Managing (Mis) Behavior in Executives, Key Employees, and Board Members

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INTRODUCTION

A company never wants to find itself defending against claims by employees or third parties for illegal, immoral or unethical acts of its executives, key employees, or board members. This happens when such an executive, employee or board member crosses the line while at work, or while otherwise engaged "in the course and scope" of his or her employment or agency relationship. The purpose of this article is to (1) outline the most common civil causes of action brought against employers due to the bad acts of their employees and/or agents, including executives and board members; (2) provide a practical framework for employers to prevent bad acts by their employees (as much as possible); and (3) provide a roadmap for handling the alleged bad acts of their employees so as to limit the liability for employers.

I. DEFINING THE SCOPE OF LIABILITY FOR EMPLOYERS

The following is an overview of the most common civil causes of action brought against employers for the bad acts of their employees and/or agents.

A. RESPONDEAT SUPERIOR

1. The Theory of Liability

Respondeat superior is a "'well-established principle'" pursuant to which "'an employer is vicariously liable for the torts of an employee committed within the course and scope of employment.'" Fahrendorff v. North Homes, Inc., 597 N.W.2d 905, 910 (Minn. 1999) (quoting Schneider v. Buckman, 433 N.W.2d 98, 101 (Minn. 1988)). Liability under respondeat superior is not predicated upon fault of the employer; instead, it results from a public policy determination that liability for acts committed within the scope of employment should be allocated to the employer as a cost of engaging in business. Id. (citing Lange v. National Biscuit Co., 297 Minn. 399, 403, 211 N.W.2d 783, 785 (1973)). As interpreted by the Minnesota Supreme Court, under respondeat superior, an employer may be held liable for even the intentional misconduct of its employees when: (1) the source of the misconduct is related to the duties of the employee; and (2) the misconduct occurs within work-related limits of time and place. Id.

2. Illustrative Cases

a. Lange v. National Biscuit Co., 297 Minn. 399, 211 N.W.2d 783 (1973). Plaintiff store owner sued defendant supplier for personal injuries suffered when the supplier's salesman physically assaulted plaintiff. During the assault, the salesman swore in the presence of children who were customers; threatened to break the store owner's neck and dared the owner to fight; "viciously assaulted" the owner when the owner refused this dare; and then "proceeded to throw merchandise around the store and then left." Id. at 401, 784. The defendant was found liable for plaintiff's injuries under a respondeat superior theory because the assault stemmed from a confrontation between the owner and the salesman over the salesman's "servicing of plaintiff's store." Id.

b. Marston v. Minneapolis Psychiatry and Neurology, Ltd., 329 N.W.2d 306 (Minn. 1983). Patients sued their psychologist for damages resulting from sexual acts committed by the psychologist during the course of the patients' therapy sessions. They also proceeded against the employer clinic under a respondeat superior theory. The trial court instructed the jury that the clinic could only be found liable if the psychologist was motivated by a desire to serve the clinic when engaging in the sexual acts at issue. The Minnesota Supreme Court reversed on this score, holding that the psychologist's motivation for committing the sexual acts was irrelevant and that the salient question was whether or not the misconduct arose within the scope of the psychologist's employment. On this issue, the Supreme Court found present a genuine issue of material fact, as "[t]here was testimony that sexual relations between a psychologist and a patient is a well-known hazard and thus, to a degree, foreseeable and a risk of employment[,]" and, "the instant situation would not have occurred but for [the psychologist's] employment; it was only through his relation to plaintiffs as a therapist that [the psychologist] was able to commit the acts in question." Id. at 311.

c. Fahrendorff v. North Homes, Inc., 597 N.W.2d 905 (Minn. 1999). A former minor resident of a group home sued the group home operator under a respondeat superior theory for injuries allegedly suffered during a sexual assault by a program counselor. The Minnesota Supreme Court reversed the district court's grant of summary judgment for the operator, holding that genuine issues of material fact existed as to counselor's wrongful acts were foreseeable, related to and connected with acts otherwise within the scope of his employment. Specifically, the Supreme Court's determination hinged upon the resident's submission of an affidavit of "a purported expert in the group home industry, expressly stating that 'inappropriate sexual contact or abuse of power in [group home] situations, although infrequent, is a well known hazard in this field.'" Id. at 911. Furthermore, as with the psychologist in Marston, the assault in Fahrendorff would not have occurred but for his counselor's employment, since the program counselor, "fulfilled the role of a 'group home parent'" to the resident and "held significant power and authority over [her]." Id.

d. P.L. v. Aubert, 545 N.W.2d 666 (Minn. 1996). Plaintiff, a male high school student, sued the school district under a respondeat superior theory for injuries allegedly suffered as a result of a sexual relationship he had with an adult female teacher. The district court granted summary judgment for the school district but the Minnesota Court of Appeals reversed, concluding that a fact question existed as to whether the sexual contact between teacher and student was foreseeable to the employer. However, on further review, the Supreme Court reversed and remanded for reinstatement of the grant of summary judgment:

> Here we find no evidence that [sexual] relationships between teacher and student are a "well-known hazard"; thus foreseeability is absent. While it is true that teachers have power and authority over students, no expert testimony or affidavits were presented regarding the potential for abuse of such power in these situations; thus, there can be no implied foreseeability.

Id. at 668.

Accordingly, it appears that the only legally distinguishing feature in this case is one of foundation: In Marston and Fahrendorff, the plaintiffs introduced expert testimony as to the issue of foreseeability while in P.L., the student did not. See also, Grozdanich v. Leisure Hills Health Center, Inc., 25 F. Supp. 2d 953, 979 (D. Minn. 1998) (court will not impose respondeat superior liability for one employee's sexual assault of another employee in the absence of expert evidence that sexual assault was foreseeable risk of employment).

B. NEGLIGENT HIRING, NEGLIGENT RETENTION AND NEGLIGENT SUPERVISION

Minnesota also recognizes three explicit employer negligence causes of actions: (1) negligent hiring; (2) negligent retention; and (3) negligent supervision.[1] These negligent employment theories are distinct from the doctrine of respondeat superior. As noted, respondeat superior imposes vicarious liability on an employer for all acts of its employees that occur within the scope of their employment, regardless of the employer's fault. Negligent employment, on the other hand, imposes direct liability on the employer only where the claimant's injuries are the result of the employer's failure to take reasonable precautions to protect the claimant from the misconduct of its employees. M.L. v. Magnuson, 531 N.W.2d 849, 856 n.3 (Minn. Ct. App. 1995) (citing Ponticas v. K.M.S. Investments, 331 N.W.2d 907, 911 n.5 (Minn. 1983)).

