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Briefly

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HAVING A SEXUAL HARASSMENT POLICY
NOT ENOUGH TO AVOID PUNITIVE DAMAGES

Mary Moffat Helms

"In spite of these policies, procedures, and training, the appeals court found that a sexual harassment policy '...is not sufficient in and of itself to insulate an employer from a punitive damages award.'"

A recent Seventh Circuit federal appeals court ruling addressed whether a defendant employer is liable for punitive damages even though it had a sex harassment policy and conducted orientation training on harassment. *EEOC v. International House of Pancakes Flipmeastack, Inc.*, 114 FEP Cases 145 (CA 7 2012). In this case, jurors ruled in favor of a plaintiff who was awarded only $4,000 in compensatory damages, but was awarded $100,000 in punitive damages, in a sexual harassment claim. There is a statutory provision in Title VII that punitive damages are available when a plaintiff demonstrates that the defendant engaged in intentional discrimination "with malice or with reckless indifference to the federally protected rights of an aggrieved individual." The defendant employer in this case challenged the punitive damages award, contending that this case presented a "textbook example of responsible employers implementing and following clear and effective sexual harassment policies."

The employer had a sexual harassment and diversity policy for managers and employees indicating that "any form of unlawful harassment is absolutely forbidden, regardless of whether it is verbal, physical, or visual harassment." The policy also stated that employees were to report any instances of improper behavior to a "manager or company representative." All new hires received training consisting of showing a sexual harassment videotape, handing them a copy of the sexual harassment policy, and asking them to read and sign it. Signed copies of the sexual harassment policy were then maintained in a locked file cabinet. However the complaint procedure was not available in print. Further, corporate IHOP had directed that a crisis management guidelines poster be displayed in every IHOP restaurant, providing a list of telephone numbers in case of an emergency, and one of the items mentioned was a "discrimination claim." The poster included a telephone number of the local management, and a corporate number of IHOP, and the cell number of one of the local managers. Neither plaintiff had any recollection of seeing this corporate poster at their facility, however.

In spite of these policies, procedures, and training, the appeals court found that a sexual harassment policy "...is not sufficient in and of itself to insulate an employer from a punitive damages award." The appeals court found that a rational jury could have concluded that the employer's policy was not sufficient to insulate it from a punitive damages award, because it was ineffective in advancing the education and protection of the employees' rights under Title VII. First, a rational jury could have concluded that certain policy language-, i.e., noting the "severity of knowingly making a false accusation of discrimination or harassment," was inserted to discourage complaints of sexual harassment. Second, once the employees viewed the sexual harassment video and signed a sexual harassment and diversity policy, the policy was locked in a file cabinet, not accessible to the employees without managerial approval. Moreover, the complaint mechanism was mentioned in the video, but was not available in written form. To the extent the crisis management poster was meant to address this issue by providing a name and cell number, the poster was insufficient because the employer could not prove it was actually displayed in the employee break room during the time the plaintiff was harassed, and the poster did not inform an employee with any degree of clarity which telephone number to call in the even that he or she believes that the sexual harassment policy had been violated. In addition, the employer did not engage in good faith efforts to educate its managerial staff about sexual harassment in the workplace, as no additional training was provided after employees were promoted into management. Further, managers themselves engaged in sexual harassment, and failed to report complaints made by employees of harassment. In sum, the jury could have properly concluded that the employer's consistent failure to comply with its own sexual harassment policy evidenced a lack of understanding about what constituted sexual harassment under the policy and what their responsibilities were as managerial staff under the policy.

Continued on page 4 ▸▸

Ronald G. Daves

"The notice posting requirement was to take effect on April 30th, but now there is no requirement to post the notice pending court review of the issue by the District of Columbia Court of Appeals."

NLRB POSTER REQUIREMENT BLOCKED

On April 17, 2012, a federal appeals court entered an order enjoining the NLRB from requiring employers to post a pro-union notice. *National Association of Manufacturers, et al., v. National Labor Relations Board, et al.* The notice posting requirement was to take effect on April 30th, but now there is no requirement to post the notice pending court review of the issue by the District of Columbia Court of Appeals. It should be noted that while the notice posting requirement of the National Labor Relations Board is no longer going into effect April 30th, there is an existing posting requirement for federal contractors under federal executive orders that remains in effect, and that currently requires a similar notice.

In a case decided in March, a federal district court in the District of Columbia previously found the NLRB rule lawful, but limited how the agency could enforce it. On April 13, a federal district court in South Carolina determined that the NLRB lacked the authority to establish the requirement, stating that rules issued by the Board must be "necessary to carry out" other provisions of the Act, and that the Board had confused a "necessary rule" to one that was simply useful. The federal district court in South Carolina also indicated that Congress intended the Board's authority over employers to be triggered by an outside party's filing of a representation petition or unfair labor practice charge, rather than dictating employer conduct prior to the filing of any petition or charge.

