

FEBRUARY 2020 NEWSLETTER

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**EMPLOYER BEWARE—PNC EMPLOYEE AWARDED \$2.4M AFTER
SEXUAL HARASSMENT BY WEALTHY CUSTOMER**

FIRM ANNOUNCEMENTS

1. AWARDS:

Pozzuolo Rodden, P.C. is pleased to announce that Martindale-Hubbell announced that 2020 Joseph R. Pozzuolo's Peer Review Rating for ethical standards and professional ability is excellent.

Pozzuolo Rodden, P.C. is pleased to announce that Joseph R. Pozzuolo, Esquire has been nominated for America's Most Honored Professionals for Pennsylvania, as a 2019 Five-Star Attorney by the American Registry.

Finally, Pozzuolo Rodden, P.C. is pleased to announce that Joseph R. Pozzuolo, Esquire has been selected by his peers as a Lawyer of Distinction member as published in the American Lawyer and the National Law Journal.

2. UPCOMING SEMINARS:

Joseph R. Pozzuolo, Esquire will be presenting the following continuing legal and accounting education (CLE/CPE) webinar seminars for Clear Law Institute on May 5th @ 1pm:

a) How Middle Income Families Should Prepare For Retirement, Including Ethics

Please contact Christine Wainwright at Chrissy@Pozzuolo.com or Clear Law Institute at gqueen@clearlawinstitute.com if you would like the online details to attend this upcoming or any other past online CLE/CPE seminars.

3. BLOGS:

1. The following are a few of the business, tax, employment, estate planning and business litigation blogs posted on our main website www.pozzuolo.com during the past month:
 - a. For Distribution Purposes Assets of An Estate Are Valued As of The Time of Distribution To Beneficiary;
 - b. Employee In Wrongful Discharge Claim Must Demonstrate That Public Policy Trumps Employment At Will; and,
 - c. Disability Of Spouse Is Not An Exception To The Additional Tax of 10% To An Under Age 59^{1/2} Distribution From An IRA.

Please visit our website www.pozzuolo.com for more information on these and other relevant business, tax, estate, business litigation and employment topics.

2. The following are a few of the family law blogs posted on our family law website www.pozzuolofamilylaw.com during the past month:
 - a. Child Support- Paternity By Estoppel;
 - b. Child Custody Relocation Rules & Regulations; and,
 - c. Court Denies Absent Father Money From Son's Wrongful Death Case.

Please visit our website www.pozzuolofamilylaw.com for more information on these and other relevant family law topics.

EMPLOYER BEWARE—PNC EMPLOYEE AWARDED \$2.4M AFTER SEXUAL HARASSMENT BY WEALTHY CUSTOMER

In recent years various employers have been held liable for sexual harassment, not only for harassment caused by managers, supervisors or coworkers, but for unwelcome behavior by third parties including vendors, customers, clients, patients, consultants, independent contractors and even someone unrelated to the business. While it is more typical to see this type of sexual harassment in bars and casinos where patrons are drinking, it can also happen in other more tame atmospheres. For instance, recently, PNC Bank had a \$2.4M verdict awarded against it in favor of a New Jersey bank employee arising from a wealthy customer who inappropriately touched a female employee. While most employers will throw their hands up in the air and say, "I have no control over the customers!", employers historically and repeatedly get in trouble on how they react after learning of the harassment. Employers do have control over their entire workplace, therefore, and it must be safe.

What Is Sexual Harassment Generally?

Sexual harassment is generally split into what is called “quid pro quo” harassment and “hostile work environment” harassment. Quid pro quo is where a superior requests sexual favors or other sexual conduct in return for favorable treatment or to stave off unfavorable treatment. Hostile work environment is a workplace in which unwelcome comments or conduct based on gender, race, nationality, disability, sexual orientation, age, or other legally protected characteristics unreasonably interfere with an employee’s work performance or cause a work environment that is so severe or pervasive as to create an intimidating, abusive and/or offensive work environment.

