Museum Personnel Practices and the Use of Arbitration
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Introduction

A number of years ago, the administrators of a large Midwestern museum received complaints from employees claiming that they had been sexually harassed by a supervisor. The allegations were sufficiently serious that the director of the museum contacted an attorney immediately and commenced an investigation. This paper will review the investigation, the discipline and the subsequent arbitration.

The purpose of the paper is twofold: First, the authors wish to point out that, contrary to many people's assumption that a museum would be free of such behavior, such illegal activity can and does occur at any type of museum at any time. Second, the authors wish to point out that the arbitration of the employment dispute in this case was an excellent alternative to potentially costly and prolonged litigation and should be considered by other museums for the prudent management of employment disputes when appropriate.

It is especially important for museum administrators to be vigilant in the management of their employees as well as their volunteers, and diligent in encouraging boards to update the employment and management policies that govern those employees and volunteers. American graduate and undergraduate programs in museum practice vary greatly to the degree to which best practices in non-profit administration and personnel management are included in their curricula. Furthermore, many museum administrators are well trained in a field of academic our curatorial specialty, but many are frequently advanced into their positions through promotion and "learn on the job" while having received little or no formal education or ongoing professional development training in museum administration. The increasing complexity of non-profit management and law coupled with the rising standards within the field demand that museum and gallery administrators become more cognizant of their responsibilities under the law, and also of the range of management strategies that can be employed in exercising due diligence.

The facts of this case have been changed to some extent so that current and former employees cannot be identified. The facts have also been changed to abbreviate the material regarding the termination appeal process and to reflect the typical arbitration process. The basic allegations regarding the sexual harassment and the arbitrator's decision have not been amended.

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The Facts

Two museum employees reported to the museum's administration that they were having problems with the same supervisor. The employees were both male and felt very uncomfortable talking about the situation. Their claims were similar. One employee said he was bending over to pick something up and the supervisor grabbed his genitals. He said he was very surprised and he told the supervisor, "I'm not like that. Please stop doing that." The employee claimed that the touching continued but only when he was alone with the supervisor. The employee said the supervisor told him that he was simply kidding around but the employee reported that replied that he did not enjoy the supervisor's sense of humor.

The other employee said he had been similarly touched by the supervisor. He also claimed that the supervisor had taken a broom handle and attempted to place it between his buttocks. The employee said that when he jumped in response to feeling the broom handle, the supervisor said, "I'm just checking your oil." This employee claimed that he repeatedly told the supervisor to stop touching him but to no avail. Both employees claimed to live in dread of the supervisor walking into a room when they were alone for fear of what he might do next.

As stated in the introduction, the museum's director asked an attorney to conduct an immediate investigation. The director was perplexed because the supervisor was considered a good employee. Upon questioning, he told the director that the employees' claims were false. The attorney independently questioned the two employees involved and the supervisor. The supervisor continued to refute the employees' accusations but the employees were steadfast in their claims. The two employees only knew each other in passing and never spoke to one another about their allegations.

Sexual Harassment Law

Types of harassment

Sexual harassment is a violation of Title VII of the Federal Civil Rights Act.[2] The law states that employers may not discriminate on the basis of sex and sexual harassment has been deemed a form of sex discrimination.[3] The courts have determined that there are two kinds of sexual harassment: quid pro quo harassment and hostile environment harassment. Quid pro quo literally means "this for that." This type of harassment occurs when, for example, a supervisor demands a sexual act from a subordinate in exchange for a promotion or a pay raise.

Hostile environment harassment occurs when a supervisor or a co-employee or even a volunteer or non-employee use the sex of an employee as a means of harassing the

[2] Title VII of the Civil Rights Act of 1964, (Pub. L. 88-352) 42 U.S.C.A. Section 2000e.
[3] Meritor Savings v Vinson, 477 U.S. 57 (1986).

employee. For instance, if a supervisor or co-employees were repeatedly making lewd comments about an employee in the employee's presence the employee may have grounds for a hostile environment claim. This is especially true if the employee reported the problem to her employer and the employer failed to take remedial action.[4]

Although many persons think that sexual harassment only involves harassment by someone of the opposite sex, the Supreme Court has determined that harassment of someone of the same sex is also a violation of Title VII. In the case of ***Oncale v Sundowner***,[5] a group of male employees on an off-shore oil platform had sexually assaulted another male employee and threatened him with rape. The Supreme Court held that such activity constituted hostile environment harassment.

