and therefore became the dealer's "sole property" under Section 351.

The court, however, held that a customer's intentions in giving a tip are generally irrelevant to the legality of a tip-pooling policy. While the court recognized that customer intent may differ when giving a tip directly to an employee as opposed to placing money in a tip jar, that distinction "does not mean that the employee to whom [a tip] is given may keep it notwithstanding a [tip-pooling] policy he or she has agreed to in accepting employment." In other words, an employee's tips aren't exempt from tip-pooling policies on the basis of the *manner* in which a tip is paid.

The dealers also argued that Bay 101 violated Section 351 by requiring the tip pool to be shared with management of the casino, such as the director of surveillance, the housekeeping supervisor, or the services manager. As a preliminary matter, the court upheld the trial court's ruling that these employees could properly participate in a tip-pool sharing based on a finding that they lacked management-level authority. And in any event, the court found that the dealers contributed the same amount to the pool no matter how many recipients were included in it. The inclusion of managerial employees in the pool therefore would have had no bearing on the actual amount of the dealers' take-home tips.

The court did observe, however, that had managerial employees been allowed to share tips, then other non-managerial pool recipients whose tips were diluted by the inclusion of improper managerial employees could have challenged Bay 101's policy on that basis. *Avidor v. Sutter's Place Inc.* (California Court of Appeals, Sixth Appellate District, 1/23/13).

Bottom line

This ruling supports California's policy in favor of tip-pooling. The court of appeal emphasized that employers have a strong interest in using such policies to promote harmony among employees and to encourage good customer service. Although the result is consistent with previous cases, the holding clarifies that tips given to specific employees aren't necessarily exempt from tip-pooling policies—even if the customer giving the tip didn't intend for it to be shared.

On the other hand, this decision also reinforces previous cases holding that tips should *not* be shared with the employer, supervisory employees, or management. Although the court of appeal rejected the dealers' claims that the tip pool improperly included managerial employees, under different circumstances, the court might have ruled differently. If you are creating a tip-pooling policy, exercise care when implementing it and designating recipients.

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SEXUAL HARASSMENT

Harassment complaints to HR protected from defamation suit

by Ryan McCoy

HR professionals are often faced with an employee lodging complaints of sexual harassment against a fellow employee. It's basic knowledge that you have a legal duty to investigate and address such claims. Ignoring an employee's complaint or making a half-hearted investigation can result in massive consequences. These claims and investigations often cause a ripple effect, and for good reason—an employee's sexual harassment claim will, by definition, disparage another employee's character. For that reason, the accused employee may go to great lengths to protect his reputation and continued employment and often claim his accuser is lying.

In a recent case, the accused employee sued his accuser. The accuser claimed her communications were protected under California's strategic lawsuit against public participation law, or as it is more commonly known, SLAPP. This maneuver gave the court of appeal an opportunity to discuss whether—and, if so, to what extent—an employee's harassment claim to HR deserves protection from the accused employee's subsequent defamation lawsuit.

'He said, she said' after a night out on the town

In June 2010, Lisa Aber, Michael Comstock, and James Cioppa—all of whom were employees of a global information services and publishing company—went out to dinner after leaving the office. What happened afterward is anyone's guess. Aber alleged that Cioppa (her supervisor) and Comstock (her fellow employee) tried to get her drunk and convince her to have sex with them, implying that her job would be secure if she did so. She complained about the incident to her employer's HR manager as well as to the police and a Kaiser Permanente nurse. Not satisfied with the resulting investigation, she filed a lawsuit alleging four claims against her employer, Comstock, and Cioppa:

(1) Sexual harassment;

(2) Failure to investigate and prevent sexual harassment;

(3) Sexual battery; and

(4) Intentional infliction of emotional distress.

