Law Office Management

Recognizing and Eliminating Sexual Harassment

Comments and guidelines for a congenial workplace

by Colleen Marea Quinn

Is your firm a target for a sexual harassment claim? Are employees in your firm allowed to date? How often have you sent or received by e-mail a slightly off-color or racy cartoon? How often are dirty jokes shared with others in the workplace? Is your workplace punctuated with bits of profanity? Are compliments sometimes overly complimentary? Depending on the "sexual innuendo" in your workplace environment, your firm might be susceptible to sexual harassment liability.

Sexual harassment and discrimination claims can result not only in monetary liability and high attorney fees, but also can be devastating to morale in the workplace and the goodwill of a company. Moreover, properly attending to, investigating, and defending sexual harassment claims can be time consuming and distract from more productive activities.

Finally, given the growing awareness of workplace harassment law, many employers, including law firms, have become more vulnerable to sexual harassment claims. In light of the recent U.S. Supreme Court decision of *Reeves v. Sanderson Plumbing Products, Inc.*, 120 S. Ct. 2097 (June 12, 2000), employers have all the more reason to be concerned. Under *Reeves*, the presentation of a *prima facie* case, and sufficient evidence of pretext, without any additional independent evidence of discrimination, may permit the jury to find unlawful discrimination or harassment. For example, where a female is subject to sexual advances, subsequently is demoted for her refusal to submit to such advances, and the reasons given by the employer for the demotion are suspect, the female applicant will have a case much more apt to get to the jury. Given *Reeves*, it is anticipated that many more plaintiff employee cases successfully will clear the hurdles of defensive motions to dismiss and motions for summary judgment and will be presented to a jury. A better understanding of the law in this area, including the implementation of a strongly enforced anti-sexual harassment policy, can better position an employer to fend off such claims.

Eliminating Myths

In the changing landscape of sexual relations, many myths surrounding sexual harassment and sex discrimination rapidly are being dissipated. Recent court rulings continue to expand those situations in which employers may incur liability. Consequently, employers should be aware of the following:

- A work environment can be hostile even if the victim is not subject to sexual advances or propositions.[1]

- A single incident of sexual harassment, if sufficiently severe, can be sufficient in some instances to constitute a Title VII violation.[2]
- Employers can be held liable for same-sex or bisexual harassment.[3]
- An employer may be liable for the conduct of third parties, such as customers, where the employer knows or should have known of the conduct and fails to take immediate and appropriate corrective action.[4]
- If employers have notice of, or are the instigators, they can be held liable for sexual harassment regardless if it occurs off of work premises.[5]
- A victim of sexual harassment need not be psychologically harmed.[6]
- Employers can be liable in some situations when both men and women are subject to harassment.[7]
- Male employees can be victims of sexual harassment.[8]
- Hostile environment harassment can be based on other discriminatory factors such as race, age, religion, national origin, and disability.[9]
- Employers may be found liable for related state law tort claims of intentional or negligent infliction of emotional distress, negligent hiring or retention, assault and battery, defamation, and false imprisonment.[10]

Defining Liability

Under Title VII of the Civil Rights Act of 1964, as amended, employers with 15 or more employees can be liable for unlawful harassment in the workplace, whether discharge is involved or not. Under Virginia state law, as it currently stands, any employer, regardless of size, has the potential to be liable for sexually related wrongful discharge if the employee is terminated in violation of a well-defined state public policy such as the public policies against adultery, fornication, lewd and lascivious acts, and sexual assault.[11]

Hostile Environment v. *Quid Pro Quo* Harassment

There basically are two types of sexual harassment, "quid pro quo" and "hostile environment."

In "quid pro quo" cases, the stereotypical situation occurs when an employee is required to submit to unwelcome sexual conduct, such as sexual advances by a co-worker or supervisor, in order to obtain and/or keep employment or an employment benefit.

In "hostile environment" cases, the stereotypical situation occurs where the environment involves sexual overtures and touching, offensive language, and photographs, jokes and/or drawings which are lewd, sexually suggestive, and generally demeaning of members of the opposite sex. Such "hostile environment" conduct must be unwelcome, pervasive, persistent and severe.