The courts, when deciding whether or not certain conduct constitutes hostile environment harassment use the reasonable person standard. The Supreme Court has opined that, "So long as the environment would reasonably be perceived and is perceived, as hostile or abusive, there is no need for it also to be psychologically injurious."[6] The Supreme Court has also stated that it will look at the totality of circumstances and the following factors:

> "These (factors) may include the frequency of the discriminatory conduct; its severity; whether it is physically threatening or humiliating, or a mere offensive utterance; and whether it unreasonably interferes with an employee's work performance. The effect on the employee's psychological well-being is, of course, relevant to determining whether the plaintiff actually found the environment abusive. But while psychological harm, like any other relevant factor, may be taken into account, no single factor is required."[7]

Museum Liability

The courts have determined that it is the employer, not the supervisor or co-employees, who is liable for sexual harassment under Title VII.[8] Consequently, in quid pro quo harassment claims, if an employee is able to prove that her supervisor made her have sex with him in order to receive a promotion, it is the employer, not the supervisor, who is strictly liable for damages resulting from the harassment.[9] While employers will not

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[4] Faragher v City of Boca Raton, 118 S. Ct. 2275 (1998).
[5] Oncale v Sundowner Offshore Services, Inc, 523 U.S. 75 (1998).
[6] Harris v Forklift Systems Inc., 510 U.S. 17, 22 (1993).
[7] Id at 23.
[8] Horney v Westfield Gage Company, 95 F. Supp. 2d. 29 (2003). See also: Tammi J. Lees, "The Individual vs. The Employer: Who Should Be Held Liable Under Employment Discrimination Law?" 54 Case W. Res. 861 (2004).
[9] Although the employer is liable for sexual harassment claims in violation of Title VII this does not preclude the victim from suing the supervisor or co-employee in tort for claims such as intentional infliction of emotional distress, or invasion of privacy or defamation. In instances where employees engage in behavior that constitutes criminal sexual conduct they may also be criminally charged for their actions.

escape liability for quid pro quo harassment they may successfully defend a hostile environment claim involving a supervisor if they are able to establish two things: First, "That (they) exercised reasonable care to prevent and correct promptly any sexually harassing behavior; and second, that the employee unreasonably failed to take advantage of any preventive or corrective opportunities provided by the employer."[10] Employers will be able to escape liability for harassment by co-employees or non employees by proving that they didn't know of the harassment nor should they have known about the harassment.[11]

Application of law to facts in case study

The museum in question had adopted a sexual harassment policy prior to the harassed employees reporting the harassment to the museum director. The policy defined the two types of harassment and it stated clearly that employees would be disciplined, up to and including discharge, if they were found guilty of harassment. The policy gave several examples of prohibited behavior and it provided more than one avenue of reporting so that the employees could complain about an offending supervisor when necessary. The museum required all of its employees to attend a training session and the employees were required to sign a statement indicating that they had attended the training.[12] When the harassment was reported to the director of the museum, an immediate investigation was conducted by an attorney.

The employees did not claim that the supervisor had required sexual favors in order to keep their jobs (quid pro quo harassment) but rather they were afraid to be alone with him because of the prior inappropriate touching. This is a classic example of hostile environment harassment and the museum's response to the complaint is exactly what the courts now require for an employer to escape liability. The museum had already made sure that all of its employees knew about the sexual harassment policy. When the employees reported the harassment the museum conducted a timely investigation and subsequently disciplined (terminated) the harasser.

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[10] Faragher, supra at note 4, page 2293.
[11] Burlington Industries v Ellerth, 118 S. Ct. 2257, 2262 (1998).
[12] The sign in sheet at the training session was required so that employees could not later claim ignorance of the policy at a disciplinary hearing. It may also serve as proof of the measures the museum took to prohibit sexual harassment.

