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Verdict

September 4, 2012

Joanna L. Grossman

Costly Mistakes: Employers Ignore Workplace Harassment at their Peril, As the Recent Cases of New York State Assemblyman Vito Lopez and Chrysler Show



Last week, titillating reports emerged about the sexually-charged atmosphere in the office of New York State Assemblyman Vito Lopez, including his preference that his female employees not wear bras to work. Two women recently filed complaints against Lopez for sexual harassment, and the Assembly released a letter in which it reported on the resolution of the women's claims. The Ethics Committee censured Lopez, stripped him of his committee chairmanship, and barred him from hiring interns or employees under the age of 21.

There are many disturbing aspects of this story—the flagrancy of the harassment and the raw abuse of power, among others. But perhaps most disturbing is that these were not the first claims of harassment against Lopez. Previous claims had been made, and secretly and expensively settled. Why would the Assembly allow this behavior to continue unchecked? Why would Lopez himself not be deterred by potential consequences to his pocketbook and political career? Forget the desire to ensure a non-discriminatory work environment for all employees, which we perhaps naively hope that employers harbor. Isn't the fear of costly jury verdicts or settlements sufficient incentive for employers to intervene to stop known harassment problems? That is the question the New York State Assembly ought to be asking itself this week—and over the many weeks and months ahead when the repercussions of Lopez's alleged chain of harassment horror are acutely felt.

Meanwhile, Chrysler, the auto giant, ought to be asking itself the same question, as it writes a check for the \$3.5 million punitive damage verdict that was just reinstated by the U.S. Court of Appeals for the Seventh Circuit, in a racial harassment case, *May v. Chrysler*.

In this column, I'll ask a key question: Are there lessons for other employers in the cases against Lopez and Chrysler?

The Lopez Problem: Why Wasn't He Stopped Earlier?

With respect to the most recent claims against Lopez, Assembly Speaker Sheldon Silver reported that, according to an internal investigation, Lopez was guilty of “pervasive unwelcome verbal conduct,” as well as unwanted groping and kissing of female staff members. As detailed in the Assembly’s letter to Lopez, the committee found to be substantiated reports of “multiple incidents of unwelcome physical conduct toward one complainant, wherein you put your hand on her leg, she removed your hand, and you then put your hand between her upper thighs, putting your hand as far up between her legs as you could go.” An assault of one complainant occurred in the car when she was required to accompany Lopez on a trip to Atlantic City.

Whatever punishment was meted out by the Assembly (censure, etc.) seems warranted—and then some. But why did the Assembly allow Lopez to rage out of control in an unlawfully discriminatory, and perhaps criminal, manner while he was running a public office? These two women were not the first to complain about Lopez. Indeed, as the scandal was unfolding, it was revealed that the Assembly’s Speaker had already authorized secret payments of over \$100,000 of state money (plus \$32,000 paid directly by Lopez) to settle at least two sexual harassment claims involving Lopez in June 2012. Putting aside the likely impropriety of the Speaker’s not referring this claim to the Ethics Committee—the usual procedure for harassment claims—Silver’s decision to settle these claims shows that he knew about Lopez’s behavior and yet allowed it to continue unchecked.

Now that the scandal has become public, even more reports about Lopez’s inappropriate and unlawful conduct in the office are emerging. Many women interviewed have reported the same types of conduct: Lopez asked them to dress in a sexual manner (more specifically, in short skirts, high heels, and no bra); questioned them closely about their boyfriends and sex lives; made unwanted sexual advances; and threatened retaliation against those who resisted, a threat that they took seriously because of his reputed bad temper and his wide-ranging connections in state politics. Those who were “well endowed” were encouraged to use it to their advantage.

Lopez’s conduct—the type identified in the Assembly’s findings, and the type described by women in newspaper interviews—clearly violates state and federal anti-discrimination laws that prohibit sexual harassment. (Hostile environment harassment is generally defined as unwelcome conduct of a sexual nature that is either severe or pervasive and creates an objectively hostile or abusive work environment.) The State Assembly—and ultimately the taxpayers—now face significant liability for allowing a man with such power over his staff to behave so inappropriately. The only repercussion for the conduct by Lopez that led to the secret payout was that Lopez had to attend a sexual harassment workshop. The secret payout, however, is just the tip of the iceberg, as the damages for failing to stop a known problem of harassment are likely to be even higher—that’s the lesson of *May v. Chrysler*, discussed just below.

