WHAT EVERY BUSINESS ATTORNEY NEEDS TO KNOW IN THE #METOO ERA

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Sexual harassment claims are front and center in the news. That means that there will be more claims in court. Employees are more aware of their rights, and the press around the #MeToo movement has empowered employees who might in the past kept quiet about their negative experiences. Employers need to build a safe work environment for everyone. This means taking harassment allegations seriously, but not leaping to judgment. Most of all, it means an ounce of prevention to avoid sexual harassment (and lawsuits) whenever possible.

So, what does the business lawyer need to know to guide his or her clients through this maze?

I. Sexual Harassment 101

Title VII of the Civil Rights Act of 1964 (Title VII) forbids discrimination on the basis of sex. Section 703 forbids "an employer (1) to fail or refuse to hire or to discharge any individual or to otherwise discriminate against any individual with respect to his [yes, it says "his"] compensation, terms, conditions, or privileges of employment because of such individual's . . . sex." 42 U.S.C. § 2000e-2(a)(1).

The Supreme Court laid out the basis for sexual harassment claims in *Meritor Savings Bank, FSB v. Vinson*, 477 U.S. 57 (1986). The Court in *Meritor* described two forms of sexual harassment that were forbidden by Title VII: quid pro quo and hostile work environment.

The first type of harassment, *Quid pro quo* ("this for that") harassment is the more easily understood. Do you want that promotion? You'd better sleep with me (kiss me, go out with me, let me flirt with you). *Meritor* established that an employee who is subjected to these sorts of demands for sexual favors in return for a job or promotion opportunity has been discriminated against in the workplace.

The second type of harassment, hostile work environment, can be somewhat fuzzier. Because of the many shades of gray (no pun intended) of behavior that may lead to a claim of hostile work environment, it can be more difficult for an employer to assure that its actions will not lead to a claim.

Under *Meritor*, employer liability for hostile work environment is essentially reviewed under an agency theory. In 1998, the Supreme Court decided the twin cases of *Burlington Industries v. Ellerth*, 524 U.S. 742 (1998) and *Faragher v. City of Boca Raton*, 524 U.S. 775 (1998). In these cases, the Supreme Court expanded on the agency theory of liability for sexual harassment, with an analogy to tort law. The primary teachings of these cases are summarized as follows:

1. A sexually hostile atmosphere can be created by behavior that is **severe OR pervasive**. In other words, one incident of sexual assault or rape would constitute a sexually hostile work environment (this is severe). Frequently repeated sexual innuendo, suggestive

emails, pin up calendars, or the like may also constitute a sexually hostile atmosphere (this is pervasive).

2. If sexual harassment is committed by a supervisor, the employer is **vicariously liable** for that harassment. (The Third Circuit later extended vicarious liability to include many circumstances involving the actions of a co-worker.)

3. The employer's liability for sexual harassment is subject to an **affirmative defense**, which looks to the reasonableness of the employer's conduct as well as the plaintiff's/victim's conduct.

4. In assessing the availability of an affirmative defense under *Faragher/Ellerth*, courts will look to:
    a. Was there a sexual harassment policy that was disseminated to employees?
    b. Was employee training provided on sexual harassment and how to report it?
    c. Did the employee complain to higher management?
    d. Once informed of the harassment, did the employer take reasonable steps to address it?

These factors on the affirmative defense set forth by *Faragher/Ellerth* and its progency provide a roadmap to the best practices for an employer to protect itself from liability from sexual harassment claims. Most of these defenses require the employer to take action *before* there is a claim. Suggested steps are outlined below.

II. An Action Plan for Employers

A. Policies: Make your workplace safer and educate employees on what to do about harassment.

A robust sexual harassment policy will help in many ways. First, the employer makes clear that harassing behavior will not be tolerated. The policy should clearly set out the types of behavior that are prohibited. Second, the policy must ensure employees who are victims of harassment know how and to whom that should be reported. It is not enough to say, "tell your supervisor," since the supervisor may be doing the harassing. Multiple pathways to reporting are best. If an employee who has signed the policy fails to report alleged sexual harassment, the employer then has a good affirmative defense.

For additional information on key components of a sexual harassment policy, see **Appendix A**.

B. Training: Teach about expected behavior.

One of the best defenses to a sexual harassment claim is an investment in training. An employer who has trained its employees in harassment has taken a large step toward showing that it is behaving reasonably.

