Educator's Guide to
Controlling Sexual Harassment

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Pattern of Discipline Problems Not 'Actual Notice' Under Title IX

Records demonstrating a pattern of discipline problems do not provide school officials with actual notice that a student may pose a threat of sexual misconduct, as is required to impute liability under Title IX of the Education Amendments of 1972. Instead, plaintiffs must present evidence that previous sexual misconduct was "so severe, pervasive and objectively offensive" that a school should have been aware of the risk of student-to-student harassment, a federal magistrate judge noted in dismissing a claim. Negligence cannot form the basis of a Title IX claim because liability does not arise from what a school district "should have known," but rather what it knew, the judge said, citing a landmark decision by the U.S. Supreme Court. ***Page 2***

Calif. Charter Not a 'Public Entity'; Claims Remanded by Appeals Court

A middle school student who allegedly was subjected to a hostile environment while visiting a charter high school did not have to register a complaint with the school prior to filing a lawsuit since the charter high school is not considered a "public entity" under California's Tort Claims Act (TCA), a state appeals court ruled. Influenced by a recent decision by the California Supreme Court, the appellate court overturned a lower court's holding that the charter school was a public entity and, as such, was required by the TCA to submit a formal claim to the school or the district before suing the school. In instances where a claimant seeks damages from a public entity, the TCA requires that he or she first submit a written complaint to the specific agency. Ultimately, the appeals court remanded the claims related to sexual harassment to the lower court. ***Page 3***

When Should an Investigation Start? Timing Is Critical to Avoid Liability

Inaction after a sexual harassment complaint is leveled can have dire consequences. If a school doesn't investigate when a student or employee voices a concern about harassment or makes a harassment complaint, administrators won't discover the severity of the situation. Nor will they learn if the individual accused of harassment has bothered others. Later on, the fact that officials ignored the matter even after a complaint was lodged will place the school in a particularly bad spot. This is why it is so critical for administrators and department heads to be trained to respond appropriately; from the moment a supervisor learns of potential trouble, the school is on notice about it and must address it. ***Page 7***

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Harassment in Employment

N.J. Investigators Offering False Information May Be Liable Absent Attorney-Client Relationship

A New Jersey lawyer who investigated a sexual harassment claim may be held liable for negligent misrepresentation for giving false advice to the claimant, even though no clear attorney-client relationship existed, a federal court recently held.

In reaching its decision, the U.S. District Court for New Jersey cited the Supreme Court of New Jersey, which had ruled that the lack of an express agreement to enter into an attorney-client relationship does not automatically preclude a finding that such a relationship existed. An attorney may still owe a duty of care to an individual who wasn't a client, provided the lawyer knew, or should have known, that the individual would heed his or her advice, the federal court concluded.

Case Background

Marie Spagnola worked as a management specialist for the Town of Morristown, N.J. Hired in the fall of 1991, Spagnola reported directly to Mayor John DeLaney and Eric Maurer, the town's business manager. As part of her job duties, Spagnola handled various information technology responsibilities for the town.

Beginning in August 2001, Spagnola frequently complained to Maurer and Mayor DeLaney about sexually explicit materials she had found in Maurer's office and on his computer. The complaints went unaddressed, according to Spagnola, who alleged that they were received with "anger and protests." Seeking a way to address the issue, Spagnola tried drafting a sexual harassment policy for Morristown, which had no such policy. Nothing came of the effort and Maurer's sexually offensive behavior persisted.

Frustrated by the inaction, Spagnola tendered her resignation on Jan. 25, 2003; however, Mayor DeLaney convinced her to retract it. A few months afterward, Mayor DeLaney arranged a meeting between Spagnola and Michael Rich, an attorney with a local law firm. At the meeting, Spagnola presented Rich with the sexually explicit material she had uncovered. Rich informed her that Maurer admitted to possessing the materials, but that the Town of Morristown had no policy against such materials.

Following the initial meeting, Spagnola alleged that Rich attempted to intimidate her and said that "no real action" would be taken against Mauerer. Further, Spagnola claimed that Rich affirmatively offered false information about her rights as related to sexual harassment and, on one occasion, recommended "off the record" that "it might be time for [her] to find a new job." In addition, Spagnola claimed that Mayor DeLaney requested she not speak with anyone other than Rich about the allegations against Maurer.

In July 2004, Spagnola received a letter from Rich, which, she argued, was specifically meant to mislead her about her legal rights. As a result of the cumulative efforts by Rich, Mauerer and Mayor DeLaney, Spagnola felt she had no choice but to resign her position on Aug. 13, 2004.