1. Negligent Hiring

a. Introduction

As described by the Minnesota Supreme Court, negligent hiring is:

> [T]he negligence of an employer in placing a person with known propensities, or propensities which should have been discovered by reasonable investigation, in an employment position in which, because of the circumstances of employment, it should have been foreseeable that the hired individual posed a threat of injury to others.

Ponticas, 331 N.W.2d at 911.

As a precondition to liability, "under the theory of negligent hiring[,] an employer must breach its 'duty to exercise reasonable care in view of all the circumstances in hiring individuals who, because of the employment, may pose a threat of injury to members of the public.'" Smith v. DataCard Corp., 9 F. Supp.2d 1067, 1082 (D. Minn.1998) (quoting Ponticas, 331 N.W.2d at 911). The tort imposes what is essentially a sliding-scale duty of care for hiring a new employee, with the degree of care required being largely dependent upon the nature of the position:

[1] Although frequently pleaded, Minnesota *does not* recognize a cause of action for negligent training. See e.g., McKenzie v. Lunds, Inc., 63 F. Supp.2d 986, 1007 (D. Minn. 1999); Mandy v. Minnesota Mining & Mfg., 940 F. Supp. 1463, 1473 (D. Minn. 1996).

> The scope of the investigation is directly related to the severity of the risk third parties are subjected to by an incompetent employee. ... [O]nly slight care might suffice in the hiring of a yardman, a worker on a production line, or other types of employment where the employee would not constitute a high risk of injury to third persons....

Ponticas, 331 N.W.2d at 913.

In adopting this sliding scale duty, the Court rejected "the contention that, as a matter of law, there exists a duty upon an employer to make an inquiry as to a prospective employee's criminal record even where it is known that the employee is to regularly deal with members of the public." Id. In the Court's view, such a bright-line rule would "would offend our civilized concept that society must make a reasonable effort to rehabilitate those who have erred so they can be assimilated into the community," and would also "counter the many worthwhile efforts of individuals, organizations and employers to aid former offenders to reestablish good citizenship[.]" Id. Consequently, and as the following cases illustrate, the duty of care imposed by this tort is not onerous except in those circumstances where the employee is hired for a position of particular trust.

b. Illustrative Cases

i. Ponticas v. K.M.S. Investments, 331 N.W.2d 907 (Minn. 1983). Plaintiff was a tenant who was raped by the manager of the apartment complex where she lived. The manager had a history of prior felony convictions that could have been discovered with a criminal background check. The Minnesota Supreme Court affirmed the trial court's entry of judgment for plaintiff on her negligent hiring claim against the owner of the apartment complex. The Court concluded that the apartment complex owed plaintiff a particularly heightened duty when investigating the manager's background pre-hiring, since the apartment manager was furnished a passkey permitting admittance to the living quarters of tenants.

ii. Grozdanich v. Leisure Hills Health Center, 25 F. Supp.2d 953 (D. Minn. 1998). Plaintiff, a nurse employed at a nursing home, was sexually assaulted three times by her male supervisor while at work. The supervisor had a history of sexually assaulting staff and patients at a hospital where he had worked prior to his hiring by the nursing home. Upon the nursing home's motion for summary judgment on plaintiff's negligent hiring claim, the District Court determined that genuine issues of material fact precluded summary judgment. Specifically, the Court noted that as part of the supervisor's pre-hiring background check for the nursing home position, his supervisor advised nursing home management that the supervisor "had some difficulties in dealing with some employee issues." Id. at 982-83. "While not a 'red flag,' we conclude that this comment was sufficient to render the adequacy of Leisure Hills' investigation a Jury issue." Id. at 983.

iii. Yunker v. Honeywell, Inc., 496 N.W.2d 419 (Minn. Ct. App. 1993). Honeywell employed Randy Landin ("Landin") from 1977 to 1979 and from 1984 to 1988. Between 1979 and 1984, Landin was imprisoned for strangling to death a Honeywell co-employee. Upon his release from prison, Honeywell rehired Landin as a custodian. In the spring of 1988,

Landin began harassing and threatening a female co-employee. He resigned on July 11, 1998, and then shot to death the second co-employee in her driveway eight days later. The employee's trustee sued Honeywell for wrongful death and included claims for negligent hiring, retention and supervision. Despite the fact that Honeywell rehired Landin after he served prison time for killing one of its employees, the Minnesota Court of Appeals affirmed the summary dismissal of the negligent hiring claim. Applying the sliding-scale concept of duty in Ponticas, the Court of Appeals concluded that Honeywell owed the second murdered employee no duty at the time of Landin's rehire: "Landin was employed as a maintenance worker whose job responsibilities entailed no exposure to the general public and required only limited contact with co-employees. Unlike the caretaker in Ponticas, Landin's duties did not involve inherent dangers to others, and unlike the tenant in Ponticas, Nesser was not a reasonably foreseeable victim at the time Landin was hired." Id. at 423.

2. Negligent Retention

a. Introduction

A negligent retention claim arises, "when an employer becomes aware or should have become aware that an employee poses a threat and fails to take remedial measures to ensure the safety of others." Benson v. Northwest Airlines, Inc., 561 N.W.2d 530, 540 (Minn. Ct. App.1997). However, under Minnesota law, a viable claim of negligent retention requires the existence of at least a threat of, or reasonable apprehension of, physical injury. See e.g., Bruchas v. Preventive Care, Inc., 553 N.W.2d 440, 442-43 (Minn. Ct. App. 1996); Thompson v. Olsten Kimberly Qualitycare, Inc., 980 F. Supp. 1035, 1041 (D. Minn.1997). Employment based sexual harassment involves enough of a threat of a physical injury to permit a negligent retention claim. DataCard Corp., 9 F. Supp.2d at 1083; D.W. v. Radisson Plaza Hotel Rochester, 958 F. Supp. 1368, 1378 (D. Minn.1997); Mandy v. Minnesota Mining & Mfg., 940 F. Supp. 1463, 1470-72 (D. Minn.1996).

