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When a Third Party Becomes the Harasser: How the #MeToo Movement May Impact Your Workforce in the Most Unsuspecting Way

April 25, 2018

In the whirlwind of #MeToo, employers are scrambling to be proactive and take control of sexual harassment issues among their workforces, but most are unprepared for how to handle sexual harassment from third parties. The most overlooked, and oftentimes misunderstood, legal obligations for employers arise when it's a customer, client, or vendor who is the alleged harasser.

You've all heard this one before: a long-time client who is loyal to your facility has built a reputation among your staff as being flirtatious and "handsy." Many of your female employees who interact with the client have complained about his behavior in the past, but you've overlooked it because, not only has he been a good client, but you just weren't sure what you could do. Over the last year, the client's behavior has become more aggressive (and concerning). Your employees are now more vocal about their complaints and refuse to serve the client. Or how about this one? Your facility has been getting deliveries from a particular food supplier for years. The supplier has recently hired a new delivery driver. Although you haven't received direct complaints from any employees who were on the receiving end of the comments, you've heard that this new driver regularly makes lewd comments to your female employees. You know the client or delivery driver (or other third party) are wrong, but you're not sure what to do. They aren't your employees, so it's out of your hands, right? As long as your employees are behaving themselves, you've done your job, right? Wrong.

Most employers know that they are required by law to protect their employees from harassment by a co-worker or supervisor, and they know what to do when one employee makes unwelcome sexual advances toward another employee. Most employers, however, do not know that they have a similar legal obligation to ensure that their employees are protected from such harassment by third parties.

The law generally requires that where an employee has been subjected to harassment by an outside party, the employer may be held liable if (1) the employee made an effort to inform the employer of the harassment, (2) the employer knew or should have known that the harassment was occurring, and (3) the employer failed to take prompt and appropriate corrective action that was reasonably likely to prevent the recurrence of harassment. This standard was highlighted in the 2011 lawsuit filed by the Equal Employment Opportunity Commission (EEOC) against the franchisee/owner of a Hurricane Grill and Wings restaurant. A group of female servers repeatedly complained to the restaurant manager about harassment from a regular customer, who happened to be a Palm Beach County Sheriff's deputy. The servers relayed stories that the deputy commented on their bodies, groped them inappropriately, and solicited them for sex. Despite continuous complaints from the female servers, the manager took no action and, instead, fired one server after she contacted a private attorney to help her file a charge with the EEOC.

The EEOC took up the case on behalf of the restaurant's female servers to file suit in federal court. The EEOC asserted that the franchisee/operator allowed a workplace environment that tolerated harassment in violation of the law and subjected its employees to severe emotional distress. According to the EEOC, instead of ignoring the complaints, the restaurant's management should have acted quickly to stop the harassment, even if that meant prohibiting the sheriff's deputy from returning, and should have made a clear statement that such behavior was not tolerated. Instead, the restaurant's management allowed the harassment to continue and retaliated against one server for exercising her rights by seeking legal assistance. "All women deserve the right

to work in an environment free of sexual harassment," said Malcolm Medley, director of the EEOC's Miami District Office. "The EEOC will take action against employers who fail to protect the work environment from such misconduct." The suit was eventually settled for $200,000.

This standard was tested and confirmed in another suit filed by the EEOC, this time against Red Olive, a chain of restaurants. Shortly after a female server was hired to work at one of the chain's locations, a male diner in his late 60s or early 70s began frequenting the restaurant where she worked and expressing his unwelcome affection for the server. The customer knew the server from her prior employment at another restaurant, where he regularly offered unsolicited comments on her body, and even touched her inappropriately. The server informed the manager at the prior restaurant, and the manager instructed the customer that the behavior was inappropriate and that he would be asked to leave and not return if he could not refrain from engaging in that behavior. When the customer found out that the server left the employ of that restaurant to work at Red Olive, he began visiting her there. During his visits to Red Olive, the customer brought the server flowers and cards, made inappropriate comments about her body, and described his sexual interest in her. When his behavior escalated to inappropriate touching, which included one incident that occurred in front of the manager, the server asked the manager for help. When the manager ignored her request, the server asked the owner of Red Olive to take action. Not long thereafter, she was fired.

