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Dear LITTLER

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DEAR LITTLER: IS AN EMPLOYEE'S #METOO SOCIAL MEDIA POST A HARASSMENT COMPLAINT?

By: Helene Wasserman

Dear Littler: I work in HR and have a very modern-day dilemma. An employee (Lauren) told me about a social media post by another employee (Jane). I don't follow Jane on social media, but a few days ago she posted this message: **#MeToo. My boss is a total jerk.** Lauren showed me the message on her phone and asked if I knew anything about it. I've heard about the #MeToo movement but don't know what to make of this post. Is this a harassment complaint? Do I need to do anything?

–Anxious in Atlanta

Dear Anxious in Atlanta,

In the wake of high-profile sexual harassment accusations in numerous industries, the #MeToo movement has taken off. As you know, the movement features everyday people—predominantly women—posting #MeToo on social media to indicate they were sexually harassed or assaulted at some point in their lives. The goal of this hashtag is to draw attention to the magnitude of these problems, which are vastly underreported and often left unaddressed.

Sexual harassment in the workplace is unlawful under Title VII, as well as under many state and local laws. Being "a total jerk," however, is not itself illegal or actionable. While the full scope of Jane's concerns is unknown, her #MeToo message implies that her boss may have harassed and/or assaulted her. Such accusations are not only deeply troubling on a personal level but also put your organization at risk. Against this backdrop, your concerns about Jane's post are entirely valid.

Now that you've seen the post, what comes next? As we'll see, even if your employer feels no response is legally required, you should not simply bury your head in the sand.

Harassment Policies and Procedures

As your first step, consider reviewing your employer's existing anti-harassment policies and procedures. (I am assuming your organization has such policies in place; if it doesn't, it should!) Anti-harassment policies should include reporting mechanisms for employees who feel they have been subjected to harassment or discrimination. Your employer's policy likely includes such protocols for employees to follow if they choose to make a complaint. For example, your policy might instruct employees to tell a direct supervisor, call a 1-800 number, or contact a specific HR representative. Once a complaint is submitted, your employer should conduct a prompt and thorough investigation into the allegations.

It's a safe bet, however, that a "vague post on a social network" is not a designated reporting option under your employer's policy. As a result, your employer might be inclined to take the position that Jane failed to make a proper complaint and inform it of her concerns. In other words, your employer might want to assert that it "doesn't know" about any potential problems in Jane's workplace and thus has no duty to investigate.

That position has some support in federal case law interpreting Title VII. Should an employee sue for sexual harassment, for example, an employer can raise an affirmative defense to the claims depending on the circumstances. In cases involving harassment by a supervisor that do not involve a tangible employment action (i.e., a termination), employers may assert what is known as the Faragher/Ellerth defense, named after two key U.S. Supreme Court cases.[1] To succeed with this affirmative defense in litigation, an employer must show that: (1) it took reasonable steps to "prevent and correct promptly any sexually harassing behavior;" and (2) the plaintiff-employee "unreasonably failed to take advantage of any preventative or corrective opportunities provided by the employer or to avoid harm otherwise."[2]

Generally, an employer can meet the first element of this defense by establishing, distributing, and enforcing an anti-harassment policy that includes a procedure for submitting complaints.[3] As for the second element, courts have explained that employees must follow the employer's reporting procedures and must "sufficiently articulate the complaint to put the employer on notice of the harassment."[4] Accordingly, an employer can satisfy the second element of the Faragher/Ellerth defense by demonstrating that an employee failed to utilize the proper mechanism for reporting. Courts have concluded that an employee unreasonably fails to take advantage of complaint procedures if he or she notifies someone not authorized by the employer's policy to accept harassment complaints.[5]

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1 *See Faragher v. City of Boca Raton*, 524 U.S. 775 (1998); *Burlington Indus., Inc. v. Ellerth*, 524 U.S. 742 (1998).

2 *Cooper v. CLP Corp.*, 679 F. App'x 851, 853 (11th Cir. 2017) (quoting Ellerth, 524 U.S. at 765). While we do not discuss state or local law for purposes of this article, employers should be aware that such laws may affect this analysis. *See*, e.g., *State Dep't of Health Servs. v. Superior Ct. (McGinnis)*, 31 Cal. 4th 1026 (Cal. 2003) (holding that *Faragher/Ellerth* principles do not apply equally to state claims brought under the California Fair Employment and Housing Act; rather, employers may assert the defense as to damages under the unavoidable consequences doctrine but not as to liability).

3 *See Cooper*, 679 F. App'x at 854; *Odom v. Fred's Stores of Tenn.*, Inc., No. 12-91, 2013 WL 6498499, at **8-9 (M.D. Ga. Dec. 11, 2013); see also EEOC, Enforcement Guidance, No. 915.002, Vicarious Employer Liability for Unlawful Harassment by Supervisors (June 18, 1999) [hereinafter *EEOC Harassment Guidance*]; EEOC, Questions and Answers for Small Employers on Employer Liability for Harassment by Supervisors, Questions 3, 7-10 (last modified Apr. 1, 2010).

4 *Odom*, 2013 WL 6498499, at *9.

