The Employer's Response

Inappropriate Sexual Conduct in the Workplace

By AnnaMary E. Gannon

The recent scandal involving former Representative Mark Foley holds several lessons for employers. Perhaps the most important lesson is that when a sexual harassment claim is filed, it is often the case that more attention is given to the employer's actions or inactions than is given to the alleged harassing conduct itself. The steps the employer took pre-complaint to assure a workplace free from harassment, and the steps it took in response to a complaint, can turn an otherwise manageable harassment complaint into a nightmare.

Let's take the Foley case out of the political arena and into the workplace. We will leave aside the fact the communications were with minors, which might subject the sender to possible criminal liability. We are concerned only with employment discrimination laws and those laws apply to employees both above and below the age of majority (although the relative age difference between the alleged harasser and the victim, particularly if the victim is under 18, will surely factor into the determination of whether a reasonable person in the victim's position would consider the conduct unwelcome). While this analysis can apply at any level of the company, in this particular scenario a new employee tells his manager that a corporate executive has sent some "creepy" emails.

What Should Happen Next?

There are some who would respond: "Nothing; the employee did not 'make a complaint'; he did not say anything about harassment or indicate the emails were sexual (or racial, or some other basis of prohibited harassment)." Some managers might advise the employee to just ignore the messages and simply delete them. Other managers might tell the employee that if he is uncomfortable with the messages, he should contact Human Resources. None of these are appropriate responses.

While it may seem counterintuitive to advise the manager to notify Human Resources immediately, that is exactly what must be done. For an employer, there is both the potential public relations damage and the very real risk of a large damages verdict in favor of the employee. Unfortunately, what apparently happened in the Foley case happens every day in the workplace. A thorough investigation must take place, including, most importantly, securing the alleged harassing executive's and the complaining employee's electronic data, such as emails and instant messages.

What's an Employer to Do?

Before a complaint is received, train your managers and supervisors to respond to any information indicating possible inappropriate conduct. No employer can afford to wait for a complaint. In many states, an employer is required to take reasonable steps to prevent harassment from occurring. See, for example, California Government Code 12940(k), which requires an employer "to take all reasonable steps necessary to prevent discrimination and harassment from occurring." What are reasonable steps? For years, employers have been advised to have a written harassment policy that is effectively communicated to employees, agents, and persons employed as independent contractors through handbooks, required postings, and regular, ongoing, repetitive communication of the policy. Employers know the policy must include specific, meaningful, and responsive procedures for reporting complaints. Employers know they should (and in some states, are required to) provide training to managers, supervisors, and rank and file employees on what constitutes harassment and its illegality in the workplace. Employers know the importance of training supervisors and managers to be alert to possible harassment and what to do when a complaint of harassment is made.

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The single largest roadblock is convincing managers and supervisors that they must be vigilant and cannot dismiss or minimize a claim of possible harassment. An employer's mantra should be "nip it in the bud," not wait until reporters call, asking for comment on a breaking story that an executive has been sending inappropriate emails to several young employees, perhaps for as long as a 10-year period. The weakest link is the supervisor or manager who does not understand or appreciate how seriously *all* complaints must be taken. All employers must have focused training for supervisors and managers to assure they appreciate the serious consequences, both professional and personal, that flow from a complaint of harassment. Representative Foley was not the only one to resign; Kirk Fordham, Foley's former chief of staff, resigned shortly after his former boss; and Korenna Cline, on Representative Jim Kolbe's staff, abruptly decided to pursue another job opportunity.

The Foley case can, and should, be used as a text-book example of what a supervisor or manager should *not* do in response to information that some sort of inappropriate conduct may have occurred in the workplace.

Do Not Ignore Early Warning Signals: It Is Your Problem

While the investigation is not complete, it appears that another representative (consider him as the equivalent of another executive within the company) learned as early as 2000 that a former page he appointed had received emails that made the page uncomfortable. What did this representative/executive do? He punted. In a prepared statement, he said:

> Some time after leaving the Page program, an individual I had appointed as a Page contacted my office to say he had received e-mails from Rep. Foley that made him uncomfortable. I was not shown the content of the messages and was not told they were sexually explicit. It was my recommendation that this complaint be passed along to Rep. Foley's office and the Clerk who supervised the Page program. This was done promptly. I did not have a personal conversation with Mr. Foley about the matter. I assume e-mail contact ceased since the former Page never raised the issue again with my office. I believed then, and believe now, that this was the appropriate way to handle this incident given the information I had and the fact that the young man was no longer a Page and not subject to the jurisdiction of the program.

Kiel, Paul, *Kolbe: My Spokeswoman Is A Liar (Or I Am)*, http://www.tpmmuckraker.com/archives/001763.php#more, TPM Muckraker.com, October 10, 2006.

Assure the new employee who reported the emails that he or she did the right thing.

This representative/executive did not ask the former page to provide copies of the emails; the adage "see no evil" was applied here. No formal report was made; instead, the information was "passed along" by staff. No follow-up was done; the representative "assumed" the emails ceased because the former page did not make a second complaint. And last, but not least, this was a former employee, so it is out of the executive's "jurisdiction"!

In contrast to this Representative, your well-trained executive would know to ask the former employee for copies of the emails; they are the best evidence of what was or was not said. Your well-trained executive would know to take the information directly to Human Resources and document when and how it was received. Both your well-trained executive and Human Resources would know that if inappropriate emails had been sent to this former employee, perhaps they have been and are being sent to others as well. At a bare minimum, a search of the executive's electronic communications would have been conducted (your company, of course, has an electronic data policy that informs employees the company has the right to search electronic communications that are maintained on its servers). The alleged harasser would have been questioned. Other employees might have been interviewed.

