

How To Minimize Legal Risk When Firing Alleged Harassers

By **Braden Campbell**

Law360 (March 16, 2018, 8:19 PM EDT) -- Conductor James Levine's decision to sue the New York Metropolitan Opera on Thursday after he was fired over allegations he molested young musicians shows employers not only run the risk of being sued when they ignore allegations of workers' misconduct, but when they take action as well.

Because the law obligates employers to investigate and take action to end harassment and assault, workers like Levine will generally have a tough time proving they were wronged, attorneys say. But they say there are a handful of steps employers can and should take to reduce their potential exposure when they decide to fire someone accused of harassment or worse.

"There's nothing in the law that requires, if you're an employee at-will, that you get due process," said Anderson Kill PC attorney Dona Kahn. "But it's incumbent, I believe, on companies and universities and institutions, not to rush to judgment."

Investigate Thoroughly

Levine's suit accuses the opera and General Manager Peter Gelb of conducting a "so-called investigation" with the intention not of finding out whether the accusations against him were credible, but of forcing him out over his age, his Parkinson's disease and creative differences between him and Gelb.

Levine's attorney, Elkan Abramowitz of Morvillo Abramowitz Grand Iason & Anello PC, said the complaint illustrates how not to investigate harassment allegations. He called the investigation "McCarthyite" because the Met wouldn't tell Levine who his accusers were or give him a chance to rebut their claims. The Met said Thursday that Levine demanded "impossible" terms for his interview, and that it promised his accusers anonymity.

Attorneys say the law doesn't necessarily require employers to hear out workers accused of misconduct, but they increase their legal risks when they don't investigate thoroughly.

"The biggest mistake an employer can make is accepting an allegation of harassment and acting upon that to discharge an accused harasser, without conducting a sufficient investigation to determine the truth or falsity of the allegations," said Dan O'Toole, chair of Armstrong Teasdale LLP's labor and employment practice.

A good investigation starts with interviewing the accuser, followed by anyone who witnessed the alleged abuse or misconduct, O'Toole said. If witness accounts of an alleged incident don't support the accuser, and the employer didn't interview them, the employer may be in trouble, he said.

"In that type of situation, the employee who is discharged will have a much easier road to show that the employer either knew the allegation of harassment to be false or showed a reckless disregard for whether the statement was false," which could lead to liability, he said.

Kahn, whose practice involves investigating workplace harassment as a third party, recommends employers hire outside counsel to conduct investigations rather than handle them in-house.

"You're exposing yourself to be deemed to have been biased toward the company," Kahn said. "It's prudent to come to somebody like me."

Kahn added that employers increase their legal risk by promising accusers anonymity, as the Met says it did. Otherwise "it is difficult to defend against such claims with more than a general denial," she said.

Mind the Contract

Most workers in America are at-will, meaning their employers can fire them for any reason not against the law, such as bias based on race, sex or age. But separating from alleged harassers is much more complicated when they're covered by contracts limiting the reasons they can be fired, as Levine claims is the case for him.

Executives and even some rank-and-file workers, if they're part of unions, may be protected by contracts. In most cases, employers will negotiate a provision that lets them fire workers "for cause," such as misconduct or behavior that embarrasses the company.

Levine says his contract lacks a clause that would let the Met fire him for misconduct or even suspend him while it investigates a complaint, claiming the opera breached their agreement by putting him on ice in December and letting him go earlier this week with dozens of performances left on his deal.

Employers should review accused workers' contracts before firing them, but ending harassment should be their primary goal, Michael Best & Friedrich LLP partner Sarah Flotte said.

"You can't let your focus on the contract overcome the need to conduct a prompt and thorough investigation and deal with harassment in the workplace," Flotte said. She added that employers may still defend against contract claims without a conduct clause, such as by claiming a fired worker breached an implied term of their deal.

Stick to the Facts

Levine also alleges Gelb defamed him when he told The New York Times — which reported the allegations against Levine in December — that the allegations were "a tragedy for anyone whose life has been affected." This phrasing suggests Gelb was confirming Levine's guilt before investigating, Levine says.

Defamation claims are common in illegal firing suits, but they're "particularly difficult for an accused employee to prevail on," O'Toole said.

"A defamation claim requires the plaintiff — here, Levine — to prove that the defendant published false statements about him with knowledge of the falsity of the statement," he said.

Employers have a few defenses available on defamation claims, the most powerful of which is truth, attorneys say. If an employer can prove a worker harassed another, then the employer is in the clear. Similarly, because defamation claims hinge on the truth or falsity of a statement, an employer can shield itself by showing its statements about a worker were opinion.

"A factual statement can't be defamatory, and if something's opinion, meaning it's not objectively verifiable ... in general, that is not going to lay the basis for a defamation claim because it's not a statement of fact," Flotte said.

--Editing by Katherine Rautenberg and Kelly Duncan.