The server sued Red Olive in federal court, where, after two years of litigation, Red Olive filed a motion for summary judgment. In April 2016, the court denied Red Olive's motion and admonished the restaurant's management and ownership. Specifically, the court found that compared to the actions taken by management at the server's previous employer to confront the customer and end the harassment, the management and ownership at Red Olive displayed "irresponsible conduct" by failing to take any action to protect the server. The court allowed the case to proceed to a jury trial, where the parties settled just days before trial was set to begin.

As is evidenced by these cases, ignoring complaints about third parties can subject you to liability, especially in this time when new harassment suits are popping up daily, if not hourly. There are several steps you can take now to make sure that your employees and your company are ready to combat any discrimination or harassment issue thrown your way:

- It may go without saying at this point, but you need to review your current written policies. Your policies on discrimination, harassment, and retaliation should not be restricted only to employees. Rather, they should state clearly and unequivocally that discrimination, harassment, and retaliation of any kind, whether from an employee or a third party, will not be tolerated and will be dealt with swiftly.
- Along those same lines, you need to review your complaint procedure, assuming you have one. A complaint procedure shouldn't just be words on a paper. It should have structure and guide employees on the steps you have made available to them for making complaints. It also should be realistic and take into account the avenues employees are most likely to take or seek when they have a complaint. If you don't have a written complaint procedure, you need to develop one as soon as possible.
- After making sure your policies and procedures satisfactorily address third-party discrimination and harassment, you must consider issues in your culture that may discourage employees from making complaints, or cause them to accept that harassment is part of their jobs, even if you have written policies. For example, managers are often trained to remind employees that the customer comes first. Although this is an ideal philosophy in the business atmosphere, lines must be drawn and policies must be implemented and enforced to maintain client and customer satisfaction only to the extent that they do not infringe on the rights of employees. Your culture should make clear that your employees are your number one priority, and their safety and health are of the utmost importance, even at the cost of potentially losing a customer or client.

- The best way to promote your culture to employees is through training, training, and more training. Nothing says that the company cares about its workforce more than requiring sexual harassment training for all employees, even at the highest levels. That training needs to reinforce your policies against discrimination and harassment of all kinds, including from third parties, and carefully explain your complaint procedure. After an 18-month study, the EEOC found that the most effective training is live and interactive, led by someone with applicable experience. It is no longer acceptable to offer computer-based training that doesn't allow for employees to ask questions or pose real-life scenarios. You should also require special training for your managers, supervisors, decision-makers, and executives – basically anyone who may receive complaints or may create liability for the company once they have knowledge of discrimination or harassment. These are the people who need to understand the importance of protecting employees, and who need to be able to adequately address complaints. Tell your employees that these individuals are required to attend this special training.
- When you get a complaint of discrimination or harassment by a third party, act quickly. Your response will, of course, vary depending on the situation, but you need to consider every option with the goal of stopping the behavior and protecting your employee from further discrimination or harassment. In the most egregious circumstances, you should contact the local authorities to determine if a criminal action is necessary. At the very least, you should remove the employee or the third party from the situation immediately. In fact, sometimes the most appropriate solution to the issue is the temporary (or permanent) removal of the customer, client, or vendor. If the third party doing the discrimination or harassment is employed by a company with which you do business or have a contract, you should inform the other company of what's been going on and the steps you are taking, and you should request that the other company take appropriate steps on its end. If you are the employer of a third party who is engaging in the harassment and you receive a complaint about your employee, you too should act quickly to address the situation.
- Every complaint of discrimination or harassment requires an investigation. No complaint should be summarily dismissed or treated as too small, and every complaint should be taken seriously. The word "investigation" often has a negative or scary connotation, but an investigation is merely an employer looking into a situation or complaint. You just want to make sure it appropriately addresses the problematic situation.
- Finally, consider retaining legal counsel to help you through this process. Whether this means creating or revising your policies, conducting training, or investigating a complaint, an attorney can protect you when you need it most. Legal insight into what you should and shouldn't do as an employer faced with a discrimination or harassment complaint can be the difference between avoiding litigation and having your company name splashed across newspaper headlines.

Although the loss of a customer, client, or vendor can equate to a loss of revenue, the morale of your employees, the expense of litigation, and the potential media attention easily outweigh that loss. In the era of #MeToo, you simply can't afford to ignore any complaint of discrimination or harassment. The costs for doing so could be staggering.

For assistance in navigating workplace harassment issues, contact the author, Jennifer Curry, or any member of Baker Donelson's Labor and Employment Group.