

## Potential Claims Of The Accused Executive

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### I. INTRODUCTION

Suppose a high ranking executive is accused of sexual harassment in the workplace by a subordinate. What are some of the key considerations the employer's attorney needs to be aware of when counseling the employer on how to respond? Conversely, what claims may the accused executive bring against the employer if he or she is terminated in response to the allegations? As demonstrated by the hypothetical below, an employer's interests may be best served by thoroughly investigating the allegations and evaluating the rights of the accused executive prior to taking any remedial action. If the employer does not consider the rights of the accused executive, the employer could be faced with a litany of claims asserted by the executive arising out of his or her termination.

This article will examine: 1) the potential steps that employers and their counsel can take during an investigation in order to avoid liability from the accused executive; 2) an executive's potential claims if the employer fails to appropriately address such a situation; and 3) how the executive's termination will be perceived within the company in terms of fairness and precedence, and the potential costs associated with such termination.

### II. HYPOTHETICAL

Jane Jones, a budget analyst at Acme Supply Company ("Acme"), contacted Human Resources ("HR") to complain that her sixty-three year old boss Bob Smith, Acme's highly compensated and notoriously demanding Chief Financial Officer, inappropriately touched her and made sexual comments to her as she was standing at the water cooler. Mr. Smith has been employed by Acme for twenty years. Acme's HR Director, Wendy Williams, who has had a long standing and well-known feud with Mr. Smith, interviewed Ms. Jones concerning her complaint. Upon conclusion of her interview with Ms. Jones, Ms. Williams recommended to the Board of Directors (the "Board") that Acme terminate Mr. Smith.

### III. TIPS TO AVOID LIABILITY FROM THE ACCUSED EXECUTIVE RELATED TO AN INVESTIGATION

While Ms. Williams' recommendation to terminate Mr. Smith may be an appropriate course of action, Acme would be well advised to conduct a fair and impartial investigation prior to terminating Mr. Smith. Indeed, failure to undertake a thorough investigation may expose Acme to liability.<sup>1</sup> Moreover, employers should be careful not to rely on recommendations for terminations from employees with an axe to grind.<sup>2</sup>

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<sup>1</sup> See *Geer v. Wal-Mart Stores, Inc.*, 2004 WL 2997840, \*13 (MCAD, Dec 3, 2004) (finding employer liable for inadequate investigation and response to complaints of sexual harassment).

<sup>2</sup> *Aviles v. F.L. Roberts & Co.*, 28 MDLR 146 (2006) (finding employer liable for relying upon statements of a supervisor with discriminatory animus in making termination decision); *EEOC v. BCI Coca-Cola Bottling Co.*, 450 F.3d 476 (10th Cir. 2006) (finding

While Acme's counsel is likely to advise the company to conduct a thorough and impartial investigation before taking action against Mr. Smith, Acme may want to consider the following tips in relation to the investigation. Before commencing the investigation, Acme should consider whether it is beneficial to bring in an outside investigator. This may reduce the risk that Mr. Smith will contend that the investigation was flawed or biased. Once the investigator is in place, he or she should develop a plan, considering the individuals to be interviewed, where the interviews will take place, and whether counsel for the accused may be present for the interviews. Acme's investigator should interview both Ms. Jones and Mr. Smith during the course of the investigation. Acme should not conduct itself in a manner in which Mr. Smith could claim that he was denied any rights he might have under Acme's policies, procedures and/or other documents. Accordingly, Mr. Smith should be made aware of the allegations and given an opportunity to give his side of the story. It may also be necessary to speak to others, such as witnesses and/or co-workers who work in Acme's Finance department. It should be made clear to all individuals involved that unprofessional conduct and acts of retaliation will not be tolerated.

Generally, the complainant should be interviewed first, followed by the accused, and then other witnesses. During the interviews, the alleged events should be explored in detail. The investigator should lead with open-ended questions and follow up with closed and direct questions when appropriate. The investigator should also review and analyze any relevant documents and/or communications that may exist. These steps are more likely to result in a factually accurate record of the event in question. At the conclusion of the investigation, Acme should consider the findings of the investigator prior to making a decision to take action, up to and including termination, against Mr. Smith.

