Sexual Harassment in the Workplace in a ‘Me Too’ World

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Me Too Movement

- Hashtag #METOO went viral in 2017
- Has encouraged thousands of women and some men to share their personal stories
Me Too Movement

Since Movement went viral, accounts of sexual harassment and assault have destroyed careers, reputations etc... of both men and women.
Me Too Movement

Accounts of sexual harassment and assault also result in negative publicity and damage to organizations

Impacts fundraising, recruitment and retention

• Second Mile
• Aspira
• CBS
• Fox News
Sexual Harassment Statistics

In recent poll: 54% of women reported being sexually harassed in workplace

Only 1 in 4 women report harassment

Number of sexual harassment Charges filed with EEOC has not increased since October 15, 2017 but threat/demand letters have
Me Too Movement

With increased scrutiny, it’s important to:

- Update harassment policies
- Conduct meaningful training
- Conduct prompt investigation
Sexual Harassment – Unlawful Hostile Work Environment

Definition:
Unwelcome sexual advances that have the purpose or effect of unreasonably interfering with an individual’s work performance, or creating an intimidating, hostile or offensive work environment.
Affirmative Defense To Hostile Work Environment Sexual Harassment

*Employer* exercised care to prevent and promptly correct any harassing behavior

*Employee* failed to take advantage of corrective opportunities
Non Profit Sexual Harassment Investigation Protocols

Define clear path to follow in investigating allegations:

- Review harassment policy & procedures
- Determine internal reporting chain and at what point (if any) Board should be notified
- Determine if entire Board or only committee of Board should be notified
  - Notify entire Board about complaints about CEO and other executive management
- Consider plan for handling media and other inquiries
Selecting the Investigator

Key Considerations

- Credibility
- Trained Interviewer
- Organizational Skills
Appropriate Investigators

- In-house human resources professionals
- In-house counsel
- Outside counsel
- Outside HR consultant or investigator
Investigations Involving Executives

Should normally be conducted by outside investigators

Avoid appearance of undue influence or impropriety

Eliminates awkwardness if executive keeps job
Investigations Conducted by Outside Counsel

Considerations

Can’t be witness and also represent in same matter
- Rules of Professional Responsibility 3.7

Could also appear to be biased if routinely performs legal work for company
Investigation Preparation Recommendations

Make certain that you or investigator:

Review applicable policies, rules, personnel records, etc. and understand purpose

Determine who will be interviewed and in what order

Generally want to interview complainant before accused
Interviews of Complainant and Witnesses

Prepare outline of questions
Ask open-ended questions
Don’t suggest answers
Ask for supportive evidence, texts, emails, etc.
Ask about other witnesses or knowledgeable persons
Upjohn warning

Explain that identity of complainant must be disclosed to wrongdoer
Interviews of Complainant and Witnesses

EEOC has published guidance about questions to be asked during interviews

EEOC Guidance on Vicarious Liability Employer Liability for Unlawful Harassment by Supervisors, June 18, 1999

New EEOC guidance will be issued soon
Conducting Harassment Claim Interviews

- Conduct in private office (certain circumstances may require off-site)
- Read notes back to witness and ask to initial to verify accuracy
- Date and sign all documents
- Record impressions on separate document
Interviews of Accused

- Identify any motives for complainant to fabricate allegations
- What is relationship between two
- Get names of other witnesses
- Ask for any documentation to disprove allegations
- Read back notes and ask to initial to verify accuracy
- Advise that retaliation will not be tolerated
Finalizing the Investigation

- Review all of the information and evidence
- Determine if follow-up interviews necessary
- Make credibility determinations
- Consider if pattern of questionable behavior
- Preponderance of the evidence standard not “beyond a reasonable doubt” standard
Determining the Response

Have policies and practices have been violated
How have similar situations have been addressed in the past.
What corrective action would be effective
What is complainant’s desired outcome
Consider preventative recommendations, if any
The Investigation Report

Describe issue prompting investigation
Summarize relevant policies
Identify witnesses interviewed and summarize information provided
Identify and summarize evidence reviewed
Describe any evidence not reviewed and why not reviewed
Summarize conclusions and recommendations
Presentation of the Report

Typically addressed to the individual(s) responsible for overseeing the investigation

In person presentation is typically the best approach

If CEO or executive management is the accused, the report may need to be provided to the Company’s Board of Directors or designated committee

If prepared by attorney, maximize the privileged nature of the report
Communicating the Outcome

Communicate the outcome to complaining party

If allegations are disproven, ask why the employee came forward

Communicate the outcome to the accused

Issue discipline if warranted

Reiterate that retaliation is not tolerated and will result in discipline

Always document what is communicated to the complainant & the accused
Post Investigation Follow-Up

Implement corrective measures

Check in with the complainant to make sure corrective action effective and retaliation has not occurred

Ensure preservation of relevant documents, both electronic and hard copy
Interim Measures

Consider following before investigation completed:

- Paid leave for accused
- Transfer accused to another department
- Place accused on another shift

Measures should be taken against alleged wrongdoer and not complainant because could be viewed as retaliation.
Unexpected Issues

Recalcitrant complainant, accused or witness

- Explain that complainant’s failure to cooperate may cause company to doubt credibility
- Explain that accused’s refusal to cooperate may lead to inference he/she engaged in wrongdoing
Common Mistakes

Promising complete confidentiality to parties or witnesses involved in the investigation

• Explain that confidentiality is qualified/limited
• Information will only be shared on a “need to know” basis
Common Mistakes (cont’d)

Failing to properly document the investigation

- Relevant documents are not properly dated or signed and cannot later be identified with respect to when or by whom document was prepared.
Common Mistakes (cont’d)

Taking the side of one of the parties involved in the investigation

- Important for investigator to remain neutral and conduct an unbiased, objective investigation
- Applies whether empathizing with complaining employee or defending conduct of accused
Common Mistakes (cont’d)

Being a “lazy” investigator

• Do not simply ask the witnesses, complainant, or accused to provide you with a written statement
• Important to have interactive interviews to assess credibility and immediately follow up on issues raised
Common Mistakes (cont’d)

Failing to talk to accused prior to reaching conclusion

- Not uncommon for Employer to reach conclusion based on strong facts against employee that employee “did it”
- No matter how implausible an explanation might be, should still get accused’s “side of the story” prior to imposing discipline
- Employee may “admit guilt” or give false statements
Common Mistakes (cont’d)

Asking complainant, witnesses and accused to keep the investigation confidential

• National Labor Relations Board balances employees’ rights under the NLRA to discuss terms and conditions of employment with co–workers against employer’s right to demand confidentiality in the investigation

• Banner Health System, 362 NLRB No. 137 (2015). Employer must have legitimate and substantial business justification for demand that witnesses not discuss the investigation
Common Mistakes (cont’d)

Failing to come to a conclusion

• In the “he said – she said” type of case, easy to state that no conclusion can be reached
• Must reach a conclusion based on who is most likely telling the truth
Common Mistakes (cont’d)

Failing to advise Board of Directors about allegations of sexual harassment or assault

- Allegations of sexual harassment that may end up in news or involve high ranking executives should be disclosed to Board
- Board of Directors should never learn about allegations via a news report
Thank You/Questions

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