Quid Pro Quo Harassment May Be With or Without the Quo

In *Burlington Industries v. Ellerth*, 118 S. Ct. 2257 (1998), the U.S. Supreme Court reviewed whether a claim of *quid pro quo* ("you do this or else") harassment could be brought under Title VII when the employee did not submit to the alleged harasser's sexual advances and threats and did not suffer any further employment action as a result. Ellerth alleged that a company vice president barraged her with sexual comments, innuendo, and ogling, and implied that her employment status would suffer if she refused his advances. The threats and overtures constituted enough harassment to make her quit her job. The Seventh Circuit Court of Appeals permitted her to bring a Title VII action, even though she suffered no adverse economic consequences. The U.S. Supreme Court affirmed, thereby recognizing liability for cases in which there is a quid (threat or harassment) but no quo (economic consequence).

Hostile Environment Harassment Can Be Derived From A Variety of Sources

Hostile environment harassment need not necessarily involve "sexual" activity or language. Rather, if the harassment is "sufficiently patterned or pervasive" and directed at employees because of their sex, it may result in Title VII liability.[12] A hostile environment can result from the following demeaning or derogatory types of evidence:

- Memoranda
- Verbal abuse
- Physical abuse/Unwanted touching
- Pictures, calendars, cartoons
- Gawking or spying
- Rumors
- E-mail and electronic bulletins

The Employer's Affirmative Defenses

The case of *Burlington Industries v. Ellerth*, cited above, and its companion case of *Faragher v. The City of Boca Raton*, 118 S. Ct. 2275 (1988), provide some clarification of an employer's defenses to sexual harassment claims. The decision in *Faragher* should be viewed as a scary one to most employers. Faragher alleged that, while she worked as a lifeguard for the City of Boca Raton, Florida, her male supervisors touched her inappropriately, talked about her breasts, pantomimed a sex act in front of female lifeguards, and called women by offensive names. Faragher never complained about this behavior to responsible management officials. The Eleventh Circuit Court of Appeals held that the City of Boca Raton was not liable for such harassment, concluding that the

supervisors had acted outside the scope of their employment and only to further personal ends, and that the employer did not know nor had reason to know about the conduct in question. However, the U.S. Supreme Court reversed. The Supreme Court held that employers could be held vicariously liable under Title VII for discrimination by supervisors, even if the employer neither knew nor had reason to know about the conduct in question. If the harassment results in a tangible adverse employment action such as a significant change in employment status or a loss of an economic benefit, the employer may have no defense. Consequently, the decision in *Faragher* makes it all the more imperative that employers train all management and supervisory employees.

For cases involving harassment by co-workers, as opposed to supervisors, or cases involving supervisors where no tangible employment action has been taken, the defending employer can raise a two component defense:

(1) That the employer exercised reasonable care to prevent and correct promptly any sexually harassing behavior, and

(2) That the plaintiff employee unreasonably failed to take advantage of any preventive or corrective opportunities provided by the employer or to otherwise avoid harm.

Prevention of Harassment

Developing a Policy. Prevention is the best tool for the elimination of sexual harassment. The EEOC encourages employers to take all steps necessary to prevent sexual harassment from occurring, including having an explicit policy prohibiting sexual harassment.[13] The policy should prohibit other forms of discriminatory harassment, should be designed to encourage victims of harassment to come forward, and should not require a victim to complain first to the offending supervisor. A comprehensive policy should:

- Define sexual harassment
- Set forth appropriate sanctions
- Require employees to report unlawful harassment to management
- Provide an effective complaint procedure including giving employees alternative sources of redress
- Clearly and regularly communicate the policy and complaint procedure to all employees. On an annual basis, have each employee sign a statement acknowledging receipt of the policy as well as whether he/she is, or is not, aware of any problems with harassment in the workplace
- Address other forms of illegal harassment
- Require that employees treat each other with dignity and respect
- Assure confidentiality as much as possible
- Prohibit retaliation against victims and witnesses
- Assure prompt and thorough investigation by management
- Require cooperation of all employees in investigation
- Provide for prompt and appropriate remedial action
- Be readily available, fair and effective
- Document carefully all information received and actions taken

Training. All employees, from rank and file to senior management, must be made aware of the company's policy against sexual harassment. Training should be regularly conducted to sensitize the workforce to the type of conduct prohibited, the penalties for non-compliance, and the procedures to follow when making a complaint.

