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Dear Clients, Colleagues and Friends:

The first business executive falsely accused of sexual harassment was Joseph. Yes, Joseph of the Bible. Joseph, chief steward of his master Potiphar's household, rebuffed the sexual advances of Potiphar's wife. So, she falsely accused him of sexual assault. For evidence, she waved around the cloak Joseph dropped as he fled from her embraces. For Joseph – "You're fired! And prison." His life would have been ruined but for his connections in the highest of places. Most executives would not have fared so well.

This time my informal update on employment law issues affecting executives, managers and professionals discusses confronting false charges of harassment. The consequences to the executive facing false harassment charges can be devastating. You might lose your job, your reputation, job mobility, and your spouse's trust. False charges of harassment have led to suicides.

This is not a screed belittling the seriousness of sexual harassment at the workplace. Sexual harassment law seeks to protect victims and eliminate abhorrent workplace behavior. Often enough I represent victims who need that legal protection.

Still, some accused are genuinely innocent. Other times, the accused executive is penalized disproportionately for a minor transgression. The law scarcely considers the rights of the accused. Instead, it focuses mainly on the rights of the accuser versus those of the employer. Worse, the law spurs employers to act aggressively against the accused even if the evidence against him is weak.¹ The falsely charged harasser has scant protection.

The Law – Briefly Workplace sexual harassment consists of unwelcome sexual advances, requests for sexual favors and other verbal or physical conduct of a sexual nature that adversely affects the victim's job status or creates an intimidating, hostile, or offensive working environment. Whether behavior is illegal harassment depends upon all of the facts including the nature and frequency of the sexual advances and the context in which the incidents occurred. The conduct must be "severe or pervasive", but sometimes a single incident alone may qualify as "severe" because it is highly offensive. Less offensive, but persistent, conduct may be regarded

¹ In this letter, the accused are male; the accusers are female. That is the usual real life situation.

as pervasive. Conduct affects the victim's work environment if it is sufficiently severe or pervasive or if it results in tangible adverse job action such as discharge or failure to promote. The victim's participation in the harassing behavior may not shield the perpetrator since circumstances sometimes coerce a victim to participate.

Sexual harassment law creates new standards for acceptable workplace behavior - it is not a "general civility code." The "ordinary tribulations of the workplace, such as the sporadic use of abusive language, gender-related jokes, and occasional teasing" are not illegal.

Your Employer's Harassment Defense Harassment law does not encourage companies to balance fairly the rights of the accused and the accuser. Instead, often the safest employer response to a complaint is to act strongly against the accused. So, in the game of "she said - he said" the "he" starts with a handicap. Why? An employer's defenses to a harassment suit are improved if the employer responds aggressively to charges of harassment. Conversely, the law does not create any incentive to stop companies from overreacting. Consider these harassment scenarios:

- When the harassment involves co-workers, the employer is liable to the victim only if the employer was negligent. This means that the employer faces liability if it knew of the harassment and failed to take steps reasonably calculated to stop it.
- When the harasser is an executive acting as supervisor and the victim does not suffer a tangible adverse job action (such as discharge, salary loss, or denial of a promotion), the employer will have a defense if it promptly took reasonable care to prevent and correct any sexually harassing behavior.
- When the harasser is an executive acting as supervisor and the victim does suffer a tangible adverse job action, the employer is always liable. Damages are reduced, however, if the employer took prompt steps to stop the harassment.

In each scenario, the employer avoids or reduces its liability by taking strong corrective action. Often that action means investigating, accepting the accusations as true and punishing the alleged harasser. Further, there is little risk of liability to the accused executive even if the allegations later prove to be false. Sadly, it is frequently smart business to throw the executive out of the lifeboat even if the evidence against him is weak.

The Executive Counterattacks What recourse does the falsely accused executive have? Even a successful lawsuit against the accuser rarely leads to any practical relief. The executive must look to his employer. Unfortunately, the news here is not good. The law offers little chance of restitution, let alone absolution.

The main lines of attack against employers who punish executives based upon false harassment charges are beset with problems.

- Wrongful discharge actions, when they succeed, provide strong remedies. An executive working under an employment contract is typically protected against termination without "good or just cause." Here a legal claim is straightforward - a discharge based upon a false harassment accusation violates the contract. Most midlevel and many senior executives do

not have a contract. Their employment is “at will.” ”The employer or the executive may end “at will” employment at any time for good reason, bad reason, or no reason at all, just so long as it is not for an unlawful reason. Unsubstantiated or weak harassment charges are grounds enough to fire an “at will” executive. An “at will” executive might challenge his discharge by claiming that he is protected by an implied contract or a provision in the company handbook. Alternatively, he might claim that the employer violated its legal obligation of good faith and fair dealing. These types of claims rarely succeed.

- Defamation claims usually promise more than they deliver. The falsely accused executive charges the company with publicizing false accusations of his misconduct. Since the law encourages employers to investigate harassment charges, most courts recognize a qualified privilege to conduct harassment investigations and to act on the results. The executive only overcomes this employer privilege by proving that the employer acted with actual malice. Defamation suits are hard to win. As a practical matter, these suits often make a bad situation worse by bringing more attention to the false charges.

- Sexual harassment claims by the charged executive are an ironic bit of legal jujitsu. The executive claims that the employer’s aggressive action against him was itself sexual harassment. The theory is that the employer applies a draconian discipline policy that discriminates against men, who are usually the accused party. Again, the burdens on the wrongfully accused are nearly insurmountable.

- Negligent investigation suits are another area of attack by wronged executives. Courts occasionally recognize that an employer might be liable to a discharged executive if it has conducted a seriously negligent sexual harassment investigation. Since the law encourages employer investigations, the courts give great latitude to employer investigations. Executives may garner extra protection during an investigation from the federal Fair Credit Reporting Act. That consumer protection law sometimes governs the conduct of workplace harassment investigations conducted by an outsider investigator.

Practical Steps The above discussion shows that the charged business executive has more theoretical avenues for relief than genuine practical tools to deal with false accusations of harassment. What practical advice is there?

- First, avoid dangerous or ambiguous situations that might lead to false accusations of harassment. Those junior high school teachers who always left the door open when meeting their students one-on-one had the right idea.

- Defeat false harassment charges during the internal company investigation if possible. Insist upon a thorough, unbiased investigation by a qualified neutral. The executive must cooperate fully during the harassment investigation. The investigation may be critical to the executive’s career; it may be wise to retain experienced employment counsel to guide and advocate during the process.

- If the executive believes that the company is using the harassment charges to disguise its actual motive for taking adverse actions, marshal the evidence with great care.

Modifying workplace behavior through legal compulsion is a rocky road. Unfortunately, the process may bruise the innocent executive.

I hope this letter finds you well.

Sincerely,

Stephen H. Kahn

You know the rules: this letter is not legal advice.
Every situation depends upon its unique facts. Call if
you have questions