and where the employer's investigation revealed no good-faith basis for concluding that sexual harassment had occurred — could bring a public policy wrongful-discharge claim pursuant to *Lehmann* and *Pierce v. Ortho Pharmaceutical Corp.*, 84 N.J. 58 (1980), in which the Court held that it is unlawful to discharge an employee in violation of a clear mandate of public policy.

John Grasser worked for United HealthCare Corporation and its corporate predecessors for almost 30 years. In or about December 1998, Grasser, having been recently divorced, began a one-month romantic relationship with an unmarried co-worker. When the co-worker's boyfriend learned of the relationship several weeks later, he insisted that she resign if she wanted to continue their relationship.

After the co-worker gave notice of her resignation, UHC managers asked her why she was resigning. When she explained her reason for resigning, UHC proceeded to conduct an investigation of Grasser's relationship with the co-worker, even though no one (including the co-worker) had complained that he had done anything inappropriate and despite the co-worker's clear statement that the relationship was entirely consensual.

The investigation uncovered absolutely no evidence that either Grasser or the co-worker had done anything inappropriate in the workplace. However, UHC fired Grasser anyway, asserting in writing that his relationship with the co-worker was a "violation of [UHC's] policy on harassment including sexual harassment."

In *Lehmann*, the Supreme Court's seminal opinion on employer liability for sexual harassment, the Court said that "[a]n employer may ... be held vicariously liable for ... sexual harassment ... if the employer negligently or recklessly failed to have an explicit policy that bans sexual harassment and that provides an effective procedure for the prompt investigation and remediation of such claims."

Subsequently, in addressing the discoverability of materials from an employer's sexual harassment investigation in *Payton v. New Jersey Turnpike Authority*, 148 N.J. 524 (1997), (another unanimous holding), the Court said that "the 'effective' remedial measures emphasized in *Lehmann* include the process by which the employer arrives at the sanctions that it imposes on the alleged harasser." The *Payton* Court went on to say that employers are "required by law to prepare an honest report" regarding their investigations of sexual harassment allegations. The Court also referred to an employer's obligation to investigate potential sexual harassment as the "legal duty to investigate" and the "legal duty under *Lehmann*."

Thus, employers in New Jersey have a legal duty to conduct honest sexual harassment investigations using a process that is both fair and thorough. This employer duty to investigate sexual harassment is a

clear mandate of public policy in New Jersey.

Implicit in the legal obligation of employers to conduct fair and thorough sexual harassment investigations is the notion that the employer will not arrive at a finding of sexual harassment without a reasonable good-faith factual basis for that finding.

Lehmann and *Payton* do not require employers to find sexual harassment every time they conduct an investigation just so they can guarantee that they will not be found liable to the alleged victim of the alleged harassment. As the Ninth U.S. Circuit Court of Appeals noted in *Swenson v. Potter*, 271 F.3d 1184 (9th Cir. 2001), "[w]hen an employee accuses a fellow employee of sexual harassment, the employer must reconcile competing rights: the accuser's right to a harassment-free workplace and the accused's right not to be disciplined without fair procedures and sufficient proof of wrongdoing." Focusing on the accused's rights, the *Swenson* court wrote:

> As a matter of public policy, it makes no sense to tell employers that they act at their legal peril if they fail to impose discipline even if they do not find ... sufficient evidence of harassment. Employees are no better served by a wrongful determination that harassment occurred than by a wrongful determination that no harassment occurred. We should be wary of tempting employers to conduct investigations that are less than fully objective and fair.

Thus, tremendous public interests are implicated by the wrongful discharge of an employee for alleged sexual harassment. Further as the Fourth Circuit noted in *Harris v. L&L Wings, Inc.*, 132 F.3d 978 (4th Cir. 1997), "[t]he legal standard of 'prompt and adequate remedial action' in no way requires an employer dispense with fair procedure for those accused or to discharge every alleged harasser."

In other words, public policy requires that employers' sexual harassment investigations be fair to the alleged harasser as well as the alleged victim.

In New Jersey, that precept means, among other things, that an employer cannot find sexual harassment and terminate an employee on the basis of a consensual out-of-work romantic relationship with a co-worker. Both the Supreme Court and the Appellate Division have held that consensual romantic relationships between co-workers do not constitute sexual harassment, even if one of the parties to the relationship is favored by the other to the detriment of third parties in the workplace.

In *Erickson v. March & McLennan Co., Inc.*, 117 N.J. 539 (1990), a unanimous Supreme Court held that (1) there was "no reason to extend the protection of the LAD to sex-discrimination claims based on voluntary personal relations in the work place" and (2) "favoritism in the work place, based solely on personal romantic preference as opposed to coercion, does not constitute discrimination on the basis of gender."

Similarly, while addressing the discoverability of consensual sexual relationships between partners and employees at a law firm in a case in which the plaintiff-associate alleged that she had been raped by one of the partners, the Appellate Division relied on the distinction between sex in the workplace and sexual harassment in the workplace to bar discovery of such consensual sexual relationships. In *K.S. v. ABC Professional Corp.*, 330 N.J. Super. 288 (App. Div. 2000), the Appellate Division noted that "[s]ex is not congruent with sexual misconduct" in holding that "whether any partner ever had a consensual and welcomed relationship with an employee is irrelevant to plaintiffs' claim that a hostile work environment was created or tolerated by defendants."

Thus, in New Jersey, consensual sexual relationships in the workplace, even between superiors and subordinates, do not constitute sexual harassment, and therefore cannot be used as a predicate for firing an employee for sexual harassment.

In light of the foregoing, an employer violates a clear mandate of public policy by firing an employee for alleged sexual harassment based on the employee's consensual romantic relationship with a co-worker. As noted in *Pierce*, such a wrongful discharge in violation of a clear mandate of public policy is unlawful.

To the extent that an employer has a policy prohibiting consensual relationships between supervisors and subordinates, that policy may violate the employees' state constitutional right to privacy. See *Hennessey v. Coastal Eagle Point Oil Co.*, 129 N.J. 81 (1992), *State v. Saunders*, 75 N.J. 200 (1977) and *Slohoda v. United Parcel Service, Inc.*, 193 N.J. Super. 586 (App. Div. 1984).

In *Grasser*, the employer's investigation of the relationship between Grasser and his co-worker was negligent, if not reckless.

One employee who was interviewed testified that there were several material inaccuracies contained in the memorandum that allegedly accurately summarized the interview of the co-worker with whom Grasser had the relationship.

Similarly, although the employer's notes of the interview indicated that she had said that her family felt that she was a victim of sexual harassment, the co-worker testified in her deposition that her family knew nothing of her relationship with Grasser.

Finally, it is worth noting that after Grasser's termination, the human resources employee who conducted the interviews and took the notes received a rating of "needs improvement" on his annual performance review in part because of his inability to record accurate meeting minutes.

New Jersey law continues to be very protective of employee rights. The proper investigation and resolution of any alleged harassment in the workplace is extremely important. An inadequate investigation can give rise to employer liability in any litigation that may ensue, whether by the alleged harassment victim or the alleged harasser. ■