X Does Not Marcus The Spot: Preventing And Handling Workplace Harassment In 2018

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The County of Pristine is a desired location for entrepreneurs in the high tech industry, younger families, and dog lovers. The County's socio-economic status is middle to upper class, and crime and divorce statistics are among the lowest in the nation. You are the Pristine County Attorney, and today you receive a knock on the door from the County's Human Resources Director, Carla Jones, requesting your legal advice concerning County Manager, Marcus Cebelius.

Deputy County Manager Tina Pohler, who directly reports to Marcus, has reported that he is harassing her, and she needs help from HR for fear of adverse reprisal. Marcus is the long-time County Manager and is well respected by the County Commissioners as well as most of Pristine County's department officials. However, neither you nor Carla are surprised by the allegation, because there have been occasional rumors over Marcus' tenure that he flirts with other female staff. Carla wants to keep things quiet as there are 30 employees in the office and she is afraid of a #metoo flurry of distraction.

The County has thorough anti-harassment and anti-retaliation policies. Carla conducted an informal investigation and through her promise to maintain confidentiality to the following three reporting parties, she discovers concerning information about Marcus' behavior:

Tina and Marcus briefly had a "more than friends" relationship for three months, until Tina broke up with Marcus because he was overly pressuring her to leave her husband. Since the breakup, Marcus has excessively texted and left voicemails for Tina to reconnect their relationship. Tina now feels uncomfortable working with Marcus, who is her direct boss and has significant power and influence in County government on hiring and firing decisions. The County employee handbook contains a provision that prohibits relationships between supervisor and employees, which may result in discipline of both parties by the appropriate hiring and firing authority.

Tina also told Carla that another female employee in the County Manager's office recently reported to Tina that Marcus was acting inappropriately with her. Susan Fey, the County Manager assistant, described to Tina that Marcus gets "handsy with me" when they are alone.

Carla conducted an in-person interview of Susan, who reported that Marcus tried to provide her a friendly hug at an office recognition party, which she resisted. Recently, according to Susan, Marcus grabbed her posterior while simultaneously telling her that she had "a stray hair on her hiney." Marcus then made a comment to Susan that she would be promoted because she allows him to be himself around her. Susan revealed that she told Jacob Ladere, her boyfriend and past Pristine County Commissioner, about Marcus' inappropriate and sexual behaviors. Susan expressed concern to Jacob that Marcus would "continue to assault" her and that she would lose her job if "he ever found out that I was talking to you." Susan suggested that Carla should speak with Mindy Warfield, the County's third party contractor who works closely with the County's IT department.

Carla conducted a phone interview of Mindy, who initially expressed her reservation in providing any information for fear that she may lose Pristine County as one of her larger client accounts. After Carla convinced Mindy that their "conversation will be kept strictly confidential," Mindy reveals that after a lunch with Marcus to discuss renewal of her contract with the County, he "attacked her with kisses on her neck" without consent or reciprocation and suggest that they to a motel "to seal the deal." Mindy reveals that Marcus then hugged her and would not let her go. She kicked him in the groin and drove off. Since that time, Mindy has sought counseling for the incident.

As the County Attorney, you immediately realize there are a lot of details and potential concerns to unpack here. You realize that all of this information portends potential sexual harassment liability, but what types of behavior actually rise to the level prohibited by law? Who does the law protect—only employees or also outside contractors? It appears Marcus may have behaved poorly for some time—at what point is an employer (the County) obligated to get involved? What are the employer's obligations once it knows of the potential issue?

Title VII Refresher: Sexual harassment, Legally-Defined

Sexual harassment is a form of sex discrimination prohibited under Title VII. Sexual harassment is defined as:

> Unwelcome sexual advances, requests for sexual favors, and other verbal or physical conduct of a sexual nature . . . when (1) submission to such conduct is made either explicitly or implicitly

> a term or condition of an individual's employment, (2) submission to or rejection of such conduct by an individual is used as the basis for employment decisions affecting such individual, or (3) such conduct has the purpose or effect of unreasonably interfering with an individual's work performance or creating an intimidating, hostile, or offensive working environment.

This definition has been interpreted to encompass two more commonly known terms: quid pro quo harassment and hostile environment harassment. Quid pro quo harassment occurs when an employee suffers a tangible employment action based on that employee's response (or nonresponse) to unwelcome sexual demands. This is the classic "sleep with me or you're fired" scenario, but can also include any granting or denial of some other benefit in the workplace that constitutes a significant change in employment status. If no tangible employment action occurred, conduct may still be unlawful under the hostile environment analysis. To rise to the level of a hostile environment, conduct must be "severe or pervasive enough to create a work environment that a reasonable person would consider intimidating, hostile, or abusive." Petty slights, annoyances, stray remarks, or isolated incidents (unless extremely severe) will not typically rise to the level of a hostile environment as defined under the law.

