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"Managing the Sexual Harassment Explosion" by Kent Pagel

UNDERSTANDING THE CLAIM OF SEXUAL HARASSMENT

Sexual harassment is a form of employment discrimination that employers should address with great care. Studies suggest that between 50 and 85 percent of American females will experience some form of sexual harassment in the workplace. Those who study the issue further estimate that only three percent of harassment is ever reported. Yet plaintiffs recover millions from employers each year in settlements. If a complaint ever gets to trial, it is not uncommon for the employer to lose big on just one case due to damages such as pain and suffering, lost wages and attorney's fees for the plaintiff. In a recent federal court case in Texas (note that most large Texas verdicts come out of the state courts), a jury awarded \$687,713 in actual damages and \$6.3 million in punitive damages.

It is a common misconception that sexual harassment in the workplace occurs only after there has been some inappropriate touching or verbal abuse and that only the employer can be held liable. In fact, sexual harassment claims may arise in many different situations. For example, claims may arise even though the claimant willfully participated in some sexually offensive conduct, such as storytelling, joking or sending email. Claims may arise even though the claimant consented to some sexual activity. Claims may also arise from any employee regardless of sex of the employee and the sex of the offender or offenders. Finally, employers, offending employees and even customers may be liable for sexual harassment.

The legal definition of sexual harassment is complex. It is defined as: (1) unwelcome sexual advances, requests for sexual favors and other verbal or physical conduct that enters into employment decisions; or (2) conduct that unreasonably interferes with an individual's work performance or creates an intimidating, hostile or offensive working environment, or when submission to such conduct is made a condition of the individual's employment. There is no requirement that there be some economic injury to or termination of the claimant.

REAL LIFE EXAMPLE

Two female employees at a large retail company alleged their supervisor had made sexual advances and gestures, and at times had groped them. They claimed the harassment was witnessed by upper management who did nothing to stop it or prevent it. Eventually the two quit. The supervisor was subsequently arrested for assaulting his girlfriend—a fact that was introduced at trial. Total jury verdict, with interest, was in excess of \$2.0 million.

WHAT SHOULD EMPLOYERS DO TO PREVENT SEXUAL HARASSMENT?

Employers should implement policies to detect any sexual harassment and to stop the offensive behavior immediately. The policy should be detailed and prohibit all types of sexual harassment. The policy should be delivered to all employees through memos or employment handbooks and should be posted in the workplace. It may be beneficial to communicate the policy to employees orally, as well as in written form. Translations of the policy may be required in many situations. All employees should sign the policy to acknowledge receipt.

All policies should contain a definition and examples of sexual harassment. The policy should state that the employer maintains a “zero tolerance” approach toward sexual harassment. It should clearly explain the employer’s grievance procedure and the requirement of prompt reporting of all claims. It should include the penalty for violation and should inform all employees of their obligation to report any observed sexual harassment. Sexual harassment policies should provide that employees address their complaints to several different sources, such as supervisors, the human resources department or an executive of the company. Employers should provide sexual harassment training to supervisors, as well as all other employees. Training may include anything from merely having employees read a brochure on sexual harassment to allowing an outside group come in to provide training.

In the event a claim of sexual harassment is filed, the employer should take action in the form of investigation as soon as possible. An employer must ensure that there is no retaliation against the claimant for filing the claim. Retaliation against one filing a claim is illegal and should be so stated within the policy. A company’s quick response to claims may limit its liability, which could include damages such as back pay, front pay, compensatory damages and punitive damages, depending upon the severity of the employer’s conduct or failure to act.

Employers should investigate all claims thoroughly and in a consistent manner. It is the employer’s duty to determine the events leading up to the claim. Many claimants do not fully disclose the facts due to embarrassment or shame. The facts, if left undiscovered by the employer, may lead to a devastating lawsuit down the road.

Employers should keep detailed records of their investigation as evidence of their prompt action to remedy the situation once a claim is filed. All actions taken by the employer should be documented and any corrective actions should be stressed. Employers should follow up on claims to ensure that the harassment has not continued.

SUMMARY

- Voluntary participation in sexual activity does not necessarily mean that the activity or approach was welcomed by the claimant.
- The mere display in the workplace of sexually explicit material including magazines, calendars and posters may constitute hostile work environment harassment if the display somehow creates an atmosphere of discrimination in the workplace.
- Employers must implement and maintain a rigid policy regarding sexual harassment. The policy must define what constitutes sexual harassment, give examples and stress that the

- employer will not tolerate sexual harassment.
- Employers must patrol the workplace and educate supervisors and employees on how to recognize sexual harassment.
 - Employers must allow claimants several avenues to report claims and must make every effort to eradicate harassment once it is discovered.
 - Employers must remember that employees have their own duty to report claims of sexual harassment. If an employer provides legitimate procedures to report claims and the employee fails to utilize the procedures to prevent harm, the employer may use such information in defense of a sexual harassment lawsuit.
 - Employers need not overreact, but instead should embark on implementation, training and enforcement of a fair and logical sexual harassment policy.
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