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and the **LAW**

Sexual Harassment and Professional Sports Organizations

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For professional sports organizations, there are few workplace scandals that carry more potential liability – and generate more unwanted press coverage – than allegations of sexual harassment. In light of recent high-profile incidents, the National Football League found it necessary to reaffirm publicly that “all employees and associates of the NFL have a right to work in a positive environment” free from all harassment, intimidation and discrimination. On December 22, 2010, the League offered guidance in addressing harassment issues in an extensive memo from Commissioner Roger Goodell to all NFL teams.

All professional sports organizations would do well to follow the NFL’s lead, and carefully evaluate their policies, training programs, and reporting mechanisms so that harassment issues can be prevented, or effectively defended if they arise. An executive who learns of a possible scandal in a panicked phone call or – worse yet – in the morning paper or on the evening news, and has to ask “now what?” has already missed a crucial opportunity to prevent a crisis and protect their organization.

In this article, we’ll review the basics of the law on sexual harassment, explain what an organization can do to prevent incidents from occurring, and explore how the proper preventive strategies lay the groundwork for an effective defense should allegations of harassment arise.

The Law of Sexual Harassment

Sexual harassment claims originate under Title VII of the Civil Rights Act of 1964, which states that “it shall be an unlawful practice for an employer . . . to discriminate against any such individual with respect to his compensation, terms, conditions or privileges of employment, because of such individual’s race, color, religion, sex, or national origin.”¹ While outside the scope of this article, causes of action may also be based on state and local laws.

Sexual harassment includes unwelcome sexual advances, requests for sexual favors, and other conduct of a sexual nature, and may lead to two possible types of claims. The first, a quid pro quo claim, involves a tangible employment action. The second, a hostile work environment claim, is based on the character of the atmosphere in the workplace.²

A quid pro quo claim is established when there is unwelcome harassment of a sexual nature, the harassment is based on the gender of the victim, and the submission to or rejection of such conduct is used as the basis for an employment decision affecting the individual.³ Tangible employment actions leading to causes of actions run the gamut from hiring and firing, to promotions, demotions, transfers, compensation issues and work assignments, amongst others.

A quid pro quo harassment claim premised on the actions of a supervisor may result in strict liability for the employer.⁴ Since a supervisor is considered

to be an agent of the employer, his or her improper actions may prove indefensible to the employer even if the employer had no knowledge of the supervisor’s actions.

A hostile work environment claim requires proof of unwelcome harassment of a sexual nature, where the harassment is so severe or pervasive that it alters the conditions of employment and creates an abusive working environment.⁵ No tangible employment action or economic loss need be established in such a claim. Any number of activities can lead to a claim, including vulgar and sexually related language, joking, or gestures, explicit graffiti or pictures, repeated offensive or unwelcome flirtations, advances or physical contact, pornography on computers, and suggestive or indecent exposures.

In a hostile work environment claim, however, the employer may have an affirmative defense to liability if the employer can show that it a) exercised reasonable care to prevent and correct promptly any sexually harassing behavior and b) when a supervisor is involved in the harassment, the employee unreasonably failed to take advantage of any preventive or corrective opportunities provided by the employer.⁶ The types of proactive actions and policies that will allow a professional sports organization to take advantage of the affirmative defense (or more ideally, to prevent issues from arising in the first instance) are discussed in the next section of this article.

If found liable for either a quid pro quo or hostile work environment claim of harass-

ment, an organization could be forced to pay a variety of damages, including awards for back pay, compensatory damages, damages for emotional distress and punitive damage awards, in addition to other types of relief, depending on the circumstances and jurisdiction.

Professional sports organizations often have expansive workplaces, regularly involving the extensive presence of vendors, outside professionals and providers, members of the media and the public. Management must be vigilant in monitoring the conduct of these non-employees as well, as their conduct may lead to organizational liability if their actions contribute to a hostile work environment of which the employer had notice but failed to correct.

Additionally, while they are outside the scope of this article, the organization must remain mindful of other related causes of action that may be brought under certain circumstances depending on the type of harassment alleged, including civil assault and battery or infliction of emotional distress, and criminal prosecutions. The proactive strategies that are effective in preventing issues from arising, or in preventing or mitigating liability should there be an incident, are often the same in these other contexts.

Preventive Medicine for Sexual Harassment Claims

So what is an organization to do in order to minimize the chance of a sexual harassment claim? As with the proper handling of many workplace issues, an ounce of prevention is worth a pound of cure.

