

THE BILL O'REILLY TEACHING FACTOR


Lessons Learned from Fox News' Employment Quagmire

By: Donald H. Scharg, Member, Workplace Law Practice Group

By now, the entire world knows that Bill O'Reilly has been separated from Fox News because of sex harassment allegations against him. According to newspaper reports, O'Reilly has paid \$13 million to settle five cases alleging harassment. There are also reports of more claims against him. Whether you love him or hate him, Bill O'Reilly's departure from Fox News provides lessons for all employers.

1. Sexual Harassment Claims Are Alive And Costly.

Thirty-one years after the Supreme Court recognized sex harassment as a violation of Title VII of the Civil Rights Act, allegations of workplace sexual harassment still permeate the workplace. A sex harassment hostile workplace claim must be based on substantial and pervasive conduct or communication. Generally, unless the action is severe, one, two, and even three improper acts are not enough to support a harassment claim. Do five harassment settlements by O'Reilly mean many more separate improper acts were alleged?



The harassment claims against O'Reilly raise another factor to consider. It is not just large companies like Fox News who are subject to sexual harassment claims; small companies can be just as vulnerable.

Employers cannot simply look the other way when presented with reports of sex harassment. Inaction is not an option.


2. The Importance Of Taking Prompt Action.

Although O'Reilly had five previous sexual harassment claims against him, which he settled, there is no indication that Fox News, which presumably had knowledge of the allegations, initiated an investigation or took any other action. Employer inaction can lead to liability. Employers cannot simply look the other way when presented with reports of sex harassment. Inaction is not an option. If a claim of sex harassment is made, the employer must initiate an immediate investigation. Failure to initiate an investigation will lead to liability for the employer if the harassment allegations are confirmed.

3. The Employer's Duty When Inappropriate Conduct Is Confirmed

To us outsiders, it does not appear that Fox News took action to change the workplace in response to the five previously settled claims. Settling claims is not enough. An employer is liable for an employee's harassment if it "tolerated or condoned the [unwelcome, substantial and pervasive conduct or communication] or knew or should have known of the alleged conduct and failed to take prompt remedial action."

Employers cannot make any guarantee against the presence of inappropriate conduct in the workplace and employers are not expected to make that guarantee. However, employers are expected to take appropriate action after an investigation if it is determined that inappropriate conduct occurred. An appropriate response includes prompt remedial action designed to prevent reoccurrence of the inappropriate conduct. Action less than termination of the harassing employee may be appropriate if the lesser action is



designed to prevent a reoccurrence. If the employer conducts an adequate investigation and takes prompt action to try to prevent reoccurrence, it should avoid liability for sex harassment. There are, however, several exceptions. First, the employer is automatically liable where a supervisor has taken a tangible job action (e.g., termination, demotion, transfer) against an employee in a harassment situation. Second, some courts have held that an employer may be liable for a single incident of severe misconduct (e.g., a sexual assault).

1. No One Is Too Big To Fall.

O'Reilly was at the top of his profession. According to news reports, O'Reilly generated over \$170 million in revenue for Fox News. Many companies have “star” performers who are protected and coddled. But, “star” status does not insulate anyone from harassment claims. Nor does customer status provide protection. Sexual harassment laws cover everyone from the president of the company to the custodian, to vendors and customers. Even harassment allegations against your best customer must be addressed. Appropriate action must be taken.

6. Make Sure You Have a Published Policy Against Harassment.

Employers can defend against harassment claims by having an effective published policy against harassment with an effective complaint mechanism, encouraging reporting. The policy should provide a reporting mechanism to Human Resources and various company officials so that the complaining employee is not required to report the harassment to the alleged harasser if that individual is the employee's supervisor. An effective policy will help reduce the potential for employer liability.

But just having a published non-harassment policy, no matter how expertly written, is not enough. Dissemination of the policy may not be enough. The policy must be utilized when allegations of improper conduct arise.

The real protection against harassment claims starts with a proactive corporate culture. Company management must notify employees, by word and deed, that harassment is not

tolerated. Many employers provide periodic non-harassment training, which also helps to ensure that the policy is utilized when allegations of improper conduct arise.

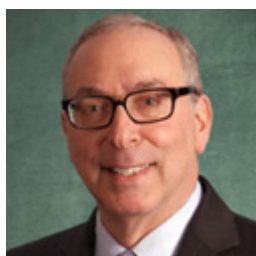
Sex harassment continues to be an issue in some workplaces. We must all learn from the Bill O'Reilly saga that employers must be vigilant in protecting the workplace. In addition, everything written about sex harassment applies equally to harassment claimed on the basis of race, color, religion, national origin, age, disability, genetic

information, and other legally protected status.

We routinely work with employers on drafting harassment policies, providing

The real protection against harassment claims starts with a proactive corporate culture.

training, and responding to harassment allegations. If you need assistance, call a member of Bodman's Workplace Law Practice Group.



About the Author. *Donald H. Scharg has more than 30 years of experience in the areas of labor law, construction labor law, employment discrimination, and employee relations. He has represented employers in collective bargaining contract arbitrations, 312 arbitrations, wrongful discharge, and discrimination claims. Don has conducted many seminars for management on employment discrimination, sexual harassment, wrongful discharge, family leave, and other topics. He also regularly contributes articles to professional and business publications regarding employment law issues.*

Bodman's Workplace Law Practice Group:

Maureen Rouse-Ayoub

Co-chair, Workplace Law
313.392.1058
mrouse-ayoub@bodmanlaw.com

Aaron D. Graves

Co-chair, Workplace Law
313.392.1075
agraves@bodmanlaw.com

Rhonda H. Armstrong

248.743.6048
rarmstrong@bodmanlaw.com

John C. Cashen

248.743.6077
jcashen@bodmanlaw.com

Steven J. Fishman

248.743.6070
sfishman@bodmanlaw.com

Jason E. LaBelle

313.393.7578
jlabelle@bodmanlaw.com

Danielle C. Lester

248.743.6078
dlester@bodmanlaw.com

Christopher P. Mazzoli

248.743.6066
cmazzoli@bodmanlaw.com

Karen L. Piper

248.743.6025
kpiper@bodmanlaw.com

Charles M. Russman

248.743.6039
crussman@bodmanlaw.com

Donald H. Scharg

248.743.6024
dscharg@bodmanlaw.com

David B. Walters

248.743.6052
dwalters@bodmanlaw.com