

## Court of Chancery Opens the Door for Expanded Caremark Liability Based on Workplace Misconduct Oversight Failures



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Recently, the Delaware Court of Chancery held in [Los Angeles City Employees' Retirement System v. Glenn Sanford, et al.](#) (“eXp”) that officers’ and directors’ fiduciary oversight obligations may extend to the investigation and remediation of workplace sexual misconduct and that a failure to respond adequately in good faith to such claims may constitute a breach of fiduciary duty under the *Caremark* doctrine.

In 2024, the Los Angeles City Employee’s Retirement System, a stockholder of the real estate brokerage firm eXp World Holdings, filed a shareholder derivative lawsuit against Glenn Sanford, eXp’s founder and CEO, as well as other current and former company directors, following allegations that two senior agents of the company had harassed, drugged, assaulted and raped other eXp real estate agents at various company events since at least 2018.

The complaint alleged, among other things, that (i) Mr. Sanford breached his duty of loyalty by working to conceal what plaintiffs described as the company’s “rape culture” in order to reap the financial benefits of retaining the two high-performing senior agents under the company’s revenue-sharing arrangement and (ii) four of the company’s directors breached their *Caremark* oversight duties by “failing to ensure that the Company had in place reasonable reporting and information systems that would have allowed eXp’s officers and the Board to know about and prevent acts of sexual assault and misconduct” and “failing to respond to and consciously disregarding the accounts of sexual assault and misconduct that were brought to the [defendants’] attention.”

According to the complaint, victims began reporting sexual misconduct in 2020 via social media posts, emails, memos and direct reports to company supervisors, directors and officers. By April 2022, one such director, referred to in the complaint as the Whistleblower, had allegedly received reports from approximately 20 agents and alerted the board to these reports on several occasions, recommending the appointment of an independent outside investigator. The board instead decided to conduct an internal investigation which allegedly did not result in any meaningful changes. The complaint further alleged that the board’s governance committee later declined to nominate the Whistleblower for reelection at the company’s next annual meeting.

In early 2023, victims filed three anti-trafficking suits against the company in federal court and *The New York Times* published an exposé regarding the company’s alleged rape culture. In January 2024, the federal court overseeing the first such suit largely denied the defendants’ motion to dismiss, finding, among other things, that the complaint had sufficiently pled facts which supported a plausible inference that certain company executives may have benefited from the alleged sex trafficking through the revenue-sharing arrangement, attempted to conceal allegations and previous instances of sexual assault and perpetuated a “longstanding culture . . . of creating an environment that allowed these assaults, then silencing those whose accounts of sexual harassment and assault would impact profit.”

The Court in *eXp* also denied the defendants' motions to dismiss the claims relating to Mr. Sanford and the director defendants. In doing so, the Court discussed two recent Delaware decisions addressing similar issues: *Brola v. Lundgren* ("*Credit Glory*"), decided in 2025, and *In re McDonald's Corporation Stockholder Derivative Litigation* ("*McDonald's*"), decided in 2023.

In *Credit Glory*, which involved a claim of a breach of the duty of loyalty by an officer-director for his own sexual misconduct (and not a *Caremark* oversight claim relating to misconduct by others), the Court's view was that sexual harassment in the workplace generally constitutes "interpersonal misconduct" governed by employment laws and would only implicate fiduciary duties in limited circumstances.

In *eXp*, after a lengthy analysis and discussion, the Court rejected the broader argument in *Credit Glory* that permitting a claim of sexual harassment of employees to support a duty of loyalty claim would go against public policy and improperly expand Delaware law or create unwarranted "doctrinal sprawl." The Court emphasized that "the active misconduct here is the cover-up and retaliation," not the sexual harassment itself.

The Court instead aligned more closely with the view in *McDonald's*, which held that directors' and officers' own sexual misconduct in the workplace, as well as *Caremark* oversight failures with respect to workplace sexual misconduct by others, may implicate fiduciary duties under Delaware law. Specifically, the Court found it reasonably conceivable that Mr. Sanford, for self-interested reasons, breached his duty of loyalty by "actively cover[ing] up acts of rape and sexual assault, refus[ing] to report that information to the Board, and retaliat[ing] against the person who did."

More significantly, the Court noted that the plaintiff had adequately alleged a so-called "red flag" oversight claim given the board's receipt of information about the sexual misconduct allegations on numerous occasions and its conscious disregard of such reports and failure to change any policies or take any meaningful steps to address the systematic problem of sexual misconduct at the company. The Court stated "efforts to respond to red flags are not sufficient under *Caremark* when it is reasonably conceivable that those efforts were nominal, tainted by deliberate heel-dragging, and ran parallel to a campaign of concealment."

Despite the shocking nature of the underlying sexual misconduct allegations, the Court remained focused on the defendants' fiduciary conduct and their actions after becoming aware of such misconduct and its potential to be credible. In denying the defendants' motion to dismiss, the Court found that directors and officers may owe fiduciary duties under *Caremark* to oversee and respond to credible claims of continued workplace misconduct and sexual assault. The *eXp* decision therefore reinforces that Delaware courts may scrutinize not only the underlying wrongdoing, but also whether fiduciaries acted in good faith when presented with credible red flags involving workplace sexual misconduct.

In addressing the conflicting holdings of *Credit Glory*, *McDonald's* and now *eXp*, the Court acknowledged that "[r]easonable trial judges can differ" and that the resolution of such differences is a function of the appellate process. Until the Delaware Supreme Court weighs in, it remains uncertain when plaintiffs may have viable claims against directors and officers for a breach of their fiduciary duties with respect to sexual misconduct in the workplace under Delaware law.