Failure is Not an Option

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When it comes to a dealership's legal liability for employment-related problems, the basis of the liability generally falls in two categories – actions the dealership took and those it failed to take. And, when it comes to big dollar jury awards and settlements, a dealership's failure to take immediate and appropriate action generally is a more significant factor than the inappropriate conduct itself. The law recognizes that an employer cannot control the actions of its employees 24/7. By the same token, the law (and juries) also understand that employers can control their responses when they know or should know about a problem. There is little sympathy for an employer who was ware of but still allowed a rogue employee to harm others. In many cases, the failure to act is viewed as the employer's acceptance of the bad conduct and a disregard for employee safety and well-being.

To understand this basic principle, one need only consider the ongoing situation involving General Motors and the damage and harm allegedly caused by faulty ignition switches. Unfortunately, some deaths and damage are linked to these switches. Not surprisingly, the news coverage, congressional hearings and overall criticism have not focused on the switches themselves but rather on GM's alleged failure to fix the problem when it first learned about it. Among other factors, GM's alleged failure to act in a timely and appropriate manner will have a significant financial and reputational impact on GM, especially if the evidence supports the claim that the "fix" could have been easy and cheap.

In the employment law context, most "fixes" are easy and cheap. Two recent cases, while nowhere near as serious as the GM situation in relative terms, illustrate how a proper response influences the outcome. In one case, the EEOC sued a dealership after several *male* employees alleged that for several years, a manager had repeatedly made sexual comments to them, invited them to have sex and engaged horseplay of a sexual nature. The lawsuit also alleged that management not only knew about this conduct but in fact actually encouraged the conduct. Discipline or discharge would have been an easy and cheap fix to this problem but the dealership allegedly did nothing. The dealership's failure to act resulted in a $2 million settlement. If the conduct occurred as alleged, perhaps the dealership did not find it objectionable based on a belief that it was nothing more than boys being boys (locker room stuff) and that such conduct is to be expected in the business. (Ask yourself, how many sales would it take to recover the $2 million?)

On the other end of the spectrum, a dealership prevailed in a case where the evidence established that it took immediate and decisive action upon learning of allegations from a customer that one of

its employees allegedly touched and tried to touch her. The alleged incident occurred when the salesperson was taking the customer home after she dropped off her car for repairs. When the customer reported the incident the following day, the dealership immediately fired the salesperson. The customer sued the dealership for negligent hiring, and mental anguish under a theory that the dealership was responsible for the employee's actions. The court disagreed, finding no evidence that the dealership had any reason to expect that the salesperson would engage in conduct of this nature or that the alleged conduct was within the scope of the salesperson's employment.

Had the dealership not acted so decisively in response to the customer complaint, the outcome likely would have been different. Under the law, a theory of liability exists referred to as "ratification." Under this theory, an employer may be held liable for their employees' actions that fall outside the scope of their employment, if the employer knew or should have known about the conduct and took no steps to stop it. An employer's failure to act in those situations may be seen as its approval or ratification of the inappropriate conduct. Conduct that is clearly outside the scope of someone's duties, such as trying to touch a customer's leg, can become the employer's responsibility if it fails to act when it learns of the inappropriate conduct.

Similarly, had the salesperson had a history of bad conduct of this nature, the outcome likely would have been different. For example, an employee hired with a history of conduct issues exposes the dealership to a claim for negligent hiring if the dealership knew or should have known about the problems at the time of hire and the employee repeats the conduct. Potential claims for negligent supervision and negligent retention also exist if the dealership fails to properly address problems caused by employees. The basic legal theory for each of these claims is that the cause of the harm to employee was the employer's action (hiring a known "bad guy') and inaction (failing to address a bad guy's conduct through appropriate discipline or discharge). In short, if the bad guy did not work there, the harm would not happened.

The news is not all bad. The law offers several "carrots" to employers to encourage them to take appropriate actions before and after a problem arises. Appropriate policies and enforcement of same may eliminate or lessen the availability of punitive damages. The implementation of an effective no harassment policy, manager training on the policy and appropriate enforcement of the policy provide a defense in many harassment cases. Effective and documented investigations by someone trained to conduct investigations of these matters also in important. Hiring procedures and disciplinary policies that screen out or remove problem employees from the work place, even those who are high producers, also decrease the risks of negligence claims.

In almost every situation, the fix was or is relatively easy and inexpensive. Conversely, failing to take appropriate action can be expensive and disruptive and result in harm to others. For this reason, smart employers recognize that failing to respond is not an option.

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