In other words, quid pro quo is direct sexual harassment from a manager or superior, whereas a hostile work environment is where an employee feels uncomfortable where, for example, a male co-worker keeps making inappropriate comments to a female co-worker about her body, what she is wearing, sexual jokes or a co-worker has sexual photos of half-naked men or women posted all over his/her office

Additionally, it is extremely important that if anyone claims sexual harassment or discrimination, that there is no “retaliation” against that person. Retaliation is anything that could negatively or adversely affect the person’s job including lowered working hours, lowered pay, demotion, termination, disciplining or anything that would seem as adverse retaliation in relation to or in response to creating or filing a claim or complaint. If an employer does retaliate this will open an employer up to potential punitive damages greatly increasing the sexual harassment potential liability.

Why Are Employers Liable For Third Party Action, and How Can An Employer Protect Itself?

One of the key aspects of hostile work environment claims is, while an employer may not initially know of the harassment and cannot control every whim of every customer, client or patient, the employer can control its reaction and take steps to minimize hostile sexual harassment when it comes to the employer’s attention. For instance, if one employee keeps uncomfortably hugging all his female co-employees or squeezing their shoulder, once the employer recognizes or is advised of the conduct or behavior, the employer should take immediate action to first tell the employee to stop, and, if he does not stop, discipline, demote, reassign and even terminate the employee for insubordinate and wrongful behavior. The failure to correct, remedy, and rectify the behavior makes the employer seem complacent in the offensive behavior and that the employer approves and does not disapprove of the conduct.

The same rule is applicable for third party sexual harassment. Although it is harder to control the actions of third parties, if the circumstances arise where the employer should have stepped in and controlled the conduct, the employer can be held liable. The balance is what amount of control would be reasonable for an employer to exercise control over and manage sexual unwelcome conduct to be certain that the entire workplace is safe. Although it is

strongly arguable that an employer cannot address a onetime incident that it had no notice beforehand, the employer does have the opportunity and ability to address incidents from repeat offenders.

Third parties come in three groups: vendors/consultants; customers/consumers of the employer; and, unrelated third parties.

Vendors/Consultants: These are individuals or companies that the employer has contracted with to provide goods and/or services to the employer. Sexual harassment from vendors can take a variety forms such as sexual remarks or comments, inappropriate touching, or telling “off” humor, sexist jokes that are just inappropriate or “creepy” that creates an offensive work place. The problem here is the employer is explicitly contracting with or for these individuals to come into the workplace to provide goods and/or perform services for the employer with employees. While they are not employees, the employer has a degree of control over these types of individuals and events and must create a non-hostile, non-offensive workplace.

As a result, when an employer becomes aware or should be aware that one of these contracting parties is acting inappropriately, the employer needs to take action immediately the same it would for an employee’s hostile, intimidating, abusive or offensive behavior. If a particular IT person is sexually harassing a female employee in any fashion, the employer needs to take action to correct the situation. If not, it makes the employer appear complacent. Some examples of rectifying or correcting the situation would be to contact the vendor, let the vendor know of the situation, and see if the contracting vendor can send a different representative to provide the services. If the representative cannot be swapped out and that harassing person is working only with the employee being harassed, the employer could possibly switch which employee interacts with the harasser and possibly add a male supervisor or manager to buffer the situation, and definitely have a manager intervene and advise the representative that the behavior is unacceptable and must stop. However, if a different representative cannot be sent by the vendor and the employer “swaps out” another employee, it is important there is no possibility of retaliation to the complaining employee by way of less hours, indirect job demotion, lower pay etc. Last, with vendors/consultant, at contracting, it should be clear that there is zero-tolerance for sexual harassment and that any issues could be grounds for terminating the vendor contract (and possibly a penalty).

Customers, Clients, Patients: Employers may think they are not responsible for customers, but if a certain customer, client or patient is creating a hostile work environment for employees such behavior must be investigated and addressed by the employer immediately. Employers cannot control the customer, but the key for liability here is once the employer is aware of the harassment, the employer can and must investigate, control and correct the harassing situation. Also, while an employer may not want to “rock the boat” with customers with large accounts, just remember, most of the times a sexual harassment suit will cost much more than the profits made from that customer.

For instance, using the PNC case referenced above, the wealthy customer was known to make inappropriate comments and inappropriate touching of a certain female employee.

