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Employers Beware: Shoddy Harassment Investigations Can Still Lead to Liability

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Imagine this scenario: You, the employer, think you've taken all the right steps when hearing about a harassment complaint. You encourage the employee to file a written complaint. You conduct an investigation. You take "prompt remedial action." What could go wrong?

Well, in a recent case, *Vasquez v. Empress Ambulance Service*, the employer discovered it had been snookered by the harasser. As a result, its investigation did not uncover what really happened. In fact, the employer had so messed up the investigation that it had charged the victim with actually being the harasser. This should serve as a cautionary tale for employers that investigations need to do more than simply weigh the proverbial "he said/she said" arguments.

A recently hired EMT complained she was being harassed by the Company dispatcher. The dispatcher repeatedly asked her out, even after she kept telling him that she was not interested and had a boyfriend. He would put his arm around her whenever he had the chance. He even sent her an "Anthony Weiner" picture of himself. She became fed up and went to her manager, who asked her to write a formal complaint, which the Company would investigate. The dispatcher learned that she was complaining about him. He then went into his cellphone and changed text messages and a revealing picture from a woman with whom he had a consensual relationship. He made the materials look like they came from the EMT. He then took screen shots of the doctored texts and photos and presented them to the Company when he was contacted as part of the investigation. The investigators believed the dispatcher's account. When they met with the EMT, she offered to show her phone with the texts and photos, but they declined. Instead they terminated her for sexually harassing the dispatcher.

She sued claiming that she was retaliated against for raising her concerns about being harassed. The employer sought to have the case dismissed because it claimed it acted in good faith, its managers and supervisors were not involved in any harassment, and the decision-makers conducted an investigation and believed what they were told by the co-worker. The Company also argued that there were no allegations that the Company had a discriminatory motive to terminate the employee.

The Second Circuit found that the employer did not have to have a discriminatory motive to be liable for the harassment and retaliation. This was because the co-worker had manipulated the decision-makers so that the Company ultimately ended up being the means by which the co-worker fulfilled his unlawful design. The Court found that the Company could be liable as it was negligent in the way in which it handled the investigation.

The investigation was conducted in such a way that it allowed the dispatcher to significantly impact the outcome. The investigators had not allowed the EMT to present evidence that would have supported her claim that she was the actual victim. The allegations in the complaint revealed that the dispatcher had tried unsuccessfully to have another employee lie on his behalf about the relationship he had with the victim, which the investigators did not discover. The Court



noted that the investigation also failed to identify serious flaws in the co-worker's evidence, including the fact that one of the text messages he provided was sent to someone who was asleep, even though a reading of the text showed it was sent during the shift being worked by the EMT.

The Court recognized that a company would not be liable if it had merely gotten the decision wrong. However, it cannot be shielded from liability if it acts negligently and allows a supervisor or a lower-ranked employee with a discriminatory or retaliatory prejudice to influence the adverse decision. The flawed investigation undermined the Company's defenses.

Employers faced with charges of harassment or discrimination need to take their investigations seriously. It is not enough simply to talk to the individuals involved. Rather, a thorough review of the statements made and the documents presented must be undertaken and then preserved. It is important to give complainants an opportunity to respond to the defense being offered against them, so that the investigator can fairly weigh the information presented. An employer should provide the complaining employee assurance that the allegations are being taken seriously, and that the process has been fair and thorough. Skeptical examination of what is presented is important, as is ensuring that there is a legitimate basis for any action taken. Employers who do not take harassment and discrimination allegations seriously or who do not conduct thorough investigations may find themselves later trying to explain their actions.

Questions or Assistance:

If you have questions about the new reporting rule, please contact Gary Starr at (860) 251-5501 or gstarr@goodwin.com or Clarisse Thomas at (203) 324-8164 or cthomas@goodwin.com.

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