Discipline and Arbitration

About the same time that the museum adopted the sexual harassment policy its governing board also adopted a personnel policy, printed and bound into a manual, referencing all forms of employment at the museum including its use of volunteers. The manual stated that permanent employees, such as the supervisor in question, were subject to disciplinary action, up to and including discharge for just cause. This means that the museum must have good and sufficient reasons for terminating an employee. As mentioned previously, the sexual harassment policy stated that an employee could be terminated for harassment. The personnel manual also stated that employees who participated in unlawful discrimination against another employee would be subject to disciplinary action up to and including discharge.

The museum's director determined that he had just cause to terminate the supervisor for three reasons: First, the victims were credible.[13] Second, the supervisor had been warned in the past that sexual harassment would not be tolerated when he had previously told an off-color joke in the presence of an employee who later filed a complaint. Third, the supervisor had received sexual harassment training and he was conversant with the personnel manual.

After the supervisor was terminated, he was notified of his right to arbitration. The personnel manual stated that a discharged employee could appeal his/her termination to an arbitrator. Arbitration, in this instance, is an informal hearing before a third party neutral (arbitrator) who hears all of the facts surrounding the case and then renders a decision about whether or not the museum had just cause to terminate the employee.[14] The museum had decided to provide for arbitration in its personnel manual as an alternative to costly litigation.[15] Prior to this case the arbitration procedure had not yet been invoked by an employee.

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[13] The museum director found the witnesses credible in this case but what if the director was uncertain about who was telling the truth? The best course of action is to conduct as professional and thorough an investigation as possible and make a determination based on the findings of the investigation. If an employer is uncertain of who is telling the truth then chances are good that an arbitrator would not be able to find just cause for termination. It should be noted that the courts are cognizant of the difficult position employers are placed in when investigating sexual harassment complaints. The courts have found employers not liable for torts claims such as defamation and intentional infliction of emotional distress that are filed by the accused if the investigations were conducted properly. See Paulson v Ford Motor Company, 612 N.W. 2d 450(200). Also see Amanda Jarrelles Mullins and Richard A. Bales, "Employer Liability for Emotional Distress Arising from Investigation of a Title VII Harassment Complaint," 23 Quinnipiac L. Rev. 1027 (2005).

[14] Although the museum personnel manual did not require that employees use the arbitration process for resolution of employment disputes the Supreme Court has decided that employers may require employees to use arbitration rather than litigation if the arbitration process meets procedural and substantive due process requirements. See: Circuit City Stores, Inc. v Adams, 532 U.S. 105 (2001).

[15] "The cost of defending an employment case in court through trial often exceeds $200,000.00. The average cost of employment arbitration is $35,000.00." Bromberg, Todd A., "Has Employment Arbitration Finally Come of Age?" The Metropolitan Corporate Counsel, Inc., National Edition, Page 9 (April 2005).

The arbitration procedure set out in the manual provided for the following: 1. the discharged employee and the museum director would mutually select a neutral arbitrator. 2. The employee had the right to have a representative present at the arbitration hearing. 3. The employee would pay only $125.00 for the arbitration process. The employer would pay all other arbitrator fees. 4. The arbitration would be conducted in accordance with the rules of the American Arbitration Association.[16] 5. The employee would be responsible for all costs associated with presenting his case (i.e., his attorney fees).

Two other requirements, of great importance, set out in the manual addressed the power of the arbitrator. First, the arbitrator only had the authority to interpret the terms set out in the personnel manual. Second, the decision of the arbitrator was final and binding on both parties. Consequently, if the arbitrator decided that the supervisor was not disciplined for just cause he could overturn the decision of the museum director and put the supervisor back to work.[17]

The Arbitration Process

The Pre-Arbitration Meeting

The supervisor retained an attorney to represent him at the arbitration hearing. The attorney met with counsel for the museum at a pre-arbitration meeting to discuss possible settlement, arbitrator selection, a list of witnesses, and the exchange of evidence that would be used at arbitration. Museum counsel offered to allow the supervisor to resign but this offer was declined. Museum counsel then offered a list of arbitrators who had extensive experience with termination cases.[18] After reviewing the resumes of each arbitrator the attorneys were able to mutually select an arbitrator.