The parameters of a viable negligent retention claim are the subject of certain dispute in the Minnesota courts. In Cook v. Greyhound Lines, Inc., 847 F. Supp. 725, 733 (D. Minn. 1994), the Court concluded that the doctrine could only logically apply when the employee acted outside of the course of his, or her, employment, or else it would merely reiterate the precepts of respondeat superior, a less than useful development in the law. See also, McKenzie v. Lunds, Inc., 63 F. Supp.2d 986, 1007 (D. Minn. 1999); Thompson, 980 F. Supp. at 1041 n. 4; Leidig v. Honeywell, Inc., 850 F. Supp. 796, 807 (D. Minn. 1994). However, in M.L., 531 N.W.2d at 857 n.4, and D.W., 958 F. Supp. at 1379, the Courts rejected this line of reasoning; indeed, the Court in D.W. dismissed it as "a non sequitur." D.W., 958 F. Supp. at 1379.

b. Illustrative Cases

i. Grozdanich v. Leisure Hills Health Center, (see supra § B.1.b.ii). The District Court denied the nursing home's motion for summary judgment on plaintiff's negligent retention claim. In so doing, the Court essentially collapsed the negligent hiring and retention analyses together, determining that a jury could properly conclude that had the nursing home made reasonable inquiry, it could have learned of the supervisor's history of predatory sexual

conduct. Id. at 983.

ii. Yunker v. Honeywell, Inc., (see supra § B.1.b.iii). The Court of Appeals reversed the district court's grant of summary judgment for Honeywell on plaintiff's negligent retention claim, concluding that Honeywell owed a duty of care to plaintiff's decedent that was not present under the negligent hiring claim:

> Landin's troubled work history and the escalation of abusive behavior during the summer of 1988 relate directly to the foreseeability prong of duty. The facts, in a light favorable to Yunker, show that it was foreseeable that Landin could act violently against a coemployee, and against Nesser in particular.
>
> This foreseeability gives rise to a duty of care to [plaintiff's decedent] that is not outweighed by policy considerations of employment opportunity. An ex-felon's "opportunity for gainful employment may spell the difference between recidivism and rehabilitation," Haddock v. City of New York, 75 N.Y.2d 478, 554 N.Y.S.2d 439, 444, 553 N.E.2d 987, 992 (1990), but it cannot predominate over the need to maintain a safe workplace when specific actions point to future violence.

Id. at 424.

iii. Johnson v. Thompson Motors of Wykoff, Inc., No. C1-99-666, 2000 WL 136076 (Minn. Ct. App., Feb. 2, 2000), pet. for rev. denied, (Minn., Mar. 28, 2000). On August 26, 1998, the employer fired Dan Copeman ("Copeman"), an employee with a history of violent and threatening work place behavior. Thompson then left the premises, but returned later in the day and shot and killed both the employer's Vice President of Finance and a customer. He also wounded two other employees and then killed himself. The estate of the customer brought suit and, after a jury trial, the employer was found liable for negligent retention. The trial court denied the employer's motion for judgment notwithstanding the verdict. On appeal, the Court of Appeals reversed, concluding that the employer owed no duty of care to the customer:

> Thompson Motors had no employment relationship with Copeman at the time of the shooting, no special relationship requiring it to protect its customer from criminal activity, and no duty to render 'assistance' in advance of the shooting. As a matter of law, Thompson Motors cannot be held liable for negligence in failing to prevent Copeman's homicidal attack on a customer.

Id. at *3.

The holdings of Johnson and Yunker are difficult to reconcile. Both Copeman and Landin had histories of violent and threatening behavior in the work place. However, if one accepts that

Johnson Court's premise that an employer owes no negligent retention duty of care with respect to the actions of former employees, then why was a reversal and remand required on the negligent retention claim in Yunker? Landin had left Honeywell's employ eight days before he murdered the second co-worker. Under the Johnson line of reasoning, Honeywell's negligent retention duty of care should have terminated upon Landin's separation.

3. Negligent Supervision

a. Introduction

The doctrine of negligent supervision imposes a duty on employers to exercise ordinary care in supervising the employment relationship, so as to prevent the foreseeable misconduct of an employee from causing harm to others. See e.g., Cook v. Greyhound Lines, Inc., 847 F. Supp. at 732. Unlike the doctrine of negligent retention, negligent supervision evolved from the respondeat superior doctrine. See Ponticas, 331 N.W.2d at 910. As a consequence, liability can only be based upon tortious conduct committed within the employee's scope of employment. See e.g., Bruchas v. Preventive Care, Inc., 553 N.W.2d at 443; Oslin v. State, 543 N.W.2d 408, 414 (Minn. Ct. App. 1996); Rosenbloom v. Senior Resource, Inc., 974 F.Supp. 738, 745 (D. Minn. 1997). For this reason perhaps, negligent supervision claims are seldom successful on the merits.

b. Illustrative Cases

i. Grozdanich v. Leisure Hills Health Center, (see supra § B.1.b.ii). Applying respondeat superior principles, the District Court granted the nursing home's motion for summary judgment on the negligent supervision claim, concluding that, as a matter of law, the supervisor's sexual assaults were committed outside the scope of his employment.

ii. Yunker v. Honeywell, Inc., (see supra § B.1.b.iii). The Court of Appeals, applying respondeat superior principles, affirmed the grant of summary judgment on plaintiff's negligent supervision claim, concluding that "negligent supervision is not a viable theory of recovery because Landin was neither on Honeywell's premises nor using Honeywell's chattels when he shot [plaintiff's decedent]." Id. at 422.

iii. M.L. v. Magnuson, 531 N.W.2d 849 (Minn. Ct. App. 1995). Appellant Albert C. Magnuson was a church pastor who sexually abused the respondents when they were boys.[2] On appeal from a jury verdict for respondents, the Court of Appeals reversed the jury's determination that the employer-church negligently supervised Magnuson and remanded for a new trial on this claim (the Court of Appeals also reversed and remanded the trial court's findings that the church negligently hired and retained Magnuson). In the view of the Court of Appeals:

[2] Magnuson would be a good candidate for the position of worst possible bad employee. During the 1960s, 1970s and 1980s, he sexually abused and molested no less than fifteen children, all of whom subsequently sued his church-employer. See Redeemer Covenant Church of Brooklyn Park v. Church Mut. Ins. Co., 567 N.W.2d 71, 74 (Minn. Ct. App. 1997).

> Even assuming that Magnuson's abuse of M.L. occurred within his scope of employment, there was insufficient evidence for the jury to conclude that Redeemer failed to exercise ordinary care in supervising Magnuson. By the nature of the position, a clergyperson has considerable freedom in religious and administrative leadership in a church. The clergy also require privacy and confidentiality in order to protect the privacy of parishioners. There was no evidence that the supervision provided by Redeemer differed from the supervision a reasonable church would provide. Nor was there any evidence of further reasonable supervision that could have prevented Magnuson from abusing M.L. There was not enough evidence from which a reasonable jury could conclude that Redeemer negligently supervised Magnuson.

