Corporate Preventative and Remedial Measures:

The Importance of Workplace Investigations in New Jersey

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I. Introduction

Employers are increasingly called upon to deal with a variety of employee relations matters that, given changes in the law in the past years, can result in liability to the employer if not handled properly. For more than fifteen (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; however, merely adopting a policy on unlawful harassment is not enough. It must be disseminated and enforced. Additionally, any complaints of harassment and discrimination 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 for an entity.

II. Legal Background: Relevant Cases

In its landmark sexual harassment decision, Lehmann v. Toys „R" Us, Inc., 132 N.J. 587, 621-23 (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 the Lehmann case, In Erickson v. Marsh & McLennan Co., Inc. 117 N.J. 539, 560 (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 the Lehmann case 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 but not limited to 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.

Payton v. New Jersey Turnpike Authority, 148 N.J. 524 (1997), involved the discoverability of an employer's remedial investigation, despite arguments that same 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.
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> Id. at 536-37.

Cavuoti v. New Jersey Transit Corporation, 61 N.J. 107 (1999) was a case involving age harassment and discrimination in which the New Jersey Supreme Court articulated the legal standards for punitive damages under the New Jersey Law Against Discrimination. The Court reiterated the significance of employer preventative and remedial measures that it previously addressed in both Lehmann and Payton. In Cavuoti, the Court ruled 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.

Thereafter, 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 set forth above and once again stressed 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. Id. at 314. The Court in Gaines stressed that while the existence of preventative measures may provide evidence of due care, the absence of same does not in itself establish negligence. Id. Similarly, the presence of such employer measures also does not automatically demonstrate an absence of negligence. Id.

The Appellate Division favorably cited Gaines in its decision in Entrot v. BASF Corp., 359 N.J. Super. 162 (App. Div. 2003).

> In a recent case, our Supreme Court stated, without analysis or mention of Ellerth and Faragher that "[a] defendant is entitled to assert the existence of an effective anti-sexual harassment workplace policy as an affirmative defense to vicarious liability." Gaines v. Bellino, supra, 173 N.J. at 320, 801 A.2d 322. Apparently the plaintiff in that case continued working for the employer; thus, there was no issue concerning whether there had been a "tangible employment action" within the meaning of the Ellerth/Faragher defense. In fact, the employer took disciplinary action against the offending supervisor. The issues were whether the employer's

> actions relieved it from liability under either section 219(2)(b) or (d) of the Restatement. The Court reversed summary judgment on both grounds, holding that there were disputed fact questions that the trial court should not have resolved. Thus, Gaines did not provide an answer, explicit or implicit, to the issue we now confront.

Id., at 192.

The Entrot court went on to hold that constructive discharge was a "tangible employment action," and thus that the Ellerth/Faragher defense was not available to employers when there had been a constructive discharge. Entrot v. BASF Corp., 359 N.J. Super. 162, 194 (App. Div. 2003)

The court in Entrot noted with favor the decision in Heitzman v. Monmouth, 321 N.J. Super. 133 at 145 n.3 (1999), regarding vicarious liability. "[T]he court added that the Supreme Court had ruled that an employer could defeat such liability by showing that it exercised reasonable care to avoid and correct any harassing behavior, and that the plaintiff-employee unreasonably failed to take advantage of the employer's opportunities to ameliorate any harm." Entrot v. BASF Corp., 359 N.J. Super. 162, 187 (App. Div. 2003).

Also discussing vicarious liability, the court in Smith v. Exxon Mobil Corp., 374 F. Supp. 2d 406 (D.N.J. 2005), noted, "[f]or 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." Id., at 421 (Internal citations omitted).

III. Practical Concerns: Performing Workplace Investigations

A. What Triggers an Employer's Obligation To Investigate?

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 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.

B. Selecting the Investigator

Once an employee complains of harassment, the complaint should be immediately and thoroughly investigated. If there is a policy and procedure in place for handling such complaints, the employer should follow the policy and procedure. It is important that the employer choose the most appropriate 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. In order 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 should keep in mind that the investigator might very well later be called 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 EEO 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; and/or

Special outside counsel.

When selecting an investigator, consider the following**:**

Who is being investigated (e.g., if the allegations are against the CEO, 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 interviewees (e.g., ability to develop rapport, press for admissions, and understand interviewees);

Credibility (e.g., 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.

C. 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 report the alleged wrongdoing, 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/or persons with knowledge should also be interviewed. If a witness corroborates the victim's allegations or the harasser"s denials, the company, depending upon 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 witnesses.

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/or other documentation pertaining to the relevant individuals may need to be reviewed. Sometimes job postings and policies regarding promotions and job positions will be relevant. Further, if any of the individuals involved (such as the victim or harasser) 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 crucial that employers not only perform prompt and thorough investigations of harassment, but that they are 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 corrective action generally consists of three elements:

Immediately halting ongoing harassment;

Taking appropriate disciplinary action against the wrongdoer; and

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 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.

*IV. **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 harassment victim or the alleged harasser.[1]

[1] This article is intended for general information purposes only and does not constitute legal advice. The reader should consult legal counsel to determine how the law applies to specific situations.