



# Harassment Claims Highlight Risk For Individual Liability

Publication

3.12.18

A widely unknown consequence of employment-related lawsuits is the potential for individual liability on behalf of managers. While managers are not liable under every employment law, and many laws actually protect managers from individual liability, there are a vast number of common and statutory laws which can impart individual liability. Claims asserting individual liability can put managers in a terrible position of having to personally defend themselves in a lawsuit, which could mean paying defense costs and attorneys' fees (and exposing their personal assets, like their home, car and bank accounts).

## Rise in Harassment Allegations

The rise of harassment allegations has increased claims asserting individual liability under common law theories.

It is clear that the litigious tide has turned with regards to sexual harassment claims, resulting from the infamous "Harvey Weinstein Effect," and the rising popularity of the #MeToo movement and Time's Up organization. Employees are emboldened, now more than ever, to speak up and report claims of harassment.

Employers have historically taken solace in the fact that individuals in most jurisdictions cannot be found liable under certain federal employment discrimination laws: Title VII of the Civil Rights Act of 1964, the Americans with Disabilities Act, and the Age Discrimination in Employment Act, or ADEA. The idea is that a supervisor is not personally liable because the supervisor is not the employee's 'employer as defined by the law. Thus, if a manager is sued under one of these laws, the claims against him or her can generally be dismissed.

However, with the rise of harassment allegations (specifically sexual harassment) common law claims are increasingly included in employment-related lawsuits. It is vital for both employers and managers to know that extraneous common law claims can — and most likely will — be brought with claims of harassment. Discrimination and harassment claims asserted against employers, are commonly accompanied by personal tort actions against individual managers or employees.

For example, defamation is a common claim that is brought in conjunction with a discrimination claim, and which can impose individual liability. An example of such a scenario may be a human resources manager telling someone that a former employee was fired for failing a drug test, when actually confusing that former employee for someone else; or even an email circulation regarding

an employee's negative performance evaluation. (Do remember Texas protects employers and their employees from defamation when providing reference information about a job candidate's former employee).

Employers and managers should pay particular attention to common law claims of assault (and battery), false imprisonment and intentional infliction of emotional distress (though in Texas, LIED claims are merely \*gap fillers," unless based on separate facts), which are now typically included in lawsuits alleging harassment, and can result in more serious consequences for the individuals involved. This is in part due to the climate of today (i.e., the #MeToo movement) and in part due to the 2017 Texas Supreme Court's decision in *B.C. v. Steak N Shake Operations Inc.*, which narrowed its previous decision in *Waffle House Inc. v. Williams*[1], which held that common law tort claims predicated on the same or similar facts as a sexual harassment claim are preempted by the Texas Commission on Human Rights Act (TCHRA). In *B.C. v. Steak N Shake Operations Inc.*[2], the Texas Supreme Court ruled that plaintiffs need only bring a sexual assault tort claim — carrying with it no limitations on damages and no administrative exhaustion requirements under the state's anti-discrimination statute — when the gravamen of the complaint is assault as opposed to harassment.

Thus, when a plaintiff can prove the gravamen of his or her claim is assault rather than harassment, the state's anti-discrimination statute will not preempt an assault claim, even if grounded in the same facts that could also constitute a sexual harassment claim under the TCHRA. This unusual decision suggested that employees subjected to a single, severe instance of sexual assault by a "vice principal" may bring a common law claim against the employer; but employees subjected to a pattern of sexual harassment involving sexually suggestive comments and conduct may only bring a claim under the TCHRA (subject to administrative exhaustion requirements and damages caps).

The Steak N Shake decision has allowed Texas plaintiffs to plead common law tort claims as a way to sue individuals directly, rid a damages cap and to also work around the state's anti-discrimination administrative remedies recourse. The #MeToo movement coupled with the Steak N Shake decision has increased the costs and complexity of litigation: employers are now forced to defend both TCHRA sexual harassment claims and common law assault claims at the same time, and face issues unique to these circumstances, such as, who qualifies as a "vice principal" and whether there is a potential conflict of interest between the employer and harasser (and thus, the harasser may be responsible for defending him or herself individually).

### **Federal Statutory Laws that Permit Individual Liability**

While claims of sexual harassment are prevalent right now, these are not the only types of claims that subject individuals to liability. In addition to common law claims, employers and managers should be aware of federal statutory laws which permit individual liability in the employment context, such as: the Fair Labor Standards Act, the Family Medical Leave Act, Section 1981 of the Civil Rights Act, the Uniformed Services Employment and Reemployment Rights Act, the Employee Retirement Income Security Act, and the Immigration Reform and Control Act.

Notably, findings of individual liability under the FMLA and FLSA are becoming more frequent. The FMLA and FLSA define the term "employer" almost identically as any "person" acting directly or indirectly in the interest of an employer with regards to any employee. The 5th Circuit, which covers Texas, Louisiana and Mississippi, recognizes individual liability of a manager under the FMLA, when the manager makes decisions about leave and benefits. Because of these broad definitions, plaintiffs in FMLA suits often sue not only the company itself, but human resources personnel, benefits coordinators and the plaintiff's supervisors.

Likewise, the FLSA specifically permits liability as to the person who establishes an employer's pay policies. Under the FLSA, an employee can make a claim against someone other than his employer based upon a showing that the person exercised sufficient control over the employee's work. The more control a manager has over an employment relationship, the more likely it may be that the manager will be held individually liable under the FLSA. Thus, a manager who has an important role in making personnel decisions or establishing pay policies could be held personally responsible under the FLSA.

But not all managers are subject to liability under the FLSA — a finding of individual liability is determined on a case-by-case basis. The key consideration in determining individual liability under the FLSA is whether the individual exerted sufficient operational control over significant aspects of the employer's employment policies. Many times, a plaintiff will name multiple individuals in his or her FLSA lawsuit. When this occurs, it may be worthwhile for the employer to make the argument that suing a group of individuals together, in and of itself, renders it impossible for any one of the individuals to separately exercise sufficient operational control over the employment policies. This argument may be particularly worthwhile when a plaintiff argues that the individuals collectively engaged in wrongdoing.

### **Best Practice: Conduct an Analysis Early, When Claims Against Individuals are Asserted**

When defending a lawsuit that alleges claims against an individual, a quick review prior to answering the suit may allow for a swift motion to dismiss on behalf of a named individual (e.g. stand-alone discrimination claim). Since determining individual liability is generally a fact-based inquiry when dealing with both common and federal statutory laws, when an employer is first served, it should analyze the named individual's role and decision-making authority over the plaintiff's employment with respect to the claims the plaintiff asserted. Employers should also take into consideration the benefits and risks of co-defending a lawsuit with named individuals, especially when more serious common law tort claims, such as assault, are alleged.

*The opinions expressed are those of the author(s) and do not necessarily reflect the views of the firm, its clients, or Portfolio Media Inc., or any of its or their respective affiliates. This article is for general information purposes and is not intended to be and should not be taken as legal advice.*

This article originally appeared in *Law360* on March 12, 2018.