Sexual harassment can occur when the victim is a man or a woman and does not have to involve the opposite sex. The harasser can be the victim's supervisor, a co-worker, a supervisor from a different department, or even a non-employee. Importantly, the conduct must be unwelcome.

Who Is Protected Under Title VII?

Employers with fifteen or more employees are subject to Title VII. An individual who works for a covered employer is protected if he or she was an employee at the time the alleged harassment occurred. The test for whether a person is an "employee" is fact specific, but generally does not include independent contractors. Simply ascribing the label "contractor" to a person performing work for an entity, however, may not be sufficient to avoid liability. A court would examine a non-exhaustive list of factors to determine whether that individual is actually in an employment relationship, including the amount of control the entity has over the work. An employee can have multiple employers who may be subject to Title VII liability as joint employers. A similar fact-specific test applies here as well: does the entity have the ability to hire and fire the individual? Which entity has the power to discipline or retain direct supervision of the employee? There are many factors that come into play here, but employers (both public and private alike) should be aware for the potential of joint-employer liability.

What Triggers an Employer's Legal Obligations?

Knowledge. When the complained of conduct is between two employees, "an employer is responsible for acts of sexual harassment in the workplace where the employer (. . . or supervisory employees) knows or should have known of the conduct." The parenthetical here in the regulation is key: "or supervisory employees." When an employer's managers/officers have knowledge… the employer has knowledge.

Appropriate Response. Once an employer knows (or has reason to know) of potentially unlawful behavior (whether by coworkers or supervisors), its legal obligation is to take "immediate and appropriate corrective action." In other words, ignoring signs or looking the other way in the face of a complaint can land an employer in hot water. But, if an employer learns of an issue and immediately remedies the issue, this gives the employer a strong defense against future claims of harassment (as long as that remedy was appropriate and the behavior did not continue).

Prevention. When the complainant alleges that a supervisor is the doer of the misdeed, the employer's liability is assumed unless the employer can show that it not only took immediate corrective action, but that it took affirmative steps to prevent harassment in the first place. Note here that an employer has an affirmative duty to take reasonable steps to prevent harassment in the workplace. Reasonableness is not specifically defined; but, to start, employers and municipalities should be looking at their written policies and formal supervisor training (including signed acknowledgments of attending the training).

Knowledge, prevention, and appropriate responses are not, by any means, get-out-of-jail-free cards for employers. Particularly in a hostile environment claim (versus quid pro quo), if a tangible employment action has been taken (e.g., the complaining employee was fired), the employer's argument that it tried to prevent and respond appropriately may be inconsequential.

Responding to a Complaint of Sexual Harassment

What is an "appropriate corrective action?" There are no black and white rules to guide an employer here. If the EEOC were to investigate a claim of sexual harassment, it would look at the situation as a whole: the nature of the alleged sexual advances and the context in which the alleged conduct occurred. Employers should do the same.

While employers should, of course, ensure that all complaints and ensuing investigations are handled with discretion, confidentiality should not be promised. An employer is obligated to respond and take remedial action, and the employer's figurative hands may be tied if it learns information that it has promised would remain confidential (or it must break the promise of confidentiality and thereby destroy the credibility of its investigatory process).

Retaliation

Title VII is intended to prevent discrimination and harassment in the workplace and encourage employees to report such misconduct without fear of punishment. An employee who complains is protected from retaliation (also known as "reprisal"). An employee who participates in an investigation is similarly protected from retaliation. The



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elements of retaliation are (1) protected activity (a complaint or investigation participation), (2) some materially adverse employment action, and (3) a causal connection between the protected activity and the adverse action. For a complaint to allege "protected activity," it need not specify any particular magic words. The complainant does not need to say, "I feel this is a hostile environment based on my sex." Further, the conduct about which the employee complains need not ultimately rise to the severe and pervasive level required under the law. The complaint itself garners some protection—not impenetrable if the adverse action is based on legitimate business reasons, but employers should proceed with caution.

Considerations for the Pristine County Attorney

As the County Attorney in this scenario, you should advise as to (1) whether the County has any current legal exposure with respect to the allegations brought forward by Tina, Susan, or Mindy, (2) what is an appropriate corrective remedy, if applicable, with respect to Marcus, and (3) whether there are any issues with the County's current policies or procedures related to sexual harassment in the workplace.