Training fulfills several purposes. Every employee should be trained on acceptable and expected behavior. While this is particularly urgent in industries and workplaces with a history or culture of sexual harassment, no workplace is immune. It takes time and attention to break away from the "everyone does it," "we're just kidding" culture. A clear statement from management that harassing behavior is not tolerated and will result in discipline is an important first step. In the event that a claim is brought against an employer that has not invested in training, this failure to prioritize prevention will be used against the employer. The failing will be viewed all the more negatively if the employer is on notice of the problem because of a history of sexual harassment complaints. Another aspect of the training for every employee will be instruction on how to report claims of sexual harassment.

Separately, it is particularly important to teach managers their role in preventing and reporting sexual harassment. A supervisor who observes sexual harassment and does not intervene to stop it has opened the door to liability. Even if they do not observe the sexual harassment, supervisors are often the first to hear about it. They need to understand that employees are not required to use any "magic words" when reporting sexual harassment, and that as managers they have a responsibility to ensure that their employees are protected.

Most importantly, supervisors need to know that retaliation against a person who lodges a complaint will not be tolerated. This is so even if the supervisor privately believes that the complaint is silly, or meritless. (See Section D below.)

For additional information on key components of effective sexual harassment training, see **Appendix B.**

C. Investigations[1]

Once a complaint of sexual harassment has been made, the employer must investigate to determine whether the complaint is founded, and what the appropriate response will be. The nature of the investigation will depend to a large extent on the nature of the complaint. A complaint about one instance of an inappropriate joke may be handled less formally by a manager talking to the parties involved. On the other hand, an allegation involving repeated conduct; conduct with physical touching; conduct with other forms of intimidation or harassment (bullying); or conduct involving multiple employees will require a more formal investigative process with someone who is trained to conduct investigations.

The investigation should be aimed at determining the credibility of different accounts, and to assist management in determining the correct course of action as to the employees involved.

[1] Although this paper focuses on investigations in the context of sexual harassment allegations, the principles apply equally to investigations of other claims, such as racial discrimination or whistleblowing.

The key factors in assessing whether an investigation is effective are the credibility of the person conducting the investigation and the credibility of the process.

Investigations are often conducted by in house human resources professionals. Sometimes this is appropriate, and it is certainly convenient and cost effective in the short run to use employees who are already on the payroll. If your company plans to use HR professionals to conduct investigations, you may wish to invest in training of those individuals so their investigations are less open to attack.

Be aware that if litigation ensues, the investigation will be scrutinized, and scrutiny will be higher if the investigation is conducted in house. Many jurors will assume that any employee who conducts an investigation will only be protecting the interests of the company, i.e., the interests of the higher ranking employees. The HR professional should not be put in the position of investigating a person at the company who is higher on the organizational chart. Even if the investigation is conducted with integrity, a jury is unlikely to believe that the HR professional could conduct a full and impartial investigation of, say, the COO.

Outside counsel may be an effective investigator, and probably has the skills needed to interview witnesses and gather evidence. However, there is always the risk of litigation. If the employer wishes to use a good faith investigation as a defense under *Faragher/Ellerth*, the attorney who conducts the investigation will be a witness, and the report cannot be used without waiving the attorney client privilege. *See, e.g., Koumoulis v. Ind. Fin. Mktg. Group, Inc.*, 295 F.R.D. 28 (E.D.N.Y. 2013). Outside counsel will then be conflicted out of handling the litigation. For this reason, many employers seek to engage an independent investigator to conduct investigations, especially when there is a complicated or high stakes complaint that may lead to litigation.

A sloppy investigation will be the plaintiff's Exhibit A if there is litigation. It will be used to show that the company had made up its mind to fire the employee even before the investigation, that the company never took the employee's complaints seriously, and that the company was just using the sham investigation to cover its tracks. If there is one thing that offends a jury or judge more than discrimination or sexual harassment, it is retaliation dressed up in a sham investigation. As one example, in *Castelluccio v. Int'l Bus. Machines Corp.*, 2013 WL 6842895 (D. Conn. 2013), the employer intended to introduce evidence of an investigation by an HR professional to demonstrate that the firing of plaintiff was not due to age discrimination. The defense of the investigation was excluded from trial because it seemed that the purpose of the investigation was more to exonerate IBM than to fairly determine the facts. The plaintiff received a total verdict of $3.7 million –upheld by the same trial judge who found the investigation to be unfair. https://www.kollmanlaw.com/age-discrimination/court-upholds-3-7-million-age-discrimination-verdict-ibm/

Similarly, in *Smothers v. Solvay Chemicals, Inc.*, 740 F.3d 530, 542 (10th Cir. 2014), the court denied summary judgment for the employer, finding that the employer's failure to conduct a

fair investigation into purported reason for firing may support a finding that the purported reason for the firing was pretextual.