Unsurprisingly, Aber's public recount of that night didn't sit well with Comstock, who responded to her complaint by filing a cross-complaint alleging that her allegations were malicious lies that amounted to defamation. While he couldn't attribute any specific allegations or quotes to Aber, Comstock alleged that she told numerous third parties that he had sexually assaulted her. He further alleged she reported the incident to their

AGENCY ACTION

Summary shows NLRB action in 2012. The National Labor Relations Board (NLRB) has released a summary of activities for fiscal year 2012. Highlights of the report include the following: 93.9% of all initial elections were conducted within 56 days of the filing of the petition; initial elections in union representation elections were conducted in a median of 38 days from the filing of the petition; a total of $44,316,059 was recovered on behalf of employees as back pay or reimbursement of fees, dues, and fines; and 94.5% of the 73 Board decisions under review by the U.S. courts of appeals were enforced or affirmed in whole or in part. Also, the NLRB's total case intake during fiscal year 2012 was 24,275 compared to 25,004 cases in fiscal year 2011.

OSHA releases inspection plan for high-hazard workplaces. The Occupational Safety and Health Administration (OSHA) has issued its annual inspection plan under the Site-Specific Targeting 2012 (SST-12) program. Under the program, enforcement resources are directed to workplaces where the highest rates of injuries and illnesses occur. The SST-12 program is one of OSHA's main programmed inspection plans for high-hazard, nonconstruction workplaces that have 20 or more workers. The plan is based on data collected from a survey of 80,000 establishments in high-hazard industries. In addition to the SST program, OSHA implements both national and local emphasis inspection programs to target high-risk hazards and industries.

Whistleblower panel appointed. The U.S. Department of Labor (DOL) has announced the inaugural appointees of the Whistleblower Protection Advisory Committee, which is to advise, consult with, and make recommendations on ways to improve the fairness, efficiency, effectiveness, and transparency of the Occupational Safety and Health Administration's (OSHA) whistleblower protection programs. The panel has 12 voting and three ad hoc members, who will serve two-year terms. Three members represent the public, four represent management, four represent labor, and one represents OSHA state plans, and the three nonvoting members represent federal agencies.

DOL signs misclassification agreement with 14th state. The DOL's Wage and Hour Division (WHD) has signed a memorandum of understanding (MOU) with the state of Iowa to work against misclassification of employees as independent contractors. Iowa is the 14th state to form such a partnership with the DOL. Since September 2011, when the WHD began entering into MOUs with states and announced a similar partnership with the IRS, the division says it has collected $9.5 million in back wages for more than 11,400 workers. ✤

employer's HR department. Those statements, he alleged, damaged his personal and professional reputation.

Aber's anti-SLAPP request

In response, Aber filed a special request to strike Comstock's cross-complaint under California's SLAPP law, claiming his cross-complaint for defamation was designed to bully her into dropping her own lawsuit. That goes to the very purpose of the SLAPP law, which is designed to prevent and deter lawsuits filed primarily to "chill" an individual's right to petition the courts for the redress of grievances. Aber argued that her communications to the HR department, the police, and the nurse all amounted to "protected activities" within the meaning of the statute, so Comstock was prohibited from suing her.

After hearing the parties' arguments and examining Comstock's evidence regarding the alleged falsity of Aber's statements, the trial court granted Aber's request and dismissed his cross-complaint. Comstock appealed, which gave the appellate court the opportunity to discuss the extent to which an employee's statements are protected when made in the context of a harassment complaint.

Statements to HR deemed protected

The court had no problem holding that communications to the police are protected and therefore within SLAPP. And because the Kaiser nurse is a "mandated reporter" under California law, the court found that communications that are preparatory to or in anticipation of commencing official proceedings are protected. Consequently, Aber's statements to the Kaiser nurse—who was required to and did report them to law enforcement—are protected activity and thus not subject to Comstock's defamation claim.

With respect to Aber's statements to her employer's HR manager, however, California courts had previously held that such complaints aren't part of "an official proceeding authorized by law" because the employer (or its HR representative) is neither a government official nor a mandated reporter.

In this case, however, the court found for the first time that communications to an employer's HR department are necessary to allow the employer to investigate claims and immediately address them if necessary. For example, had Aber failed to disclose her claims to her employer, that failure could be used as an affirmative defense against her sexual harassment claim. Thus, her report to HR was a necessary part of the right of redress under SLAPP and couldn't be considered defamatory. *Aber v. Comstock* (California Court of Appeal, First Appellate District, 12/18/12, published 1/11/13).