Because of the conflicting rulings and the pending appeal in the Federal Appeals Court for the District of Columbia, the DC Circuit granted an emergency motion for injunction preserving the status quo until the appeal in that case could be determined. The court went on to set a briefing schedule providing for the final briefs to be filed on June 29, 2012, but an ultimate ruling by the District of Columbia Circuit could take many months.

The bottom line is that the employers do not have to post the NLRB notice on April 30th, but existing obligations to post a similar notice by government contractors under the executive order remain in effect.

Amanda Lowe

"According to the WBI, workplace bullying is 'repeated mistreatment: sabotage by others that prevented work from getting done, verbal abuse, threatening conduct, intimidation, and humiliation.'"

WORKPLACE BULLYING: SCHOOL PLAYGROUND BEHAVIOR IN THE PROFESSIONAL SETTING

According to statistics from STOMP Out Bullying, an anti-bullying program for kids, 1 out of 4 kids have been bullied. Research shows that bullying adversely affects childrens' mental health, academic success, and ability to relate to others. Similarly, the Workplace Bullying Institute ("WBI") reports that 35% of adult American workers have been bullied and an additional 15% have witnessed it. Bullying affects workplace morale and efficiency, and the victim may ultimately quit. According to federal data on the subject, "bullying" includes being made fun of, being the subject of a rumor, being pushed, shoved, tripped or spit on, threatened with harm, or being excluded from activities of others. According to the WBI, workplace bullying is "repeated mistreatment: sabotage by others that prevented work from getting done, verbal abuse, threatening conduct, intimidation, and humiliation."

As we often see on the news, bullying occurs both in person and via the internet, sometimes with devastating consequences. Over the last several years children have committed suicide as a result of being bullied, and according to the U.S. Department of Justice, many of the two million violent crimes occurring at work each year are related to bullying. When my nine year old son said he did not like school, it took an act of congress to get him to tell us about his bully at school. Apparently, victims in the workplace are no different- less than one half of workplace incidents are reported by employees. The victims may fear the aggressor or lack confidence that their employer will properly respond to the problem. Tackling the problem in either setting can be complicated, but addressing workplace bullying must take more into consideration than the School Resource Officer simply having a talk with the victim and aggressor. While under some circumstances, bullying may be unlawful under federal and state anti-discrimination and harassment laws, particularly if related to a protected-class status, workplace bullying can also be "generic" in the sense it does not use discriminatory words or actions and does not single out individuals because of their race,

Continued on page 4

Jeff Jones

"Such a knee-jerk reaction may not always be legally appropriate…"

SHOULD AN ARRESTED EMPLOYEE BE FIRED?

When an employee is arrested for a serious or notorious offense, some may instinctively want to fire the employee. Such a knee-jerk reaction may not always be legally appropriate, however. The Equal Employment Opportunity Commission (EEOC) takes the position that an arrest record alone is often not a suitable basis for a decision to discharge an employee if it is the only information the employer has to support its decision. The rationale for this concept is that minorities are often arrested to a greater extent than non-minorities, and many charges are dismissed or otherwise lack validity. Thus, the EEOC takes the position that using arrest records in this way have a disparate impact on some protected groups, and as a result, may constitute an unlawful discriminatory practice in some circumstances.

Even the EEOC, however, would give employers more latitude if they have reason to believe the charges are true and the alleged crimes have some relationship to the employee's role at work. In its Policy Guidance on the Consideration of Arrest Records in Employment Decisions, the EEOC states:

Where it appears that the applicant or employee engaged in the conduct for which he was arrested and that the conduct is job-related and relatively recent, exclusion is justified.

The EEOC suggests to justify the use of arrest records, that an additional inquiry be made. The employer should look at the surrounding circumstances, offer the applicant or employee an opportunity to explain, and if he or she denies engaging in the conduct, make sufficient inquiries necessary to evaluate his or her credibility.

Even in cases where the crime is not job-related, the notoriety of the arrest may adversely affect relations in the workplace and also violate attendance or other policies. If an employee cannot work because of the arrest, employers generally are not required to provide time off to employees who have to appear in court or serve sentences as a result of criminal allegations.

A further approach to consider is to suspend the employee pending the conclusion of the criminal proceedings, subject to review upon the conclusion. While this type of approach is not specifically addressed in EEOC policies, it would seem to offer some reasonable compromises. In many cases, the employee may seek another job and not return. In other cases, the employee may be ultimately convicted. Even if the case is dismissed on grounds unrelated to the merits of the case, the employer can then independently review the facts at the conclusion of the criminal process and decide whether to reinstate the employee.

In any case, like in other situations, the employer should be careful not to commit defamation against the employee. The reasons for such employment actions should be only communicated to those who have a "need to know."