Allowing this to continue to happen lead to PNC's employer sexual harassment liability as it was ruled that PNC was complacent in the offensive, abusive environment and even financially benefitted from the sexual harassment. After the first incident, the customer should be told such behavior is inappropriate and must stop and if it happens again he/she will be banned, or if the alleged act is so blatant, bold, and offensive to temporarily ban the customer while performing an investigation. If there is more than one incident, the customer should be banned immediately. Again, the cost of a sexual harassment award and verdict and the cost of litigation will likely outweigh the income the customer provides, and more than likely, the customer sexually offends, abuses, or harasses other employees too.

Additionally, while many companies focus on training on how to deal with supervisors, managers, co-worker, and vendor harassment, it is important to have training for employees on how to handle and address a customer sexual harassment. This is a sensitive situation as the employer wants to ensure that false accusations are not made about a profitable, wealthy or long-term customer causing him to take his/her business elsewhere, but the employer needs to be certain that its employees are not sexually harassed and its entire workplace is safe. The training allows employees to learn possible ways to exit the harassing situation without an uncomfortable confrontation, reporting it to a superior immediately so it can be investigated and dealt with, and teaching co-workers how to spot it when an employee is being sexually harassed so he/she can step in and take steps necessary to rectify the situation.

Unrelated Third Parties: While cases on unrelated third parties are not prevalent, given the way the state of this world and litigation today, it is foreseeable that at some point in the immediate foreseeable future, an employer would be liable for the harassment or abuse by an unrelated third party. Again, the definition of hostile work environment does not limit it to employees, vendors/consultants, and customers/clients/patients, but any situation that is creates an offensive or intimidating workplace or interferes with an employee's work performance that is not remedied. While some situations are more tenuous if an employee is harassed far from the work premises, there are other instances where the employer must take seriously. For example, if there is a bar next door with outdoor seating, and intoxicated patrons are sexually harassing both customers and employees every time they arrive and leave your business premises, it would be wise to take some security or cautionary action. For instance, the employer should discuss with the landlord, discuss with the owner of the business premises and/or discuss with the owner/manager of the bar what can be done to make the employer's entire workplace safe especially since the sexual harassing incidents are now completely known and foreseeable. While every situation may not be resolvable, if a harassment suit is brought against the employer, it must be shown that steps were taken to protect its employees.

Conclusion:

While many business owners only think of sexual harassment cases stemming from employee conduct, third party conduct with a failure to appropriately respond will likely lead to employer sexual harassment liability. The employer needs to take complaints seriously and defuse the risk that such situation could be repeated. Additionally, it is important that the

employer does not negatively retaliate against the complaining employee as a result of the complaint as this will lead to additional punitive liability damages for retaliation. It is also important to take a step back and analyze what situations in your workplace could lead to harassment, and tweak your sexual harassment policy/education policies and materials so managers and employees are aware of how to react if the sexual harassment comes from an unusual source such as a customer or an unrelated third party.

In closing, an experienced Philadelphia Business/Employment Law attorney should be consulted for all questions or concerns about minimizing your business' risks in providing a safe workplace. Please feel free to contact this office and meet with one of our experienced attorneys about any such questions or concerns.

PUBLICATIONS

All of the following professional publications and past newsletters written by attorneys of this office are available by clicking here: http://pozzuolo.com/Pubs_Articles.shtml

Corporate/Tax Articles

Bankruptcy - How To Prevent It And How To Cope With It Should It Happen To Your Business

Deferred Compensation Rewards And Retains Key Employees

Design Buy-Sell Agreements For Maximum Utility

How An S Corporation Avoids The Double Taxation Incurred When Excessive Compensation Is Treated As A Dividend

How Mortgage Lenders Should Draft Broker Agreements To Avoid RESPA Violations

How To Look, Act And Sound Like A Professional Corporation

How to Structure a Suitable Buy-Sell Agreement

How To Use Non-Qualified Deferred Compensation Arrangements As A Business, Retirement And Tax Planning Tool

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This newsletter is courtesy of Pozzuolo Rodden, P.C.

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