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Have You Heard? Six Steps to Protect Your Company from Hostile Work Environment Claims Based on Workplace Rumors

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December 19, 2019

Workplace rumors can create an unlawful hostile work environment if they are based on an employee's age, race, color, religion, sex, or national origin (collectively "protected status"), are known to or spread by management, and are severe and/or pervasive enough to alter the terms and conditions of the victim's employment.¹

Earlier this year, the Fourth Circuit Court of Appeals decided that a rumor accusing a female employee of sleeping with her supervisor to secure a promotion could be based on her protected status as a woman.² The Court joined the Third and Seventh Circuit Courts of Appeal in holding that such rumors invoke "a deeply rooted perception – one that unfortunately still persists – that generally women, not men, use sex to achieve success."³

Because the rumor was advanced frequently over several weeks, permeated the workplace and thus was heard or should have been heard by management, and resulted in "open resentment and disrespect" to the employee, including her exclusion from a meeting where the rumor was discussed, the Court concluded that the rumor could meet the severe or pervasive standard given that high-level managers participated in spreading it.⁴

Prompt, remedial action is key to avoiding liability when faced with a rumor implicating an employee's protected status. If the rumor is being spread by a co-worker, an employer may face liability if it knew or should have known of the rumor and failed to take immediate and appropriate corrective action.⁵ If, however, the rumor was created or circulated by a supervisor and results in a tangible employment action – such as a decrease in pay or hours, a demotion, or termination – the employer may be held strictly liable for it.⁶ In the absence of a tangible employment action, the employer can avoid liability for a supervisor's participation in the rumor mill only if it took action to prevent and correct the rumor and the employee failed to timely take advantage of the employer's preventive or corrective opportunities.⁷

For example, one employer avoided liability for a workplace rumor that a pornographic photograph circulated by several male co-workers featured a female employee by:

1. Immediately investigating the extent to which the photograph and rumor had been circulated.
2. Destroying all copies of the photograph.
3. Disciplining the wrongdoers and requiring them to attend sexual harassment training.
4. Contemplating a company-wide statement to rebut the rumor. The company ultimately decided that such a statement would only increase interest in the photograph given the limited circulation of the photograph and rumor.⁸

Your organization can likewise minimize its potential liability for workplace rumors by following these steps:

Step 1 – Update Anti-Harassment and Anti-Discrimination Policies

Consider proactively updating your company's policies to put employees on notice that rumors based on protected status violate your company's anti-harassment and anti-discrimination policies and will lead to discipline. Implementing this step now can add clarity when disciplining wrongdoers later on.

Step 2 – Determine If the Rumor Implicates Protected Status

Does the subject of the rumor relate to an employee's age, race, color, religion, sex, or national origin? If the rumor doesn't explicitly mention the employee's protected status, is it based on a related stereotype? If yes, the rumor potentially creates an unlawful hostile work environment and warrants investigation.

Step 3 – Determine How Far the Rumor Has Traveled

It is important to determine how far the rumor has traveled within your organization. As the number of employees circulating the rumor increases, the likelihood that the rumor will meet the severe or pervasive standard also rises.

Step 4 – Determine if the Employee Implicated in the Rumor Has Experienced Resulting Mistreatment

It is more likely that the rumor will meet the severe or pervasive standard if the victim has experienced resulting mistreatment such as being subjected to hostility or insubordination, being passed over for a promotion, or being excluded from a company benefit or event.

Step 5 – Administer Appropriate Discipline

Appropriate discipline will vary in each case. The nature of the rumor, the extent of the rumor's permeation in the organization, and the severity of any resulting mistreatment should guide your organization in determining what level of discipline to impose. Options include, but aren't limited to, anti-harassment and anti-discrimination training, written warnings, suspension, pay decreases or freezes, and termination.

Step 6 – Document Everything

Make sure to document the investigation and resulting remedial action to protect your company against any resulting EEOC charge and litigation.

¹ 42 U.S.C. § 2000e-2; *Parker v. Reema Consulting Servs., Inc.*, 915 F.3d 297, 303 (4th Cir. 2019), cert. denied, No. 18-1442, 2019 WL 4921375 (U.S. Oct. 7, 2019); *Adams v. Austal, U.S.A., L.L.C.*, 754 F.3d 1240, 1249 (11th Cir. 2014).

² *Parker*, 915 F.3d at 303.

³ *Id.* See also *McDonnell v. Cisneros*, 84 F.3d 256, 259–60 (7th Cir. 1996) (concluding that rumors of a woman's "sleeping her way to the top" "could constitute a form of sexual harassment"); *Spain v. Gallegos*, 26 F.3d 439, 448 (3d Cir. 1994) (concluding that rumor that a woman gained influence over the head of the office, a man, because she was engaged in a sexual relationship with him was sufficient to allow a reasonable jury to conclude the a woman suffered the harassment alleged because she was a woman).

⁴ *Parker*, 915 F.3d at 303.

⁵ *Hill v. Wal-Mart Stores, Inc.*, 510 F. App'x 810, 814 (11th Cir. 2013).

⁶ *Vance v. Ball State Univ.*, 570 U.S. 421, 424, 133 S. Ct. 2434, 2439, 186 L. Ed. 2d 565 (2013).

⁷ *Id.*

⁸ *Rheineck v. Hutchinson Tech., Inc.*, 261 F.3d 751, 754 (8th Cir. 2001).