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Employment Law Lessons From the Penn State Scandal

BY MICHAEL D. HOMANS

Special to the Legal

The injuries to children, trust and reputation that Jerry Sandusky caused — and some former Penn State University administrators allegedly compounded — may never fully heal. But some good may come out of this tragedy, if Penn State and other institutions and employers learn from it.

The sad story is well known by now. Sandusky, the longtime Penn State assistant football coach, was sentenced to 30 to 60 years in prison for abusing boys he met through his charity for troubled children.

The scandal shook Penn State, leading its board to hire former FBI Director Louis Freeh as special investigative counsel to conduct a thorough investigation. In July 2012, Freeh and his team issued a 267-page report with excruciating detail as to the alleged sexual abuse by Sandusky and how the university responded — or failed to respond — to the allegations. Freeh's report generated a mix of acclaim and condemnation. The family of late football coach Joe Paterno hired former governor Dick Thornburgh to conduct their own counter-investigation and they published a 238-page report in response.

The scandal, investigation and reports provide multiple lessons for employment lawyers. We often deal with allegations of workplace misconduct, but rarely as egregious as those involved at Penn State, usually without the time and resources to investigate as thoroughly as Freeh and without the white-hot publicity that applied there.



MICHAEL D. HOMANS

is a labor and employment law shareholder at Flaster/ Greenberg in Philadelphia. He can be reached at michael.homans@flastergreenberg.com or 215-279-9379.

CRIMINAL ALLEGATIONS

Employment lawyers need to be aware of criminal laws that may apply to workplace misconduct and react promptly to avoid or curtail criminal liability. In the Penn State scandal, the allegations against Sandusky raised mandatory reporting obligations under the Child Protective Services Law and the federal Clery Act. Yet, the administration did not report all allegations to appropriate officials, according to the Freeh report, instead deciding to handle the matters internally in a way that was “humane” to Sandusky — but seemed to ignore the risk of harm to his child victims.

Criminal laws that commonly arise in the workplace include fraud, sexual assault, child pornography, embezzlement and theft. When such allegations arise, employers are well served to immediately consult with a criminal defense lawyer, determine whether mandatory reporting is required and, if sufficient evidence of a crime is discovered, make a report to the police or the appropriate officials.

As Penn State learned, failure to act promptly can lead to additional criminal charges against the executives involved, as well as a loss of confidence in the integrity and safeguards of the employer.

COVER-UP CULTURE

The Freeh report documents a culture at Penn State where employees were often “loyal to a fault” — choosing to keep silent about observations and allegations of criminal abuse, rather than risk damaging Penn State or its beloved football coach. The university had “no centralized office, officer or committee to oversee institutional compliance with laws, regulations, policies and procedures,” the Freeh report states. The football program “did not fully participate in, or opted out of, some university programs, including Clery Act [criminal reporting] compliance.” Little training was provided to administrators and employees about compliance, the football program was seen as “above the law,” human resources was not even informed of the 1998 allegations and low-level employees were afraid they would get into trouble if they reported observing sexual abuse by a powerful former football coach.

Penn State janitors provided some of the most disturbing testimony in the case — both as to misconduct by Sandusky and the culture that prevented them from coming forward.

Employers must ensure their company culture includes a strong emphasis on compliance and a commitment to protect whistleblowers and witnesses from retaliation.

RETIRED EMPLOYEES

Among the most recurrent themes in the investigation of the Sandusky scandal is how often conventional steps by Penn State could have avoided most, if not all, of the criminal conduct.

The first documented report of abuse by Sandusky occurred in May 1998, when a mother told university police that Sandusky had showered with her 11-year-old son. Although Sandusky admitted to “hugging” the boy in the shower, and that he had done the same with other boys, he denied any sexual intent.

Despite this information, Sandusky was allowed to retire with an agreement that he would continue to have privileges at Penn State, including “free lifetime use of East Area locker room facilities” and a continuing role “to work with young people through Penn State.”

Sandusky subsequently sexually abused other minors through his continuing affiliation with Penn State.

Employers should cut the cord with employees they terminate because of performance or misconduct and not let them back into the workplace. To allow otherwise invites problems from an uncontrollable non-employee, as Penn State experienced.

THOROUGH INVESTIGATIONS

The Freeh report dramatically demonstrates the contrasts between a thorough and independent investigation and an incomplete inquiry by people with vested interests to protect.

The harshest measure taken by Penn State was to direct Sandusky not to bring children alone to the showers.

In contrast, Freeh’s team conducted more than 430 interviews, analyzed more than 3.5 million pieces of electronic data and documents and reviewed substantial law enforcement and criminal records. Most counsel for employers will not have Freeh’s resources, but his report provides a helpful roadmap of areas to explore. And it shows the importance of the documentary record — especially emails and handwritten notes — in determining what happened in cases in which the allegations are dated, or when key witnesses claim not to recall what happened.

The Freeh report also illustrates the danger of hiring an independent

investigator: the institution loses control. This independence can be a strength in defending against subsequent claims, showing the institution’s commitment to an unbiased review and evaluation. However, employers should not underestimate the danger of commissioning a report that becomes an indictment.

The costs of an independent investigation also can be substantial — the Freeh Report allegedly cost Penn State \$8 million.

Another issue to consider is whether the independent investigator’s report will be treated as confidential attorney work product. Generally, in order to use the investigation to defend against subsequent claims, the report must be disclosed and work-product privileges waived.

REMEDIAL ACTIONS

The Freeh report highlights Penn State’s failure to take prompt and effective remedial action.

Penn State’s lapse led to increased exposure to liability, as is often the case with employers that fail to deal with a serial sexual harasser.

Such failure to effectively respond to reports of misconduct can also contribute to an award of punitive damages, as a plaintiff may be able to show willful disregard for the law (and the victims).

BE CLEAR ABOUT ROLES

The Sandusky scandal involved another issue that commonly arises in workplace investigations. Employees and those investigated often claim to have misperceived the role of the company’s lawyer or investigator. This happened at Penn State, as the role of former General Counsel Cynthia Baldwin has been questioned with regard to her appearance with Penn State athletic director Tim Curley before the grand jury. Curley told the grand jury he thought Baldwin was his attorney, but she later claimed she was representing only the university.

In all investigations, it is extremely important for the attorney to make clear to all the attorney’s role (and who he or she represents, if applicable), and document that communication. Failing to do so can lead to misperceptions and legal liability.

DEALING WITH THE PRESS

The Sandusky scandal provides counsel with helpful guidance on the wide range of press issues that can arise in these cases.

First, before making a final decision on how to handle a complaint of misconduct, use the Penn State case to illustrate the potential reality of the standard query, “How would this look on the front page of *The New York Times* or in the blogosphere?” If your plan of action won’t look good in bold headlines, then maybe you and your client should reconsider.

Second, as with Watergate, warn the client that a cover-up may generate even more condemnation. In hindsight, Penn State would have been better served by fully investigating the allegations against Sandusky at the time they first arose and terminating him then. The cover-up was the institution’s downfall.

Third, warn the employer about making statements on the facts before conducting a thorough investigation. Penn State and its top officials dug their own graves deeper by their early denials of knowledge of the allegations. Many of those denials were contradicted, according to the Freeh report, by the discovery of emails and notes not previously reviewed.

Fourth, if you have someone comfortable with the press — like Freeh — use his talents to get the message out. If you don’t have such a respected leader, or even if you do, consider hiring a media consultant. •