#### IV. EVALUATING POTENTIAL LEGAL CLAIMS OF THE ACCUSED EXECUTIVE

Prior to supporting the recommendation to terminate Mr. Smith, Acme's counsel should also evaluate and consider Mr. Smith's potential legal claims against Acme and/or individual employees. Such claims can be found in contract, tort, or statutory rights.

##### 1. Breach of Express and Implied Contracts

Assume for purposes of the hypothetical that Mr. Smith's alleged conduct took place during the term of his three-year employment agreement with Acme, which provided that Acme may only terminate him within that three-year period "for cause." If Acme's termination of Mr. Smith violates the terms of his employment agreement, Mr. Smith may have a viable claim for breach of contract against Acme. Accordingly, before making the decision to terminate Mr. Smith, Acme and its counsel must make a careful assessment as to whether it has "cause," as defined under the terms of his employment agreement (and possible other applicable agreements) to support the decision. The threshold standards to establish cause can be quite varied and can range from the narrowly tailored "conviction of a felony or crime of moral turpitude" to the more general "any misconduct by the employee detrimental to the company." In cases where the employment agreement is silent as to the definition of cause, courts are likely to apply the common law standard: 1) a reasonable basis for employer dissatisfaction, and 2) grounds for discharge reasonably related, in the employer's honest judgment, to the needs of the business.<sup>3</sup> Furthermore, as an executive's overall compensation is

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that under Title VII an employer may be liable for a subordinate employee's prejudice even though the ultimate decision maker lacked discriminatory intent).

<sup>3</sup> See *Boothby v. Texon*, 414 Mass. 468, 480-482 (1993) (applying the common law definition of cause, the court ruled that the employer did not have cause to terminate a high-ranking executive for his refusal to obey the CEO's instructions to terminate a subordinate).

often tied to various deferred compensation and/or stock option plans, it is also important to analyze any “termination for cause” language found in these plans and its relation to the relevant vesting and forfeiture provisions of such plans. In any situation, an assessment of whether the conduct in question truly rises to the level of cause is essential.

Suppose in the hypothetical that Acme had previously provided Mr. Smith with an employee handbook. Acme’s handbook contained a progressive discipline policy requiring that Acme’s employees be provided with oral and written warnings prior to termination. The handbook also provided an explicit disclaimer stating that its policies are not terms and conditions of employment. If Acme terminates Mr. Smith without applying its progressive discipline measures, a potential contract claim may arise notwithstanding the explicit disclaimer.<sup>4</sup> Accordingly, Acme should consider strictly following its internal policies and procedures.

## 2. Breach of Covenant of Good Faith and Fair Dealing

In addition to the express breach of contract claim set forth above, Mr. Smith’s termination may give rise to a claim for breach of the covenant of good faith and fair dealing, which requires that “neither party shall do anything that will have the effect of destroying or injuring the right of the other party to receive the fruits of the contract.”<sup>5</sup> Based on the doctrine of good faith and fair dealing, Acme cannot act in such a manner that would unjustifiably deprive Mr. Smith of the benefits of his employment agreement.

## 3. Statutory Claims

Based upon the fact that he is over the age of forty, Mr. Smith qualifies for protection under state and federal age anti-discrimination laws. See *Age Discrimination in Employment Act*, 29 U.S.C. § 623; M.G.L. c. 151B, § 4. Accordingly, Acme should be advised not to engage in conduct which could be used by Mr. Smith to support a claim for age discrimination. For example, if Acme did not apply its progressive discipline policy to Mr. Smith prior to his termination, but had applied it in the past to employees under the age of forty, Mr. Smith may be able to demonstrate that Acme’s failure to adhere to its policies is evidence of discriminatory animus in support of his discrimination claim.<sup>6</sup>

## 4. Tort Claims

Assume for purposes of the hypothetical that Mr. Smith heard from an Acme Board member that Ms. Williams referred to him as a “serial groper who needs to be let go” during her presentation to the Board recommending Mr. Smith’s termination. Based upon such conduct, Mr. Smith may attempt to pursue tort-based claims. For example, Mr. Smith may assert a claim of tortious

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<sup>4</sup> See *Ortega v. Wakefield Thermal Solutions*, 2006 WL 225835, \*3-4 (Mass. Super. Jan. 5, 2006) (finding that employer was not entitled to summary judgment on the employee’s claim of wrongful termination based upon the employer’s failure to follow its progressive discipline policy in its employee handbook).

