

#WhatToDo about #MeToo? An employer's guide to preventing liability for workplace sexual harassment

(February 27, 2018) - Todd R. Wulffson and Ashley A. Halberda of Carothers DiSante & Freudenberger provide guidelines for employers investigating sexual harassment complaints.

Sexual harassment charges have proliferated since the allegations against Harvey Weinstein surfaced in October 2017, helping to launch what is known as the #MeToo movement. From "Today" show co-host Matt Lauer to U.S. Sen. Al Franken, more than 50 men have been fired or have resigned from their high-profile positions in response to allegations of sexual misconduct.

It is clear that sexual harassment in the workplace has been a festering secret for some time in Hollywood, and has rapidly proliferated throughout the nation. How should employers respond to allegations of sexual harassment without causing more problems than they solve? Is the solution as simple as firing, or forcing the resignation of, the person accused? Or does this merely engender liability for terminations based on unproven accusations?

While the focus is on liability related to the employee raising the sexual harassment allegations, liability for mishandling a complaint and investigation should not be overlooked, since it can be significant. An employee fired based on a sexual harassment complaint could have a claim against the employer for wrongful termination.

Additionally, a person accused of harassment who feels there is no choice but to resign, which we have seen with many of Hollywood's accused, could have an actionable claim for constructive termination.

Other possible claims are age discrimination (if the accused 40 or older), disability discrimination (if there is a qualifying medical condition like diabetes or alcoholism), and even, ironically, gender discrimination.

The person accused may also assert a claim of defamation for the damage to reputation that results from statements made during the investigation.

With these claims comes a plethora of potential damages for which the employer could be on the hook, such as emotional distress and punitive damages, which exponentially increase liability exposure. And then there are the legal costs of the defense, which employers must bear even if the lawsuit is ultimately deemed meritless.

Most significantly, it is increasingly common in the wake of the #MeToo movement for former employees to claim, long after the limitations period has expired, that they were sexually harassed during their term of employment. Even though it is too late to bring the claim, the employer is obligated to conduct an investigation to prevent a repetition of the conduct alleged.

Proper handling of the investigation is critical to insulating the employer from liability. While there is no bright-line rule, the following provides a guideline for the type of investigation employers should conduct.

1. Get the accuser's story

An essential first step in the investigation is for the employer to talk with the employee bringing the complaint to get their full story, preferably in writing. If the sufficiency of the investigation is challenged, this is one of the first things the judge or jury will ask about.

2. Speak with the person accused

As much as you want to avoid telling a company executive they have been accused of sexual harassment and hope the matter just goes away, you must address it head on. Whether the accusations allege harassment 10 years ago or now, employers must confront the person accused.

This is crucial to support an employer's ultimate decision to terminate based on facts learned through the investigation. While a jury cannot trump an employer's factual findings on whether the person accused engaged in misconduct rising to the level of good cause for termination, the jury can decide whether the stated reason for termination is fair, honest and regulated by good faith. *Cotran v. Rollins Hudig Hall Int'l Inc.*, 17 Cal. 4th 93, 104-105 (Cal. 1998).

Accordingly, if challenged, employers must show they had a reasonable belief (i.e., more likely than not it happened) that the employee engaged in the misconduct alleged. Interviewing the alleged harasser and providing an opportunity to explain the conduct or refute the allegations is a critical step.

The interview also gives the accused the chance to talk about factors that could relate to the conduct, like depression or schizophrenia. Even though the potential disability does not excuse the conduct, employers need to consider these factors and the potential need for accommodation before making the decision to terminate.

Similarly, if the employee claims that addiction to drugs (not used at work due to company policy) led to the inappropriate conduct, the employer should explore accommodations like substance-abuse treatment before deciding to terminate.

Interviewing the people accused also includes them in the investigation so that are not blindsided by adverse findings at the conclusion of the investigation.

