

REPRESENTING THE ACCUSED IN THE #METOO ERA

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People often assume that the rapid rise in the visibility and public recognition of the #MeToo movement has translated into a significant increase in potential clients contacting our firm alleging sexual harassment.

Much more significant, however, has been the increase in the number of calls we have received from “the accused”—typically individuals seeking legal counsel in response to a fellow employee filing an internal complaint of sexual harassment or misconduct against them.

It is important to note at the outset that, although the majority of calls we receive from individuals accused of sexual harassment are from men, women are also accused of harassment, and men can be victims as well. According to a 2016 report, “[t]he least common response of either men or women to harassment is to take some formal action – either to report the harassment internally or file a formal legal complaint.” See Chai R. Feldblum & Victoria A. Lipnic, *Report of the Co-Chairs of the EEOC Select Task Force on the Study of Harassment in the Workplace* 16 (2016), available at: https://www.eeoc.gov/eeoc/task_force/harassment/upload/report.pdf. In practice, regardless of gender, it is not common for individuals to pursue false or baseless allegations of sexual harassment.

For these reasons, plaintiff-oriented employment attorneys may be hesitant to take on clients accused of sexual harassment, believing that representing the accused would run counter to their strong advocacy for victims of sexual harassment. Those same firms, however, are also often committed to advocating for the rights of all employees to be treated fairly. Moreover, plaintiffs’ attorneys are best suited to represent individuals accused of sexual harassment or other related misconduct, because these cases require attorneys interested and experienced in advocating for individual persons against powerful organizations. Many obstacles encountered in representing complainants in sexual harassment cases also arise in representing the accused, including barriers to gathering accurate data and information and the reluctance of witnesses (often coworkers) to provide statements that conflict with the employer’s interests or account of events.

The clearest distinction between representing the accuser and the accused, however, is that the formal rights of the accused may be more limited. An individual who is falsely accused of sexual harassment and suffers an adverse employment action as a result of the accusation generally has a narrow set of remedies available, depending on the circumstances of each case. Not surprisingly, representing the accused can be difficult, and clients are often frustrated by what they view as an unjust process. In addition to the weight of the evidence against the client, the outcome of the investigatory or disciplinary process often depends on the accused’s value to the employer and the employer’s tolerance for risk.

In order to determine what remedies may be available to an accused client, the first question the attorney should ask is whether the client is protected under a collective bargaining agreement or employment contract. If a collective bargaining agreement provides any remedies for the client, those remedies should be pursued first. Similarly, if the employer has entered into an individual employment contract with the client, the attorney should carefully examine its language to determine whether any remedies are available under contract law. In either instance, the terms of the agreement may require the employer to investigate the complaint or follow certain steps in the disciplinary process prior to disciplining or terminating the accused employee. In Maryland, however, in the majority of circumstances in which the accused seeks out legal representation, our state’s at-will employment principles will apply.

When an attorney begins his or her representation of an accused client early in the process, the most valuable role the attorney fulfills is the client’s guide through the internal investigation and disciplinary

process. The accused's ability to have his or her account of events considered during the investigation is paramount. It is therefore incumbent on the attorney to explain to the client the importance of his or her full cooperation in the investigation. The attorney should ensure that the client is prepared to handle interviews with investigators, control his or demeanor, and provide honest answers to the questions asked. The client is much better off disclosing potentially embarrassing circumstances when asked than risking the employer discovering later that the employee lied during the investigation. Further, the client should be advised to document as much as possible, put together a timeline, and take contemporaneous notes as events occur going forward. A difficult aspect of this process in some cases is that the client may not know the identity of his or her accuser, which can make it difficult to know what facts may be relevant. If the client knows or suspects the particular events that likely prompted the complaint, however, the attorney should work with the client to compile a list of witnesses who might be willing to support the client's version of events.

No law in Maryland, however, prohibits an employer from terminating or otherwise disciplining an employee accused of sexual harassment without thoroughly investigating the complaint. The employer may decide to terminate the employee even if an internal investigation produces no evidence of the alleged misconduct. Instead, an accused client who is terminated, demoted, transferred to an undesirable location, or otherwise disciplined as a result of a false allegation is generally limited to collateral or indirect claims and remedies.

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The most common claim that clients in these circumstances pursue is a complaint for defamation against the employer, the accuser, or both. One reason so many clients seek to pursue defamation claims is that they often feel the greatest harm from the damage to their reputations. In Maryland, however, "the burden of proving falsity falls upon the plaintiff, rather than the burden of proving the truth of the alleged defamatory statement falling upon the defendant." *Seley-Radtke v. Hosmane*, 450 Md. 468, 472, 149 A.3d 573, 575 (2016) (citations omitted). As most attorneys understand, that feat, alone, is difficult to accomplish. Additionally, an employee who accurately relays an accuser's allegations to a third-party is not liable for defamation. See *Lindenmuth v. McCreer*, 233 Md. App. 343, 361, 165 A.3d 544, 555 (2017). Even if the plaintiff can establish a *prima facie* case of defamation, employers are entitled to certain conditional privileges

under Maryland law. An employer is not "held liable for disclosing any information about the job performance or the reason for termination of employment of an employee or former employee . . . [t]o a prospective employer of the employee or former employee at the request of the prospective employer . . ." See Md. Code, Cts. & Jud. Proc. § 5-423. Moreover, defendants are generally entitled to a common law conditional privilege if the statement was published to a third-party "who shares a common interest" or when the statement is made "in defense of oneself or in the interest of others." *Gohari v. Darvish*, 363 Md. 42, 57, 767 A.2d 321, 329 (2001) (citation omitted). To overcome these privileges, the accused must meet Maryland's stringent standard for showing that the defendant abused the privilege by publishing the statement with "malice" – *i.e.*, with "knowledge of falsity or reckless disregard for truth." See *Marchesi v. Franchino*, 283 Md. 131, 139, 387 A.2d 1129, 1133 (1978). Attorneys should therefore emphasize these obstacles to an accused client.

Other potential remedies for an accused client relate to causes of action that allege that the employer's adverse employment action was based on some prohibited factor, rather than the allegation of sexual harassment itself. For example, the attorney should determine if any comparators exist for purposes of bringing a claim under Title VII, such as if the employer treated another employee outside of the client's protected class more favorably than the client, despite being accused of similar misconduct. Additionally, if the accused can provide evidence that he or she engaged in certain protected activities immediately prior to the allegation of sexual harassment or adverse action, the client may have a claim under a pertinent anti-retaliation provision, such as those under Title VII, the Americans with Disabilities Act (ADA), Age Discrimination in Employment Act (ADEA), Family Medical Leave Act (FMLA), Fair Labor Standards Act (FLSA), and a number of state and federal whistleblower laws, to name a few.

Although these secondary claims may provide a few potential paths for recourse, representing the accused has its obvious challenges. Even when an allegation of sexual harassment does not result in an adverse employment action, the accused employee may suffer other consequences from the allegation. When the representation of an accused client begins early in the process, however, the most important aspect of the attorney's job is to assist the client in responding to the allegations in an honest and cooperative manner. Doing so will not only increase the odds of a favorable outcome to an internal investigation, but it will also help prevent the client from sabotaging his or her chances of success under some other indirect remedy in the future.

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