Legal Matters®

Employment
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Protecting yourself from 'hostile environment' claims

Federal anti-discrimination law (and most state anti-discrimination statutes) requires employers to prevent harassment of workers based on race, religion, sex, national origin and disability and to take steps to investigate and address claims of harassment when they arise.

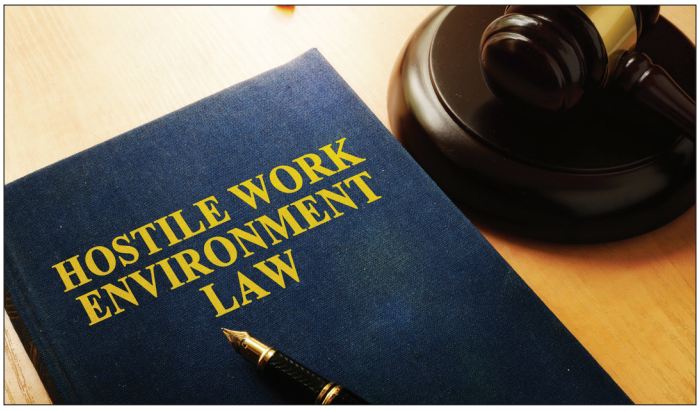
"Hostile work environment" claims are a subset of claims brought by employees who allege they're experiencing harassment severe and pervasive enough to create a workplace that a reasonable person would find intimidating, hostile or abusive.

Employers who allow such conditions in the workplace risk enforcement actions by the Equal Employment Opportunity Commission and/or relevant state agencies and can also face costly, embarrassing and time-consuming lawsuits by the victim. That's why it's important to train supervisors to detect and address such situations and to have an attorney review your policies for reporting, investigating and responding to misbehavior.

It's also important to be aware that a hostile environment can arise in any number of forms.

For example, a recent case from North Carolina recognized the possibility that a child who was often present in the workplace could create a hostile environment for workers.

In that case, the 4th U.S. Circuit Court of Appeals ruled that the repeated use of the "n-word" by the 6-year-old grandson of the white owners of an assisted living facility was enough for a Black employee's hostile work environment claim to proceed to trial.



Though the worker alleged only three instances in which this happened, the 4th Circuit — in reversing the federal District Court's dismissal of the case — said it didn't matter that the child may have been too young to understand what he was saying. That's because a reasonable person in the worker's position would consider the comments to be especially humiliating given the boy's young age and because his constant presence at the facility posed a threat that another incident could occur at any time.

Meanwhile, a U.S. District Court judge in Michigan recently ruled that a bisexual worker's claim of a hostile work environment could proceed against an employer that allegedly failed to investigate or address his complaints.

In that case, co-workers and a supervisor allegedly began directing

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Employer's shifting reasons for firing result in retaliation claim

The federal Rehabilitation Act prohibits federal employers and government contractors from discriminating against otherwise qualified workers or job candidates with disabilities.

That means it's illegal for a federal agency or contractor to fire, demote or refuse to hire someone based on their disability. It also means such employers must provide reasonable accommodations that can enable a disabled person to do the job. Employers who retaliate against employees for requesting an accommodation for their disability may face consequences as well, as happened recently in Virginia.

That case arose several months after disabled veteran Anthon Calix-Hestick started working for the U.S. Postal Service. His second-line supervisor had planned to fire him for a poor attendance record but held back upon learning in a meeting with him that his absences were due to medical appointments.

During that meeting, Calix-Hestick requested a standing mat to help with pain in his knees. The USPS then sent him home without pay and subsequently fired him for his answers to open-ended questions on an application form that called for subjective-based answers.

When Calix-Hestick brought a retaliation claim under the Rehabilitation Act, the USPS argued that it had a legitimate, nonretaliatory reason for doing what it did. But a federal judge ruled that the claim could proceed, noting that conflicting explanations by USPS managers involved in the decision suggested that the employer's stated reason for the termination may have been a pretext — or smokescreen — for retaliation.

Calix-Hestick now will have a chance to bring his case before a jury. But even if the postal service prevails, it will likely come after a costly, time-consuming trial, which is not desirable for any employer.

Additionally, while the Rehabilitation Act covers federal workers and employees of government contractors, the federal Americans with Disabilities Act offers similar protection to private employees nationwide. This means all employers should have an attorney review their procedures for dealing with workers requesting accommodations for potential disabilities.

Drafting error in severance agreement may result in windfall for employee

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If you are like many employers, you might offer terminated employees severance agreements under which they receive a certain amount of additional pay or benefits in exchange for releasing any potential claims they may have against the company.

A Massachusetts case, however, illustrates just how critical it is to have an employment lawyer closely review any agreement before you offer it to a fired worker. The reason? If the agreement contains any mistakes, you may be the one paying for them.

In the Massachusetts case, Dahua Technologies, a China-based provider of surveillance products, terminated Feng Zhang, its president of North American sales, in August 2017, relegating him to the role of consultant. At that time, the company promised to make monthly severance payments in the amount of "$680,000 for sixteen (16) months."

Several months later, Dahua terminated Zhang's consulting agreement and offered him a lump sum of $910,000. Zhang rebuffed the offer and demanded the nearly $11 million he was owed according to the express language in the severance agreement.