3. Interview other employees

After interviewing the accused and the accuser, the employer should interview other employees who might know about the alleged harassment.

As a quick overview, the standard of proving sexual harassment claims is high: Accusers must show they were subjected to severe or pervasive conduct and that the conditions of employment were altered and created a hostile work environment.

They must also establish that a reasonable person in the same circumstances would have considered it a hostile work environment. To make this showing, accusers can introduce "me too" evidence showing that co-workers were subjected to similar treatment.

Interviewing people other than the accuser and accused is critical to conducting an adequate investigation. These interviews will educate employers on the facts surrounding the sexual harassment complaint and identify any "me too" witnesses who would support the claims if pursued in court.

While it is up to the court to determine the weight to allocate to "me too" evidence, this evidence is instrumental in a sexual harassment case. It is important for employers to identify the witnesses against it as well as other employees who could be experiencing similar issues.

Also, interviewing other employees helps establish the reasonableness of the ultimate conclusion of the investigation, whether it is a finding of fault against the accused or a finding that the claim is baseless.

4. Maintain privacy

It is imperative to maintain the privacy of everyone involved during a sexual harassment investigation. If the investigation is mismanaged and statements about the accused are publicized to other employees, there could be a viable claim of defamation against the company, especially if the complaints prove to be unfounded.

Sullyng the reputation of the company's president is often an unfortunate byproduct of an investigation, and it should be avoided at all costs.

In addition, maintaining the privacy of the person bringing the claim promotes confidence in an employer's complaint process and encourages other employees to come forward with complaints of harassment.

A new app called "Kendr" allows employees to confidentially submit sexual harassment complaints to their employers and receive confidential updates on the status of the investigation. Employers continue to take considerable measures to ensure the confidentiality of their employees during investigations. We will likely see other new developments that allow for increased privacy in workplace investigations.

5. Suspend the accused pending the investigation

While the investigation is underway, it is prudent to place the person accused of harassment on an immediate and indefinite suspension until the investigation is concluded. This insulates the employer from ongoing liability, and it lets the accuser know the complaints are being addressed.

The person accused should not be terminated until a thorough investigation has been completed and the employer has reasonably determined that the complaint is adequately supported. At the same time, the person accused should not be made to feel that there is no choice but to resign pending the investigation.

It is important to consider how the investigation will affect the employment and personal life of an executive or long-term employee — and not just how it will affect the employee who makes the accusation.

6. Do not retaliate

Regardless of the conclusion reached after the investigation, and even if the complaint is ultimately found to be meritless, there should be no retaliation against the accuser. Employees must not fear they will be treated differently in the workplace or lose their jobs as a result of filing a complaint.

Employers must maintain an open-door policy and encourage employees to report allegations of sexual harassment and other misconduct.

Remember, there are many forms of sexual harassment. Although the #MeToo movement focuses primarily on men's sexual harassment of women, any unwanted sexual advance in the workplace — including those made by women against men and those involving people of the same gender — constitute actionable sexual harassment.

Employers who receive complaints of harassment, from either current or former employees, should conduct an investigation to determine the legitimacy of the complaints before taking any adverse employment action against the person accused.

By Todd R. Wulffson, Esq., and Ashley A. Halberda, Esq., Carothers DiSante & Freudenberger

Todd R. Wulffson is managing partner in the Orange County, California, office of **Carothers DiSante & Freudenberger**, a leading employment, labor and business immigration law firm providing litigation defense and counseling to California employers. With 25 years' experience, Wulffson focuses on implementation of proactive measures to reduce risk and cost, and he has experience in the evolving area of social media law. Contact him at twulffson@cdfllaborlaw.com. **Ashley A. Halberda** is an attorney at the firm's Orange County office. Halberda represents California employers regarding wage-and-hour law, wrongful termination, harassment and class actions. She also counsels clients on compliance strategies to help protect them from future litigation. Halberda can be reached at ahalberda@cdfllaborlaw.com.