IN PRACTICE...with CNA™

We can show you more.®

RISK MANAGEMENT 2019-2

A PRACTITIONER'S PERSPECTIVE ON EMERGING LEGAL TRENDS

Law Firms, Heal Yourselves

A variation of the ancient proverb comes to mind in reflecting how the #MeToo movement has placed a spotlight on business practices that shield employers from sexual harassment claims at workplaces and fail to protect victims who are mostly women. That spotlight does not exempt law firms or lawyers from sexual harassment claims that may arise out of business practices which do not address the current environment. The governing legal policies and laws, and their associated best management practices that seek to prevent and prohibit sexual harassment, are not new. The increasing use of social media, combined with the challenges of retaining the best lawyers from all backgrounds, require every law firm to address issues related to sexual harassment and the associated ethical obligations.

These notes identify the initial issues and focal points to examine and review in order to design policies and practices that protect victims of sexual harassment by providing multiple avenues for reporting complaints. Such policies also should provide consistency, as well as reasonable flexibility for the individuals investigating the harassment complaints. The objective is to establish procedures for neutral decision-makers — both internal and external — to take prompt action. In order to create or update your policies and procedures, you should first review some of the guidelines historically established when law firms encountered claims of sexual harassment before the social media era.

1. How Law Firms Previously Responded to Sexual Harassment Claims

For law firms, the seminal case that signaled the importance of sexual harassment claimants in the law firm setting was *Weeks v. Baker & McKenzie*, 74 Cal.Rptr.2d 510, 63 Cal.App.4th 1128 (Cal. App. 1st Dist. 1998). Unfortunately, the fact pattern in *Weeks* was not unique. The law firm received multiple complaints about a partner who allegedly sexually harassed multiple female administrative personnel and younger associate attorneys. The administrative and management teams of the law firm, populated by men and women, are portrayed by the court as receiving one complaint after another without taking any meaningful action. One of the multiple complainants filed suit and pled claims under California employment laws that prohibit sexual harassment. She sued the law firm and the alleged harassing law firm partner. The plaintiff sought a recovery against the law firm by contending that the law firm was strictly liable for not protecting her against sexual harassment by the law firm partner defendant. The plaintiff did not pursue a claim of *quid pro quo*, where submission to an alleged harasser's sexual conduct is a condition for receiving employment benefits. Instead, she pursued a claim based upon hostile work environment.

Hostile work environment claims typically focus on whether the alleged misconduct at issue had the purpose or effect of unreasonably interfering with the plaintiff's work performance or created an intimidating, hostile or offensive working environment through harassing or sexualized conduct. Substantial evidence of multiple complaints about the law firm partner physically touching or verbalizing unwelcome sexual conduct with female administrative staff and lawyers, and the law firm's lack of any viable response, resulted in the court affirming the $50,000 awards in compensatory damages entered against the law firm and the law firm partner. The court also affirmed the $225,000 award of punitive damages entered against the law firm partner and the $3.5 million punitive damage award entered against the law firm. The court emphasized that the evidence suggested that the plaintiff was a highly foreseeable target of the law firm partner's sexual harassment misconduct. It noted, moreover, that the law firm failed to take steps to prevent the partner's misconduct or to warn the plaintiff of her rights and options. According to the decision, the multiple complaints by female employees about the law firm partner reflected that the law firm was aware that the law firm partner was likely to create a hostile work environment for women employees. Therefore, the failure to place reports of the law firm partner's misconduct in his personnel file in order to warn future supervisors about his conduct was viewed as a knowing disregard for the rights and safety of other employees. The court stressed that such evidence supported a finding that the law firm failed to take any formal action to prevent the creation of a hostile work environment and was, therefore, properly subject to an award of punitive damages. No law firm should repeat the missteps in *Weeks* which the court traced in detail.

