

SEXUAL HARASSMENT: EMPLOYER AND EMPLOYEE RIGHTS AND RESPONSIBILITIES

by

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SEXUAL HARASSMENT: EMPLOYER AND EMPLOYEE RIGHTS AND RESPONSIBILITIES¹

I. DEFINING SEXUAL HARASSMENT

- A. Under federal and state law and some local laws it is illegal for employees to be subjected to sexual harassment. What is sexual harassment? Generally, sexual harassment is defined as unwelcome sexual advances, requests for sexual favors, and other verbal or physical conduct of a sexual nature. “Unwelcome” means that the employee did not invite or solicit the alleged behavior and that he or she finds it undesirable or offensive. The EEOC guidelines describe two types of sexual harassment, *quid pro quo* and hostile work environment. *EEOC Policy Guidance on Current Issues of Sexual Harassment*, <http://www.eeoc.gov/policy/docs/currentissues.html>. *Quid pro quo* harassment occurs when submission to or rejection of sexual demands is a term or condition of employment. For example, when an employee is told to provide sexual favors to a supervisor in order to remain employed, receive a promotion or receive a good evaluation.
- B. Hostile work environment sexual harassment occurs when the workplace is permeated with discriminatory intimidation, ridicule, and insult, that is sufficiently severe and/or pervasive to alter the conditions of the victim’s employment and create an abusive working environment. *Harris v. Forklift Systems, Inc.*, 114 S.Ct. 367 (1993). The standard in determining whether the conduct rises to the level of unlawful sexual harassment is whether objectively a **reasonable** person would find the environment sexually abusive or hostile and whether the victim subjectively perceived the environment to be hostile. Factors considered by the Court in determining whether a reasonable person, and therefore the victim, found a work environment offensive would include the frequency of the discriminatory conduct, its severity, whether the conduct is physically threatening or humiliating or a mere offensive utterance, and whether the conduct unreasonably interferes with the employee’s job performance.
- C. An employer can be liable for unlawful sexual harassment by co-workers, supervisors and third parties such as clients, customers and independent contractors. In 1998, the Supreme Court defined the standard of liability for an employer for sexual harassment by a supervisor. See *Burlington Industries, Inc. v. Ellerth*, 118 S.Ct. 2257 (1998) and *Faragher v. City of Boca Raton*, 118 S.Ct. 2275 (1998). The Court held that an employer is vicariously liable for unlawful sexual harassment by a supervisor if it culminates in a tangible employment action. This means that an employer will be found liable if a supervisor with immediate or successively higher authority over the victim/employee subjects an employee to

¹ The following material is intended to provide information of a general nature concerning the broad topic of sexual harassment. The materials included in this paper are distributed by the Law Offices of Cynthia N. Sass, P.A., as a service to interested individuals. The outlines contained herein are provided for informal use only. This material should not be considered legal advice and should not be used as such.

sexual harassment and the harassment causes a significant change in the employee's employment status, i.e. a tangible employment action. Examples of tangible employment actions include: hiring and firing, promoting or failing to promote, demoting, changing work assignments, benefits, or compensation. *EEOC Enforcement Guidance: Vicarious Employer Liability for Unlawful Harassment by Supervisors*, <http://www.eeoc.gov/policy/docs/harassment.html>. The only defense available to an employer in this type of situation is to prove that the harassment did not occur.

- D. If no tangible job action is taken against the employee, the employer can avoid liability if it can prove that it exercised reasonable care to prevent and promptly correct any harassment and the employee unreasonably failed to take advantage of any preventive or corrective opportunities provided by the employer or to avoid harm otherwise. Arguably, the standard of liability created by the Supreme Court cases should be applied to non-supervisor sexual harassment cases. To take advantage of this defense, an employer should have in place an effective anti-sexual harassment policy and provide anti-sexual harassment training to employees and supervisors.
- E. It is important to understand that in order for a claim of sexual harassment to be actionable, the conduct must be directed at the employee because of his or her gender. *Robinson v. Jacksonville Shipyards, Inc.*, 760 F. Supp. 1486 (M.D. Fla. 1991). Therefore, cases of sexual harassment arise not only in the context of males harassing females, but females harassing males, males harassing males and females harassing females.

