The magazine from
NEW JERSEY LAWYER
www.njlnews.com
EMPLOYMENT LAW The Lawyer's Source October 30, 2006

Corporate preventative and remedial measures

Importance of workplace investigations

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Employers are increasingly called upon to deal with a variety of employee relations matters that, given changes in the law in recent years, can result in liability to the employer if not handled properly.

For more than 15 years, New Jersey courts have made it clear that effective preventative and prompt remedial measures are critically important in the workplace. This is true not only as the determination of the employer's liability for permitting a hostile work environment to exist, but also in establishing the type of willful indifference that will cause an employer to be subjected to punitive damages.

In New Jersey, for an employer to attempt to limit liability, it should establish comprehensive sexual harassment and anti-harassment policies. But merely adopting a policy on unlawful harassment is not enough: It must be disseminated and enforced. Additionally, any harassment and discrimination complaints must be promptly, thoroughly and effectively investigated. An employer's failure to take these basic steps will undoubtedly lead to exposure of varying degrees, which can lead to financially devastating effects.

Background: Relevant cases

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. Therefore, not only must employers create effective policies and train their employees to help prevent incidents of sexual harassment, but when complaints are made, employers must promptly and thoroughly investigate such complaints and take other remedial measures as well. Even prior to *Lehmann*, in *Erickson v. Marsh & McLennan Co., Inc.* 117 N.J. 539 (1990), the New Jersey Supreme Court opined on several issues, including that an employer's failure to investigate a sexual harassment claim can lead to employer liability.

While *Lehmann* involved allegations of sexual harassment, it is certainly advisable for employers to investigate all claims of unlawful harassing. 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 there is no reason to limit the "hostile work environment" cause of action to sexual harassment claims. Therefore, it is reasonable to assume employers also will be subjected to the preventative and remedial aspects of *Lehmann* in cases involving harassment on the basis of criteria other than sex.

Payton v. New Jersey Turnpike Authority, 148 N.J. 524 (1997), involved the discoverability of an employer's remedial investigation, despite arguments they were protected by various privileges. The New Jersey Supreme Court found that such investigation materials were relevant and discoverable. In so deciding, the court wrote:

> "While the effectiveness of an employer's remedial steps relates to an employee's claim of liability, it is also relevant to an employer's affirmative defense that its actions absolve it from all liability ... Thus, the efficacy of an employer's remedial program is highly relevant to both an employee's claim of liability against the employer and the employer's defense to liability … if effectiveness is gauged by the *process* of the investigation — including timeliness, thoroughness, attitude toward the allegedly harassed employee, and the like — as well as the result of the investigation, then the documents are clearly relevant and discoverable."

Cavuoti v. New Jersey Transit Corporation, 61 N.J. 107 (1999) involved age harassment and discrimination in which the New Jersey Supreme Court articulated legal standards for punitive damages under the New Jersey Law Against Discrimination. The court reiterated the significance of employer preventative and remedial measures of *Lehmann* and *Payton*, ruling that an organization that has effective policies and procedures and performs training geared toward prevention of discrimination and harassment will be able to limit liability as to the creation of a hostile work environment and/or as to the lack of showing the requisite "willful indifference" needed to establish punitive damages.

In *Gaines v. Bellino*, 173 N.J. 301 (2002), the New Jersey Supreme Court once again addressed the issues of prevention and remediation in the context of a sexual harassment case. Specifically, the court echoed the prior decisions, stressing the importance of the employer's remedial steps not only to the employee's claim for liability, but to the employer's defense to such claim. The *Gaines* court stated that while the existence of preventative measures may provide evidence of due care, the absence of same does not in itself establish negligence.

In *Entrot v. BASF Corp.*, 359 N.J. Super. 162, (App. Div. 2003), the court favorably cited *Gaines*, finding "[a] defendant is entitled to assert the existence of an effective anti-sexual harassment workplace policy as an affirmative defense to vicarious liability."

The U.S. Supreme Court, in *Faragher v. City of Boca Raton,* 524 U.S. 775, 118 S. Ct. 2275, 141 L. Ed.2d 662 (1998) and its companion case, *Burlington Industries, Inc. v. Ellerth,* 524 U.S. 742, 118 S. Ct. 2257, 141 L. Ed.2d. 633 (1998), held that defending employers who "exercised reasonable care to prevent and correct promptly any sexually harassing behavior," may raise this an affirmative defense, where "the plaintiff employee unreasonably failed to take advantage of any preventive or corrective opportunities provided by the employer or to avoid harm otherwise." However, the *Ellerth/Faragher* defense can be used only where there is no "tangible employment action."