Id. at 858-59.

iv. Cook v. Greyhound Lines, Inc., 847 F. Supp. 725 (D. Minn. 1994). Plaintiff was a female passenger on a Greyhound bus traveling from Washington D.C. to Pittsburgh, Pennsylvania. One of the other passengers, Timothy Lamont Walker ("Walker"), boarded the bus and sat next to plaintiff. Walker passed a bottle of liquor amongst the passengers, and when this supply ran out, he prevailed upon the bus driver to pull over at a liquor store where Walker bought two cases of beer. The trip resumed, and Walker and several other passengers engaged in prolonged and open alcohol consumption. After an unspecified period of time, Walker accosted plaintiff in the vehicle's rest room and attempted to force her to perform oral sex acts. After these attempts proved unsuccessful, Walker forced plaintiff to return to her seat where he then raped her. Throughout this sordid episode, the driver -- a convicted felon who had been working for Greyhound less than 90 days -- took no steps to intervene.

Plaintiff then sued Greyhound and sought leave to amend her complaint to add a claim for negligent supervision (and to add claims for negligent hiring and retention). The District Court granted her leave to so amend her complaint, concluding that the negligent supervision claim was "implicitly subsumed" in plaintiff's existing negligence allegations, and that it could "see no prejudice to the clarification of an allegation which is presently in a pleading and which has an appreciable, supportive showing in the evidentiary record." Id. at 734. The Court observed that "[w]hether the facts should ultimately support such a claim is an issue which is properly left to another day." Id.

C. STATUTORY HARASSMENT/DISCRIMINATION CLAIMS

In circumstances where the bad apple employee/agent sexually assaults a fellow employee, the victim often sues the employer for sexual harassment under statutory discrimination theories. See e.g., Todd v. Ortho Biotech, Inc., 175 F.3d 595 (8th Cir. 1999) (sexual harassment claims under Title VII and the Minnesota Human Rights Act ("MHRA")); Breitenfeldt v. Long Prairie Packing Co., 48 F. Supp.2d 1170 (D. Minn. 1999) (same); Grozdanich v. Leisure Hills Health Center, supra (same). Different standards of liability apply to assess the company's liability for harassment,

depending on the level of the alleged perpetrator.

If the claim is brought under Title VII or the MHRA,[3] and the perpetrator of the harassment was the victim's supervisor, then the employer may be vicariously liable for the harassment. If the sexual assault/harassment resulted in tangible employment action – such as a discharge, a demotion, or an undesirable work reassignment -- then the employer is vicariously liable for damages resulting from the assault/harassment. See e.g., Burlington Indus. v. Ellerth, 524 U.S. 742, 764 (1998). In the absence of a tangible employment action, an employer may raise an affirmative defense to liability or damages, subject to proof by a preponderance of the evidence, which must be established by "two necessary elements: (a) that the employer exercised reasonable care to prevent and correct promptly any sexually harassing behavior, and (b) that the plaintiff employee unreasonably failed to take advantage of any preventive or corrective opportunities provided by the employer or to avoid harm otherwise." Id.

In Title VII and MHRA cases where the assault/harassment was perpetrated by a co-worker, then the employer may be directly liable for the misconduct if it knew or should have known of the conduct and failed to take proper remedial action. See e.g., Dheine v. Meiners Thriftway, Inc., 184 F.3d 983, 987 (8th Cir. 1999); Carter v. Chrysler Corp., 173 F.3d 693, 700 (8th Cir. 1999). According to the United States Supreme Court, the employer is liable for hostile work environment harassment by employees who are not supervisors if the employer was "negligent in failing to prevent harassment from taking place." In assessing such negligence, the Court explained, "the nature and degree of authority wielded by the harasser is an important factor to be considered in determining whether the employer was negligent." Also relevant is "[e]vidence that an employer did not monitor the workplace, failed to respond to complaints, failed to provide a system for registering complaints, or effectively discouraged complaints from being filed." Vance v. Ball State University, 133 S.Ct. 2434 (2013).

Harassment is a particularly challenging situation when the bad actors are leaders in the company; when the harasser is an "alter ego" or "proxy" of the company, the company is strictly liable and has no defense to the claim regardless of good acts by the company. See e.g., Townsend v. Benjamin Enterprises, Inc., 679 F.3d 41 (2d Cir. 2012) (holding an employer cannot raise the Faragher/Ellerth affirmative defense if the sexual harassment was committed by a 'proxy' or 'alter ego' of the company); see also, Ackel v. Nat'l Commc'ns, Inc., 339 F.3d 376, 383-84 (5th Cir.2003) (holding that the Faragher/Ellerth defense is unavailable "when the harassing supervisor is . . . `indisputably within that class of an employer organization's officials who may be treated as the organization's proxy'" (quoting Faragher, 524 U.S. at 789, 118 S.Ct. 2275) (emphasis omitted)); Johnson v. West, 218 F.3d 725, 730 (7th Cir.2000) (same); cf. Passantino v. Johnson & Johnson Consumer Prods., Inc., 212 F.3d 493, 517 (9th Cir.2000) (holding that the Faragher/Ellerth affirmative defense is "inapplicable as a defense to punitive damages when the corporate officers who engage in illegal conduct are sufficiently senior to be considered proxies for the company"). According to Townsend, "The EEOC's interpretation of Title VII, as set forth in its Enforcement

[3] If the plaintiff brings claims under both the MHRA and under state negligence theories (e.g., negligent hiring, retention or supervision) then the MHRA will preempt the negligence claims to the extent they are premised upon the same facts and legal duties as the MHRA claims. See e.g., Breitenfeldt, 48 F. Supp.2d at 1180.

Guidance, is in accord with [strict liability for employers for the harassment of senior leaders]. See EEOC Enforcement Guidance: Vicarious Employer Liability for Unlawful Harassment by Supervisors, 1999 WL 33305874, at *18 (June 18, 1999) ('[When the alleged harasser qualifies as the employer's proxy], the official's unlawful harassment is imputed automatically to the employer. Thus, the employer cannot raise the [Faragher/Ellerth] affirmative defense, even if the harassment did not result in a tangible employment action.' (footnote omitted)). The EEOC's Enforcement Guidance is entitled to deference to the extent it has the power to persuade. See Skidmore, 323 U.S. at 140, 65 S.Ct. 161; Nat'l R.R. Passenger Corp. v. Morgan, 536 U.S. 101, 110 n. 6, 122 S.Ct. 2061, 153 L.Ed.2d 106 (2002) (EEOC's interpretation contained in Compliance Manual subject to Skidmore deference); Mack v. Otis Elevator Co., 326 F.3d 116, 127 (2d Cir.2003) ("While we are not bound by [the EEOC's] enforcement guidelines, they are entitled to respect to the extent that they are persuasive.")….we find the EEOC's interpretation persuasive." See also, http://www.eeoc.gov/policy/docs/harassment.html; Identifying Employers' "Proxies" in Sexual-Harassment Litigation (Curtis J. Bankers);
http://ilr.law.uiowa.edu/files/ilr.law.uiowa.edu/files/ILR_99-4

D. RETALIATION / REPRISAL

Both Title VII and the MHRA prohibit employers from retaliating against employees based on an employee's opposition to employment discrimination or complaint of discrimination, among other things. The federal courts, especially the U.S. Supreme Court, have been very friendly to employees making retaliation claims in the last decade.

