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Employer's Adverse Employment Action Following Irregular Investigation of Sexual Harassment Allegations Gives Rise to Title VII and Other Claims

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January 22, 2020 - Last year, in a significant decision that may result in increased employment litigation, the Second Circuit Court of Appeals ruled that a university's termination of a male employee, following an irregular investigation of sexual harassment allegations by a female student, gave rise to a valid Title VII claim of sex discrimination. *See Menaker v. Hofstra University*, 935 F.3d 20 (2d Cir. 2019). In a footnote, the Court further noted that a university's disregard of "promised procedural protections may also give rise to claims for breach of contract and violations of state law guarantees of procedural or substantive fairness." *Id.* at n.45.

In *Menaker*, a female student athlete at Hofstra University made a complaint of sexual harassment against a male coach. Following an internal investigation, the university fired the coach, who then sued the university for wrongful termination based on his sex. The plaintiff-male employee alleged that the university had not investigated the sexual harassment complaint against him properly, and instead fired him because he is male and because there was pressure on the university to respond forcefully to allegations of male sexual misconduct. The district court granted the university's motion to dismiss the complaint. On appeal, the Court of Appeals disagreed, finding that the male employee had sufficiently pleaded a case of sex discrimination to survive a motion to dismiss.

The Court of Appeals' decision turned on whether the plaintiff-male employee had alleged that the university's investigation process into the sexual harassment complaint against him was "sufficiently irregular," so as to "raise an inference of bias" against him because of his sex. *Id.* at 34. In ruling that plaintiff had done so, the Court pointed to the following allegations of irregularities in plaintiff's complaint:

- university's failure to interview relevant witnesses identified by the male employee;
- university's disregard of the investigative process included in its written harassment policy;
- university's failure to make good on a promise that the accused male employee would receive a report based on the investigation;
- alleged knowledge of a supervisor (a university vice president) that at least one of the accusations against the male employee was false; and
- the supervisor's alleged belief that the accusations of sexual harassment were a "ploy" after the female student athlete was denied a scholarship. *Id.* at 34-35.

The Court found that the above irregularities of process combined with general criticism of the university for reacting inadequately to complaints of male sexual misconduct on campus, were sufficient to make out a *prima facie* case of sex discrimination. *See id.* at 33. Although the defendant in this case was a private university, the *Menaker* decision applies equally to all New York employers otherwise subject to federal antidiscrimination laws.

The Second Circuit's decision in *Menaker* highlights the need for employers to conduct proper investigations into complaints of sexual harassment in the workplace. In today's #MeToo environment, many employees who have been disciplined or discharged following complaints of workplace sexual misconduct will now find it easier to allege at least "*minimal* evidence of pressure" on the employer to respond to allegations of male sexual misconduct. That, combined with allegations of irregularities in the employer's investigation of those complaints, will allow such plaintiffs to survive a motion to dismiss. Among other things, employers must be careful to follow the investigative procedures specified in their Employee Handbooks or other written policies and procedures, interview relevant witnesses, and properly document the bases of their investigatory conclusions.

If you would like legal assistance with an investigation of sexual harassment allegations, please contact Ned Bassen, +1 (212) 837-6090 or ned.bassen@hugheshubbard.com or Amina Hassan, +1 (212) 837-6793 or amina.hassan@hugheshubbard.com.

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