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Second Circuit Decision in Sexual Harassment Case Shows Heightened Risk for Health Care Employers

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Health care employers should be aware that a recent holding from the U.S. Court of Appeals for the Second Circuit may indicate that courts and juries are beginning to weigh in on the dramatic sexual harassment developments, such as the #MeToo and #Time'sUp movements addressing workplace harassment, by holding employers to heightened standards, including as to "last chance" agreements. In *MacCluskey v. University of Connecticut Health Center*[1] (*"MacCluskey"*), the Second Circuit upheld a jury verdict awarding plaintiff Mindy MacCluskey $125,000 in damages after finding that she was subject to a hostile work environment where she was repeatedly sexually harassed by a co-worker, dentist Michael Young, who was subject to a last-chance agreement from 10 years earlier. The bottom line in the *MacCluskey* holding is that it is not enough for employers to merely maintain a policy prohibiting sexual harassment, they must also take reasonable care to enforce the policy.

Background of the *MacCluskey* Case

MacCluskey began working as a dental assistant for the University of Connecticut Health Center ("UCHC") in 2008. Both MacCluskey and Young were supervised by Dr. Alexis Gendell, making them co-workers despite MacCluskey's assistant role. In mid-2009, approximately six months after they began working together, Young allegedly began invading MacCluskey's personal space and speaking to her in a manner that she described as "creepy" and "weird." He complimented her "young and beautiful" appearance, noted his surprise to learn that she had had multiple children, and asked personal questions that made her feel uncomfortable, including about her relationship with her children's father and whether "anybody had ever cheated." MacCluskey reported her discomfort to a co-worker and a union representative. When Dr. Gendell,

[1] *MacCluskey v. Univ. of Conn. Health Ctr.*, 17-0807-cv, 2017 U.S. App. LEXIS 26218, at *11 (2d Cir. Dec. 19, 2017).

the supervisor, subsequently spoke to MacCluskey about the situation,[2] MacCluskey responded "there is a situation and I'm all set. It is under control." Dr. Gendell allegedly did not follow up, and UCHC took no further action until February 2011, when the harassment escalated.[3] At that time, MacCluskey reported to her new supervisor that Young had put his hand under her shirt. Young was placed on paid administrative leave during UCHC's investigation, later choosing to resign rather than be fired after the investigation concluded.

MacCluskey sued UCHC on September 25, 2013, claiming gender discrimination and a hostile work environment under Title VII of the Civil Rights Act of 1964. A jury found in her favor on March 30, 2017, awarding her $200,000, which the court later reduced to $125,000.

Distinguishing Facts

On appeal, the Second Circuit upheld the trial court's verdict, finding that UCHC "knew, or in the exercise of reasonable care should have known, about the harassment but failed to take appropriate action." However, several notable elements distinguish this case from many other harassment cases.

Young's History of Harassment and Last-Chance Agreement

The Second Circuit noted the fact that Young had been disciplined by UCHC for sexually harassing another dental assistant in 2000 and was thereafter subject to a last-chance agreement with a termination clause upon "any future instances of unsolicited flirtatious letters or comments to any employee, or any behavior similar to this." Despite this agreement, however, MacCluskey also introduced evidence suggesting that UCHC paid little, if any, attention to the agreement after its inception. Young's subsequent supervisors, including Dr. Gendell, were not informed of the harassment complaint against Young or the last-chance agreement, and, in alleged violation of UCHC's own policy, Young received no extra attention, monitoring, or training as a result of the 2000 complaint and last-chance agreement. Furthermore, several of the basic, mandatory-for-all-employee trainings Young reportedly completed in the years following the 2000 complaint were self-administered, and their completion could not be verified.

Timing of Misconduct and Last-Chance Agreement

Nearly 10 years passed between the initial harassment complaints levied against Young by the other dental assistant and his resignation following the investigation into his

[2] The parties disputed the nature of this conversation: MacCluskey claimed the conversation "took place in the hallway, where others were present, and . . . she felt 'embarrassed' and 'uncomfortable'"; Gendell claimed that she "summoned Ms. MacCluskey to her office, where the conversation was held in private."

