

14 PRACTICAL STRATEGIES TO HELP AVOID
AND DEFEND SEXUAL HARASSMENT LAWSUITS

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A prohibited form of sex discrimination is harassment. In 1986, the U.S. Supreme Court ruled that sexual harassment was actionable under Title VII of the Civil Rights Act of 1964. The importance of this development is that companies may now be held strictly liable for the acts of their supervisors and employees who engage in on-the-job sexual harassment, even if management is not aware of the problem. The EEOC has seen a dramatic increase in the number of harassment complaints filed nationwide since 1992 studies indicate that the vast majority of working women (more than 85 percent) believe they have been sexually harassed on the job at one time or another. With the enactment of the Civil Rights Act of 1991, employers face up to as much as \$300,000 in punitive and compensatory damages (for pain and suffering) in a jury trial for charges of sexual harassment. Previously, monetary damages under federal law were limited to back pay and other forms of equitable relief.

Additionally, due to a recent Supreme Court decision, employees do not have to prove severe psychological harm or the inability to perform their job after being exposed to harassment to prevail in a lawsuit. This development has made it easier for all employees to file and win a sexual harassment lawsuit.

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Sexual harassment cases are on the rise in a variety of non-traditional areas. For example, if a person is passed over for a promotion or denied benefits in favor of an individual who submitted to sexual advances, the passed-over person is considered to be a victim of sexual harassment under federal and state guidelines. Additionally, if a worker initially participates in social or sexual contact, but then rejects continued unwelcome advances, that constitutes sexual harassment in most instances.

The harassment can come from any source, not just fellow employees. For example, sexual harassment was found in one case when female employees were required to wear revealing uniforms and suffer derogatory comments from passersby. And, claims of sexual harassment are not limited to women. In one case that received nationwide coverage, a jury awarded \$196,500 in damages to a man who claimed his supervisor demoted him because he refused her sexual advances. According to court testimony, the employee and his supervisor met one night in a hotel room, but the man refused to continue the relationship. The man proved he was demoted and passed over for a promotion as a result. In another case, the termination of a male employee for rejecting the advances of his homosexual male supervisor proved costly to a company.

Imaginative lawyers representing claimants in sexual harassment suits are also asserting other non-traditional causes of action in federal and state courts. These include wrongful

discharge, fraud, intentional infliction of emotional distress for outrageous conduct, invasion of privacy, and assault and civil battery if the harassment involved unwanted touching. Awards from these suits often include large sums for mental anguish, back pay, reinstatement and punitive damages by a jury and insurance coverage for the defense of these charges may not be available. Damages incurred by employers also include hefty legal bills from lengthy courtroom litigation and adverse media attention.

In many states, courts are ruling that companies are responsible for the acts of their supervisory employees regardless of whether the company knew about the incident. In some cases, the courts are ruling against companies on the basis that they should have known. When no prompt action is taken to end the harassment, employers often become strictly liable for the incident(s).

Definition of Sex Harassment

Unwelcome sexual advances, requests for sexual favors, and verbal or physical conduct of a sexual nature all constitute sexual harassment when:

- The person must submit to such activity in order to be hired;
- The person's consent or refusal is used in making an employment decision (e.g., to offer a raise or

promotion); or

- Such conduct unreasonably interferes with the person's work performance or creates an intimidating, hostile, or offensive working environment (e.g., humiliating comments are repeatedly addressed to the complainant).

Defining what constitutes sexual harassment depends upon the facts of each particular case. In instances when employees of either sex are propositioned for sexual favors in order to receive a promotion or raise (these are referred to as "quid pro quo" cases), the issue may be clear cut. In other situations (e.g., the "hostile, intimidating, work environment case") the issue is less clear. Typically, to establish a prima facie case, the employee must prove that (1) he or she was subjected to unwelcome sexual conduct; (2) the unwelcome sexual conduct was based on his or her gender; (3) the unwelcome sexual conduct was sufficiently pervasive or severe to alter the terms or conditions of the employee's employment and create an abusive or hostile working environment; and (4) the employer knew or should have known of the harassment and failed to take prompt and reasonable remedial action.

Courts have ruled the following to constitute sexual harassment with respect to hostile, intimidating work environment cases:

- Extremely vulgar and sexually related epithets, jokes or

crusty language, provided the language is not isolated and is continuously stated to the complainant;

- Sexually suggestive comments about an employee's attire or body;
- Sexually degrading words describing an employee;
- Repeated touching of the employee's anatomy, provided the touching is unsolicited and unwelcome;
- Showing lewd photographs or objects of a sexual nature to employees at the workplace;
- Requiring females to wear revealing uniforms and suffer sexual comments from non-employee passers-by;
- Offensive, repeated requests for dates, even if the calls are made to the complainant after work;
- Continued advances of a sexual nature which the employee rejects, even after the parties break off a consensual sexual relationship.

Protecting Your Company From Sex Harassment Claims. How your company investigates and acts on complaints can determine whether it will end up in court and incur substantial damages.

In one recent case, for example, after a company investigated a sexual harassment charge and found that it had merit, the employer did nothing further but to warn the supervisor. When the supervisor continued his unlawful conduct (by showing lewd pictures to the complainant), the female worker quit her job and filed a

complaint with the EEOC. She was awarded \$48,000 when the court ruled that the company had failed to act on its investigation.

