

\$137 Million Verdict Illustrates Importance of Competent Anti-Harassment Policies

Related Professionals

Bridget A. Blinn-Spears
919.678.7593
BBlinn-Spears@nexsenpruet.com

Tommy Postek*
336.387.5145
TPostek@nexsenpruet.com

Practices

Employment & Labor Law

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On October 4, 2021, a North California federal jury awarded a former Tesla subcontractor \$137 million after finding that he had been subjected to a hostile work environment and that Tesla was responsible for the harm it caused. The jury found that the contract employee, Owen Diaz, a Black male, had been subjected to repeated and continuous harassment at a Tesla-owned factory. The jury held Tesla liable as a joint employer with the staffing company that hired Diaz.

Diaz alleged that he faced repeated and prolific use of the N-word throughout the Tesla factory. He also alleged that Tesla workers had drawn swastikas, written a racial epithet in a bathroom stall, and drawn caricatures of Black children around the factory. A 2018 New York Times article describes Mr. Diaz's claims in more detail. The article references ten other claims of race discrimination filed regarding the same plant where Diaz worked. Tesla also lost a race discrimination arbitration with one of its employees, Melvin Berry, in which it was ordered to pay approximately \$1 million earlier this year. A class-action case brought on behalf of more than 100 Tesla employees alleging race discrimination is still pending.

In the Tesla case, the jury determined that Diaz was harmed as a result of Tesla's negligent supervision or continued employment of harassing coworkers. The monumental award was decided upon after only 4 hours of deliberation by the jury and was comprised primarily of the \$130 million in punitive damages awarded "to get Tesla's attention."^[1] The verdict demonstrates the importance of compliance with anti-discrimination and anti-harassment laws. The jury's award punishes Tesla for its failure to take appropriate action regarding the Diaz's repeated complaints to supervisors regarding the harassment.

The verdict has drawn the attention of employers around the country who had been focusing their concerns on Covid-19 related ordinances and issues. The case brings a sobering reentry into the discussion of the importance and significant ramifications of failed anti-harassment and anti-discrimination policies and responses.

In the wake of the *Diaz v. Tesla* verdict, employers should revisit their approach when presented with a harassment-based complaint.

→ *Comprehensive and Compliant Policies*

The first step in addressing potential discrimination and harassment in your workplace is a comprehensive and compliant anti-discrimination and anti-harassment policy that is known and understood by everyone in your workplace.

Tesla did have these policies in their “Anti-Handbook Handbook” under the section titled “Stupid Stuff.” Naming schemes aside, your policy (and the related training) is the first chance for your workers to see your commitment to the harassment-free workplace, so should be presented deliberately with sufficient gravitas.

Your policies prohibiting harassment and discrimination must be more than wordy slogans, but should be understood and implemented throughout your workforce. Your workers should know of their rights and have clear direction regarding how to report concerns or potential violations. You should also assure workers that they are protected from retaliation and that any good faith report will be reviewed honestly and thoroughly.

The written policies found in your handbooks will be scrutinized in any discrimination or harassment claim that could be brought against you. To make sure you have all the required language and that you know how to implement the policies, we strongly recommend having an employment attorney assist in the drafting and launch of the policies.

→ *Reporting Structure*

Implementing and managing avenues of reporting requires ongoing effort to ensure your company has the benefit of learning about issues in a timely manner so they can be addressed appropriately. In the Tesla case, Diaz emphasized his multiple reports and complaints of harassment, which were seemingly ignored. Although Tesla had relevant policies, the Tesla supervisors to whom Diaz complained did not take action related to those complaints, so Tesla’s human resources and upper management did not learn about them in time.

Large companies face significant potential liability when violations of their policies are until it is too late. In order to maximize the chance that the appropriate individuals hear about issues in a timely manner, you should make sure that each employee knows the ways suspected violations can be reported and how to escalate their concerns if they’re not appropriately addressed.

In sum, workers need to feel confident that they will not be punished for speaking up, and supervisors need to understand that their knowledge of an issue is imputed to the Company so they should not sit on allegations—even concerns they view as not credible or explainable.

→ *Thorough Investigation*

Next, reports of suspected violations of the anti-harassment or discrimination policies must be immediately and appropriately addressed. Not every report will always result in determining a policy violation has occurred, but each must be thoroughly and fairly investigated. If a violation is found, your company must take appropriate actions to prevent future violations of the same sort.

In the Tesla case, witnesses testified that despite the complaints submitted by Diaz, the daily use of the N-word did not subside. Diaz and his legal team argued that the effect of this insufficient reaction by Tesla and its lackluster response to this and other complaints served to embolden the harassers. In fact, when Diaz complained about finding a racist cartoon drawing with the words “Booo” on it, the individual involved received only a suspension and a final warning. Tesla blamed a “bungled investigation.” Two other employees were terminated for offenses Diaz reported, but the harassing conduct continued by other employees.

Employers should treat each complaint or report as an opportunity to strengthen their commitment to your policies by conducting a thorough and fair investigation. If a violation is found, the discipline should be considered in the context of the violation. Each employment decision that results from a report should be considered based on all of the facts and may require the consultation of employment attorneys. Ultimately, the way you react to a violation will be the message you send to not only your workers and company, but also a potential future jury. For that reason, it is important to not react based on incomplete data or to react in a way that itself would indicate disparate treatment, as we discuss next.

→ *Consistent Application*

Once you have created and implemented a comprehensive and compliant policy; ensured communications regarding potential violations are quickly and accurately presented to the appropriate individuals; and they have conducted thorough and fair investigations and made conclusions based on the facts collected, you must ensure that you consistently apply these standards in a neutral way to avoid further violation of your policies.

Disciplinary action should also end similar policy violations. In the Tesla case, the company did terminate two employees and suspend a third, but the racist behavior continued. When you find that a violation did take place, make sure that any employment decision you make prevents any ongoing violations, prevents future wrongdoing, and protects your workers.

Arbitration

Given the substantial differences between the \$1 million arbitration award Tesla faced earlier this year and the \$137 million verdict Diaz received, companies may also want to consider whether to enter arbitration agreements with their employees regarding their employment relationships. There are a variety of pros and cons related to arbitration, and enforceable arbitration agreements must be carefully drafted to comply with applicable law.

Conclusion

Tesla was unable to convince the jury that it responded appropriately to the complaints Diaz raised. The verdict should serve as a call to action to other companies to revisit their policies, procedures, and training to avoid similar missteps.

[1] Diaz was awarded \$6.9 million in compensatory damages, \$4.5 million for past emotional distress, and \$2.4 million for future emotional distress.