

LABOR AND EMPLOYMENT LAW UPDATE



RESPONDING TO COMPLAINTS OF SEXUAL HARASSMENT: DOS AND DON'TS FOR AVOIDING POTENTIAL LIABILITY

Consider the facts recently presented in a case in the U.S. District Court for the Northern District of Texas: An employer has a sexual harassment policy which is communicated to employees in a handbook and in training sessions. An employee complains of harassment by a supervisor while working at a client's facility. The employee is placed on paid leave pending an investigation. The employer's human resources manager promptly conducts an investigation which includes interviews of the alleged harasser and victim, as well as several employees. At the conclusion of the investigation, the employer opts to separate the supervisor and employee so that neither is working at the same location. No tangible harm is suffered by the employee. DID THE EMPLOYER DO ENOUGH TO INSULATE ITSELF FROM POTENTIAL LIABILITY FOR THE SUPERVISOR'S HARASSMENT?

According to the September 12, 2007 opinion in *Vincent v. Aztec Facility Services, Inc.*, the answer was: NO. Among the shortcomings in the employer's response found by the court were: (1) the failure to interview an employee of the client who was a key witness to the alleged harassment, (2) the failure to follow standard procedures during the investigation, and (3) the retention of the supervisor despite the recommendation of the human resources manager that he be terminated. The court denied the employer's motion for summary judgment.

The message of the *Vincent* opinion is unequivocal: Where potential liability turns upon the employer's response to a complaint of sexual harassment, the response will be scrutinized closely and harshly. Any shortcoming can be the difference between escaping and facing potential liability for supervisory harassment.

THE LEGAL LANDSCAPE: In the landmark cases of *Burlington Indus. v. Ellerth* and *Faragher v. City of Boca Raton*, the U.S. Supreme Court recognized an affirmative defense to claims alleging sexual harassment by a supervisor under Title VII of the Civil Rights Act of 1964. As long as the employee did not suffer a tangible employment action as a result of the harassment, an employer may avoid potential liability for the harassment by showing that (1) it exercised reasonable care to prevent and promptly correct any sexually harassing behavior, and (2) the employee unreasonably failed to take advantage of any preventative or corrective opportunities provided by the employer or to avoid harm otherwise. It is the first prong of the defense which is entirely within the control of an employer.

DO IDENTIFY INDIVIDUALS WITH WHOM COMPLAINTS SHOULD BE LODGED: The more people who are authorized to receive complaints of sexual harassment, the greater the risk of delays, misunderstandings, mistakes and personal agendas adverse to the interests of the employer. To minimize this risk, employees should be directed to lodge a complaint of sexual harassment with specific individuals who have the time and experience to adequately address the complaint.

DO TAKE ALL COMPLAINTS OF SEXUAL HARASSMENT SERIOUSLY: An employer should act on all complaints of sexual harassment without exception. Even complaints which seem too incredible to believe or which have suspicious motives should be investigated.

DO ACT PROMPTLY: Any delay in responding to a complaint of sexual harassment can be fatal to the ability of an employer to assert the *Ellerth/Faragher* defense. A contingency plan which alleviates any potential for delay is recommended.

DO SEPARATE THE SUPERVISOR FROM THE EMPLOYEE PENDING AN INVESTIGATION: The first step of any response to a complaint of harassment should be a measure which forecloses any opportunity for harassment or further complaints of harassment. Viable options include a paid leave of absence or a temporary reassignment for either the employee or supervisor.

DON'T RETALIATE AGAINST THE EMPLOYEE OR PERMIT OTHERS TO DO SO: An employee should never be treated less favorably or placed in a less favorable position by an employer because he or she complained of sexual harassment. As a general policy, all employees should also be warned that retaliation in any form against an employee who has complained of harassment is grounds for discipline or termination. A failure to heed this warning should bring about the consequences promised.

DO INVESTIGATE THOROUGHLY: An investigation of a complaint of sexual harassment should include all potential witnesses, all potential victims, and all potential acts of harassment. Shortcuts and information gaps are a recipe for potential liability.

DON'T LET AGENDAS CLOUD THE INVESTIGATION: As demonstrated by the *Vincent* opinion, an investigation conducted primarily to protect the employer can actually harm the employer. The protection of a supervisor who is considered more valuable to the employer than the complaining employee may also prove to be a harmful agenda. The truth should be the only goal of an investigation.

DO EVALUATE GATHERED INFORMATION OBJECTIVELY: Often, conflicting information will be obtained during the course of an investigation. Giving a supervisor the benefit of the doubt will not help the employer's cause. Rather, the information should be viewed objectively with one question in mind: Did sexual harassment occur? Consultation with legal counsel can be invaluable in this regard.

DO TAKE MEASURED ACTION: Termination of a supervisor for harassment or termination of an employee for a false report of harassment may be warranted by the circumstances but are by no means the only options available to an employer following an investigation. Other options include less severe discipline, counseling, education, job reassignment and negotiated solutions.

DON'T END AN INVESTIGATION WITH INACTION: Even in situations where a complaint is determined to be without merit, the employer should take precautionary steps with respect to the supervisor, such as education, warnings, etc. In the event the supervisor is later found to have engaged in other harassing behavior, the employer can then point to its efforts to prevent such misconduct.

ADDITIONAL QUESTIONS? If you have any questions about sexual harassment please contact Robert Chadwick at Campbell & LeBoeuf, P.C.

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