KNOW YOUR ATTORNEY

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JAMES W. FRIAUF is an Associate in the Knoxville, Tennessee office of the Firm, which he joined in September 2009. He practices in the area of general civil litigation with an emphasis on fair housing, employment, landlord/tenant counseling and litigation. James received his A.S. degree from Richard Bland College of the College of William and Mary. He attended the University of Virginia and Middle Tennessee State University, graduating cum laude in 2005 with a B.S. Degree, majoring in Political Science. James received his J.D. from the T.C. Williams School of Law at the University of Richmond in 2008 where he was awarded for outstanding oral advocacy in 2006, was a Member of the Moot Court Board 2006-08, a member of the Moot Court Interscholastic Competition Team in 2007, and was an Executive Member and the Treasurer of the Moot Court Board 2007-08. James is a Member of the Knoxville Bar Association.

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"HAVING A SEXUAL HARASSMENT POLICY" continued from page 1

WHOM SHOULD EMPLOYER BELIEVE CONCERNING HARASSMENT ALLEGATION?

Employees have a tendency to believe that the "deck is stacked against them" concerning any type of employment case. While there may be some truth to this common assumption, employers generally have many rights that they do not know they have. One of the rights an employer generally has is the right to make a reasonable credibility determination in deciding what happened concerning an employment incident. A clear example of this occurs in connection with sexual harassment investigations.

Obviously, when a sex harassment matter is reported to the employer, or the employer otherwise hears of a sexual harassment matter, it has an obligation in almost every situation to investigate. The investigation normally includes talking to the complaining employee or victim, to the alleged perpetrator, and to any third party witnesses. If there are no third parties that were present when the incident occurred, perhaps the victim contemporaneously explained what happened to a third party, so that there can be some means of some type of verification of the victim's story. Also, obviously the accused has to be interviewed, and any witnesses of the accused considered. Nevertheless, some tough credibility issues may still remain, and the question is, how does an employer resolve them?

One thing to remember is to apply the proper burden of proof, which is generally considered to be one of "preponderance" of the evidence. That is, based on the proof and the reasonable inferences from the proof and known facts, is it more likely or not that the incident occurred. Next, it is appropriate to look at the past record of the accused, and examine other statements made by each pertinent witness to determine credibility. For example, this writer recalls a harassment investigation in which the accused manager insisted that he had never been behind closed doors with the complainant. Because many witnesses contradicted this assertion by the accused manager, this was a significant factor in the company crediting the accuser over the accused. Similarly, the employer should look at whether there has been any past history of similar accusations or concerns regarding the accused. Also, the employer should consider whether there could be any ulterior motive as to why the victim would make such an accusation.

One of the most difficult issues is in evaluating the demeanor of the accuser versus the accused. Demeanor can include subtle reactions such as eye contact and body language. Attention should be given as to whether the accused answered the questions directly, or attempted to evade the subject.

It is important to conduct a fair investigation, and to interview all relevant witnesses. This writer recalls another situation in which a company manager called and said he had interviewed several witnesses, was tired of interviewing witnesses, and was going to base his conclusions on what was known at that present time. Later, in a hearing attended by the accuser's attorney, this manager was quizzed extensively as to why certain witnesses were not interviewed, suggesting an impropriety or bias in the process.

The bottom line, however, is that the employer is going to need to weigh witness credibility and reach some determination based on a preponderance of the evidence. It may be a good idea to evaluate the evidence and reach a credibility determination in writing, in some sort of internal documentation. Employers should strive to make the appropriate credibility resolution in every case, because it is a rare case that the employer would conclude that due to the conflicting evidence, that no determination can be made.

"WORKPLACE BULLYING" continued from page 2

sex, age, national origin, religion, disability, etc. The WBI reports that workplace bullying is four times more prevalent than illegal harassment.

The first step in addressing bullying is to have a published policy defining and prohibiting bullying and providing a reporting procedure for incidents. The anti-bullying policy can be similar to harassment prevention policies, and even be included as a part of those policies. Most employers include bullying policies as part of their workplace violence policies. In addition to definitions and a reporting procedure, the policy should encourage employees to report incidents and emphasize that all acts will be investigated. The policy should include a "no retaliation clause," and inform employees that violations of the policy may result in discipline, up to and including termination.

When complaints under such a policy do occur, the complaint should be handled similar to a harassment complaint. During the investigation, the employer should determine whether the complaint involves an allegation of potentially unlawful harassment, or "generic bullying." Even if the complaint or incident does not involve legally protected issues, it is still necessary to thoroughly and impartially investigate in order to determine if corrective action is necessary. Employers should be careful as to what labels are attached to its investigatory materials, however, as an incorrect label may later be used against the company in a legal action.