1. Retaliation Claims Under Federal Law

a. Title VII

Burlington North and Santa Fe Ry. Co. v. White, 548 U.S. 53 (2006)
The Court held that adverse action includes any conduct that "***might have*** 'dissuaded a reasonable worker from making or supporting a charge of discrimination.'" Id. at 68 (emphasis added). The Court's explanation of the standard has special import for the summary judgment stage of litigation: "[w]e phrase the standard in general terms because the significance of any given act of retaliation will often depend upon the particular circumstances. ***Context matters***." Id. at 69 (emphasis added). Based on that liberal standard, the Court ruled that action not tied to terms and conditions of employment, including exclusion from lunches in this case, can support a valid retaliation claim. Id. at 69-71.

Crawford v. Metropolitan Government of Nashville, 129 S. Ct. 846, 555 U.S. 271 (2009)
In an opinion by Justice Souter, the Court held that Title VII's anti-retaliation provision protects employees from retaliation when employees merely participate in an employer's internal investigation of a potential Title VII violation. Id. at 849. The Court reasoned that, if employees could be subject to adverse action for responding to questions during an internal investigation, employees would feel compelled not to report violations against themselves or others – undermining enforcement of the statute. Id. at 852-53.

Thompson v. North Amer. Stainless, LP, 131 S.Ct. 863 (2011)
In a unanimous opinion announced by Justice Scalia, the Court held that adverse action against a third party can support a retaliation claim; the Court determined that the termination of a discrimination complainant's fiancé was such unlawful action because it would dissuade a reasonable employee from asserting rights under Title VII. Id. at 868. The Court further found that the third party fiancé has a right to sue because he was in the zone of interest sought to be protected by Title VII's anti-retaliation provision and, therefore, the fiancé was not "collateral damage." Id. at 870.

b. § 1981

CBOCS West, Inc. v. Humphries, 553 U.S. 442 (2008)
The Court held that Section 1981 protects individuals who have complained about potential Section 1981 violations concerning a third party. Id. at 445. The Court's decision essentially read an anti-retaliation provision into the statute based on Congressional action that rejected the Court's prior precedent (which largely limited Section 1981 cases to pre-contract-formation claims). Id. at 449-53.

2. Retaliation Claims Under State Law

a. Minnesota Whistleblower Act

The Minnesota Whistleblower Act (MWBA) is a fertile ground for employees to make claims against employers since the May of 2013 amendments. See, generally, The Canary Sings Again: New Life for the Minnesota Whistleblower Act, Minnesota Bench & Bar, Steven Andrew Smith, David E. Schlesinger and Eleanor Frisch, Sep 9 2013.

The MWBA prohibits employers from discharging, disciplining, threatening, or penalizing an employee in retaliation for making a good faith report of a violation or suspected violation of any federal or state law or rule adopted pursuant to law to an employer, governmental body, or law enforcement official. Minn. Stat. § 181.932, subd. 1(1). It also prohibits retaliation against an employee for participating in an investigation or hearing instigated by a public body, refusing an employer's order to violate the law, or reporting a situation regarding the quality of healthcare services provided by healthcare institutions. Id. at subd. 1(2-4). A successful employee under the MWBA recovers damages, including wage loss and emotional distress, and attorneys' fees and costs. This claim is as treacherous as a discrimination, harassment or retaliation claim.

Report

The new law defines a "report" as any "verbal, written, or electronic communication by an employee about an actual, suspected, or planned violation of a statute, regulation, or common law, whether committed by an employer or a third party." Minn. Stat. § 181.931, subd. 6. By adding "planned violation of law," the 2013 amendments extend the MWBA protection to acts that have not yet taken place. And, employees who report unlawful conduct by *anyone*, rather

than just the employer, are protected since 2013. The MWBA also now includes reports of suspected violations of common law as protected.

Good Faith

Since May, 2013, the MWBA explicitly defines the term "good faith" as "any statements or disclosures" as long as the statements or disclosures are not knowingly false or made in reckless disregard of the truth. Id. at subd. 4.[4]

Penalize

The new law also defines "penalize" as "conduct that might dissuade a reasonable employee from making or supporting a report, including post-termination conduct by an employer or conduct by an employer for the benefit of a third party." Id. at subd. 5. Prior to this amendment, Minnesota courts had not adopted the "dissuade" standard set forth in Burlington (see p. 9, infra).

Broader Time Period Covered

The 2013 amendments added new whistleblower protection for post-employment actions. Minnesota courts had previously held post-employment actions were not covered by the MWA because the statute only protects "employees" as defined in Minn. Stat. § 181.931, subd. 2.

b. MHRA

Minnesota employment law experts (including one of the authors of this piece) have written extensively about the pro-employee case holdings in federal court on the topic of retaliation over the last many years. See e.g., Recent Developments in the Law on Retaliation Against Employees, Upper Midwest Employment Law Institute (2011), Minnesota CLE (Cummins, Duddleston, Engelmeier and Halunen); Employee Retaliation Claims, Minnesota Bench & Bar, November 11, 2011 (Marshall Tanick). However, the Minnesota Human Rights Act, on its face, sets forth a much stricter standard than the federal law about which Minnesota employers must be mindful. Specifically, retaliation is a "prohibited practice under the Minnesota Human Rights Act. The Act prohibits reprisal or retaliation because a person opposed a practice forbidden by the MHRA, filed a charge or participated in a matter brought under the Act; is a member of a local human rights commission; or because a person associated with a person or group of persons who are disabled or of a different race, color, creed, religion, sexual orientation, or national origin. A reprisal includes, but is not limited to, any form of intimidation, retaliation, or harassment." (Emphasis added; http://www.mn.gov/mdhr/employers/index.html.) Any deviation from typical practices or policies relating to an employee who has engaged in protected activity can be evidence of retaliation under Minnesota law. Minn. Stat. § 363A.15.

[4] Under the old law prior to the amendment, Minnesota courts defined a "good faith" report being "for the purpose of exposing an illegality." Obst v. Microtron, Inc., 614 N.W.2d 196, 202 (Minn. 2002).