For additional information on EEOC guidance for the conduct of sexual harassment investigations, see **Appendix C.**

D. No Retaliation

Finally, it is absolutely essential that everyone who has contact with a complaining employee be instructed that there must not be retaliation.

It is tempting to retaliate. Maybe it is human nature to get back at someone who has made an accusation, or to ostracize the employee who apparently "can't take a joke." It is also illegal. That is why it is so important to train and instruct employees to prevent retaliation.

The case law is full of examples of successful suits by employees whose underlying claim was rejected, but who prevailed on a retaliation claim. For example, an employee who complains that she felt uncomfortable because of one lewd joke by a co-worker may not have enough to prevail on a sexual harassment claim. But, if the employee is retaliated against in any way, the employer who allowed this retaliation to happen has suddenly revitalized the lawsuit against it.

Retaliation claims are also particularly dangerous because a wide range of behavior may be considered retaliatory. A company does not have to fire an employee to be subject to a lawsuit based on retaliation. In *Burlington N. & Santa Fe Ry. Co. v. White*, 548 U.S. 53 (2006), the Supreme Court held that retaliation requires showing that a reasonable employee would have found employer's challenged action materially adverse, that is that the employer's actions could dissuade a reasonable employee from engaging in the protected conduct. What constitutes retaliation is a jury question – and is not limited to employer's actions that affect terms, conditions or status of employment, or those that occur at workplace. Leaving an employee out of a meeting, transferring the employee to a less desirable desk, taking away an interesting project, or denying a requested vacation day can all be deemed retaliatory. Once an employee has raised a complaint of sexual harassment, any changes to that employee's employment or responsibilities should be carefully considered.

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Hardwick Benfer LLC concentrates its practice on employment law. Our three attorneys are experienced litigators, who also work to avoid litigation. We counsel both employees and employers, we assist with policies and processes to keep the workplace safe and legally compliant, and we conduct workplace investigations and trainings. Because of our focused practice area, we frequently work hand in hand with corporate counsel for our clients.

Appendix A: Components of an Anti-Harassment Policy

- Written in clear, simple words, in all languages commonly used by members of the workforce.
- An unequivocal statement that harassment based on *any* protected characteristic will not be tolerated.
- An easy-to-understand description of prohibited conduct. Be sure to include examples.
- A description of a reporting system available to 1) employees who experience harassment and 2) those who observe harassment, which provides multiple avenues to report, in a manner easily accessible to employees.
- A statement that the reporting system will provide a prompt, thorough, and impartial investigation.
- A statement that the identity of an individual who submits a report, a witness who provides information regarding a report, and the target of the complaint, will be kept confidential to the extent possible consistent with a thorough and impartial investigation.
- A statement that any information gathered as part of an investigation will be kept confidential to the extent possible consistent with a thorough and impartial investigation.
- An assurance that the employer will take immediate and proportionate corrective action if it determines that harassment has occurred.
- An assurance that an individual who submits a report (either of harassment experienced or observed) or a witness who provides information regarding a report will be protected from retaliation from co-workers and supervisors.
- A statement that any employee who retaliates against any individual who submits a report or provides information regarding a report will be disciplined appropriately.

Source: https://www.eeoc.gov/eeoc/task_force/harassment/checklist2.cfm

Appendix B: Components of Effective Harassment Training

Leadership, accountability, and strong harassment policies and complaint systems are essential components of a successful harassment prevention strategy, but only if employees are aware of them. Regular, interactive, comprehensive training of all employees may help ensure that the workforce understands organizational rules, policies, procedures, and expectations, as well as the consequences of misconduct.

