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The Customer Isn't Always Right: Why and How Employers Should Address Third-Party Discrimination in the Workplace

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In pursuit of customer satisfaction, employers may be inclined to take a hands-off approach when customers or other third parties exhibit discriminatory conduct towards their employees. This can be a costly mistake. Courts have repeatedly held employers responsible for the discriminatory wrongdoing of third parties, even when the employer itself claimed to be free of bias. An employer's obligation to take prompt, reasonable remedial action is designed to address and respond to complaints of harassment, even if the alleged harasser is not an employee of the company.

The danger of not addressing third party harassment is demonstrated by a recent lawsuit filed in the United States District Court for Vermont by the Equal Employment Opportunity Commission ("EEOC").¹ On September 6, 2022, the EEOC sued 98 Starr Road Operating Co., LLC d/b/a Elderwood at Burlington, a long-term care facility located in Burlington, Vermont. The EEOC claims that patients repeatedly told African-American employees to "go back to Africa," followed them around the facility to racially berate them, and physically assaulted them because of their race. It is alleged that management's response to the employee complaints was that the residents of the facility could "say what they want" and that the employees should be used to being the target of racial slurs because they were "from the South."

The issue of third-party discrimination/harassment is a repeated area of concern for the EEOC. In 2013, the Hurley Medical Center ("Hurley") in Michigan entered into an agreement with the EEOC to settle a race discrimination charge, which alleged that Hurley complied with a father's request not to let any African-American nurses treat his infant.² Hurley agreed to pay approximately \$200,000 and entered into a five-year agreement with the EEOC, which provided that the EEOC would conduct non-discrimination training for all Hurley staff and evaluate their progress.

Employers can reduce potential liability for third-party discrimination/harassment claims by common sense measures:

- Employers should not acquiesce to a client's possibly discriminatory request. Courts have repeatedly held that customer preference is not a sufficient justification for discrimination.
- Employers should review their policies to make sure that a well-defined complaint procedure exists. The policy should provide clear instructions to employees regarding when, where, and how to report their concerns. The complaint procedure should also indicate that it applies to the conduct of non-employees, as well as employees.
- Ensure that all complaints, including complaints of discrimination or harassment by third parties are fully investigated and, if warranted, that the employer takes prompt remedial action that is reasonable under the circumstances.

Contact any member of **Bodman's Workplace Law Group** if you need assistance with review or drafting non-discrimination/harassment policies or for advice on investigating or responding to complaints. Bodman cannot respond to your questions or receive information from you without first clearing potential conflicts with other clients. Thank you for your patience and understanding.

¹ *EEOC v. 98 Starr Road Operating Co.*, D. Vt, No. 2:22-cv-00168.

² Hurley Medical Center Agrees to Settle EEOC Race Discrimination Case, U.S. Equal Employment Opportunity Commission (Sept. 26, 2013), <https://www.eeoc.gov/newsroom/hurley-medical-center-agrees-settle-eeoc-race-discrimination-case>.

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