Multiple Claims Filed

Just over five months later, Spagnola filed a complaint with the federal court, alleging five complaints; she added three more claims while the court considered a motion to dismiss those filed earlier. The court dismissed the first five claims and received another motion to dismiss the new complaints for violations of U.S.C. §1985 and §1986 of the Civil Rights Act of 1871 for not preventing a Section 1985 conspiracy, and a negligent misrepresentation claim against Rich in violation of New Jersey common law.

Ultimately, the district court also dismissed the §1985 and §1986 claims, but allowed the negligent misrepresentation claim to proceed.

In establishing a cause of action for negligent misrepresentation in New Jersey, a plaintiff must demonstrate that 1) the defendant made an incorrect statement of a past or existing fact; 2) the plaintiff justifiably relied on the misleading statement; and 3) the reliance on the misinformation led to a loss or injury. In making the determination on a motion to dismiss at the pleading stage, the court must weigh all the surrounding circumstances, with dismissal inappropriate unless it finds beyond a reasonable doubt no set of facts consistent with the claim. At this stage, all of Spagnola's statements are taken as fact.

Rich argued that he did not owe Spagnola a duty of care for two reasons: 1) no attorney-client relationship was created; and 2) he took no affirmative action to justify Spagnola's reliance on him.

N.J. Supreme Court's Standard

Regardless of Rich's contention, however, the court noted that the state's high court has held that the absence

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of express assent to an attorney-client relationship does not always mean that one could not have existed. "[A]ttorneys may owe a duty of care to non-clients when the attorneys know, or should know, that non-clients will rely on the attorney's representations and the non-clients are not too remote from the attorneys to be entitled to protection," the district court said.

Considering Spagnola's allegations as true, the court ruled that the claim of negligent misrepresentation could not be dismissed. First, the court found that her allegations satisfied the first element in that Rich made false statements intended to mislead her. Next, the court held that Rich's misrepresentation concerning the town's duty to protect her from sexual harassment caused her to stay in the job and continue to be exposed to sexually explicit materials. Finally, the court determined that Spagnola suffered — as alleged in her complaint — economic loss, emotional distress, psychological injury, pain and suffering, humiliation, and damage to her reputation as a result of staying in the position and being exposed to the sexually explicit materials.

The court said it would not evaluate Rich's argument that Spagnola had not proved that he owed her a duty of care. That issue, the court said, is a matter of law and is only appropriately considered during summary judgment. (*Spagnola v. Town of Morristown*, Civil Action No. 05-577, D. N.J., Dec. 7, 2006)

Five Tips for Investigations

To avoid liability similar to that in *Spagnola v. Town of Morristown*, investigators must make clear before, during and after the investigation that they are simply gathering information to help the employer decide how to respond to the claim, not offering advice to the complainant, said Eric Savage, an employment law attorney with the Newark, N.J., office of Littler Mendelson, P.C.

Doing so limits the opportunity for the employee to claim that the investigator is liable, but also limits the chance that the employer could be held responsible for any misconduct on the part of the investigator, Savage said.

"The investigation [piece] is sometimes overlooked," Savage told the *Educator's Guide*. "Companies often think all they have to do is have a good policy in place, conduct training and do all those important things to make sure they don't have a harassing or discriminatory environment. That's obviously all extremely important, but the area that is sometimes neglected is the investigation. This is something that is absolutely essential … and has to be done right so that the claimant doesn't have the ability to add to the claim by saying the company didn't take it seriously and didn't investigate it."

Savage recommended five strategies that investigators and companies could take to protect themselves from liability in similar situations, including:

1. The attorney or law firm who would be representing the company in a suit should not conduct the investigation, since the attorney could be called as a witness.
2. The investigator or attorney must be very clear and up front with employee that he or she is not there as the employee's attorney. The investigator should recommend the employee contact an attorney if he or she needs legal advice.
3. The investigator should give the employee a letter at the beginning stating that he or she will not be providing legal advice for the employee's claim.
4. The investigator must appear to be completely neutral. The investigator should not, under any circumstance, offer advice about the merits or lack of merits of the claim, or what the employer might do as a result of the investigation.
5. The investigator should send another letter to the employee after the investigation concludes restating that he or she didn't offer any legal advice or guidance, and again stressing that the employee is free to contact an attorney if questions remain.

Savage said he was unaware of other states likely to interpret a negligent misrepresentation statute as strictly as New Jersey, but stressed that "these are the kinds of precautions that … are standard elements of care that any employer should be taking."

"I think it is a real push to suggest that there would be a valid claim or an independent claim against an attorney [in other states], although that's not to say that some court somewhere in another state might not find that appealing," he said. "I think the bigger problem — and the more typical problem in this situation — would be an allegation that the employer failed to investigate the claim thoroughly, properly and fairly as evidenced that the investigating attorney was expressing skeptical opinions from the very outset of the interview."