Complaint and Investigative Procedure. Once an employer has notice of a harassment claim, it has an affirmative duty to investigate the claim. This duty arises without regard to whether the complaint is made formally through the company's grievance procedure or informally.[14]

An employer should act promptly to make a thorough investigation whenever a supervisor, manager, or co-worker (1) observes something which may be a form of sexual harassment, (2) receives information concerning a possible instance of sexual harassment, or (3) receives a complaint concerning sexual harassment.

All complaints of sexual harassment should be taken seriously by management. However, no judgment should be rendered until the matter is fully investigated and all corroborating evidence explored. All complaints, investigative steps, and actions taken should be carefully documented.

Commitment from Management. Management must be committed to a workplace free of unlawful harassment. Management's commitment extends beyond adopting and disseminating a policy. By its' actions, management sets the tone in the workplace. Management must apply the policy consistently, investigate each complaint promptly and thoroughly, and take appropriate disciplinary action where warranted.

Conclusion

Developing and distributing a proper harassment and discrimination policy, implementing training to eliminate harassment and discrimination in the workplace, and employing careful investigative procedures can be time consuming and meddlesome. However, given the litigation and liability costs of harassment and discrimination claims, clearly an ounce of prevention is worth a pound of cure.

Endnotes

1. *Smith v. First Union National Bank*, 202 F.3d 234 (4th Cir. 2000).
2. *See Brzonkala v. Virginia Polytechnic Institute and State Univ.*, 132 F.3d 949 (4th Cir. 1997), rehearing en banc granted, opinion vacated (1998) (rape is conduct sufficient) and *Hines v. ITT Defense and Electronics*, Memo Op. 96-0081-R, VLW 096-3-325 (W.D. Va. 1996) (harassing employee ran his hand up victim's leg fondling her vagina).
3. *See Oncale v. Sundowner Offshore Service*, 118 S. Ct. 998 (1998).
4. *Magnuson v. Pete's Technical Services, Inc.*, 808 F. Supp. 500 (E.D. Va. 1992). *See also Lockard v. Pizza Hut, Inc.*, 162 F.3d 1062 (10th Cir. 1998), *Moland v. Bil-Mar Food*, 76 FEP 180 (Iowa D.C. 1998), and *Menchaca v. Rose Records, Inc.*, 67 FEP 1334 (N.D.Ill. 1995).
5. *See Martin v. Cavalier Hotel Corp.*, 48 F.3d 1343, 67 FEP 300 (4th Cir. 1995), and *Tomka v. Seiler Corp.*, 66 F.3d 1295, 68 FEP 1508 (2nd Cir. 1995).
6. *Harris v. Forklift Systems*, 114 S. Ct. 367 (1993).
7. *See, e.g., Steiner v. Showboat Operating Co.*, 25 F.3d 1459, 65 FEP 58 (9th Cir. 1994), and *Kopp v. Samaritan Health System, Inc.*, 13 F.3d 264, 63 FEP 880 (8th Cir. 1993).
8. *Ferguson v. Marriott Int'l, Inc.*, No. 97-1990-A, 1998 U.S. Dist. LEXIS 16736 (E.D. Va. 1998).
9. *See, e.g., Joyner v. Fillion*, 17 F. Supp.2d 519 (E.D. Va. 1998) (racially hostile environment).
10. *See, e.g., Swentek v. U.S. Air, Inc.*, 830 F.2d 552 (4th Cir. 1987).
11. *See Mitchum v. Counts*, 259 Va. 179, 523 S.E.2d 246 (2000).
12. *See Smith v. First Union Bank*, 202 F.3d 234 (4th Cir. 2000).
13. *EEOC: Policy Guidance on Sexual Harassment*, FEPM 405: 6699 (BNA) (March 19, 1990).
14. *See, e.g., Meritor Sav. Bank v. Vinson*, 477 U.S. 57, 72 (1986) (plaintiff's failure to utilize company's formal grievance procedure, while relevant, was held not to be dispositive as to whether employer is insulated from liability).

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