II. PREVENTING "BAD ACTS" OF EMPLOYEES

While it is virtually impossible to absolutely prevent bad acts of employees and agents of the company, the following is a practical framework to follow to significantly limit such acts.

(1) Create a "Bad Act" – Free Culture. A good opportunity for an employer to prevent bad acts of employees is to create a culture where such bad acts will not be tolerated. This can be achieved through the creation and implementation of, as well as effective communication about, workplace policies and codes of conduct to demonstrate to ALL employees (1) what is acceptable behavior in the workplace and in work-related settings; (2) how to report unacceptable behavior in the workplace; and (3) what the repercussions will be should a policy/code be violated.

Beyond the practical advantages of creating workplace policies, the EEOC and several courts around the country have indicated that employers may risk stiff penalties (and lose a defense to a harassment or discrimination claim, see infra, p. 9) unless the employer provides harassment and discrimination avoidance training to its employees and managers. For example, in 1999 the United States Supreme Court resolved a debate in the lower courts as to what type of conduct is sufficient to impose punitive damages for discriminatory conduct. In doing so, the Court stated that employers who make good faith efforts to comply with federal anti-discrimination laws may avoid punitive damages. Kolstad v. American Dental Association, 119 S.Ct. 2118 (1999). Most significantly, the court determined that an employer will not be held' "vicariously liable [for punitive damages] for discriminatory employment decisions of managerial agents where these decisions are contrary to the employer's good faith efforts to comply with Title VII." Kolstad, 119 S.Ct. at 2129 (quotation omitted). The Court clearly sent a message to employers to "educate themselves and their employees on Title VII' s [the federal discrimination and harassment law's] prohibitions." Id. Accordingly, by demonstrating expectations to employees through effective policies and codes of conduct, employers not only have the ability to "set the tone" for what is acceptable behavior in the workplace, but they also protect themselves from additional penalties should they find themselves defending against a harassment or discrimination claim stemming from the bad acts of their employees.[5]

(2) Hire The Right People for Leadership Positions. The point must be emphasized -- the most opportune occasion to prevent bad acts of employees/agents is prior to hire/engagement. Creating a "bad act-free" culture starts with the selection of the company's leaders. Search for leaders with a long history of honesty and integrity, as well as successful leadership. Reinforcing honesty and integrity in the company culture includes hiring top-level employees and leaders who demonstrate to an adherence to that value system; when leadership is filled with role models of integrity, honesty and policy-followers, employers take a significant step toward preventing bad acts by their employees. Accordingly, it is imperative that employers (1) emphasize the importance of honesty and integrity when recruiting and hiring executives, key employees, and board members; and (2) properly screen prospective leaders for a history of prior bad acts through background and reference checks and a thorough interview process prior to hire. All senior

[5] E&U helps employers with policies and codes of conduct complying with courts' requirements for avoiding/minimizing liability.

leadership, including board members, should be subject to a deep-dive background check, not only to avoid liability for their bad acts, but also to ensure the best background and skill set for the work at hand. Given the stakes, it is important to diligently consider leaders' history prior to on-boarding. Companies too often defer to recruiting firms for assessing leaders' history. Recruiting firms can drop the ball on those issues. See e.g., Search firm that found Norwood Teague also tied to embattled UMD athletics director, Minneapolis/St. Paul Business Journal, Aug 12, 2015 (Nick Halter).

(3) Train, Train, Train. It is not enough; however, for employers to have anti-harassment and discrimination policies and exemplary codes of conduct and/or to hire the right people, employers must also take steps necessary to train their employees regardless of their position. Indeed, it is well established that an employer's duty to exercise reasonable care includes training employees on anti-harassment and discrimination (and many other legal) issues. Courts have made it clear that employers must train not only about sexual harassment and discrimination, but on all types of workplace harassment and discrimination. A 1999 Tenth Circuit case emphasized that an employer's "good-faith efforts" means more than simply issuing a policy against discrimination. In EEOC v. WalMart Stores, Inc., the court held that the employer's company-wide policy against discrimination and special anti-discrimination handbook were insufficient to preclude a punitive damages award where the company did not actually effectively train its managers about discrimination and its anti-discrimination handbook was not widely disseminated. EEOC v. WalMart Stores, Inc., 187 F.3d 1241 (10th Cir. 1999). Thus, courts have for decades sent clear messages that employers should seriously consider the need to conduct training to avoid liability, and more significantly, prevent illegal conduct before it happens.

In addition to training all employees, employers must train managers and supervisors on how to model appropriate, respectful behavior, supervise employees and recognize inappropriate behavior to avoid harassment and discrimination, respond immediately to conduct that could be harassing or discriminatory and appropriately respond to complaints of improper conduct. The EEOC has advised that an "employer should ensure that its supervisors and managers understand their responsibilities under the organization's anti-harassment policy and complaint procedure. Periodic training of those individuals can help achieve that result." EEOC Enforcement Guidance: Vicarious Employer Liability for Unlawful Harassment by Supervisors. As the Supreme Court stated, "the employer has a greater opportunity to guard against misconduct by supervisors than by common workers; employers have greater opportunity and incentive to screen them, train them, and monitor their performance." Faragher v. City of Boca Raton, 118 S.Ct. 2275, 2291 (1998).

According to the 1999 EEOC Guidelines, manager and supervisor training "should explain the types of conduct that violate the employer's anti-harassment policy; the seriousness of the policy; the responsibilities of supervisors and managers when they learn of alleged harassment; and the prohibition against retaliation." In April 2006, the EEOC once again reinforced the importance of training managers. See EEOC Compliance Manual: Section 15 on "Race and Color Discrimination" (April 2006). It provided the following examples of "best practices for employers – proactive measures designed to reduce the likelihood of Title VII violations and to address impediments to equal employment opportunity":

- Develop a strong EEO policy that is embraced by the CEO and top executives, **train managers** and employees on its contents, enforce it, and **hold company managers accountable.**
- Make sure decisions are transparent (to the extent feasible) and documented. The reasons for employment decisions should be well-explained to affected persons. **Make sure managers maintain records** for at least the statutorily-required periods.

Id. at p. 53 (emphasis added).

An employer's failure to provide effective training managers and supervisors will not only limit the company's ability to defend a harassment or discrimination claim (see, infra, p. 14), but it will also increase the company's risk of punitive damages. As one court stated, "leaving a manager in ignorance . . . of the basic features of [employment] laws is an 'extraordinary mistake', for a company to make, and a jury can find that such an extraordinary mistake amounts to reckless indifference." Mathis v. Phillips Chevrolet, Inc., 269 F.3.d 771 (7th Cir. 2001). If an employer has not properly trained its managers, then a jury could infer "reckless indifference" and award punitive damages.