The *Entrot* court went on to find that constructive discharge could be a "tangible employment action," and, thus, its statements as to the effect of an anti-sexual harassment workplace policy was *dicta.*

Also discussing vicarious liability, the court in *Smith v. Exxon Mobil Corp.*, 374 F. Supp. 2d 406 (D.N.J. 2005), noted:

> "For example, an employer will be held vicariously liable in situations where it delegates authority to control a work environment to a supervisor, and the supervisor abuses that authority, or where sexual harassment is foreseeable and the employer is negligent in having in place or enforcing anti-harassment policies, or where the employer intended for or gave apparent authorization to the harassing conduct."

Workplace investigations

A. What triggers an employer's obligation to investigate?

Any complaint of sexual harassment, filed internally or externally, must be investigated. However, informal indications of harassment in the workplace also should 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 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 he or she does not want the allegations investigated.

B. Selecting the investigator

Once an employee complains of harassment, the complaint should be

immediately and thoroughly investigated. If there is policy and procedure in place for handling such complaints, the employer should follow them. It is important the employer choose the most appropriate investigator — someone who will be open-minded and impartial during the investigation and who will consider all the evidence.

In order to maintain impartiality and lend credibility to the investigation, it often is advisable for the company to hire outside investigators experienced in the particular area at issue. In choosing an investigator, employers should keep in mind the investigator might very well later be called as a witness. Therefore, the investigator should be someone who will be credible and be able to communicate effectively.

Among the types of investigators typically considered:
- Members of the human resources department;
- In-house EEO officers;
- In-house attorneys;
- Members of high-level management;
- Members of the internal audit, ethics or security department;
- Private investigators or other outside consultants;
- Regular outside counsel; and/or
- Special outside counsel.

When selecting an investigator, consider:
1) Who is being investigated (if the allegations are against the CEO, it is best to have an outside investigator);
2) 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;
3) Knowledge of company policies, procedures, practices and rules;
4) Interviewing skills;
5) Effectiveness as an interviewer in view of personalities and backgrounds of potential interviewees (ability to develop rapport, press for admissions, and understand interviewees);
6) Credibility (no criminal conviction record; no history of termination for misconduct or incompetence or history of harassing or discriminatory behavior);
7) Objectivity and impartiality;
8) Ability to take thorough and accurate notes that can be used as evidence;
9) Ability to maintain confidentiality to the extent appropriate; and
10) Ability to instill confidence in and work with complainant.

C. Prompt and thorough investigation

Once the company receives a harassment complaint, the investigator must promptly begin to gather evidence to help ascertain whether the harassment allegations can be corroborated. No complete definition of "prompt" has emerged or is possible given the variables impacting each investigation, such as the number and availability of witnesses, the time the complainant takes to report the alleged wrongdoing and the complexity of the corrective action required in response. However, the employer should act as expeditiously as possible.

Victims should be interviewed and asked to state all their allegations and name any witnesses or individuals with 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 also should provide names of witnesses or those with relevant knowledge. In certain instances, the investigator may want to have both victim and harasser sign certifications setting forth their claims and defenses. All witnesses and/or persons with knowledge should be interviewed. If a witness corroborates the victim's allegations or the harasser's denials, the company, depending on the circumstances, may want the witness to sign a certification describing the conduct that occurred, including all specifics. The investigator should keep detailed notes of all interviews with the victim, the harasser and any witnesses.

In many investigations, numerous employment documents will need to be reviewed. For example, an investigator must review the employer's policies and procedures regarding harassment, discrimination, complaints, grievances and investigations. Personnel files and/or other documentation pertaining to relevant individuals may need review. Sometimes job postings and policies regarding promotions and job positions will be relevant. Further, if any individuals involved (such as the victim or harasser) are under a union or private contract, the investigator should become familiar with the terms contained therein.

It is crucial employers not only perform prompt and thorough investigations of harassment, but they must 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.

D. Prompt cessation

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

E. Retaliation

It is essential for employers to have anti-retaliation provisions in their policies regarding illegal harassment and to enforce such policies. It is crucial that employers do not retaliate (or allow other employees to retaliate) against complainants alleging harassment or 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 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 they were retaliated against for complaining.

Conclusion

New Jersey law continues to be very protective of employee rights. Thus, employers should consult in-house or experienced outside counsel from the first indication of any unlawful harassment in the workplace. The proper investigation and resolution of such problems is extremely important because an employer's inadequate investigation can give rise to employer liability in any litigation that may ensue, whether by the alleged victim or the alleged harasser.

Montclair attorney Ty Hyderally litigates sexual harassment, discrimination, retaliation, whistleblower, wage and hour, ERISA, medical leave, breach of contract and restrictive covenant claims.

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