Bottom line

This ruling underscores the importance of your duty to communicate with employees about their claims and investigate them promptly. It also has far-reaching ramifications to harassment complaints against coworkers and resulting investigations involving third-party witnesses. The court's ruling shows that any lawsuit filed by the accused employee runs the risk

of facing a potential anti-SLAPP request. But perhaps more important, given the risks of losing an anti-SLAPP request (including the payment of attorneys' fees to the other side), this case makes it more difficult for the accused to defend against false accusations.

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WRONGFUL TERMINATION

Can you fire employee for being uncooperative during investigation?

by Cathleen S. Yonahara

A lesbian employee accused her manager of discrimination based on her sex and sexual orientation. After conducting an internal investigation, the company concluded that although the manager didn't discriminate against his subordinate, he had violated the company's policies and was uncooperative and deceptive during the investigation. The company fired the manager, who then sued for wrongful termination. The main issue on appeal was whether an employer can fire an at-will employee based on his failure to cooperate during an internal investigation.

What happened?

John McGrory worked for Applied Signal Technology, Inc., as the contracts/pricing department manager. His job offer letter stated that he was an at-will employee who "may be terminated at any time, with or without good cause, and with or without advance notice."

McGrory gave his subordinate, Dana Thomas, a verbal warning for poor work performance in 2008 and placed her on a performance improvement plan (PIP) in 2009. In response, Thomas complained that her work performance didn't merit a PIP and McGrory's criticism of her work could be explained only by "sexual orientation and/or gender discrimination and harassment" of her as an openly gay female who had announced in an e-mail to her coworkers on November 10, 2008, that she had gotten married despite Proposition 8. Thomas also accused McGrory of "telling off-color jokes in the presence of groups that demonstrate his lack of good judgment and sensitivity of those of other cultures."

Applied Signal retained an attorney, Sejal Mistry, to conduct an internal investigation of Thomas' complaint. On June 16, 2009, Mistry issued a report concluding that although McGrory didn't discriminate against Thomas on the basis of her sexual orientation or gender, he violated Applied Signal's policies on sexual harassment and business/personal ethics by making jokes and remarks based on race or sex. McGrory admitted regularly making jokes of a sexual or racial nature and telling his subordinates that his wife bought him *Playboy* magazines four times a year. He further acknowledged that he and other men in his department went into an office during and after office hours to tell jokes but that he thought it complied with Applied Signal's policies because female employees weren't present.

Although McGrory was forthcoming about some of his conduct, Mistry found that he was uncooperative and intentionally misrepresented other facts during the investigation. For example, he refused to disclose his written rankings of subordinates and the identities of individuals who had complained about him. He denied making the statements Thomas attributed to him, although other witnesses confirmed that he had made similar statements. Mistry determined all of the other witnesses were credible, except for Curt Oliver, who was evasive and defensive. Unlike all the other witnesses, Oliver denied that McGrory had discussed *Playboy* magazines.

McGrory claimed that the investigation was biased against men.

On June 23, 2009, Applied Signal terminated McGrory based on:

(1) Mistry's findings that he had violated the company's policies;

(2) Her findings that he had been untruthful during the investigation and didn't participate in good faith; and

(3) Applied Signal's concern that his behavior exposed the company to liability.

McGrory claimed that at his termination meeting, his supervisor, Jim Doyle, told him that the investigator had found that he had used foul language and made some inappropriate comments and jokes but that wasn't why he was terminated, as he himself was guilty of the same conduct. Rather, Doyle said that the reason for his termination was that he was uncooperative and had made false statements during the internal investigation.

On June 24, Applied Signal gave Oliver a written warning for his intentional misrepresentations to the investigator and his racial and sexual joking in the workplace. Thomas remained subject to the PIP.

On June 4, 2010, McGrory filed a lawsuit claiming that he was wrongfully terminated for being male and participating in Applied Signal's internal investigation. The court dismissed the case without a trial, and he appealed.

Public policy and FEHA

McGrory argued that the "public policy of California is to shield anyone participating in an investigation