Attached as **Appendix A** is a non-exhaustive list of issues for employers to consider when developing an appropriate training program for their respective workplace.

III. HANDLING ALLEGED "BAD ACTS" OF EMPLOYEES

Beyond creating a culture – through policies, hiring and training – to prevent "bad acts" of employees, employers are required to **ACT** when they directly or indirectly receive a complaint (or otherwise become aware of) the potential violation of company policy or state or federal law. The following is a roadmap for employers faced with such a situation.

A. INVESTIGATE

When an employer directly or indirectly receives a complaint or becomes aware of a potential violation of company policy or state or federal law it is imperative that they *act as soon as possible* to determine whether there was a violation. The first action an employer should take is to notify the complaining/affected employee that: (1) it is taking the complaint/issue seriously, and (2) in the event it is determined a violation of company policy or law exists, the employer will take action to remedy the issue (no matter what position the alleged violator holds within the organization).[6] The employer then must determine what happened (through a formal or informal investigation). The following are a few reasons to conduct a thorough investigation:

1. There was a complaint of harassment, discrimination or other wrongful conduct submitted through the employer's respective reporting channels;

[6] It is important to note that when the subject of the complaint is an executive, key employee or board member, the employer should consider whether an independent, outside investigator should be hired.

2. There was a complaint of harassment, discrimination or other wrongful conduct filed with a state or government agency.
3. A supervisor or someone else witnessed behavior believed to violate company policy, or state or federal law.

Determine whether interim measures should be taken during the investigation. For example, leave for both the accused wrongdoer and the affected person(s) should be considered. Depending on the severity of the complaint and employment relationship between the complainant and the accused wrongdoer, consider paid leave for the affected employee or paid/unpaid leave for the alleged wrongdoer.[7] Note, however, that taking interim measures towards a complainant may be perceived as retaliation, such as transfer to a different position. The employer should also consider other interim or long term action-separation of the two parties (i.e. changing reporting lines or other aspects of the job to avoid negative influence on the affected person).

Retain the investigation documentation, including interview notes, statements, documents gathered, and investigation report, if any, in a separate file; not in a personnel file.

B. ACT TO REINFORCE "BAD ACT" – FREE CULTURE

At the conclusion of the investigation, employers must make a determination of whether any wrongdoing occurred and must act based on that determination.

a. If a Violation Occurred

If it is determined that an employee/agent has committed a violation of company policy, or state or federal law, the employer must take "prompt remedial action" to remedy the problem. By taking such action, the employer not only demonstrates to the complaining employee that the alleged conduct will not be tolerated (no matter what position the violator holds within the organization), it also could, in some circumstances, provide the employer with a defense should the complaining employee later file an administrative charge or civil complaint based on the conduct. Conversely, should the employer not act after receiving notice of an alleged violation of company policy, or state or federal law, it not only sends the message to employees that its policies are not more than "lip service," it invites administrative charges and /or civil lawsuits by the complaining employee and may, in itself, impute liability to the employer for the bad acts of the wrongdoer. The following is a non-exhaustive list of actions an employer may take:

1. Discipline the Wrongdoer. The first action the employer should consider is whether disciplining the wrongdoer is appropriate. Obviously, the appropriate disciplinary action depends on the severity of the violation; but in all cases, the disciplinary action should be meaningful and consistent and employers should consider the following:
   - What is the position of the wrongdoer?

7 Leave under the Family and Medical Leave Act cannot be forced on the Complainant.

- Note: Setting the tone for a culture that does not tolerate bad acts of employees/agents may mean handing down more severe punishment for employees higher within the organization. This sends a very clear message to all employees.

- What is the severity of the conduct?
  - Note: It is important that the employer ensures that the "punishment" fits the violation.
- Is there a policy (or prior precedence) that suggests a particular discipline in this case?
  - Note: If there is a policy (or precedence in place), discipline should be consistent for wrongdoers in parallel or similar situations (so as to prevent a potential claim of discrimination or retaliation brought by the wrongdoer). In addition, if the employer has a progressive discipline policy, that policy should be followed (not following a progressive discipline [or any other] policy may be grounds for a claim of discrimination or retaliation by the wrongdoer [see, infra, p. 12).
- Does the wrongdoer have a history of wrongful conduct (similar or otherwise)?
  - Note: If the wrongdoer is a repeat offender, and the employer is on notice of the repeat offenses, the employer may face liability for negligent retention or supervision, addressed previously, infra, p. 1- 8.

2. Consider Coaching as well as Discipline. Coaching may be appropriate, in addition to or in place of discipline, depending on the severity of the misconduct. Some leaders "grew up" in other cultures that did not value adherence to stated company expectations. Some leaders view themselves as immune or have a history of immunity to the rules applicable to others. Still others need detailed coaching on appropriate boundaries and work-related expectations.

3. Prevent Retaliation. Upon disciplining and/or coaching the wrongdoer, the employer should inform the wrongdoer (and any other necessary employees) that retaliation against the complaining employee and/or witnesses will not be tolerated and will give rise to further disciplinary action. Education about what is considered "retaliatory" under the law may need to take place. Given the courts' views on retaliation, a confirmed retaliatory act should result in decisive employer action, including considering promptly ending the business/employment relationship.

4. Inform the Complaining/Affected Employee. Once disciplinary action has been determined, the employer should inform the complaining employee of the results of the investigation and (to the extent necessary) the action the employer took or intends to take to (1) discipline the wrongdoer, and/or (2) prevent the conduct from happening again. The employer should also thank the employee for raising the issue and notify the complaining/affected employee that any retaliation by the wrongdoer (or any other employee) will not be tolerated and provide the employee with necessary steps to take should retaliation occur (including encouraging the employee

to let appropriate leaders know if there is a concern about retaliation).

5. Follow up to see how things are going for the Complaining/Affected Employee. As important as addressing the misconduct promptly after learning about it is following up with those impacted by the misconduct. A "check in" with the complaining/affected employees or those who could also be affected should occur regularly, starting within a short time after the dust settles on the investigation and the results thereof.

b. If a Violation Did Not Occur (Or Results Inconclusive)

Even if it is determined that the employee/agent has not committed a violation of company policy, or state or federal law (or if the results of the investigation are inconclusive), the employer may still need to take some action. This action may be something as simple as taking note that there is some level of turbulence in the workplace and taking steps to reduce the potential for future problems. In addition, the employer should take the following steps:

1. Prevent Retaliation. Even if it is determined that there were no violations, an employer may still be liable to the complaining employee for retaliation (by the subject of the complaint or others). As such, the employer should inform the subject of the complaint (and any other necessary employees) that retaliation against the complaining/affected employee and /or witnesses will not be tolerated and will give rise to disciplinary action.