2. A Few Basic Principles of Title VII and Sexual Harassment Claims

Liability of Corporate Entity

Under Title VII, courts impute liability for sexual harassment to a corporate entity when the alleged harasser serves as its president, director, or majority shareholder. *Ross v. Twenty-Four Collection, Inc.*, 681 F.Supp. 1547, 1551 (S.D. Fla. 1988), *aff'd*, 875 F.2d 873 (11th Cir. 1989). Such situations are akin to direct liability cases. In addition, a law firm partner or employee may qualify as a "supervisor" for purposes of imposing vicarious liability under Title VII if that person has authority from the law firm employer to take tangible employment actions against a plaintiff alleging workplace harassment. *Vance v. Ball State University*, 570 U.S. 421, 424, 431 (2013). However, even in the absence of vicarious liability, or traditional direct liability flowing from the acts of a firm's senior leadership, a law firm employer can incur direct liability for its employee's unlawful harassment if the employer was negligent with respect to the alleged offensive conduct. *Id.* at 446. The significance of the status of the alleged harasser as a supervisor is that if the supervisor's alleged sexual harassment results in a "tangible employment action," the law firm employer then incurs strict liability for sex discrimination. *Burlington Indus., Inc. v. Ellerth*, 524 U.S. 742, 762-63 (1998). In addition, the EEOC has codified that if the conduct of a supervisor is sufficiently pervasive and related to work, the employer is considered to have notice that the complained of conduct constitutes harassment. EEOC Policy Guidance, N-915.035 (Oct. 25, 1988) A at 10, n. 12.

EEOC Definition of "Sexual Harassment" and Title VII

The EEOC defines sexual harassment as "[u]nwelcome sexual advances, requests for sexual favors, and other verbal or physical conduct of a sexual nature." EEOC Guidelines, 29 C.F.R. §1604.11(a) (1988). The U.S. Supreme Court approved the EEOC's definition. *Meritor Savings Bank v. Vinson*, 477 U.S. 57 (1986). Law firms also must remember that Title VII also prohibits same-sex sexual harassment, *see Oncale v. Sundowner Offshore Services, Inc.*, 523 U.S. 75 (1998), as well as harassment of male employees by female employees. *Keeton v. Flying J, Inc.*, 429 F.3d 259 (6th Cir. 2005), *cert. denied*, 549 U.S. 819 (2006).

Title VII prohibits sexual harassment that constitutes unwelcome verbal or physical conduct of a sexual nature sustained by an employee where such conduct affects a term, condition, or privilege of employment. EEOC Guidelines, 29 C.F.R. §1604.11(a)(1988); *see also White v. BFI Waste Servs., LLC*, 375 F.3d 288, 298-99 & n.6 (4th Cir. 2004) (explaining that absence of physical threats is not dispositive where reasonable jury could rely on sufficient evidence to conclude that alleged harassing conduct was otherwise humiliating). In a unanimous ruling, the U.S. Supreme Court clarified that a harassment victim need not sustain psychological harm. As long as the proven offensive conduct created a workplace environment that can be reasonably perceived as hostile or abusive, such evidence is sufficient. Finally, a determination of whether sexual harassment occurred is made by evaluating all the circumstances including the frequency and severity of the alleged harassment, and whether it was physically threatening or humiliating or unreasonably interfered with the work performance of the employee. *Harris v. Forklift Systems, Inc.*, 510 U.S. 17, 22-23 (1993).

3. Potential Exposure and Non-Arbitrability of Related Tort Claims

Some sexual harassment claimants have opted out of pursuing their claims in federal court. Such claimants may file state law anti-harassment claims combined with state law tort claims. The additionally pled tort claims may include assault, battery, intentional infliction of emotional distress, negligent infliction of emotional distress, aiding and abetting, civil conspiracy, or negligent supervision and retention. State law tort claims emanating from alleged incidents of sexual harassment have arisen in disputes over whether such claims are subject to arbitration. Federal courts have ruled in favor of firms seeking to have the claimants arbitrate their claims, while noting that the EEOC or enforcement agencies are not bound by such agreements. *See E.E.O.C. v. Rappaport, Hertz, Cherson & Rosenthal, P.C.*, 448 F.Supp.2d 458, 465 (E.D.N.Y. 2006), *citing EEOC v. Waffle House, Inc.*, 534 U.S. 279, 294 (2002).

