Investigations, Compliance and Defense

Key Considerations in Investigating Workplace Sexual Misconduct Complaints

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From the advent of the #MeToo movement, corporate leadership across industries have confronted the question of what to do to assess their own company's risk of a potential workplace sexual misconduct claim. Victims coming forward have called out a broad range of inappropriate behaviors, ranging from the clearly criminal to the otherwise illegal to the unfortunate, perhaps a violation of corporate policy but probably not sufficient to establish a claim for legal liability. Employers may not know at the inception of a complaint where on the spectrum a given complaint will ultimately fall. Regardless, in many cases, an investigation – of appropriate size, character, methods, and objectives – will aid management in understanding the facts underlying the complaint, making employment determinations related to the alleged perpetrator, and considering broader cultural and compliance issues in the company.

Why Facilitate Reporting and Investigation of Workplace Sexual Misconduct Allegations?

A complaint of workplace sexual misconduct presents risks to an employer on several fronts. First, a complaint handled in a less than ideal way – or not handled at all – may result in the loss of talented employees, not just the complainant. This is demonstrated by examples like American Apparel, driven into bankruptcy after years of sexual misconduct allegations and suits against CEO, Dov Charney, who was ultimately removed, and Monster Energy, which recently faced boycott threats after several lawsuits by female former employees alleged the company had an abusive culture of sexual misconduct, harassment and retaliation. The mere publication of a complaint by an employee can subject the company to reputational risk with meaningful potential consequences from customer boycott or erosion of investor confidence. And, failure to address allegations of workplace sexual misconduct evincing a culture of non-compliance with ethics and norms puts the company in a more negative light in the eyes of a regulator or prosecutor considering pursuing the company for unrelated conduct.

Moreover, a company may face liability for its employees' misconduct. As a general matter, under the doctrine of *respondeat superior*, an employer is responsible for the actions of its employees committed within the scope of employment where it was at least partially intended to benefit the employer. *See Burlington Indus., Inc. v. Ellerth*, 524 U.S. 742, 756 (1998) (citing W. Keeton, D. Dobbs, R. Keeton, & D. Owen, Prosser and Keeton on Law of Torts § 70, at 505 (5th ed.1984)); Restatement (Third) Of Agency §§ 2.04, 7.07 (2006). That many instances of sexual misconduct may not appear to be within the scope of employment, or with an intent to benefit the employer does not insulate an employer from liability in these contexts. Under Title VII of the Civil Rights Act, which prohibits both *quid pro quo* harassment and the creation of a hostile work environment – as interpreted by the Supreme Court in *Burlington Industries*, *Faragher v. City of Boca Raton* and, most recently, *Vance v. Ball State University* – an employer is responsible for sexual harassment by a supervisor of a subordinate where the conduct results in an employment action, which can include not just hiring, firing and promotion determinations but also reassignment to a less favorable role. *See Vance*, 570 U.S. 421, 424 (2013); *Faragher*, 524 U.S. 775, 807 (1998); *see also Crawford v. Metro. Gov't of Nashville & Davidson Cty., Tenn.*, 555 U.S. 271, 278 (2009). Where such a tangible employment action does not exist, the employer may have an affirmative defense to liability where the employer acted with reasonable care to prevent, and promptly correct, the harassing behavior and the employee alleging harassment unreasonably failed to take advantage of preventive or corrective opportunities put in place by the employer (or to otherwise avoid harm). *Vance*, 570 U.S. at 424; *Faragher*, 524 U.S. at 807. Thus, in the Title VII context, an appropriate harassment policy and a prompt and reasonable investigation form crucial pieces of a company's

potential defense to a Title VII claim. Liability can also arise under state and local harassment and discrimination laws, some of which are broader than Title VII in some respects.

