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# Takeaways From Mechanic's 10th Circ. Sex Harassment Suit

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In the mechanic's sexual harassment case of Jones v. Needham[1], the Tenth Circuit reversed the dismissal of a sexual harassment claim based on "quid pro quo" set of facts, and rejected the employer's position that the required administrative claim did not specifically allege facts of quid pro quo harassment.

This case highlights for employers that labels or categories are irrelevant to harassment claims; exhausting administrative remedies is much easier than most employers might appreciate; and more importantly, that it is crucial for employers to promptly perform objective, unbiased and thorough workplace investigations whenever complaints of misconduct are made by employees, whenever harassment is rumored to have occurred, or whenever harassment is observed to have occurred in the workplace. In other words, employers must be vigilant and proactive.

**What is Sexual Harassment?**

In the Jones case, the court spent considerable time explaining that while sexual harassment can occur in different ways, the accepted two forms of harassment are not "wholly distinct claims," but "[r]ather shorthand descriptors to delineate different ways in which sexual harassment can occur." Sexual harassment can take many different forms and involve many different types of people and genders. Sexual harassment is defined as unsolicited and unwelcome sexual advances, requests for sexual favors and/or other verbal, physical, visual or written conduct of a sexual nature directed to persons of the same or opposite sex when:

- Submission to such conduct is made either explicitly or implicitly as a term or condition of employment;
- Submission to or rejection of such conduct by an employee is used as a basis for employment decisions affecting the employee; or
- Such conduct has the purpose or effect of substantially interfering with an employee's work performance or creating an intimidating, hostile or otherwise offensive working environment.

As the Jones court explained, the courts have defined two types of sexual harassment: One type is quid

pro quo which is Latin for “something for something.” This form of sexual harassment occurs when the harasser:

- Makes unwanted sexual advances or engages in other unwanted verbal or physical conduct of a sexual nature; and/or;

- Job benefits were conditioned, by words or conduct on the employee's acceptance of the harasser's sexual advances or conduct[2].

Examples of quid pro quo include asking for sexual favors in exchange for a promotion or raise, or threatening to fire or demote a person if s/he does not agree to grant the sexual request.

The second type of sexual harassment the courts recognize is the hostile work environment in which the employee is subjected to unwelcome sexual advances or other gender-based conduct that is sufficiently severe or pervasive to the work environment.

**Exhaustion of Administrative Remedies is Not So Exhausting for Employees**

The Jones court pointed out that the pre-lawsuit "charge" which an employee is required to file before filing an actual civil action, "need only 'describe generally' the alleged discrimination,”[3] and that the purpose is simply to "give notice of an alleged violation to the charged party." Indeed, administrative agencies have made it increasingly easy for employees to meet the requirement that a claimant must first exhaust his/her administrative remedies before filing a civil lawsuit for harassment, whether it be facts involving quid pro quo or facts constituting a hostile work environment. In California, for example, a claimant need only complete a form online, check a number of options (or boxes) describing the types of illegal activity claimed to have taken place in the workplace, and hit a keyboard button in order to obtain an immediate "right to sue" letter.

In fact, an administrative claim submitted by an individual to the California Department of Fair Employment and Housing, does not even need to be physically signed if the individual electronically files the claim.[4] Since the courts have defined two types of sexual harassment, the claimant typically need only check one box for "harassment." The Jones court emphasized that that the type of harassment, i.e., quid pro quo or hostile work environment, need not be specifically articulated in the prelawsuit claim in order for the employee to exhaust his/her administrative remedies before filing a lawsuit for "harassment."

Exhaustion of administrative remedies is not even required any longer for whistleblower claims. As of Jan. 1, 2014, California Labor Code §1102.5 removed the requirement that an employee had to file a claim with the labor commissioner before filing a lawsuit for retaliation. Therefore, if an employee includes a claim that s/he was retaliated against for lodging a harassment complaint to her/his employer, the need to exhaust administrative remedies as to the whistleblowing component of a harassment claim no longer exists.

**The Investigation**

While exhaustion of remedies is practically effortless for the complaining employee, the need for employers to investigate any type of harassment, however, is not so simple. Whenever an employer receives a claim of harassment, or is made aware that harassment may have occurred or is occurring, an

investigation must be launched without delay. Take seriously the phrase, "knew or should have known." When timely interviews are conducted, parties and witnesses are more likely to accurately recall facts and important details. Any delays encountered in the investigation, and the reasons for the delays, should also be documented. Documentary and other tangible evidence is less likely to be lost, deleted or misplaced when an investigation is promptly conducted.

In addition, the employer needs to be vigilant about recognizing other potential claims by the employee/subject of harassment such as discrimination and retaliation because the employer could also face "cat's paw" liability when the alleged harasser influences an unwitting decision-maker, who is without animus, to take adverse employment action against the complaining employee.

**Practical Tips for Employers**

Employers are well advised to implement the following safeguards:

- Educate the workforce about the employer's anti-harassment policies;
- Maintain and follow internal complaint procedures;
- Promptly and thoroughly investigate all allegations or inklings of harassment, including interviews of all key parties and witnesses;
- Plan the approach to an investigation in advance;
- Review the U.S. Equal Employment Opportunity Commission guidelines for sexual harassment investigations;
- Ensure the investigator is trained to conduct unbiased, objective and defensible investigations;
- Document the claims and results of the investigation which is based upon a consistent interview process;
- Follow up with any supplemental interviews or necessary discovery;
- Think outside the box by considering all facts and documents discovered during the investigation and even those not readily produced such as emails, text messages, badge entry/exit records, etc.;
- Reach conclusions supported by objective evidence;
- Make reasoned credibility assessments;
- Consider possible motives which are inherently subjective and intangible; and
- Lastly, treat employees and witnesses with respect during the investigation process.

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[1] No. 16-6156 (10th Cir. 2017)

[2] Judicial Council of California Civil Jury Instructions 2520

[3] 29 CFR section 1601.12(b)

[4] Cal. Code of Regulations, title 2, §10005(d)(9).

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