Susan and Mindy

Susan and Mindy both presented serious allegations during the investigation of Tina's complaint. Susan reported misconduct that implicates both hostile environment and quid pro quo claims. Marcus' comment about, and grabbing of, her posterior have the potential to create an intimidating/offensive environment. Is it an isolated incident? A stray remark? His comment that Susan could get a promotion if she continues to allow him to be himself (presumably, his posterior-grabbing self) is an alarming comment that is well on its way to quid pro quo. Mindy's comments, similarly, should be sounding internal alarms for the County Attorney: unwelcome sexual physical contact (kisses on the neck) and a suggestion to head to the motel to "seal the deal." However, setting aside for a moment what the County should do with Marcus as a responsible employer (regardless of the actual legal risk associated with claims from Susan or Mindy), the County has several defenses for consideration.

First, Mindy is likely not an employee. Further analysis is needed to ensure that the County does not exercise joint control over Mindy that could impose any joint-employer liability, or that the County does not exercise control on its own such that the label "contractor" is inappropriate. Assuming she is truly an independent contractor, she is not covered by Title VII for purposes of a potential claim against the County.

Second, although aware of Marcus' flirtatious nature, the County had no direct knowledge of either Susan or Mindy being harassed. Mindy told nobody, and Susan told only her boyfriend who was no longer a county employee (he was the past Commissioner). The analysis is drastically different with respect to Susan if Jacob was still the Commissioner when she confided in him, but that does not appear to be the case. Recall, a supervisory employee with knowledge means that the knowledge is imputed to the employer. Supervisors have a legal obligation to "tell" even if romantically involved with the complaining employee. Depending on the jurisdiction, you should still expect that a Plaintiff's attorney would attempt to impute liability on the County for the past Commissioner, Susan's boyfriend, having knowledge of Marcus' harassment.

Tina

Tina's complaint passes some of the initial threshold questions. Title VII applies as the County employs fifteen or more employees. She is a covered individual because she is employed by the County. She has put the County on notice of a potential sexual harassment issue, which should be evident based on a few key allegations: relationship gone south between boss and subordinate, excessive unwelcome advances regarding their sexual/romantic relationship, discomfort in the workplace and intimidation because of Marcus' power as her boss. True or not, the County is on notice and must investigate accordingly.

The conduct. Is the conduct unwelcome and severe and pervasive as to create an intimidating, hostile, or offensive working environment? Maybe. The initial relationship was not unwelcome, but the excessive voicemails and text messages certainly were (according to Tina). She has expressed a fear of quid pro quo (i.e., Marcus has power and the relationship is over so she is apprehensive). She has not, however, alleged any actual changes to the terms or conditions of her employment to constitute an adverse action. The investigation at this point does not feel complete.

Investigation. Carla took some great first steps with her informal interviews. However, a key component is missing—she did not interview Marcus. Unless the County is presented with conclusive undisputed evidence of Marcus' behavior (e.g., the smoking gun email...and, frankly, even if there was a "smoking gun"), Marcus should be given an opportunity to respond to the allegations.

Knowledge: As the County Attorney, you should be concerned about the fact that neither you nor Carla are surprised by these allegations. Your knowledge, and Carla's knowledge, is the County's knowledge. The details surrounding these prior "occasional rumors" are important to understand whether the County has already shirked its duty to implement appropriate corrective action. If evidence exists that these prior rumors were substantive enough that a reasonable person in your shoes, as the County Attorney, would have at least looked into it, the County may be exposed for failing to prevent/remedy harassment. It is imperative that the County respond appropriately, now, to Tina's allegations.

Immediate Action. Two items. Based on the specificity and nature of the allegations by three different female reporting parties, and depending on policy and practice, the County would be best served to place Marcus on administrative leave and have him work from home as well as advise him that communications with all staff and vendors must henceforth be made by email. It is important to interview Marcus before forming a final conclusion as to appropriate discipline, if any. Has Marcus ever been spoken with or disciplined in the past for similar behavior? Even though Susan and Mindy's allegations may or may not present legal risk by way of a Susan/Mindy claim, the new knowledge of his alleged misconduct toward them should be taken seriously not only because that is what a responsible employer should do, but also to protect the County from risk of a future claim

should Marcus continue his [alleged] bad behavior. The spectrum of potential discipline ranges from a written warning ensuring that Marcus understands he is to avoid any conduct that could give even the perception of this type of behavior moving forward, to immediate termination. If these allegations went public, would the County be comfortable standing behind the decision it made?