Federal policies and laws that favor arbitration, however, may not apply in state court proceedings. For example, a Michigan appellate court recently held that the Michigan laws on mandatory dispute resolution procedures did not apply to pled state law claims of sexual harassment, sexual assault and battery, and negligent and intentional infliction of emotional distress, among other pled tort claims. *Lichon v. Morse*, Consolidated 339972; 2019 BL 88853 (Mich. Ct. App. March 14, 2019) (The court noted: "The effect of allowing defendants to enforce the [state statute on arbitration] under the facts of this case would effectively perpetuate a culture that silences victims of sexual assault and allows abusers to quietly settle these claims behind an arbitrator's closed door. Such a result has no place in Michigan law."). Law firms should consider planning for similar outcomes in their respective states, especially following the 2018 adoption by the American Bar Association (ABA) of Resolution 300 which urges legal employers not to require mandatory arbitration of sexual harassment claims. Resolution 300 recognizes that sexual harassment victims who wish to use other means of obtaining relief should not be precluded from doing so as a condition of employment.

4. Ethics Issues

In addition to the liability exposure arising from sexual harassment claims, the acts of sexual misconduct violate professional ethical obligations. Many states have a rule similar to ABA Model Rule 8.4(g), which lists instances of professional misconduct as including conduct that a lawyer knows or reasonably should know is harassment or discrimination on the basis of sex. Comment [3] to the ABA rule specifies that when lawyers are involved in sexual harassment, such conduct "undermine[s] confidence in the legal profession and the legal system." In specific cases, lawyers found to have committed acts of sexual harassment have been disciplined by their bar disciplinary authorities. *See Iowa Supreme Court Attorney Discipline Board v. Stansberry*, No. 18-1719 (Iowa Jan. 25, 2019) (The license was suspended when attorney was found to have taken female colleagues' underpants from their gym bags to photograph for personal sexual reasons based on violations of ethical rules); *In re Tenenbaum*, 880 A.2d 1025 (Del. 2005) (The attorney was suspended for multiple acts of sexual misconduct, including acts committed against legal secretary and paralegal at attorney's law firm). Attorneys who commit sexual harassment may also be subject to licensure suspension or revocation, thus losing their ability to practice law.

5. Next Steps

Law firms interested in updating their policies and procedures may wish to start with a review of the landscape of current events. *See* "Businesses Face Expanding Harassment Risks, Liabilities," P. Dorrian, Mar. 22, 2019, Bloomberg Law News; "Is Time Really Up for Sexual Harassment in the Workplace? Companies and Law Firms Respond," H. Hayes, Jan. 17, 2019, American Bar Association, on-line news article, Commission on Women in the Profession.

Obtaining a big picture initially may aid later efforts to formulate solutions. Then, when embarking upon the more challenging task of forming or updating a law firm's policies about the prohibitions against, reporting of, and handling of complaints of sexual harassment, the EEOCs discussions, guidelines, training recommendations, and checklists provide tools and resources for this process. EEOC Select Task Force on the Study of Harassment in the Workplace, Report of Co-Chairs Chai R. Feldblum & Victoria A. Lipnic, (June 2016). The EEOC study addresses many issues and will help start your firm's discussions that seek to update and enforce responsible policies regarding sexual harassment. The resources are now abundant and available in this area, and the employment laws and ethical obligations make clear that ignoring them is not a viable option.

By developing a sound policy addressing best practices in addressing sexual harassment issues, law firms will become more proactive in managing the risk exposure in this area.

This article was authored for the benefit of CNA by:
Ambrose V. McCall

Ambrose McCall brings more than three decades of experience to his robust employment, commercial and professional liability litigation practice. His clients — who include insurers, professionals, businesses, law firms and governmental entities throughout Illinois — appreciate his commitment to help them succeed personally and in business.

In the field of labor and employment, Ambrose defends employers in a broad spectrum of employment issues. He has represented clients in cases involving civil rights, cyber security — including claims arising out of Illinois' Biometric Information Privacy Act (BIPA) — discrimination, harassment and retaliation, as well as restrictive covenant, wage and hour, workplace tort and whistleblower claims.

A portion of Ambrose's practice is also dedicated to counseling clients in commercial litigation. He has advised his clients in contract real estate litigation, construction litigation, and creditor matters. Ambrose also defends lawyers and law firms facing claims of professional liability.

For more information, please call us at 866-262-0540 or email us at lawyersrisk@cna.com.