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Blog Post

Reminder: Promptly Investigate Harassment Complaints

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Even though the COVID-19 pandemic and its impact on the workplace has dominated the headlines recently, employers should be careful not to delay investigating non-pandemic-related complaints — particularly those of harassment. Failing to promptly investigate and correct harassing behavior can be costly. Based on a recent federal appellate court ruling, a month between complaint and action may not be prompt enough.

More than two decades ago, in two companion cases, the United States Supreme Court provided employers guidance on avoiding or minimizing liability for claims where an employee has been harassed by a supervisor. Where no tangible employment action was taken against the employee (such as termination or demotion), an employer may be able to avoid liability or minimize damages where it can establish a two-pronged defense (known as the "*Faragher-Ellerth*" defense). This requires an employer to show: a) that the employer exercised reasonable care to prevent and *promptly correct* any harassing behavior, and b) that the employee unreasonably failed to take advantage of any preventive or corrective opportunities provided by the employer or to avoid harm otherwise.

Adopting policies that prohibit harassment, establishing reporting procedures, and training supervisors are the first steps in showing an

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employer has taken reasonable care to prevent harassment. But taking care to promptly correct any harassing behavior requires doing more. Employers must first conduct an investigation to determine whether such conduct occurred. That often involves identifying an appropriate investigator and another person to serve as a witness, interviewing the complaining employee, identifying and interviewing other witnesses, identifying and reviewing documents which substantiate or refute the allegations, interviewing the alleged wrongdoer, assessing credibility, making a good faith determination as to whether harassment – or other misconduct which may not rise to the level of harassment – has occurred, and documenting all of the foregoing. Then the employer must act to stop the harassment. All of that can take time. How much time does an employer have?

Unfortunately, that is not crystal clear. The EEOC has not issued formal guidance stating what "prompt" means, and different court decisions have reached different conclusions. However, a recent court case from the federal appellate court for the Sixth Circuit, which has jurisdiction over Kentucky, Michigan, Ohio, and Tennessee, indicates that an employer who takes a month to act is not acting as promptly as it should.

The Facts of the Case

The plaintiff was a female project manager in information systems for a large automobile manufacturing company. In April 2015, she began working on a project that was headed by a male Senior Manager. The Senior Manager was not her manager, but rather headed the particular project. Shortly after she started working on the project, the Senior Manager allegedly began making inappropriate comments. The plaintiff alleged that the conduct escalated, and in September 2015, the Senior Manager lured her to a hotel room under false pretenses, exposed himself, made sexual comments, prevented her from leaving the room, and tried to embrace her. She alleged that thereafter

she tried to avoid him at work and told him he made her feel uncomfortable. Shortly thereafter, on October 1, 2015, she was removed from the project at his request. However, she alleged that he continued to touch her inappropriately.

On November 10, 2015, the plaintiff reported the unwelcome touching – but not the hotel incident – to another manager (not her own manager.) That manager asked if he could escalate her complaint to Human Resources. The plaintiff agreed and *nine* days later, on November 19, 2015, he reported her complaint to Human Resources. Two weeks later, on December 1, the plaintiff reached out to Human Resources on her own, saying she was tired of the continued groping. On December 3, HR interviewed the plaintiff. During this interview, the plaintiff disclosed all of the conduct by the Senior Manager, including the hotel room incident. However HR did not interview the Senior Manager until December 9, after which they walked him out of the office. HR recommended his termination the next day. It was approved on December 11, but the Senior Manager resigned before the termination took effect.

The plaintiff sued her employer for sexual harassment, among other claims. The employer asserted the *Faragher-Ellerth* defense and argued it was entitled to judgment in its favor as a matter of law. As discussed above, under this legal defense, the employer must show that: (1) "it exercised reasonable care to prevent and correct any harassing behavior" and (2) that the employee "unreasonably failed to take advantage of the preventative or corrective opportunities" that the employer provided. The trial court found the company established the defense and granted summary judgment, but the appellate court reversed.

