

## **Employer's Response to Discriminatory Conduct is Critical to Avoiding Punitive Damages**

**By Brian J. Mullin, Esq.**

In a recent decision, the Massachusetts Supreme Judicial Court ("SJC") highlighted the critical need for employers to ensure that all reports of discriminatory conduct are taken seriously, competently investigated, and appropriate remedial action is taken. In Gyulakian v. Lexus of Watertown, the SJC made clear that a plaintiff's entitlement to an award of punitive damages under M.G.L. 151B will be determined by his or her employer's response once placed on notice of the alleged discriminatory conduct, even where the perpetrator is a supervisor.

In Gyulakian, the plaintiff began working for Lexus of Watertown in 2003 and was promoted to the position of finance manager in 2010. Lexus maintained a written sexual harassment policy directing employees to report incidents of harassment to the general manager, human resources manager, or to "any other of member of management" and stated that all complaints would be "promptly and thoroughly investigated". Despite her history of satisfactory performance, Lexus terminated plaintiff's employment in January 2012 on grounds that her relationships with coworkers had deteriorated.

During the termination meeting, plaintiff told Lexus' general manager and sales manager that from the time of her promotion, her supervisor had subjected her to an ongoing course of sexual harassment and created a sexually hostile environment. The general manager did not believe the plaintiff's allegations and told her that she may not be considered for a position in a related car dealership if she reported her allegations to Lexus' human resources manager. Despite this warning, plaintiff reported her allegations of sexual harassment to the human resources manager later that same day. Following plaintiff's termination, the general manager and human resources manager conducted separate investigations in to plaintiff's allegations but found no evidence to corroborate her claims. However, neither of them interviewed any of plaintiff's co-workers in the finance department.

Plaintiff filed a lawsuit against Lexus and her manager for, among other claims, sexual harassment and retaliation under M.G.L. 151B. At trial, plaintiff presented evidence that her manager had subjected her to a continuous course of unwanted verbal and physical conduct of a sexual nature from the time of her promotion and that she had spoken with Lexus' assistant sales manager about these issues several times, but no action was taken. Furthermore, evidence demonstrated that Lexus managers were aware that plaintiff's supervisor had been reprimanded in the past for discussing sexual intercourse in the workplace.

The jury rendered a verdict in plaintiff's favor and awarded her \$40,000 in compensatory damages and \$500,000 in punitive damages. However, the trial judge threw out the punitive damage award. On appeal, the SJC found sufficient evidence to support the jury's verdict and addressed the question of an employer's liability for punitive damages under M.G.L. 151B based on its employee's discriminatory conduct. The SJC ruled that the determination as to whether to impose punitive damages against an employer based on the actions of one of its employees, even one with supervisory responsibilities, must be focused on the actions of the employer once on notice of the discriminatory conduct.

The SJC set out a two-step process for this inquiry. The first step is to determine whether the employer was on notice of the harassment and failed to take adequate steps to investigate or remedy the situation; and, the second step must be to determine whether the failure to do so was outrageous or egregious. The SJC explained that although there is no bright line rule as to who must be notified of discriminatory conduct, notice given to individuals designated to receive complaints in a sexual harassment policy or to “senior managers,” would be sufficient to trigger an employer’s obligation to conduct an adequate investigation and to take effective action to remedy the situation. Failure to investigate and to take such action when on notice of offending behavior can open the door for punitive damages against the employer if “outrageous or egregious”.

Based on its inquiry, the SJC reinstated the punitive damage award, finding Lexus’s actions to have been outrageous and egregious because despite clear notice to senior managers including the assistant sales manager, general manager and human resources manager, Lexus failed to follow the requirements of its own sexual harassment policy to conduct an unbiased investigation of plaintiff’s complaints and to take immediate action to remedy the offending behavior.

Gyulakian, serves as an excellent reminder for HR professionals of the need to review and enforce policies prohibiting discrimination in the workplace and to take appropriate action in accordance with these policies to address any incident of potentially discriminatory behavior.