Northwest Ohio Human Resource Association

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AFFILIATE OF SHRM SOCIETY FOR HUMAN RESOURCE MANAGEMENT

LEGISLATIVE UPDATE

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Culture Change and Sexual Harassment Prevention

2017 brought sexual harassment, sexual misconduct, and gender inequality into national focus for the first time in many years in large part because of the media attention garnered by the salacious sexual harassment/misconduct allegations against high profile celebrities and politicians such Harvey Weinstein, Matt Lauer, Al Franken, Charlie Rose, Roy Moore, and Kevin Spacey to name a few. In December, *Time Magazine* named its Person of the Year, which was not a person at all. The 2017 Person of the Year is "The Silence Breakers," in recognition of the women's empowerment movement spawned earlier in the year and known as the #MeToo movement. Recently, Golden Globe Award attendees supported the Time's Up movement against sexual harassment by calling on women and men alike to wear black and speak out against sexual harassment and sexual assault. In fact, during and after the Golden Globe Awards show, #TimesUP was tweeted more than 520,000 times.

In the wake of these recent events, employers probably are wondering how sexual harassment and misconduct claims will manifest themselves in 2018. According to the EEOC's Charge Statistics, charges based on sex accounted for 29.4% of all charges filed in 2016, lagging only behind race and disability. However, the EEOC's Select Task Force on the Study of Harassment in the Workplace found that many sex based harassment claims never get reported because of fear of disbelief, inaction by the employer, blame, or social or professional retaliation. Employers should brace themselves for an influx of sexual harassment/misconduct complaints in 2018, as the #MeToo and #TimesUp movements will likely embolden employees to report misconduct that might have otherwise gone unreported.

To prepare for what seems to be the inevitable, of course employers must revisit their sexual harassment policies. Policies should include a clear definition of what is considered "harassment," the procedure for reporting harassment, and how to proceed when the complaint is against a supervisor or company executive. Remember, sexual harassment is about power and when the bad actor is a high-level harasser, the victims will feel powerless to complain, unless companies have a known mechanism to report complaints even against supervisory and executive level employees.

Employers should also institute regular and reoccurring company-wide sexual harassment training and education. In other words, training and education should not be limited to lower level employees. The events of 2017 prove that a culture of harassment can fester at all levels of the food chain. Ultimately, employers should strive for training that will affect a culture change and promote a productive, safe, and respectful work environment. If upper management is exempt from sexual harassment training, employees will perceive a double standard which may perpetuate malfeasant behavior.

The U.S. Supreme Court has made clear that employers can avoid liability in sexual harassment claims by establishing sound and consistent policies, training their workforce, and taking appropriate action when complaints are deemed valid. Nevertheless, such policies and practices are meaningless if employers are ambivalent about addressing the cultural attitudes that pervade our society and infect the work environment. 2018 may be a challenging year for some employers, but those who embrace culture change will limit their liability and reap the benefits of a satisfied and productive workforce.

Handling employees with potential disabilities

From time to time, employers call our office wondering what to do about an employee who previously was able to perform their job and now has a questionable ability to do so – but who has not requested an accommodation. The protections of the ADA are typically triggered by the employee's request for an accommodation. However, from time to time, it can become apparent that an employee's physical or mental well-being prevents them from fulfilling their job functions or creates a risk for themselves or others.

In the fall, the Eastern District of Michigan waded into the murky waters of the appropriate way to manage an employee who appeared to be mentally unfit for their job. In *Monroe v. Consumers Energy*, Case No. 16-10079 (E.D. Mich. Oct. 19, 2017), the employee had worked for the Michigan gas company for 13 years, when supervisors noticed increasingly paranoid behaviors and complaints including a plethora of complaints that co-workers had installed recording devices on her cell phone, and in her cubicle, car, and home; being followed by her supervisor; and that tracking devices were installed in her keys and her car. The employee even went as far as filing a police report against co-workers she believed had installed a surveillance device in her home. The employer investigated the various complaints, and found them all to be without merit. As part of the investigation, the employee also admitted to human resources that she was unable to focus at work. The employee was then found crying at work by various individuals.

The company placed the employee on paid sick leave and sent her for a neuropsychological evaluation to determine if she was mentally able to perform the essential functions of her job. The independent physician determined the employee would be able to perform her job, but only after engaging in at least 12 counseling sessions to obtain coping skills. The employee refused to attend counseling, but was permitted to remain on paid sick leave. Some months later, the employee requested to come back to work and claimed she was much improved despite not having engaged in the counseling. The employer sent her for reevaluation with the same physician, who agreed she was improved, but opined she still needed counseling before she could return to work. The employee filed a charge with the EEOC, claiming disability discrimination. The charge was found to be without merit. The employee then engaged in counseling and returned to work – now nearly 2 years after she was initially placed on leave.

Shortly after returning to work, the employee filed a lawsuit against the employer claiming it violated the ADA. The employee did not claim she was disabled, but rather that the employer regarded her as disabled and discriminated against her because of a perceived disability. The trial court entered summary judgment in favor of the employer. In making this ruling, the Court relied upon prior rulings within the Circuit related to an employer's right to seek the opinion of a doctor, even through examination, when it has reason to believe the employee is not able to perform their job functions. The Court held that simply requiring an employee to undergo such an examination is not proof in itself that the employer regards the employee as having a disability. The Court found the company's actions reasonable and lawful.

While the *Consumers Energy* employer clearly went out of its way to accommodate its employee (including granting her 2 years' leave) it gives employers some guidance on how to manage employees who have physically, cognitively, or mentally declined to a degree that they are unable to perform their essential job duties. In some instances and under some circumstances, employers do not have to wait until the employee requests an accommodation to determine their continuing fitness for work. However, in any case, an employer-ordered examination must be job-related and consistent with business necessity, and should be used as a means of last resort.

The case has been appealed to Sixth Circuit Court of Appeals and remains pending there. The Court of Appeals may have something to say on the matter, but it's too soon to tell as the appeal is in its very early stages.

The full text of the trial court's opinion may be found here: https://www.leagle.com/decision/infdco20171023c05

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