The two attorneys then reviewed the list of witnesses that the museum planned to have testify before the arbitrator. The list included the names of only three persons: the two employees who had alleged sexual harassment and the museum director. The attorney for the supervisor indicated that she might have the supervisor testify. The museum counsel then gave the supervisor's attorney a list of the evidence that would be presented at arbitration by the museum. The list included the following: 1. the personnel manual. 2. The sexual harassment policy. 3. The sign in sheet for sexual harassment training

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[16] See the web site for the American Arbitration Association at http://www.adr.org to learn more about the American Arbitration Association, its rules for arbitration hearings and its dispute resolution services. (Site last visited on August 17, 2005).

[17] There have been few lower court cases that have dealt with the issue of judicial review of non union employment arbitration decisions. Usually the arbitrator's opinion is upheld by the courts but the Supreme Court has not articulated a standard of review for employment arbitration opinions. For more information on the subject see: Laurie Leader and Melissa Burger, "Let's Get a Vision: Drafting Effective Arbitration Agreements In Employment and Effecting Other Safeguards To Insure Equal Access To Justice." 8 Empl. Rts. and Employ. Pol'y J. 87 (2004).

[18] For more information on how to select an arbitrator see: Swift, Sanford and Jones-Rikkers, "Legal and Procedural Strategies for Employees Utilizing Arbitration for Statutory Disputes." Employee Responsibilities and Rights Journal, Vol. 16, No. 1, (March 2004).

which included the supervisor's signature. 4. The letter of warning given to the supervisor for the previous telling of an inappropriate joke on the work site. 5. The letter of discharge given to the supervisor which summarized, in detail, the reasons for the supervisor's termination.

The supervisor's attorney asked for a copy of the supervisor's personnel file but she did not provide a list of the evidence she intended to introduce at arbitration. She did agree however to provide such a list at least one week prior to the arbitration hearing.

Preparing the Witnesses

Preparation of the witnesses proved to be difficult. The two men were embarrassed about what had happened to them and they did not want to tell the facts to a complete stranger. They also continued to fear retribution by the supervisor. Although they never wavered in their retelling of the facts, they were very distressed during preparatory meetings with museum counsel and worried about becoming emotional when testifying before the arbitrator. The employees requested that only necessary persons be present during the hearing and this requested was granted. The employees were also assured that retaliation or threats of retaliation by the supervisor would not be tolerated. [19] The employees calmed down considerably once these assurances were made.

Hearing Day

At the arbitration hearing, the supervisor's attorney stated that the supervisor would not be present for the hearing because he was ill. She indicated that the supervisor wanted the hearing to proceed without him. The attorneys then gave the arbitrator all of the items mentioned above in the museum's list of evidence. The supervisor's attorney had no additional evidence to submit. Both attorneys gave a brief opening statement. The museum counsel outlined what the employees had alleged about their supervisor and the reasons for termination. The supervisor's attorney claimed the employees were not telling the truth and that even if they were, the termination was unjust.

During direct examination by museum counsel, the two employees testified in great detail about the harassment they endured and the emotional impact the harassment caused in their lives. The employees had no problems answering questions posed by the supervisor's attorney on cross examination. During direct examination the museum director explained his reasons for terminating the supervisor. On cross examination the supervisor's attorney questioned the museum director about why he would believe the employees over her client, and the fairness of the discipline. The museum director explained that the museum had conducted an extensive investigation and found the employees' claims to be credible. He went on to explain that the termination was

[19] Although the museum did not transfer employees in this case an employer in another instance may find it necessary to reassign an employee to a different supervisor during a sexual harassment investigation to avoid further harassment or retaliatory action by the supervisor who is under investigation.

reasonable because he had previously warned the supervisor about sexual harassment, the supervisor had been specifically trained about sexual harassment, and inappropriate touching of employees would never be tolerated at the museum.

Arbitrator's Decision

The arbitrator, like the museum director, found the testimony of the two employees to be credible. He said that the conduct of the supervisor was highly inappropriate, offensive and in clear violation of museum rules. The arbitrator found it particularly offensive that the supervisor had been told repeatedly by the employees to stop his harassing behavior yet the supervisor failed to heed their requests. The arbitrator concluded his opinion by stating that he thought termination was a fair form of discipline considering the facts of the case.