2. Inform the Complaining/Affected Employee. Once the investigation has concluded, the employer should inform the complaining employee of the results of the investigation (even though there was no violation found or the results were inconclusive). The employer should also thank the complaining/affected employee for coming forward, notifying all relevant parties that raising concerns is an important part of making sure the workplace is everything it can be, as well as noting that any retaliation will not be tolerated. Also, provide the employee with necessary steps to take should retaliation occur, including encouraging further reporting.

3. Consider Education or Team Building. Miscommunications occur at work and perceptions of mistreatment by leaders are especially important to unravel. Accordingly, employers should consider whether there is a lack of understanding between those involved in the dispute that needs to be addressed. This does not mean putting the complainer and alleged wrongdoer in a room together to "hash it out." But, it can mean focusing on an activity that could build rapport or communication explaining the need for the leader's misunderstood actions. Of course, education for the leader could be appropriate as well, as noted infra, at p. 17.

4. Follow up to see how things are going for the Complaining/Affected Employee. As important as investigating promptly after learning about alleged misconduct is following up with those impacted by the dispute. A "check in" with the

complaining/affected employees or those who could also be affected should occur regularly, starting within a short time after the dust settles on the investigation and the results thereof.

5. Keep an eye on the alleged wrongdoer. Simply because a complaint cannot be corroborated does not mean it did not occur. Follow up with those around the leader in question to assess whether the "smoke" indicates there is a "fire."

APPENDIX A

TRAINING ISSUES TO CONSIDER.

A. Harassment training not conducted at regular intervals, with no refresher sessions for employees who have received training: Even when an employer provides training, it may not be enough to escape summary judgment. See Diaz v. Swift-Eckrich, Inc., 318 F.3d 796 (Ark. 2003) (denying summary judgment where a question of material fact existed as to the promptness and adequacy of the employee training session because it occurred over a year after the harassment began and was reported).

B. Failure to document supervisors' participation in training: Even if an employer contends that it provided training for all managers, it must, be able to demonstrate who actually attended the training. See Soto v. John Morrell & Co., 285 F. Supp. 2d 1146, 1165 (N.D. Iowa 2003) (denying employer's motion for judgment as a matter of law that company supervisors were trained in regard to sexual harassment because it was ambiguous who attended the training sessions and whether sexual harassment training was actually provided to company supervisors).

C. Training too short: Some courts have suggested that brief training sessions will not be sufficient to comply with the law. A Missouri court granted injunctive relief, requiring the defendant company to revamp its orientation program for all new employees to include two hours of training on sexual harassment. The two hours of sexual harassment training was to be provided by an outside contractor or a "qualified trainer" employed by defendant. In addition, defendant was ordered to also give two hours of sexual harassment, training to all employees who have received less than two hours of sexual harassment training in the last twelve months. Lastly, the defendant was required to provide two-hours of training on sexual harassment to all of its employees each year for three years. Huffman and EEOC v. New Prime, Inc., 2003 WL 24009005, 3 (W.D. Mo. 2003). See also Wagner v. Dillard Dep't Stores, WL 2000 1229648 (M.D.N.C. 2000) (holding employer's posting on a bulletin board and providing a brief training video were insufficient to comply with Title VII requirements), affirmed in part, reversed in part by Wagner v. Dillard Dep't Stores, 17 Fed. Appx. 141 (4th Cir. August 27, 2001). Mancini v. Township of Teaneck, 794 A.2d 185 (2002) (despite the fact that the defendant-employer showed a 20-minute video once a year, the court said that the defendant-employer "just did not get it" and "did nothing to curtail or prevent sexual harassment from occurring"). Dillard Department Stores, Inc. v. Gonzales, 72 S.W.3d 398 (Tex App. 2002) (where general harassment training took ten-minutes of an orientation program lasting several hours, the court said that the defendant-employer did not take reasonable steps to prevent sexual harassment).

D. Timely training: Some courts suggest that the training must have occurred during the relevant time period at issue. Green v. Coach, Inc., 218 F.Supp. 2d 404 (S.D.N.Y. 2002) ("[A] dearth of antidiscrimination training during the time period at issue in this lawsuit could actually lead a jury to infer that [the employer] did not, in fact, make a good faith effort to enforce such policies."); see also David v. Caterpillar, 324 F.3d 851, 865 (7th Cir. 2003) (rejecting the idea that "good deeds taken by the employer after it has made an unlawful employment decision somehow insulate the employer from an award of punitive damages"). If training occurred more than a year after the

alleged harassment began, then the training may not be adequate. See Diaz v. Swift-Eckrish, Inc., 318 F.3d 796 (Ark. 2003).

E. Unqualified trainers may create liability or produce unfavorable discoverable evidence: Notes taken by a diversity trainer regarding managers' racial and gender bias may later be used as evidence of discrimination. See Stender v. Lucky Stores, 803 F.Supp. 259 (N.D. Cal. 1992). Other cases have been brought by participants for discriminatory comments made by trainers.

F. Training insufficient to avoid punitive damages where company managers and executives act contrary to policy and training guidelines: Even where a company has an anti-harassment and discrimination policy and conducts extensive training, evidence that the managers and executives engage in' discriminatory conduct is sufficient to submit the issue of punitive damages to the jury. See Lowery v. Circuit City Stores, Inc., 206 F.3d 431 (4th Cir. 2000); see also EEOC v. WalMart Stores, Inc., 187 F.3d 1241 (10th Cir. 1999); Ogden v. Wax Works, Inc., 214 F.3d 999 (8th Cir. 2000) (holding evidence was sufficient to award punitive damages notwithstanding the fact that employer had a written sexual harassment policy and policy of encouraging employees with concerns to make a complaint because employer minimized the complaints and performed cursory investigation); Valentin v. Municipality of Aguadilla, No. 04-2413 (1st Cir., May 9, 2006) (court of appeals upheld a jury award of over $1 million in damages to a female police officer where the commissioner and mayor failed to investigate plaintiff's complaints of sexual harassment and retaliation).

G. Training insufficient under the circumstances: One court opined that training that may be adequate in on circumstance may be inadequate in others. In Baty, an employee complained of various incidents of harassment and, as a result, the employer conducted two separate forty-five minute post-incident training sessions for management and non-management employees. During the training sessions, the employer provided examples of sexual harassment and showed a video. However, the court said that such a "small amount of training was insufficient to avoid liability, given the severity of the complaints of the employee." Baty v. Willamette Industries Inc., 172 F.3d 1232 (10th Cir. 1999).