The company sued to reform the contract, claiming Zhang was supposed to receive a total of $680,000 in severance money, and that an employee made a clerical error by typing "680,000" in a space left blank for the amount of monthly payments.

A U.S. District Court judge agreed with Dahua that there was a mistake. But the 1st U.S. Circuit Court of Appeals sent the case back to the lower court, where a different judge ruled that Dahua bore the risk of the mistake and thus the agreement could not be reformed — at least not until Dahua could come up with solid evidence that the company and Zhang had orally agreed that he would receive only $680,000 total.

The judge may yet make a final determination that a different remedy is appropriate, but the judge may also leave the remedy as is. And though this is an unusual set of circumstances, the best course of action is to avoid a dispute altogether through careful review of any critical employment agreements by multiple sets of eyes, ahead of time.

Malicious prosecution verdict highlights need for caution in workplace investigations

A recent case from Massachusetts highlights just how important it is for employers that suspect an employee has engaged in workplace misconduct to enlist a lawyer to conduct a careful, deliberate, thorough and fair investigation before taking any definitive action.

The employee in the case, Susan Moran, worked for Pentucket Medical Associates for nine years, during which time she was promoted several times. But understaffing apparently made the job difficult for Moran, PMA's clerical manager, and she looked for a new job.

Several months later, she told her supervisor she was taking a job at a large Boston hospital and gave four weeks' notice but agreed to stay longer to train her replacement.

Among Moran's duties was auditing reconciliations of patient payments and copayments at two other locations — a task that required her to travel between locations to audit cash, checks and credit card slips and place them in locked bags, which would be picked up by couriers and delivered first prosecutionto headquarters and then to the bank.

As Moran was preparing to leave, PMA started receiving complaints from patients about billing errors and uncashed checks, and the company realized it had an $18,000 shortfall in its books.

Meanwhile, PMA and its management already faced negative press coverage from an unrelated incident in which PMA couriers had left boxes of patient medical records in a publicly accessible area, where they were photographed and carried away.

Things got contentious when management, without any evidence from security cameras or

financial records, accused Moran of absconding with the $18,000. PMA then announced it was suspending Moran without pay pending an investigation. Moran, who was preparing to start a new job anyway, responded that she would be leaving immediately.

Without further investigation, management reported to police that Moran had stolen the $18,000 in cash and checks but provided no hard evidence in support.

Though the district attorney ultimately decided not to prosecute, given the lack of valid evidence, Moran still had to make several humiliating court appearances, including being brought into the courtroom in handcuffs for her arraignment. She claimed she suffered severe emotional distress as a result of the ordeal.

Moran ultimately sued PMA and the managers for malicious prosecution, with a jury finding that not only was the managers' report false, but that it was made to shift blame away from themselves for their own mismanagement of the company. The jury awarded a seven-figure verdict.

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anti-gay slurs toward the man on a daily basis after his first few months on the job, including referring to him as "Kevin Bacon," the name of a gay Michigan man who was murdered and chopped up by his killer in 2019.

Though the employee allegedly reported the treatment to management, the company allegedly failed to investigate or take remedial action, even when he had to take medical leave for anxiety.

The court rejected the employer's argument that it didn't have adequate knowledge of the alleged harassment to take action.

On the other hand, a U.S. District Court judge in Virginia found that a supervisor's "racially questionable" comments toward a Black employee were not sufficient to support a hostile work environment claim.

The worker in that case alleged that her manager repeatedly asked why Black girls "wore wigs," described one employee's wig as looking matted and dirty, and used the word "colored" to refer to African-Americans. According to the judge, the comments — while potentially offensive and insensitive — did not rise to the level of severity necessary to "alter the terms and conditions" of the worker's employment.

But another court may have allowed a jury to determine whether such remarks amounted to a hostile work environment. So the best course of action is to have an employment attorney review your policies and procedures to ensure you're taking the right steps to maintain a harassment-free workplace.

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Company hit for cutting job while injured worker on leave

If you have workers out on leave for health reasons and you're simultaneously considering cutting positions for economic reasons, it's important to review your plans with an employment attorney. Depending on how you carry out the decisions you make, you could be leaving yourself vulnerable to legal claims.

That happened recently in Kansas when a warehouse worker who had been with his employer for nearly 20 years suffered a back injury on the job.

He returned to work after a month but then took leave under the federal Family and Medical Leave Act 20 months later.

According to the employee, he wanted to file a worker's compensation claim, but his employer discouraged him from doing so while promising to hold his job for him for an additional seven months.

A couple months after that, he returned with lifting restrictions, but his employer told him the warehouse team had been restructured and his position no longer existed.

The employee proceeded to file a claim in U.S. District Court alleging disability discrimination and failure to accommodate.

The employer vigorously fought the allegations, insisting that it restructured the warehouse out of economic need. However, the company's own policies called for a 12-month leave under the circumstances involving the employee, and the employee was able to obtain email and other evidence that his employer was irritated by his need for time off. In addition, his position was apparently the only one eliminated in the restructuring.

The facts were damaging enough for a jury to find in the employee's favor and award a seven-figure verdict that included a substantial amount of punitive damages intended to punish the employer for egregious behavior and deter similar conduct going forward.

The court also ordered the employer to pay the worker's attorney fees and costs.