The best way to prevent claims of sexual harassment is for the organization and its leadership to make clear to all connected individuals that such conduct is unacceptable, while also ensuring that any issues that do arise are promptly and thoroughly investigated and addressed. Organizations should carefully review their policies and procedures to make sure that a clear policy against harassment is

in place *and* that all connected individuals understand what the policy means. A simple statement against sexual harassment alone is not enough.

We have learned from our experience with corporate codes of conduct, that the most effective materials are those that provide real world examples of unacceptable behavior, and real scenarios of what to do when faced with a potential issue. Regular harassment training for all levels of the organization reinforces the contents of the policy, demonstrates a commitment to its principles, and provides further opportunities to ensure understanding and comprehension. Management should lead by example, as there is simply no room for sexual harassment in a professionally run sports organization.

The best-written policies in the world, however, are of no value unless the organization also establishes an effective reporting system and problem resolution procedure. Good reporting systems make it more likely that management will be able to monitor the conduct of those connected with the organization, so potential problems can be dealt with quickly and efficiently. Those within the organization may be less likely to engage in unacceptable behavior if they know that they can be reported and that management is listening. Good reporting systems also ensure that complaints are actually heard. Litigation becomes less likely when those who have an issue believe their concerns are being taken seriously by management.

Organizations should ensure that there are multiple ways for persons to report misconduct. Workers may be hesitant if they are only given one reporting contact and they believe that the designated contact is aligned too closely with the harasser, or if they are uncomfortable talking to the specified person. Alternate contacts, dedicated hotlines and open door policies are all good ways to provide effective reporting pathways, especially when they are used in conjunction with each other.

Of course, once an incident is reported, it's important that a thorough investigation be conducted promptly and professionally. Managers and human resource personnel should receive specialized training in investigating and resolving sexual harassment complaints. Don't assume anyone can handle a claim—these complaints are often difficult to present, as workers may feel that they will be criticized for making the complaints, or that their concerns will not be taken seriously. The more proactive an organization is in ensuring that complaints are handled properly, the better the opportunities for resolution may be.

For that reason, organizations should also resist the temptation to meet accusations in the media with categorical denials or personal attacks on a complainant, even if it is skeptical of the legitimacy of the complaint. The last thing an employer wants is to discourage the reporting of legitimate complaints because of the way an organization treated someone else who alleged harassment. In fact, actions which discourage reporting may completely wipe out any benefit an organization may expect to receive for having a comprehensive policy in place. It is far more effective to emphasize, instead, that the type of conduct alleged violates the standards and policies of the organization, is not tolerated or condoned in any way, and will be the subject of a fair and thorough investigation.

Similarly, the sexual harassment policy and reporting procedure should reaffirm a commitment that there will be no retaliation or reprisal for the making of an honestly believed complaint of sexual harassment. If the investigation results in a finding that the complaint was justified and supported, the organization must take appropriate action and ensure that all connected individuals understand that the same conduct will not be tolerated in the future.

Sports teams may face challenges if those with a history of sexual harassment are hired

at any level, including on-the-field talent. While such individuals may not be a wise hire in a traditional company, there may be times when a professional sports organization may choose to employ someone with exceptional skills, status, or recognition. In those cases, it goes without saying that the organization must be extra vigilant with respect to the conduct of such hires, because failure to exercise proper caution may lead to a high price down the road.

What Is At Stake?

Professional sports organizations are rightly concerned about the direct financial effects of liability for sexual harassment. They are high profile targets, which are inevitably in the public eye, and rightly or wrongly, the media believes that the attention devoted to coverage of these claims is of great interest to their audience.

Sexual harassment claims have other effects, however, that can prove just as corrosive. Multiple harassment allegations may make it harder to attract and retain the best workers for the organization. The

organization's history may result in it being viewed as less than professional, which in turn hurts its credibility with the public, and the communities with which it is affiliated. The allegations may be humiliating and the intense scrutiny and criticism surrounding these allegations may act as a drain on resources, creating a diversion from the operation of a top-functioning organization.

Commitment to the principles of an anti-harassment policy, however, sets the correct tone for a professional sports organization. Proper training, emphasis, and the establishment of effective reporting mechanisms make it much more likely that management will be able to prevent instances of harassment or defend them effectively should allegations arise.

- 1 42 U.S.C. 2000e *et seq.*
- 2 See 29 C.F.R. § 1604.11
- 3 *Burlington Industries, Inc. v Ellerth*, 524 U.S. 742 (1998)
- 4 *Id.* at 758.
- 5 *Meritor Savings Bank, FSB v Vinson*, 477 U.S. 57 (1986)
- 6 *Faragher v City of Boca Raton*, 524 U.S. 775 (1998)

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