

## Some Reminders On Sexual Harassment And Retaliation Liability

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We spend a lot of time coming up with timely and cutting edge topics for seminars, webinars, and blog posts for employers. However, for years no topic attracts more continuing interest than old fashioned sexual harassment, seemingly a timeless topic because some (mostly) guys can be counted on not to manage their behavior in the workplace. This week, S is for sexual harassment, and a recent case that is a good reminder of some key points about sexual harassment. The case is [Boone v. Cementation USA Inc.](#) from the U.S. District Court in Nevada.

The case involved a short term employee who alleged that she was subjected to harassment in the form of a supervisor was making various communications of a sexual nature to her. The company responded to her immediately and made clear that it was prepared to respond with necessary corrective measures, but she repeatedly failed to cooperate in providing information to the company. When the project she was working on ended, she was laid off with a recommendation that she not be rehired. When the investigation into her complaints was completed, the supervisor was disciplined for his conduct. The employee filed a harassment and retaliation case and, as is not uncommon, the employer won the harassment case at the summary judgment stage, but the court found the retaliation claim could not be dismissed at that stage and would go to a jury. As noted, the case illustrates two key points about sexual harassment:

- Defending against hostile environment claims is a winnable game. The supervisor engaged in inappropriate conduct, the employer itself found, yet the company was not liable because it had the proper policies in place, and it took prompt action and documented that it had done so.
- Retaliation is much tougher to defend against. An adverse action that follows a complaint carries inherent risk, even if the company did everything right up until then. Here, the court found that the negative rehire recommendation could be an adverse action, and that a jury could possibly find that the recommendation was linked to the harassment complaint.

Any action against an employee who has made a harassment or other complaint is inherently high risk. That does not mean the employer cannot

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run its business and address performance and conduct issues, just that it should treat them with great care and likely consult with counsel. Here, subject to the caveat that from a distance it is easy to second guess, one has to ask why not simply check that the employee can be rehired, then make the best hiring decision in light of all the facts when it is time to do so. Failing to hire the one time complainant could still give rise to a retaliation claim, but without the smoking gun of a box checked “no rehire.” Both aspects of this case demonstrate the importance of a little planning and strategic response to avoiding sexual harassment liability.