Harassment training may be most effective if it is, among other things:

- Championed by senior leaders;
- Repeated and reinforced regularly;
- Provided to employees at every level and location of the organization;
- Provided in a clear, easy to understand style and format;
- Provided in all languages commonly used by employees;
- Tailored to the specific workplace and workforce;
- Conducted by qualified, live, interactive trainers, or, if live training is not feasible, designed to include active engagement by participants; and
- Routinely evaluated by participants and revised as necessary.

In addition, harassment training may be most effective when it is tailored to the organization and audience. Accordingly, when developing training, the daily experiences and unique characteristics of the work, workforce, and workplace are important considerations.

Effective harassment training for all employees includes, for example:

- Descriptions of prohibited harassment, as well as conduct that if left unchecked, might rise to the level of prohibited harassment;
- Examples that are tailored to the specific workplace and workforce;
- Information about employees' rights and responsibilities if they experience, observe, or become aware of conduct that they believe may be prohibited;
- Encouragement for employees to report harassing conduct;
- Explanations of the complaint process, as well as any voluntary alternative dispute resolution processes;

- Explanations of the information that may be requested during an investigation, including: the name or a description of the alleged harasser(s), alleged victim(s), and any witnesses; the date(s) of the alleged harassment; the location(s) of the alleged harassment; and a description of the alleged harassment;

- Assurance that employees who report harassing conduct, participate in investigations, or take any other actions protected under federal employment discrimination laws will not be subjected to retaliation;

- Explanations of the range of possible consequences for engaging in prohibited conduct;

- Opportunities to ask questions about the training, harassment policy, complaint system, and related rules and expectations; and

- Identification and provision of contact information for the individual(s) and/or office(s) responsible for addressing harassment questions, concerns, and complaints.

Because supervisors and managers have additional responsibilities, they may benefit from additional training. Employers may also find it helpful to include non-managerial and non-supervisory employees who exercise authority, such as team leaders.

Effective harassment training for supervisors and managers includes, for example:

- Information about how to prevent, identify, stop, report, and correct harassment, such as:

    - Identification of potential risk factors for harassment and specific actions that may minimize or eliminate the risk of harassment;

    - Easy to understand, realistic methods for addressing harassment that they observe, that is reported to them, or that they otherwise learn of;

    - Clear instructions about how to report harassment up the chain of command; and

    - Explanations of the confidentiality rules associated with harassment complaints;

- An unequivocal statement that retaliation is prohibited, along with an explanation of the types of conduct that are protected from retaliation under federal employment discrimination laws, such as:

- Complaining or expressing an intent to complain about harassing conduct;
- Resisting sexual advances or intervening to protect others from such conduct; and
- Participating in an investigation about harassing conduct or other alleged discrimination; and

- Explanations of the consequences of failing to fulfill their responsibilities related to harassment, retaliation, and other prohibited conduct.

To help prevent conduct from rising to the level of unlawful workplace harassment, employers also may find it helpful to consider and implement new forms of training, such as workplace civility or respectful workplace training and/or bystander intervention training. In addition, employers may find it helpful to meet with employees as needed to discuss issues related to current or upcoming events and to share relevant resources.

Source: https://www.eeoc.gov/eeoc/publications/promising-practices.cfm

Appendix C: Key Components for a Harassment Reporting and Investigations

- A fully-resourced reporting process that allows the organization to respond promptly and thoroughly to reports of harassment that have been experienced or observed.
- A supportive environment where individuals feel safe to report harassing behavior to management.
- Employer representatives who take reports seriously.
- Well-trained, objective, and neutral investigators.
- Timely responses and investigations.
- Investigators who document all steps taken from the point of first contact and who prepare a written report using guidelines to weigh credibility.
- An investigation that protects the privacy of individuals who file complaints or reports, individuals who provide information during the investigation, and the person(s) alleged to have engaged in harassment, to the greatest extent possible.
- Mechanisms to determine whether individuals who file reports or provide information during an investigation experience retribution, and authority to impose sanctions on those who engage in retaliation.
- During the pendency of an investigation, systems to ensure individuals alleged to have engaged in harassment are not "presumed guilty" and are not "punished" unless and until a complete investigation determines that harassment has occurred.
- A communication of the determination of the investigation to all parties and, where appropriate, a communication of the sanction imposed if harassment was found to have occurred.

Source: https://www.eeoc.gov/eeoc/task_force/harassment/checklist3.cfm