

How You Respond Makes All the Difference

Mark A. Fahleson, Esq.
Rembolt Ludtke LLP

Chances are even the best intentioned employers will at some point be the target of an employment claim. It's inevitable. What is not inevitable, however, is that every employer will find itself legally responsible for an employment claim. A recent case serves as a timely reminder that how you respond to an employment claim can make all the difference in the world.

In *Equal Employment Opportunity Commission v. Xerxes Corp* (D.Md. Nov. 30, 2009), three African-American employees filed charges of discrimination with the federal EEOC alleging racial harassment. Among other things the African-American employees alleged that white coworkers:

referred to them as "boy" and "n#**@!";
referred to black women as "nappy-headed hos";
referred to music as "jungle music" and "n#**@!" music;
played pranks on them, including turning off the bathroom lights,
covering bathroom doorknobs with gel, and placing resin on a
work lock so that it couldn't be opened; and
placed a piece of fiberglass in one of the employee's locker with
the message "KKK plans could result in death, serious personal
injury, NIGGA BENARd" glued on it."

Some of these incidents were never reported to Xerxes management despite its posted written anti-harassment policy and complaint procedure. Those that were reported were promptly investigated by management and human resources. The investigations were thorough—for one of the allegations at least 15 employees were interviewed and Xerxes enlisted the assistance of law enforcement for the more serious fiberglass incident. Those incidents found to have merit resulted in Xerxes implementing various corrective measures, including verbal warnings, written warnings, unpaid suspensions, individual and company-wide anti-harassment training, and republication of Xerxes' anti-harassment policy. The internal investigations were documented, and Xerxes provided the complainants with written memos outlining the steps the company had taken to investigate and remedy the harassment and thanked the complainants for coming forward. Furthermore,

Employment/Labor Law Practice Group

David J. A. Bargaen
dbargaen@remboltludtke.com

Mark A. Fahleson
mfahleson@remboltludtke.com

Sarah S. Pillen
spillen@remboltludtke.com

Rembolt Ludtke LLP Attorneys at Law

MAIN OFFICE

1201 Lincoln Mall, Suite 102
Lincoln, NE 68508
Fax: 402 / 475-5087
402 / 475-5100

BRANCH OFFICES

125 South 6th Street
Seward, NE 68434
Fax: 402 / 643-3969
402 / 643-4770

3280 Woodridge Boulevard
Suite 160
Grand Island, NE 68801
308 / 384-6888

www.remboltludtke.com

We find the way®

management periodically followed up with the complainants to ensure they had no further complaints. Indeed, Xerxes' response was so thorough that the EEOC did not provide a single suggestion in response to a written discovery request from Xerxes' legal counsel asking what more Xerxes could have done to stop the harassment.

The trial court granted Xerxes' motion for summary judgment and dismissed the case. According to the court, "Xerxes' practice of conducting internal investigations and notifying law enforcement in cases of especially severe and threatening harassment hardly portrays a company trying to ignore racial harassment. . . . When Xerxes learned of racial harassment at [its] . . . Plant, it disciplined employees with unpaid suspensions and written reprimands. These actions set Xerxes apart from employers found to have responded inappropriately to employees' allegations of harassment."

LESSON: Because this case involved allegations of coworker, as opposed to supervisor, racial harassment, the employer was entitled to a defense if it established that it took effective action to prevent and correct promptly acts of unlawful harassment. Xerxes response represents a model for employers to follow to avoid liability for such claims.

Interestingly, one of the issues raised by the EEOC was that the company's warning letters notified the offending employees that they were being disciplined for "sexual," rather than racial, harassment. While the court rejected this argument by noting that they were merely copied from an internal form, employers would be well advised to ensure that their internal policies and procedures prohibit all forms of unlawful harassment, not just sexual harassment. Even today, we review far too many employee handbooks and policies that speak to employer policies against sexual harassment, but ignore acts of harassment based on any of the other protected classes (e.g., race, color, religion, national origin, disability, age, marital status).

Fahleson is a partner with the law firm of Rembolt Ludtke LLP and may be reached at (402) 475-5100 or mfahleson@remboltludtke.com. This article is provided for general informational purposes only and should not be construed as legal advice. Those requiring legal advice are encouraged to consult with their attorney.