The Importance of Electronic Data

When dealing with electronic information, the importance of searching, securing and maintaining all data cannot be overemphasized. In the Foley case, it appears that while the initial emails seemed innocuous, more explicit instant messages have been discovered. An employer's failure to conduct a thorough search of all available electronic data, including backup tapes, may mean that incriminating evidence is not discovered until the case is in litigation. Of course, if the employer can document that a thorough search was conducted and nothing more was discovered, that may be helpful in the defense of any subsequent harassment claim. While outside the scope of this article, at this stage the employer should consult legal counsel as to whether a "litigation hold" should be instituted to preserve data. If the employer finds additional incriminating documents, but does not preserve them and they are subsequently deleted in accordance with a records retention policy, claims of spoliation of evidence may follow.

Take Appropriate Remedial Action

This thorough investigation would have been followed by appropriate remedial action. Depending on the content of the emails and whether there were similar messages to other employees, anything from termination to a written warning might be appropriate. At a minimum, the executive should have been required to refresh his or her knowledge of the company's harassment policy (as well as the company's electronic data policy prohibiting the use of company email accounts for non-business related communications), and perhaps have been required to attend additional training on the illegality of harassment in the workplace. The company should consider installing software that screens for potentially offensive communications, and/or conducting periodic audits of the executive's electronic communications to assure that there has not been a reoccurrence.

The employer would have considered remedial action beyond that directed at the harasser. In this case, the employer might

consider offering the employees who received the emails counseling. The employer would certainly assure the new employee who reported the emails that he or she did the right thing and remind any other employees who received similar emails that they should have immediately come forward and utilized the company's complaint procedure. And while the employer does not necessarily have to tell the employee who first reported the emails exactly what action was taken with the executive, the employer should meet with the employee, describe the investigation in general terms, and assure the employee that appropriate remedial action has been taken. All too often, employers leave the complaining employee to wonder if anything was ever done with his or her complaint. In addition to remedial actions, there should be regular follow-up with both the harasser and the employees who received the offensive emails; both to assure that the communications have, in fact, stopped, and to assure that there has been no retaliation (particularly necessary if the harassing executive is still with the company).

Do Not Miss Subsequent Opportunities to Address a Possible Problem

The Foley matter has been complicated because it now appears that reports of inappropriate conduct were made several times. (At last count, more than a dozen Congressmen or congressional staffers have publicly admitted knowing of the emails before they became public.) There may have been meetings with Foley in 2003 and 2005 to discuss his interactions with pages. One representative indicated he did not make a formal report because the page's parents wanted the matter kept confidential. What an employer wants to do is avoid a situation where it finds out after the fact that others knew all along and may have privately met with the offending executive in an attempt to resolve the situation. Within the company, there should be an institutional custodian of all information related to possible claims of harassment. Typically, this role will be filled by a senior Human Resources professional. Knowledge of prior complaints is important, even if there was no corroboration of them at the time. Knowledge of private reprimands or warnings is important. Employers should not be sanguine that the Foley matter could never arise in a corporation. Corporate politics can be as compelling as national politics, particularly when executives are involved. When it is the CEO or other high-ranking executive who is accused, everyone wants to treat the problem like a hot potato. And, as has been said over and over, once a complaint has been made, it cannot be treated as "confidential." That is not to say that all complaints will show up in the company newsletter, but that all complaints will be forwarded to Human Resources for investigation.

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Do Not Jump to Conclusions Until a Thorough Investigation Is Completed

Although your company might not attract the media attention that Congress does, sexual harassment complaints against high-ranking executives do generate media coverage. Do not respond to the press, other than to say that the company is investigating the matter, without consulting counsel and public relations professionals. When the first emails were revealed, Foley admitted he had authored them, but insisted they were innocuous and part of an attempt to smear him during an election campaign. Soon thereafter, Foley abruptly resigned and his attorney issued a statement that the communications were made when the Congressman was under the influence of alcohol and not while he was conducting business. Of course, that turned out not to be the case when instant messages sent during a floor debate were uncovered. The House leadership (think of them as the executive team) denied knowledge of Foley engaging in any type of inappropriate conduct, only to be contradicted by other members and their staff. In the event that a claim of harassment against your company hits the media, designate one person to act as spokesperson. Make sure that person has access to all information that has been gathered and has credibility.

Conclusion

Be proactive:

- Do not make it hard for an employee to make a complaint. Do not require that the complaint be in writing. Do not require that complaints be made within a specified time period. Do not require the employee to follow the "chain of command" when making a complaint. The employer does not want to be the last to know. It appears that for years Congressional pages had been warned to steer clear of certain members of the House of Representatives. As you read this article, are you thinking of which executives in your company have a reputation for being flirtatious or overly friendly, especially with new, young, attractive employees? No, you have not been presented with any proof, but you have not gone looking for it either... and it may be beneath your very nose.
- Employers cannot afford to sit in an ivory tower. Get to know your employees. Listen to office scuttlebutt. I recommend that Human Resources and office managers make it a point to eat with employees in the lunchroom; you will learn more about what is going on in that hour than you will in the other eight hours behind your desk.
- Implement policies and procedures for monitoring electronic communications. Every employer should have a written electronic communications policy that advises employees they should have no expectation that communications through the employer's Internet and intranet resources are private.
- Supervisors and managers must be constantly reminded that any complaint of possible harassment, no matter how mild, must be reported. The employee may ask the manager not to take any action, that the complaint is confidential or "just for the record" in case the harassment continues. The manager has to respond that each and every complaint is investigated.
- Train your supervisors and managers. It simply is not a good career move to take a "see no evil; speak no evil; hear no evil" approach to complaints of possible harassment. IDQ