II. ESSENTIAL ELEMENTS OF AN EFFECTIVE POLICY

- A. As noted above, an effective anti-sexual harassment policy will limit and in some cases even eliminate an employer's liability completely for sexual harassment claims. The key to drafting an effective policy is to ensure that the policy at a minimum contains the following elements.²
 - 1. A clear explanation of prohibited conduct. The policy should make it clear that harassment based on all protected classifications (sex, race, color, religion, national origin, age, disability and any other protected classifications and protected activity) is prohibited. This prohibition should cover conduct by supervisors, co-workers and non-employees. The policy should also require employees to report harassment before it becomes severe or pervasive.
 - 2. Assurance that employees who make complaints of harassment or provide information related to such complaints will be protected against retaliation. It is essential that the policy prohibit retaliation against employees who

² *EEOC Enforcement Guidance: Vicarious Employer Liability for Unlawful Harassment by Supervisors*, <http://www.eeoc.gov/policy/docs/harassment.html>. (This guidance reviews the elements of an effective policy.)

report sexual harassment or provide information to related complaints as federal, state and some local laws prohibit retaliation against an employee who reports sexual harassment and/or provides information related to such a complaint or investigation. A recent jury verdict research analysis of retaliation claims has revealed that retaliation claims based on sexual harassment have a median award of \$132,453.00. *Employment Practice Liability Verdicts and Settlements*, LRP Publications - January 2002.

3. A clearly described complaint process that provides accessible avenues of complaint. The complaint procedure should be one that is designed to encourage victims to come forward; therefore, there should be no unreasonable obstacles to complaints. To accomplish this goal, care should be taken in making the procedure simple to follow and in determining the designated personnel to whom the complaints are made. Because sexual harassment is often perpetrated by an employee's supervisor, the procedure should designate at least one official outside of the victim's chain of command to receive complaints. This will help provide additional assurance that the complaint will be handled in an impartial manner.
4. Assurance that the employer will protect the confidentiality of harassment complaints to the extent possible. Complete confidentiality of the harassment allegations cannot be guaranteed by the employer as it cannot conduct an effective investigation without revealing certain information to the alleged harasser and witnesses. However, certain sensitive information should only be shared with individuals who need to know. Records relating to the complaint and investigation should also be kept confidential.
5. A complaint process that provides a prompt, thorough and impartial investigation and assurance that the employer will take immediate and appropriate corrective action. The complaint process should designate a well-trained person to conduct the investigation who will objectively gather and consider the relevant facts, and the investigation should be completed as quickly as possible.

- B. The anti-harassment policy should be written, disseminated to all employees, followed and enforced.

III. EMPLOYER AND EMPLOYEE TRAINING

- A. In many circumstances, an aggressively enforced anti-sexual harassment policy can be a defense to a sexual harassment claim. To vigorously enforce an anti-sexual harassment policy, an employer should periodically provide training to its employees and supervisors. This training should be mandatory for all employees and provided by someone knowledgeable in the field. Employers should obtain written acknowledgments from all employees and supervisors regarding their

attendance at the training, receipt of training material and the anti-harassment policy and the date of the training. Copies of the information distributed at the training should also be kept. This acknowledgment and the materials distributed at the training will support the employer's position that it had a policy against sexual harassment, it has zero tolerance for such harassment, the employee knew about the anti-sexual harassment policy, and its complaint process but unreasonably failed to avail himself or herself of this process. Further, supervisors should be trained that they are required to report any and all types of harassment, even if there has not been a complaint. This will ensure that harassment will be stopped before it becomes severe and pervasive.

IV. HOW TO INVESTIGATE AND HANDLE A SEXUAL HARASSMENT CLAIM

- A. Once a complaint is lodged, an employer needs to take immediate action. This means that an employer needs to take prompt action to investigate the complaint. The first step is to assign an impartial well-trained investigator(s) to conduct a fact-finding investigation. (When selecting an investigator, an employer should keep in mind that if the matter goes to court, the investigator will be a witness at trial regarding the action taken and the investigative procedure.) An effective fact-finding investigation should include interviewing the complainant, the alleged harasser, and third parties who could have relevant information.
- B. When interviewing the complainant, the EEOC provides the following examples of questions to be asked:
 1. Who, what, when, where, and how:
 - Who committed the alleged harassment?
 - What exactly occurred or was said?
 - When did it occur and is it still ongoing?
 - Where did it occur?
 - How often did it occur?
 - How did it affect the complainant?
 - How did he or she react?
 - What response did he or she make when or after the incident(s) occurred?
 - How did the harassment affect the complainant?
 - Has the job been affected in any way?
 - Are there any persons who have relevant information?
 - Was anyone present when the alleged harassment occurred?
 - Did the complainant tell anyone about it?
 - Did anyone see the complainant immediately after the episodes of alleged harassment?
 - Did the alleged harasser harass anyone else?
 - Did anyone complain about harassment by that person?