[3] Among other behaviors, Young allegedly asked MacCluskey to model lingerie for him, told her that he had helped her get the job and that she "owed him," stood in the doorway silently for sustained periods watching while she worked, and sent a Valentine's Day gift to her (undisclosed) home address. MacCluskey also testified that if she asked or told him to stop, that would at times only make him more persistent in his actions.

conduct toward MacCluskey. No evidence presented at trial suggested that the last-chance agreement was ever terminated. No additional incidents were identified during that time, which may have been due, in part, to the fact that his supervisors seemingly were unaware of the agreement. Despite the 10-year gap, the Second Circuit nonetheless appears to have evaluated UCHC's actions (and inactions) against a heightened standard.

What Health Care Employers Should Do Now

The Second Circuit's holding may indicate a tendency to hold employers to a higher standard in light of the current cultural reckoning with sexual harassment and assault.

Therefore, employers should be:

- ***Vigilant in preventing harassment and documenting misconduct to avoid repeat offenses***

Effective prevention does not necessarily mean canceling the annual holiday party or all other social activities. It does, however, require proactive measures, such as providing appropriate training that employees and management take seriously due to the strong and visible support of the most senior levels of management. Documentation of the training and attendance is also strongly advised.

Additionally, employers should offer and promote ways for employees to report when they experience or witness harassment, mandate and enforce strict documentation procedures, and foster internal communications between managers to maintain the integrity and significance of behavioral issue records.

It almost goes without saying that an employer's sexual harassment policies and complaint procedures must zealously assure that there is no retaliation for bona fide complaints or reports. Employers need not abandon the use of last-chance agreements when they are warranted. Employers must be mindful that the implementation of "zero tolerance" policies may limit their flexibility in being able to offer last-chance agreements. Further, an employer that elects to implement a last-chance agreement must be aware that it might incur a heightened responsibility for monitoring the subject employee and enforcing the terms of the agreement, perhaps indefinitely, if it is not formally terminated at an appropriate point in time if the employee has demonstrated full compliance.

- ***Sensitive to employee complaints and risky situations***

Isolated work environments, like Young and MacCluskey's, where employees are not regularly visited by supervisors, create additional risks for employers. Had UCHC more closely monitored Young, it may have discovered the harassment or more plausibly asserted that the harassment was not discoverable despite UCHC's exercise of "reasonable care." Employers should also be mindful that employees may be reluctant

to make formal reports, particularly when harassment is primarily verbal and the employee has other concerns to consider, such as the need to provide for a family, be close to home for childcare, or for transportation purposes. Supervisors have a duty to report potential misconduct, regardless of whether the employee does not want to pursue a complaint or investigation. Employers should be alert to any signs of harassment and not exclusively rely on formal reports to identify harassment in the workplace, given the present environment.

- ***Prompt in investigating alleged misconduct and redressing substantiated misconduct allegations***

It's not enough to merely maintain a policy prohibiting sexual harassment. As the Second Circuit noted in *MacCluskey*, employers must also take reasonable care to enforce the policy.

- ***Unwilling to overlook or downplay misconduct of "top performers," and intolerant of harassment-correlated behaviors, like bullying***

The #MeToo and #Time'sUp movements have highlighted that some employers may have considered an employee's (monetary) value to the company in the calculus of determining how the employer addresses misbehavior. Employers should clearly demonstrate that workplace behavioral standards apply to all employees equally. Additionally, according to a group of former members of the U.S. Department of Labor's Whistleblower Protection Advisory Committee, employers should ensure that "informal norms do not tacitly condone inappropriate behavior."[4] Preventing workplace sexual or other harassment and bullying must be a top priority for employers in 2018.

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[4] Jonathan Brock, Billie Pirner Garde & Marcia Narine Weldon, Opinion, *What Exactly Is Zero Tolerance on Sexual Harassment?*, Boston Globe, Jan. 2, 2018, https://www.bostonglobe.com/opinion/2018/01/02/what-exactly-zero-tolerance-sexual-harassment/3mKqMjzMDll3UZqgWoXu7N/story.html.

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