May v. Chrysler: A Different Type of Harassment, but the Same Type of Liability

The recent ruling by the U.S. Court of Appeals for the Seventh Circuit reinstates a \$3.5 million punitive damages verdict against Chrysler in a case brought by Otto May, a pipefitter at Chrysler’s Belvedere, Illinois Assembly Plant since 1988. May was never groped on a business trip by a supervisor, but he was systematically tormented, threatened, sabotaged, and physically endangered by a band of co-workers who were bound and determined to drive him out of the workforce.

May filed suit in 2002 under Title VII, bringing a claim for a hostile work environment in which he was targeted on the basis of his race, religion, and national origin. As the factual details below will make clear, May’s Cuban Jewish background made him a target for abuse at this particular plant. Title VII prohibits hostile environment harassment on the basis of any characteristic that is protected by the statute. Thus, sexual harassment is not the only actionable type of harassment. Racial, ethnic, and religious harassment are equally unlawful, and are governed by the same standards for employer liability.

After a trial, a jury awarded May \$709,000 in compensatory damages, and \$3.5 million in punitive damages. The evidence at trial showed 70 separate incidents of harassment occurring over the course of three years, many of which each individually could create an unlawful hostile environment by itself. Here are the highlights: graffiti around May’s area of the plant saying things like “Otto Cuban Jew fag die,” and “death to the Cuban Jew”; puncturing the tires on May’s bike and car; pouring sugar in the gas tanks of two of May’s cars; and placing “a dead bird wrapped in toilet paper to look like a Ku Klux Klansman (complete with pointy hat) in a vise at one of

May's work stations.”

There is no question that harassment of this type, even if it had been much less severe or pervasive, is actionable. But is Chrysler responsible for it? Because the harassment that May experienced seemed to be at the hands of co-workers (the perpetrators were never convincingly identified), the employer is held only to a negligence standard. In other words, the employer is liable only if it knew, or should have known, of the hostile environment and failed to take prompt and effective remedial action. (For harassment by supervisors, the liability is stricter.) Punitive damages can be awarded if the employer behaves with malice or reckless indifference to an employee's federally protected rights.

Plant management clearly knew about the harassment early on, since the graffiti was painted on workplace walls. May also complained many times to management, as well as to police, the FBI, and the Anti-Defamation League. So Chrysler's liability turns on its response to the harassment. And it was the company's anemic and entirely ineffective response that led the jury to impose such a high amount of punitive damages in its verdict. (It could also be that the jury was disgusted by Chrysler's main defense at trial, which was to suggest that May inflicted the harassment on himself in order to draw others' attention to him.)

Why Chrysler's Response was Inadequate

The harassment against May began early in 2002, with vandalism to his car and then to the cars he used as replacements. Each incident was reported to local police and to Chrysler in February 2002.

Three months later, May drove over a spike hidden in a rag under his tire, and again complained to company security and to the police. May got no response at the plant, so he contacted someone in human resources at Chrysler's headquarters in another state. Ten days later, someone in the local human resources office (who was married to an employee who was a suspect in the harassment) called and offered him a parking space in the salaried lot. May objected, however, that many of the cameras on the lot did not work or were not monitored.

By late spring, the threatening messages (mentioned above) started to appear—on May's walls, on his coveralls, and on paper left at his workstation. He found a note in his toolbox on September 12 that said, “no one can help you fucken Cuban Jew We will get you Death to the Jews Cuban fag Die.” May complained again and again, but got no response.

On September 26, the heads of human resources and labor relations at Chrysler held two meetings with about sixty people who held skilled-trades jobs. At the meetings, they reviewed Chrysler's harassment policy. According to the appellate court's description of this meeting, “Some didn't appreciate the reminder; they were upset that skilled trades was being singled-out and complained that [the HR head] was telling them they could not have ‘fun’ at work anymore.”

Moreover, the court noted, the “meeting was just a meeting.” The higher-ups did not interview the attendees as part of any investigation into the harassment, nor did they follow up with those who equated prohibited harassment with “fun.” And only 60 of the 1000 people who had access to May's work area were asked to attend.

The harassment continued unabated after the September meeting. The Anti-Defamation League, a civil rights group, contacted Chrysler to implore it to take action to stop the harassment. May also filed a charge with the EEOC, which found that he had reasonable cause for his complaint and encouraged Chrysler to take necessary remedial action.