- Are there any notes, physical evidence, or other documentation regarding the incident(s)?
 - How would the complainant like to see the situation resolved?
 - Does the complainant have any other relevant information?
- C. In the interview with the complainant, the investigator should assure the employee that he or she will not be retaliated against for providing information and if he or she feels that the conduct is continuing or that he or she is being retaliated against, he or she should immediately report it to the investigator.
- D. When interviewing the alleged harasser, the EEOC provides the following examples of questions to be asked:
- What is his or her response to the allegations?
 - If the harasser claims that the allegations are false, ask why the complainant might lie.
 - Are there any persons who have relevant information?
 - Are there any notes, physical evidence, or other documentation regarding the incident(s)?
 - Does the alleged harasser have any other relevant information?
- E. It is a better practice not to identify to the alleged harasser the complainant, but instead describe the alleged conduct. Further, it is essential that the investigator explain to the alleged harasser that he or she cannot retaliate against the complainant or anyone else who may be associated with the investigation.
- F. After interviewing the complainant and alleged harasser, the investigator should interview third parties who have been identified as witnesses or who the investigator would reasonably expect to be a witness. Care should be taken in disclosing only information to these witnesses on an as-needed basis. These witnesses should also be told that they will not be retaliated against for providing information and if they are being retaliated against to report this immediately to the investigator.
- G. The EEOC provides the following examples of questions to be asked:
- What did the witness see or hear?
 - When did it occur?
 - Describe the alleged harasser's behavior toward the complainant and toward others in the workplace.
 - What did the complainant tell the witness?
 - When did she/he tell the witness?
 - Does the witness know of any other relevant information?
 - Are there other persons who have relevant information?

EEOC Enforcement Guidance: Vicarious Employer Liability for Unlawful Harassment by Supervisors, <http://www.eeoc.gov/policy/docs/harassment.html>.

- H. An investigator should be professional and courteous to all individuals interviewed during the investigation process. No witness should be accused of fabricating facts. The investigator should not offer an opinion to the witnesses as to the potential outcome of the investigation or as to the credibility of the complainant or alleged harasser; rather, the investigator should be a fact gatherer. The investigator should make sure questions asked are relevant to the allegations. Generally, questions regarding someone's personal life are not appropriate.

V. CORRECTIVE ACTION - TIMING IS EVERYTHING

- A. In many instances, an employer can avoid liability if it can prove that immediate corrective action was taken to end the harassment and to prevent it from re-occurring. Thus, the timing of the correction is essential. In some extreme circumstances, it may be appropriate to take intermediate measures before completing the investigation to ensure that further harassment does not occur. Such measures include making scheduling changes so as to avoid contact between the parties, transferring the harasser, or placing the alleged harasser on non-disciplinary leave with pay pending the conclusion of the investigation.
- B. If intermediate measures are not needed, and if, at the conclusion of the investigation an employer finds some merit to the complaint then effective corrective action needs to be taken. The requisite corrective action is the action needed to stop the harassment from occurring and re-occurring. The EEOC suggests that disciplinary measures should be proportionate to the seriousness of the offense: "If the harassment was minor, such as a small number of 'off-color' remarks by an individual with no prior history of similar misconduct, then counseling and an oral warning might be all that is necessary. On the other hand, if the harassment was severe or persistent, then suspension or discharge may be appropriate." <http://www.eeoc.gov/policy/docs/harassment.html>, page 15 of 30.
- C. The EEOC guidance provides the following examples of measures to stop the harassment and ensure that it does not reoccur:
- oral or written warning or reprimand;
 - transfer or reassignment;
 - demotion;
 - reduction of wages;
 - suspension;
 - discharge;
 - training or counseling of harasser to ensure that he or she understands why his or her conduct violated the employer's anti-harassment policy; and
 - monitoring of harasser to ensure that harassment stops.

D. The EEOC guidance provides the following examples of measures to correct the effects of the harassment:

- restoration of leave taken because of the harassment;
- expungement of negative evaluation(s) in employee's personnel file that arose from the harassment;
- reinstatement;
- apology by the harasser;
- monitoring treatment of employee to ensure that he or she is not subjected to retaliation by the harasser or others in the work place because of the complaint; and
- correction of any other harm caused by the harassment (e.g., compensation for losses).

<http://www.eeoc.gov/policy/docs/harassment.html>, page 15 of 30.

E. Procedures addressing the investigation of a complaint and the resulting corrective action should be consistently applied.