SEXUAL HARASSMENT BASICS FOR EMPLOYERS

Sexual harassment is prohibited by both state and federal law. The federal law only applies to employers with fifteen or more employees, Washington state law applies to employers with eight or more and Oregon's harassment prohibitions cover all employers.

There are two types of sexual harassment: Quid Pro Quo harassment and "hostile environment" harassment. Quid Pro Quo harassment is the conditioning of a tangible job outcome on submission to requests for sexual favors or conduct of a sexual nature. The second and more prevalent type is "Hostile Environment" harassment. In a hostile environment claim employees proclaim having endured offensive behavior severe or pervasive enough to make the conditions of the work environment intimidating, hostile, or abusive to a reasonable person.

Hostile environment complaints make up the majority of sexual harassment claims. To be actionable as "hostile environment" requires evidence of an objectively hostile or abusive environment as well as the victim's subjective perception that the environment is abusive.

Whether an environment is sufficiently hostile to be actionable requires consideration of all the circumstances rather than any single factor. There are no numbers or facts that will definitively determine which situations are "severe" or "pervasive" enough to be actionable.

The Supreme Court has identified four factors to consider:

1. The frequency of the conduct;
2. The severity of the conduct;
3. Whether the conduct is physically threatening or humiliating, or a mere offensive utterance; and
4. Whether the conduct unreasonably interferes with the employee's job performance.

Other factors a court will consider in hostile work environment cases include:

- Conduct of the victim
- Context of alleged harassment
- Size of employer's business
- Nature of employer's business
- Whether a reasonable person in the position of the plaintiff would have thought the environment to be hostile
While it is easy to define sexual harassment, it is difficult to apply that definition to a set of particular facts. Courts are inconsistent in deciding whether sexual harassment has occurred. It’s particularly muddy in hostile work environment cases.

If there is a unifying characteristic among the hostile environment cases, it is that you don’t know if there is a valid claim until the verdict is returned. Prevent such claims before they get into a courtroom!

LIABILITY

Quid Pro Quo Harassment
If an employee proves that a tangible employment action resulted from a refusal to submit to a supervisor’s sexual demands, sexual harassment has occurred.

Once sexual harassment has occurred, an employer is always vicariously liable.

Hostile Environment Harassment created by Supervisors
Where a supervisor is in a position of authority over the employee, and this is the source of an actionable hostile environment claim, an employer is vicariously liable to the employee. If sexual harassment has been established, then the employer has no defense to liability.

If there has been no tangible employment action taken, the employer may raise a defense. The employer must prove:

1. That it took reasonable care to prevent and promptly correct the harassing behavior; and
2. The employee unreasonably failed to take advantage of any preventive or corrective opportunities provided by the employer.

Hostile Environment Harassment created by Coworkers
If an employee has stated a hostile environment claim on the basis of actions taken by coworkers, the employer will be liable if it knew or should have known of the conduct. There is one defense - having taken immediate and corrective action.

Corrective action must be reasonably calculated to end the current harassment and deter future harassment from the same offender or others. Whether or not the response is adequate will depend upon the nature of the particular harassment.

Hostile Environment Harassment created by Nonemployees
An employer may be liable for the acts of nonemployees (usually customers or clients) where the employer knew or should have known of the harassment and failed to take timely corrective action.
For example, one court recently held an employer liable for harassment based on the sexual advances made by a high-level executive of one of the employer's most important customers. The court discovered that the employer "not only acquiesced in the customer's demands, but explicitly told her to give in to those demands and satisfy the customer."

 Liability to Other Employees Where a Harassed Employee Submits to a Quid Pro Quo Demand

An employer may be liable for unlawful sex discrimination against other persons who were qualified for but denied that employment opportunity if employment opportunities are granted to other employees because of an employee's submission to an employer's or supervisor's requests for sexual favors. If, for example, a supervisor promotes a certain employee because she submitted to requests for sexual favors, other employees that were qualified for the promotion, both male and female, may sue the employer for sexual discrimination.

Note, however, the employer may only be liable where the relationship results from harassing behavior. Solely promoting one's consensual lover is not actionable conduct.

WHAT CAN EMPLOYERS DO TO AVOID LIABILITY?

The best remedy for sexual harassment is prevention. Prevention means having a well-written policy and conducting regular training.

A sexual harassment policy should do the following:

1. State the employer's philosophy on sexual harassment and its commitment to responding to circumstances suggesting sexual harassment, even lacking a formal complaint.
2. Define "sexual harassment" thoroughly.
3. Assure that employees that file complaints or provide information regarding such complaints will not be retaliated against.
4. Describe a meaningful complaint procedure.
5. State the consequences of violating the policy.
6. Provide ongoing educational and training programs.

An employer should provide every employee with a copy of the policy and the complaint procedure, and redistribute the policy periodically. In addition to providing each employee with a copy, the policy and complaint procedure should be posted in a central location and incorporated into employee handbooks, which should include a signed acknowledgement of the contents.

An employer must train its employees in every aspect of sexual harassment. Training is imperative if an employer seeks to use an affirmative defense. If any affirmative defense hopes to be successful, courts expect to see employers exercise reasonable care to prevent and correct harassing behavior, and regular training is key to demonstrating preventive efforts.
Once a complaint has been filed an employer must investigate thoroughly, and ASAP. Careful investigation shows reasonable steps to correct any harassing behavior. An investigation is the best way to learn whether the employee took advantage of corrective opportunities provided by the employer.

Courts examine the timing and scope of an investigation carefully. Employers should use male and female investigators to ensure a fair analysis of the facts and favor with the court. If the investigation is seen as unfair, the alleged harasser may bring suit for any unwarranted employment actions. Such employees have brought suits for breach of employment agreements, breach of implied-in-fact agreements, defamation, infliction of emotional distress, and gender discrimination based on allegedly inadequate investigation of charges.

The 9th Circuit's recent decision in Montero v. AGCO Corp. (1999) illustrates the importance of properly handling a complaint. The plaintiff employee testified that upon hiring she received a handbook that contained the policy. She also stated that during her tenure two other packets regarding the company's harassment policy were distributed to her and other employees. Two days after contacting her human resources manager with the allegations, the manager flew to her office to investigate the complaint. Within a week one of the alleged harassers was terminated and two more disciplined. The human resources manager then met with all the employees in the office and made clear that retaliation would not be tolerated. As a result of these expeditious efforts the employer avoided potential liability.

Another recent decision is illustrative of what not to do. In Molnar v. Booth (2000), a court found that an employer's policy, complaint mechanism, and response defeated its affirmative defense. While the company had a general policy barring discrimination on the basis of race, color or sex, it had no policy aimed specifically at sexual harassment. Nor did its policy provide employees with any guidance about handling such harassment. The employer also failed to effectively investigate the plaintiff's complaint. As a result, the employer was found vicariously liable for the harassing behavior of a supervisor.

Sexual harassment is a pervasive problem in many workplaces. Even worse from an employer's viewpoint, liability for such conduct has continued to expand to the point where an employer can be held accountable for the actions of not only those it employs, but also its clients and customers. Further, sexual harassment claims rarely come alone. They are usually accompanied by additional claims of retaliation and emotional distress. Courts now mandate employers implement proactive solutions to sexual harassment. Carefully crafted policies, thorough employee training, and meticulous investigations are helpful ways to prevent sexual harassment and to insulate an employer from liability should it ever occur.

If you need Anti-Harassment training, call us at (503)595-2095 or email umta@unitedemployers.org!

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