In January 2003, May was contacted by Scott Huller in Chrysler's corporate diversity office for an interview. May was asked for names of possible suspects; he provided a list of 19 people, with his reasons for suspecting that each might be involved, ranging from past discipline for assault, racist behavior, or personal antagonism to May. Huller, however, did not interview any of the 19. Someone else was supposed to use the list to crosscheck with the 19's work attendance on the dates the harassment occurred.

More than a year after May first complained, at which point the harassment still continued, the company finally

developed a protocol for handling the incidents. Graffiti was photographed and then cleaned; attendance data was checked. In May 2003, Chrysler hired a forensic document examiner to compare handwriting samples with the graffiti and notes, but his investigation was inconclusive.

Three full years after the first incident, May was still being harassed with graffiti, death threats, and vandalism to his car. Obviously, whatever measures Chrysler employed to address the problem were woefully ineffective.

At trial, Chrysler suggested mostly that May fabricated his whole claim and wrote all the disgusting, threatening messages himself. They pursued this strategy despite the fact that the main human resources officer responsible for his case said she saw “no evidence that he did this himself.” Obviously, the jury did not believe this was what happened. To the contrary, its \$3.5 million punitive damages verdict shows instead that the jurors believed May.

What Chrysler didn’t explain at trial was why it responded so slowly during the first months of harassment, and why it didn’t step up its response as it became clear that the problem was not going away. Chrysler failed to take even the most basic steps that are called for in this type of situation. It did not properly investigate May’s complaints. It did not interview potential witnesses or suspects. It did not impose measures designed to catch the perpetrators.

How hard is it, after all, to discover which employees are painting graffiti on the inside walls of a plant during work hours? How about a surveillance camera? The appellate court noted the lack of a single such camera in evaluating Chrysler’s response.

The appellate court majority had no trouble upholding the finding of liability after a step-by-step review of Chrysler’s response to May’s complaints. As its opinion concludes:

During the first year of written threats and harassment, what had Chrysler done? They held a meeting. They interviewed May. And, one year in, they hired [a handwriting analyst]. Did that amount to a “prompt and adequate” response to multiple racist and anti-Semitic death threats? Especially in light of the gravity of the harassment, the jury was presented with more than enough evidence to conclude that Chrysler had not done enough.

The law required Chrysler to take steps reasonably calculated to stop the harassment. That, it clearly did not do. It fell so short of the bar, the court concluded, that the jury’s award of punitive damages was also warranted:

If it was negligent to respond to weeks and months of death threats with a pair of meetings and documentation, what happens when that inadequate response does not improve over the course of a year? Two years? Three years? At some point the response sinks from negligent to reckless, at some point it is obvious that an increased effort is necessary, and if that does not happen, punitive damages become a possibility.

Chrysler argued, correctly, that a good-faith response to comply with the law can insulate a company from punitive damages for harassment under the Supreme Court’s ruling in *Kolstad v. American Dental Ass’n* (<http://supreme.justia.com/cases/federal/us/527/526/case.html>) (1999). But the court saw no evidence of such good faith. A “good-faith effort at compliance,” the court explained, “is not a matter of *declarations* about how much the employer cared about a victim of harassment or about how hard certain HR employees say they worked to rectify the situation.”

In addition to all the failures already discussed above, the company also gave principal responsibility for the case to a human resources employee who was married to one of the suspects (she did not recuse herself because she “knew he wasn’t the person involved”)—an insurmountable conflict of interest that would have doomed even a well-conducted internal investigation. There was also ample evidence at trial that Chrysler’s primary concern was simply getting rid of May, rather than protecting him from further harassment. The Seventh Circuit thus concluded not only that punitive damages were appropriate, but that the amount of the damages award was not so “grossly excessive” as to be unconstitutional.

What the Claims Against Lopez and Chrysler Have In Common

The claims against Vito Lopez and the claims against Chrysler may seem to have very little in common. They involved very different workplaces; perpetrators with very different levels of power; and very different types of harassment. But what they have in common is more important than the ways in which they differ: In both cases, the problem of harassment was made known to those with the power—and the responsibility—to stop it. And those in power did nothing.

Employers cannot just click their heels three times and hope for the best. Law and common sense both dictate basic steps that should be taken in response to any complaint of harassment, as well as steps designed to prevent harassment from occurring in the first place. The State Assembly and Chrysler each made critical mistakes in their handling of these cases, for which each will pay handsomely. Let's hope that other employers learn from these mistakes, before future employees must endure similar workplaces.



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