Arbitration Costs

It is interesting to note that at the beginning of the arbitration, the arbitrator asked for assurances that he would be paid. He indicated that his one concern with non union employment arbitration cases was payment. He stated that he had been involved in cases where the arbitration agreement provided that the loser paid for the arbitrator and he had found that terminated employees sometimes did not pay because they were without the resources to pay once they had lost their jobs. (This is typically not the case if the employee has union representation because the union, not the employee, pays the bill.) The museum counsel assured the arbitrator that the museum would be responsible for paying his fees regardless of the outcome of the case. Counsel informed the arbitrator that the museum handbook required the employee to pay the museum $125.00 at the time he requested the arbitration and the museum was then responsible for the remainder of the arbitrator's expenses regardless of the outcome of the case.

Although the authors were unable to find records of the billing by the arbitrator, the following information was recollected. The authors ask the arbitrator forgiveness if the information is not completely accurate. The fees for the arbitrator were approximately $700.00 per day. The arbitration lasted about three hours and the arbitrator had about five hours of travel time so he billed the museum for one full day. He also billed the museum for writing the decision which took two days. So the museum paid the arbitrator for three days ($2,100.00) plus travel costs (approximately $100.00).

The arbitrator's written decision was received approximately 30 days after the hearing and it was never challenged in court by the supervisor. The time it took to resolve this matter from the date of termination to the date of the arbitration decision was about one year. This is not a bad turn around time considering the average civil case is pending for over two years in many courts.[20]

[20] Supra, at note 15.

Conclusion

The museum in this case was fortunate for two reasons: First, it had proactively adopted a comprehensive sexual harassment policy and trained its employees about the policy. Second, it had adopted a personnel policy with an arbitration provision so the museum was able to avoid costly and prolonged litigation.

Museums are labor intensive organizations so it is imperative that they monitor and evaluate their employees closely and update their personnel practices on a regular basis in order to avoid liability for the misdeeds of their employees. It is incumbent upon museum administrators at institutions of all sizes to be aware of current issues in the changing and growing field of non profit administration and to maintain a program of ongoing professional education. One valuable resource for museum personnel practices is The American Association of Museums (AAM). The AAM is the principal body that accredits American museums, represents the industry in Washington, D.C. and sets and monitors the standards for the best practices in the museum field. While it is one of many museum-related professional organizations, it is the only one that represents a national range of museums of all types and disciplines (i.e. art museums, science centers, historic houses, zoos, botanical gardens and arboreta).[21] The accreditation program of the AAM is the only program that authenticates and certifies compliance with best practices across the nation.

The AAM has an excellent web site.[22] The Association's Information Center maintains a vast, easy access on-line library of best practices for use by members on the web site. In addition, it publishes, and distributes publications in the area of law as it affects museums. The AAM's on line bookstore is currently offering helpful texts ranging from The Employer's Handbook: A Guide to Personnel Practices and Policies for Museums[23] and the AAM Guide to Writing an Employee Handbook[24] to Museum Law: A Guide for Officers, Directors and Counsel.[25] The Association administers the Museum Assessment Program that provides museum with a peer-review process of analysis, including self study, and in depth consultancies in several areas including general practices, personnel practices, governance and public service.[26] Its Professional Education Program offers

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[21] 2006 is the Association's 100th anniversary.

[22] The American Association of Museums website may be found at: http://aam-us.org (Last visited on August 27, 2005).

[23] Charlene Perkins Cutler, Naomi Joshi, and Kathryn P Veins, The Employer's Handbook, A Guide to Personnel Practices and Policies for Museums, 2nd Edition, The New England Museum Associating, (2004).

[24] Alexandra Marmion Roosa and Paul L. Chin, The AAM Guide To Writing An Employee Handbook, American Association of Museums (2002).

[25] Marilyn E. Phelan , Museum Law, A Guide For Officers, Directors and Counsel, 2nd Edition, Kalos Kapp Press (2001).

[26] The Nonprofit Good Practice Guide, located at http://www.nonprofitbasics.org, and maintained by the Dorothy A. Johnson Center for Philanthropy and Nonprofit Leadership at Michigan's Grand Valley State University is another excellent on-line guide to literature and resources related to best practices in managing non-profit organizations, including museums. (Site last visited August 30, 2005).

seminars and workshops around the nation in ongoing professional education that keep participants abreast with best practices in the field ranging from collections management and risk assessment to legal and ethical problems in the administration of museums.