First Important Take Away: Immediate Training and Bystander Empowerment

If Marcus has not already been dismissed from his employment, to go along with his severe warning/reprimand, he should be required to attend harassment and awareness training. For most employers and municipalities, directing an alleged offender to training seems like an obvious [minimal] response. However, prevention is part of an employer's defense against a claim of supervisor sexual harassment. Written policies and self-guided auto-pilot online "tutorials" only go so far. The goal is not simply mass exposure to the law and the material, the goal is understanding and actual prevention. All employees (including supervisory employees) should receive a uniform message as an initial step, followed by separate training sessions for employees in supervisory roles. This training should include topics such as reporting to appropriate individuals when rumors are abuzz, not unlike the rumors that the County Attorney and Carla were aware of in the County of Pristine. This training should include interactive analysis of real-world scenarios (e.g., talk about the County of Pristine!).

Employees should be encouraged to confront unwelcome situations in the workplace directly. Employees should also have a clear roadmap of the various (at least two) reporting resources to whom a complaint can be made. While it may not be advisable to implement a policy whereby a non-supervisor employee would actually be disciplined for failing to report harassment in the workplace, it's important that all employees understand that withholding information may mean that the employer escapes liablity.

Presently, a growing number of workplace trainers are incorporating the concept of bystander empowerment into their harassment training methods to employees and management. The crux of this concept is to re-educate the majority of employees or managers that would traditionally ignore or "bystand" witnessed harassment. Such training focuses on taking affirmative steps towards productively and contemporaneously addressing inappropriate workplace behavior before it either turns into full-fledged harassment (or continued harassment). Depending on workplace culture and the employer's policy and enforcement on anti-harassment measures, the County under these facts is a good candidate for having a bystander empowerment component added to its harassment training –both for employees and administration/management.

Two Additional Take Always

1. The County should have a qualified internal I.T. manager or independent forensic expert immediately capture and preserve screen shots of all electronic information that may be sitting in the employer's servers. Presuming that the County's employee handbook establishes that such information shall be considered employer property, the scope of such a search would include but not be limited to all emails, word processing documents, and texts (if connected to the county servers through employer-issued mobile phones or software) that are relevant to the allegations or denials of harassment.

2. Carla should avoid providing promises of confidentiality to reporting parties as a means of enticing disclosure. Doing so will result in an unfulfilled and false assertion if any of the employees file an administrative claim or lawsuit against the County. As part of the subpoena or disclosure process, the employer is required to turn over copies of its written notes or witness statements made during the internal harassment investigation.

For future reports of harassment, the County should consider contacting its external employment counsel or a third-party workplace investigator to evaluate the allegations of harassment against Marcus. That approach may create better separation and a stronger position, provided that law or regulation allows such information to be kept confidential. If, however, the County maintains a practice of conducting reports of harassment internally through its Human Resources department, then it should avoid guaranteeing that the statements are confidential. Carla should, instead, inform the County employees being interviewed that any statements made to her during her workplace investigation fall under the anti-retaliation policy found in its employee handbook.

Notes

1. 42 U.S.C. §2000e-2(a); 29 C.F.R. § 1604.11.
2. 29 C.F.R. § 1604.11.
3. EEOC Enforcement Guidance: Vicarious Employer Liability for Unlawful Harassment by Supervisors, https://www.eeoc.gov/policy/docs/harassment.pdf (last modified Mar. 29, 2010).
4. *Id.*
5. EEOC, Harassment, https://www.eeoc.gov/laws/types/harassment.cfm (last visited Jan. 23, 2018).
6. *Id.*
7. EEOC, Facts About Sexual Harassment, https://www.eeoc.gov/eeoc/publications/fs-sex.cfm (last visited Jan. 23, 2018).
8. *Id.*
9. *Id.* 42 U.S.C. § 2000e(b).
10. EEOC Compliance Manual, 2-III(A), https://www.eeoc.gov/policy/docs/threshold.html#2-III-A (last visited Jan. 23, 2018).
11. *Id.*
12. EEOC Compliance Manual, 2-III(B), https://www.eeoc.gov/policy/docs/threshold.html#2-III-B-1-a-iii-(b) (last visited Feb. 28, 2018).
13. 29 C.F.R. § 1604.11(d).
14. EEOC Enforcement Guidance: Vicarious Employer Liability for Unlawful Harassment by Supervisors, https://www.eeoc.gov/policy/docs/harassment.html (last visited Feb. 28, 2018).
15. EEOC, Facts About Sexual Harassment, https://www.eeoc.gov/eeoc/publications/fs-sex.cfm (last visited Jan. 23, 2018).
16. Employers also should not require that non-supervisory employees participating in the investigation keep the details confidential, but that is a topic for another article addressing the National Labor Relations Act and the prohibitions against "chilling" an employee from discussing the terms and conditions of their employment. https://www.eeoc.gov/laws/guidance/retaliation-guidance.cfm
17. *Id.*
18. *Id.* at II.
19. *Id.*