<sup>5</sup> *Williams v. B&K Medical Systems*, 49 Mass. App. Ct. 563, 569 (2000).

<sup>6</sup> See *Trustees of Health and Hospitals of the City of Boston, Inc. v. Massachusetts Com’n Against Discrimination*, 65 Mass. App. Ct. 329, 336 (2005). However, in the absence of any other evidence of discriminatory intent, it is unlikely that a plaintiff will be able to rely solely on the fact that the employer deviated from company policy. See *Sharp v. Bellsouth Advertising & Publishing Corp.*, 232 F. Supp. 1369, 1379-80 (N.D. Ga. 2002).

interference with contractual relations claim against Ms. Williams.<sup>7</sup> As the Massachusetts Supreme Judicial Court recently clarified, in order to prevail on a tortious interference claim, Mr. Smith would be required to establish that Ms. Williams was motivated by actual malice, *i.e.*, a spiteful malignant purpose, unrelated to the legitimate corporate interest of the employer.<sup>8</sup> In the context of discrimination cases, it is worth noting that an individual's discriminatory intent may constitute malice for purposes of tortious interference.<sup>9</sup>

Furthermore, Ms. Williams and Acme could potentially face a defamation claim if her comments to the Board about Mr. Smith damaged his reputation and caused him to suffer economic harm. While Acme has a conditional privilege to disclose defamatory information about an employee when necessary to serve its legitimate interests, such privilege can be lost if the information is published recklessly, *i.e.*, it was unnecessary, unreasonable, or excessive.<sup>10</sup>

## V. EQUITABLE CONSIDERATIONS

In addition to recognizing Mr. Smith's potential legal claims, Acme would be well advised to consider how its actions will be perceived by its employees. If Acme quickly and decisively takes action against Mr. Smith prior to conducting a full and thorough investigation, similarly situated executives may be concerned that any accusations against them in the future, valid or not, will lead to their abrupt termination, which could lead to eroding morale. Moreover, there may be fairness issues that arise if Acme summarily dismisses Mr. Smith, who during his twenty year career made significant contributions to the company, without conducting an impartial investigation and balancing all of the interests involved. It is important to keep in mind that Acme's actions will set a precedent for the future. Moreover, as noted above, deviation from these practices in the future could expose Acme to potential liability down the road. Acme should also consider the cost of terminating Mr. Smith. Assume that Mr. Smith's employment agreement provides him with substantial severance payments or accelerated vesting of company stock or options upon termination in certain circumstances. His termination could result in a costly payout for Acme. Additionally, Acme will also have to bear the costs of finding a replacement for Mr. Smith.

## VI. CONCLUSION

This article is intended to provide a practical roadmap to attorneys who may be confronted with a similar workplace misconduct scenario. While each case is unique, counsel for the employer and the accused will be in a better position to protect and serve the interests of their clients by considering the potential issues and claims raised here.

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<sup>7</sup> Mr. Smith would only be able to assert a tortious interference claim against Ms. Williams, not Acme. See *Appley v. Locke*, 396 Mass. 540, 543 (1986) (noting that employer cannot be liable for tortious interference with employment relationships between itself and its employees).

<sup>8</sup> See *Blackstone v. Cashman*, 448 Mass. 255 (2007).

<sup>9</sup> See *Bray v. Community Newspaper Co.*, 67 Mass. App. Ct. 42, 47-48 (2006).

<sup>10</sup> An employer's physical actions witnessed by others, without the presence of written or spoken communication, may also suffice to establish defamatory publication. See *Phelan v. May Department Stores*, 44 Mass. 52, 56 (2004).