EEOC guidelines specify preventive affirmative steps which may create immunity from liability for employers. In determining whether an employer is liable, some courts look to see if a comprehensive policy against sexual harassment was in place at the time the incident(s) occurred and whether the employer acted promptly and properly. In one case, the fact that the defendant-employer's policy on sexual harassment was vague and ineffective in protecting the victims of alleged harassment was crucial to a finding of employer liability. In that case, the court was dismayed by the company's inadequate investigation (the investigation assumed the supervisor was not the harasser, there was no documentation of the investigation in the personnel file and the supervisor has previously harassed other women in the company unhampered).

Basically, a prevention program -- the best tool for eliminating sexual harassment -- should include a comprehensive written policy advising workers about the dangers of sexual harassment and that sexual harassment may result from conduct by co-workers as well as supervisors. Also employees need to be advised that not all complaints must be addressed to the employee's supervisor, especially when the superior is responsible for the harassment.

The following is a set of rules and strategies to assist your company in this area:

1. Issue a specific policy in work rules, company manuals and employment agreements defining sexual harassment and prohibiting it in the workplace. Any policy on harassment (sexual or otherwise) on the job should not only state the company's position, but also state procedures to follow should an employee feel he/she is a victim of such harassment.

Periodic reminders in policy manuals, journals and letters to employees may not only clearly define what constitutes sexual harassment, but state that any related action will not be tolerated and could lead to immediate discipline, including discharge. Additionally, employees should be notified regularly that any one experiencing or observing such treatment is required to report this to management immediately, and that all communications will be held in strict confidence with no direct or indirectly reprisals to the informant and/or complainant.

2. Educate supervisors as to what constitutes sexual harassment and ways to handle any problems that may arise. Management must be trained to address itself promptly and properly to all complaints in an objective and responsive fashion.

3. Develop an internal complaint procedure that directs

employees to "seek out" a neutral manager.

4. Create, through employee education, an atmosphere that encourages complainants to come forward if they have been harassed.

5. Take speedy action to investigate and resolve complaints. Employees should be reminded that all complaints will be promptly and confidentially investigated. Supervisors and management should be instructed to investigate all charges, no matter how slight. The investigation would include:

- What exactly was said or done that constituted sexual harassment;
- The circumstances under which the event occurred (e.g., at a meeting, luncheon, or sales call);
- Where it happened (in the office, someone's home, etc.);
- The name of the party who allegedly caused the harassment; and
- Names of any witnesses.

All the details of the incident(s) must be documented including how the complainant acted, whether the incident was isolated or part of a series, and whether the complainant has spoken to anyone else about the incident.

6. Train supervisors to remain unbiased. Instruct the

supervisor never to reach any conclusion until after he/she gathers all the evidence (e.g., by speaking to witnesses, if any). A manager investigating harassment charges should treat the incident as an accusation with serious consequences. Harassment charges must never be dismissed without full investigation. The company's policy and the investigation must recognize that either sex can be guilty of harassing and that harassment can be heterosexual or homosexual.

Since written materials may end up in court, be accurate with any notes written during the investigation. Take notes during interviews, but don't prepare a formal report which draws a conclusion. In fact, it may be better to brief superiors orally.

If multiple incidents are reported, investigate each separately, preparing a detailed factual chronology of each.

7. When interviewing witnesses, conduct the interview to insure privacy, such as in a room without windows, so non-essential company personnel will not see or hear what is going on. Phrase questions so that you do not disclose any information you have already learned. Instead of asking "Did you see X touch Y?" put the question in an open-ended fashion so that it is not an allegation: "Did you see anyone touch Y in a way that made Y uncomfortable?" Merely ask the person to report what he/she saw or heard. Avoid asking for opinions (e.g., "Did the worker ask for

it?").

8. **Make all decisions in an objective manner.** Weigh all the evidence to determine the truth. Do not assume that either party is right. Avoid making definitive statements or conclusions about what occurred. In the initial investigation, stick to relevant facts only -- not either party's family or sex life. Investigate the employment history of all parties involved. Does the accused person have a history of similar acts or poor work performance? Is there a reason that the complainant might have fabricated the story?

9. **Determine whether the alleged act(s) really happened and, if so, whether they legally constitute sexual harassment.** Be sure you can document your decision with concrete evidence. Draft a written report for the file; consult with and have the report reviewed by upper management before a final decision is made. Do not disparage the accused's character, job performance, or family life, as this can contribute to a finding of libel or slander, should the accused sue for defamation.

10. **Be consistent in the decision.** Determine the appropriate disciplinary action to be imposed. To avoid charges of race, age or sex discrimination, be sure that whatever action is taken is consistent with previous related forms of discipline. Consider transferring the complainant or the accused to a different

department, especially if one of the parties has already agreed to move. If a transfer seems the appropriate solution, offer it but do not **force** the complainant to transfer since that might be interpreted as illegal retaliatory action for making the complaint.

11. **Implement a course of action immediately after your company is notified of a problem.** Never treat complaints lightly, particularly when they are in writing.

12. **Seek legal advice.** Speaking to a labor lawyer when you receive a written complaint is a good idea, because in addition to obtaining practical advice on how to properly investigate and act on the charge, the lawyer may assist you in drafting a written response. If a charge is then filed with your state's Human Rights Commission or the EEOC, the document can serve as a first step in demonstrating that an adequate response was taken in a timely fashion.

13. **Keep all investigations strictly confidential.** Impress the need for confidentiality on all involved. Never use actual case information in training others.

14. **Remind all employees periodically that any person who violated company policy concerning harassment will be subject to disciplinary action and possible discharge.** This can go a long way toward reducing harassment within you plant or office. All

employers must take adequate steps so that no harassment, even if it is not sexual in nature, occurs within the company.