Outside the Title VII context, courts have taken different approaches to determining whether employers may be held liable for their employees' acts of sexual misconduct. Some courts have flatly held that sexual misconduct is automatically outside the scope of employment, and employers thus cannot be liable for their employees' sexual misconduct. *See Simpkins v. Grace Brethren Church of Del.*, 16 N.E.3d 687, 703 (Ohio Ct. App. 2014). Indeed, both New York and California take this approach, though California has created an exception for acts of sexual misconduct committed by on-duty police officers. *See Doe v. City of San Diego*, 35 F. Supp. 3d 1195, 1204–05 (S.D. Cal. 2014); *Benacquista v. Spratt*, 217 F. Supp. 3d 588, 604 (N.D.N.Y. 2016) (noting "de facto bar to vicarious liability in sexual assault cases . . . because that sort of misconduct is a clear departure from the scope of employment, having been committed for wholly personal motives"). Other courts have taken a more nuanced approach. For example, Indiana law looks to whether "the employee's job duties involved extensive physical contact with the alleged victim, such as undressing, bathing, measuring, or fitting." *Hansen v. Bd. of Trustees of Hamilton Southeastern School Corp.*, 551 F.3d 599, 612 (7th Cir. 2008). Florida courts determine whether "the employee/tortfeasor was assisted in accomplishing the tort by the existence of the employee/employer relationship." *Doe v. St. John's Episcopal Parish Day School, Inc.*, 997 F. Supp. 2d 1279, 1288 (M.D. Fla. 2014). And Minnesota courts examine whether "sexual assaults by employees in a particular profession are a foreseeable risk of that profession." *M.Y. ex rel. J.Y. v. Special School Dist. No. 1*, 519 F. Supp. 2d 995, 1005 (D. Minn. 2007). However, even where a court refuses to hold the employer vicariously liable for sexual misconduct committed by an employee, the victim may still have a cause of action for negligent hiring, supervision, or other negligence. *See Benacquista*, 217 F. Supp. 3d at 604.

How to Promote Reporting of Concerns

Given the risks, a company is best positioned to address a potential workplace sexual misconduct issue if the issue is raised within the company before it is raised externally. Best practices in modern compliance programs dictate that reporting mechanisms be clearly communicated, easily accessible, and redundant. Multiple avenues of reporting make it more likely a complainant can find a feasible option for internally reporting workplace sexual misconduct. This includes both the ability to approach multiple managers – rather than merely within one's own chain of command – and a formal ethics or compliance helpline.

Training is critical to establishing an environment for successful reporting. Training should clearly describe prohibited conduct, and be tailored to specific recipients based on location, function, and other variables. For example, managers with authority to receive complaints require additional training on effective handling of the initial complaint, documentation, and reporting within the organization. In appropriate cases, in-person training on what constitutes workplace sexual misconduct, and how to handle potential allegations, will provide critical additional insight beyond web-based or other methods.

Best Practices in Conducting the Investigation

How an investigation into workplace sexual misconduct is conducted can itself affect how a complainant and others perceive the conduct of the company. A careful, prompt, respectful investigation into the allegations – even before any employment consequences or other actions take place – can promote the complainant's trust in the organization; a perfunctory or insensitive review can have a deleterious effect. Confidentiality, to the extent it is practical and appropriate, is paramount; investigators should be clear with complainants, subjects, and witnesses, however, about potential limitations on a commitment to complete confidentiality. Of equal importance is a nuanced understanding of the impact of external factors on assessments of evidence and witness credibility. Whether conducted by outside counsel experts in this area, or by specially trained in-house counsel, interviews of complainants must take into account the potential impact of trauma on the complainant's recollection, and ensure the complainant is treated with dignity throughout the process. For a variety of reasons, including not just the potential utility of attorney-client privilege and attorney work product protection, but also the skill required in conducting such interviews, these interviews should be conducted by counsel or under the supervision of counsel, whether in-house or external. When interviewing the subject of allegations, the questioner must

consider a potential role of unconscious biases in the subject's responses. A skilled investigator will consider alternative sources of corroborating (or refuting) evidence and scope the investigation appropriately.

What to Do With Results

Investigations of this nature may not always be susceptible to clear conclusions, but careful consideration of statements provided by witnesses, within the context of a given company's culture, that weighs competing narratives can result in a meaningful set of findings. The form those findings take will depend on the desires of the company, and potentially, those of the complainant as well. Any written report must be carefully scrubbed for disclosure of only necessary information, even if not intended for public distribution. In the alternative, a set of oral reports to the company, and potentially involving the complainant and the subject may be preferable.

With the results of the investigation in hand, companies may pursue a variety of steps to remediate any identified issues. Employment decisions involving not only the perpetrator of the misconduct, but also his or her managers or supervisors may be necessary. Unconscious bias and other diversity training – for individuals, specific groups, or the entire company – or enhanced publicity of the company's anti-harassment policies may be recommended even where the conduct found was not so severe as to require terminations or reassignments. Finally, some companies may consider, where appropriate, implementing a restorative justice model engaging both complainant and wrongdoer in an interactive process allowing the wrongdoer to rehabilitate and potentially make amends to those affected by the conduct if the complainant is receptive to such measures.

Conclusion

Allegations of workplace sexual misconduct must be taken seriously by companies. Investigating these allegations requires sensitivity to unique challenges. Done appropriately, the investigation can be an important step in mitigating risk attendant to allegations of sexual misconduct, and even in remediating potential weaknesses in company culture around tolerance, respect, and compliance.

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