It is important to note that the policy in this instance allowed an employee to report the harassment to his or her department manager, to Human Resources, to a company hotline, or "to any member of

management." Allowing an employee to report to any member of management creates a real issue unless managers know that they must immediately escalate such complaints to HR for investigation and corrective action. In the Sixth Circuit case, the plaintiff did not dispute that the company's policy was reasonable; she argued that the trial court erred in concluding that the company *promptly* investigated and corrected the conduct.

Although the Sixth Circuit Court of Appeals noted that the employer had implemented an anti-harassment policy for investigating harassment complaints, the existence of the policy alone was not dispositive of the issue of whether the employer exercised "reasonable care" in preventing or correcting harassing behavior. Instead, the Sixth Circuit Court focused on the conduct of the employer after receiving notice of the complaint. The court said that under Sixth Circuit law, an employer is deemed to have notice of harassment the moment the harassment is reported to any supervisor or department head who is authorized to receive or forward such complaints to management. Since the company policy authorized harassment to be reported to any manager, the company was on notice as of the date the plaintiff first reported it to a manager, November 10, 2015, not December 1, 2015, the date in which the plaintiff reported the alleged harassment to Human Resources. The Court then used the November 10 date to determine whether the employer acted with reasonable care, including "promptly" investigating the plaintiff's complaint.

In this case, the Court found that it took the manager nine days to escalate the complaint Human Resources, and another two weeks for Human Resources to schedule an interview with the plaintiff. Notably, the Sixth Circuit observed that when the employer was asked about the two-week delay, the HR Manager could only testify that the holidays may have played a factor, but he could not provide any details as to what was being done during

that two-week period to investigate the plaintiff's complaint. Meanwhile, during this delay, the plaintiff said she was still being subjected to sexual harassment. In sum, from the moment the plaintiff first complained of harassment, the employer waited twenty (20) days to take any investigative steps and twenty-eight (28) days before removing the Senior Manager from the workplace. Based on these circumstances, the Sixth Circuit Court determined that there were issues of fact and a jury must determine whether the employer exercised reasonable care.

This ruling does not mean that the employers will now be liable for sexual harassment because of a one-month delay. It simply illustrates that the longer an employer waits to investigate allegations of harassment and take corrective action, the harder it is to obtain judgment without going through the significant time and expense of trial.

Takeaways For Employers

- Maintain a clear anti-harassment policy that requires employees to report harassment in writing to Human Resources, or, if Human Resources is involved in the alleged wrongdoing, to one alternative individual in an executive leadership position who knows what to do. Policies should not allow employees to report concerns to "any member of management" unless the employer is confident that every single one of them is trained in responding to such concerns and knows to escalate them to Human Resources immediately for investigation and action.
- Be sure your policies preclude "gateway" conduct, not just harassment that meets the legal definition. Inappropriate conduct that may not rise to the level of actionable harassment should still be nipped in the bud, as it, too, can give rise to claims.
- Train managers on how to recognize harassment and establish a clear procedure for how to respond. That procedure should include promptly

reporting allegations or observations of harassment to Human Resources. Impress upon managers that while they can do their best to maintain confidentiality, they must report such allegations or conduct to HR, even if the employee does not want them to do so. Let HR deal with the employee's reticence; managers need to immediately report allegations or incidents of harassment.

- Take steps towards moving the investigation forward and document those steps. If there are unavoidable delays, document the reasons.
- When interviewing the complaining employee and witnesses, emphasize anti-retaliation policies. Be sure the complaining employee knows to notify HR if harassment continues during the investigation.
- Take steps to remove the alleged harasser from the plaintiff's worksite where possible or to otherwise ensure that the alleged harasser is not alone with the complaining employee while the investigation is ongoing.

For assistance with investigating harassment complaints or other workplace issues, contact your Akerman attorney.
