

SEXUAL HARASSMENT: AN EXPENSIVE PROPOSITION

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The Equal Employment Opportunity Commission (EEOC) reports that sexual harassment claims continue to be a serious issue, with 7,256 new charges filed in FY 2013. Although that number has decreased in recent years, the awards in sexual harassment lawsuits continue to climb.

Employers simply cannot afford to ignore the threat of sexual harassment. If employers fail to take steps to minimize liability from sexual harassment complaints in the current litigious climate, they may find themselves writing some very large checks.

Forms of Sexual Harassment

Sexual harassment comes in several forms. The most well-known type of sexual harassment is quid pro quo harassment. The traditional example is "sleep with me and you get the job or the promotion." This claim requires the action of a supervisor. While most supervisors know that this behavior is improper, these claims continue to arise.

Sexual harassment also comes in the form of hostile environment claims. This claim can result from peer or co-worker conduct. For example, two men in an open workplace telling graphic jokes or stories of a sexual nature can create a hostile work environment for females forced to endure the behavior. Even if the men think this is funny, the women often do not and a complaint of sexual harassment can result.

Remember that it's not just the company that's on the line, individuals in management are too. Many times, the lawsuits are not just against the companies—the victims sue their supervisors and the alleged harassers as well, often in their individual capacities. The alleged harasser could be individually liable for certain tort

claims, such as assault and battery, intentional infliction of emotional distress, and others. And there is an increasing trend to hold supervisors liable for negligent supervision when they fail to address issues in the workplace, such as harassment, and harm results.

In other words, they get sued for not doing their jobs.

Employers must provide a workplace free from unlawful harassment. As a consequence, a company could also be liable for the alleged harassment by non-employees, including alleged harassment by customers or the employees of vendors or subcontractors.

For example, a situation can arise on a construction site where the employee of a subcontractor complains of harassment by the employee of the general contractor. Although the alleged harassment is by a non-employee, the subcontractor-employer is still required to investigate the complaint and take remedial action appropriate on the circumstances to prevent further harassment. This non-employee harassment situation can be difficult for an employer to address because it involves a non-employee.

The employer is required, however, to take remedial action and therefore must determine the best way to prevent further harassment, which would most likely require communication with the alleged harasser's employer. To safeguard against claims of sexual harassment and avoid lawsuits, employers must understand their legal responsibilities.

IMPLEMENTATION OF POLICIES PROHIBITING SEXUAL HARASSMENT

To comply with their legal responsibilities, employers must adopt a clear policy or policies prohibiting sexual harassment. The policy should define the prohibited conduct, and provide a description of how and to whom employees can report a violation to management.

The policy should include:

- A "bypass" reporting procedure to ensure employees have more than one supervisor to report a violation;
- A statement informing employees that they will not be retaliated against for making a complaint;
- An explanation of the consequences of violating the policy.

In this regard, the policy should inform employees that a violation will subject them to disciplinary action up to and including termination of employment. All employees should receive a copy of the policy when they are hired and given an opportunity to ask questions. Employers should stress the importance of reporting discriminatory misconduct to the person or persons identified in the policy. As necessary, the policy should be reviewed, revised and republished to ensure continued compliance and awareness.

SUPERVISOR TRAINING

Employers should train their supervisors about the policy prohibiting sexual harassment and how to handle employee complaints. The training should stress the importance of taking all complaints seriously and informing upper management when a complaint is received. In addition, supervisors must be trained to take action when they see something that could be a violation of the policy, even if there has been no complaint. Employers should provide supervisor training at least annually to ensure their continued attention to compliance and enforcement of the policy. It is important to remember that harassment can also be based on other protected classes, such as race, national origin, etc. and this should also be covered in the training.

Handling Complaints of Sexual Harassment

Supervisors must listen to and take seriously every complaint of sexual harassment. After a complaint is received, an investigation must be conducted. The scope of the investigation may vary depending on the circumstance but should be sufficient to obtain the information needed to determine the "appropriate remedial action" to be taken to ensure the misconduct stops and does not recur. It is important to note that the termination of the offending employee's employment may not be the "appropriate remedial action" necessary to ensure the unlawful conduct stops and does not recur. It is also important to note that the employer must ensure that the employee making a complaint is not retaliated against.

Lead by Example

Executives and supervisors need to lead by example if the policy prohibiting discrimination is to be successful. Like most anything else, if executives and supervisors are not following the rules, this sets a tone for others in the organization to do the same.

How companies react to alleged harassment is now more important than ever. It is crucial for organizations to take all harassment complaints seriously, investigate them quickly, and take prompt remedial action. These actions help retain the

goodwill of their employees' customers and the public, and are also critical for minimizing the risk of legal liability.

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