5 *Cooper*, 679 F. App'x at 854-55; *Odom*, 2013 WL 6498499, at *9; *see* also *Speigner v. Shoal Creek Drummond Mine*, 402 F. App'x 428, 431-32 (11th Cir. 2010) (affirming defense where plaintiff "made an oral complaint to the union steward but never reported the harassment to the officials identified in [the employer's] published sexual harassment reporting procedures"); *Cramer v. Bojangles' Rests., Inc.*, No. 10-159, 2012 WL 716176, at *12 (N.D. Ga. Feb. 8, 2012) (holding that plaintiff's complaint that someone made "nasty" comments to her did not adequately inform employer of the nature of the allegedly harassing comments). If an employee makes another type of formal complaint, however, such as an EEOC charge or union grievance, such action might qualify as an effort to avoid harm. In that event, the *Faragher/Ellerth* defense may not be available. *See* EEOC Harassment Guidance, Section V.

Depending on your employer's internal policies and regular practices, it might be possible to assert the Faragher/Ellerth defense if Jane's post turns into a sexual harassment lawsuit in the future. It is questionable whether her #MeToo post constitutes a complaint that legally would give rise to employer notice.

On the other hand, let's face it: you know about the post and what it suggests.

Knowing What You Know, How Do You Respond?

Even if Jane has not followed your employer's reporting procedures, you still have to grapple with this precarious situation. Your employer must choose what to do with this information, if anything. When making this decision, bear in mind that your response may have repercussions far beyond Jane. She publicly posted this message, which means that coworkers and the public (i.e., her other social media followers, at the very least) may now be drawing their own conclusions, rightly or wrongly. Indeed, Lauren already expressed concern when she brought this information to you. How might it reflect on your organization if word gets out that you ignored this post when it was brought to your attention? Even if it is vague, and even if it turned out that Jane's post was not referring to any harassment or other workplace misconduct by her supervisor, you should think through all of the potential workplace and public relations consequences.

And, moreover, what if Jane's post is referring to harassment? Is your employer aware of accusations or other problems involving Jane's boss or perhaps her department? You may have access to additional information that could shine some light on Jane's post and any associated risks to your employer. Before reacting, consider delving into these broader circumstances.

No employer wants to create issues where none exist. Jane's post is unclear and you are rightfully perplexed about what it means. Nonetheless, you should seriously consider meeting with Jane to discuss her post.

If you choose to bring Jane in, you can keep it simple. You could explain that you learned she posted #MeToo on a social media account and that you have seen the post about her boss being "a total jerk." Remind her that your employer takes allegations of harassment seriously and that retaliation is prohibited. Ask if she has any concerns about harassment—or other behaviors—to report. If she says "no," perhaps make sure she is aware of the designated harassment complaint procedure and the company's open door policy regarding reporting workplace concerns. No matter how the meeting plays out, you should document it.

If she does raise a complaint, you should treat it as you would any other accusation and initiate your investigation as usual. Investigations should be consistent, timely, thorough, fully compliant with employer policies, and well-documented.[6] Even if Jane does not allege harassment, you may have an opportunity to address some sort of workplace gripe that could be stifling productivity and affecting others on her team.

Asking Jane about the post might feel like a gamble. In reality, it might enable you to exert some control over the situation, protect your organization, and ideally improve working conditions.[7]

6 *See*, e.g., Katherine Franklin & Kevin O'Neill, Conducting Internal Workplace Investigations–Are You Prepared?, Littler Podcast (Sept. 6, 2016).
7 *See* also Helene Wasserman, The Higher They Are, The Harder You Fall, Littler Insight (Oct. 19, 2017).

Seize This Teachable Moment

In addition to potential harassment, Jane's post reveals that your employees might benefit from supplemental anti-harassment training. Whether or not Jane intended her post to constitute a formal complaint, there may be some confusion about the complaint process. Many employees (especially tech-savvy employees) are accustomed to managing their lives online and to sharing posts on social media frequently. They may not anticipate or remember that they cannot simply tweet a workplace harassment complaint but must direct it to appropriate personnel.

While this topic is gaining greater consciousness, now is a great time to conduct further antidiscrimination and anti-harassment training. Your employer should strive to ensure that employees understand its policies and procedures, as well as its commitment to preventing and correcting unlawful behavior in the workplace.

Your employer also might wish to revisit the content of its training materials and programs. In a report issued last year, the Equal Employment Opportunity Commission (EEOC) explored workplace harassment as a persistent problem.[8] The EEOC analyzed effective harassment-prevention training efforts and offered numerous recommendations for employers. For example, the EEOC suggested that employers evaluate risk factors within their workplaces, present anti-harassment training in a live and interactive setting, and incorporate bystander and workplace civility topics in the curriculum. The report emphasized that employer training should not be focused solely on avoiding liability but also should be designed to proactively eliminate harassing conduct.

Given that sexual harassment claims may increase as victims continue to find their voices, employers should take a hard look at their policies and training—sooner rather than later. For today: best of luck to you, Anxious in Atlanta!

8 Kevin O'Neill, Christopher Cobey & Marissa Dragoo, Taking Workplace Training to the Next Level: EEOC Task Force Recommends Live, Interactive Harassment Prevention Training, Littler Insight (June 29, 2016). The EEOC task force's report is available here. The report notes, for example, that a significant percentage of EEOC charges received each year—about one-third—include a harassment allegation. In the 2016 fiscal year, nearly 13,000 charges were filed alleging sex-based harassment. *See* EEOC, Enforcement & Litig. Statistics, Charges Alleging Sex-Based Harassment (Charges filed with EEOC) FY 2010 – FY 2016.