

Memo to Employers: Take the Dozen Steps Necessary to Prevent Sexual Harassment Claims

By: David R. Johnson, Esquire
THOMSON, RHODES & COWIE, P.C.
Tenth Floor, Two Chatham Center
Pittsburgh, PA 15219
(412) 232-3400
Facsimile: (412) 232-3498
drj@trc-law.com

NOTE: These guidelines are general in nature and should not be construed as providing legal advice. The circumstances of any particular problem are important in analyzing legal issues, and an employer seeking guidance for a particular question should seek specific legal advice.

“It is now well recognized,” the United States Supreme Court has declared “that hostile environment sexual harassment by supervisors (and for that matter, co-employees) is a persistent problem in the workplace.” As a result, the number of sexual harassment lawsuits filed against employers has risen dramatically in recent years, and each case bears considerable monetary and public relations risks for the involved employer. Thus, prevention of sexual harassment disputes is of utmost importance. While there are legal defenses which may be raised in the event a claim is filed, an employer is much better off if it never has to reach the point of defending allegations of sexual harassment.

If an employer loses a case of sexual harassment, it can be exceedingly costly. Among the remedies potentially available to a plaintiff are:

1. Back pay, including lost wages and benefits;
2. Reinstatement or front pay;
3. Plaintiff’s attorneys fees (potentially much larger than the fees already expended by the defendant employer);

4. Payment of plaintiff's expert witness fees;
5. Compensatory damages for emotional pain and suffering;
6. Punitive damages; and
7. Court costs.

Unfortunately, it is not only the meritorious cases which are costly. Even completely unfounded charges of sexual harassment can cause great expense and workplace havoc. The media's interest is sparked whenever allegations of sexual harassment are revealed, with the juiciest claims receiving the greatest exposure, long before the allegations are either supported by credible evidence or refuted. And, any lawsuit will result in the employer's own attorneys fees, costs for the employer's expert witnesses, and internal loss of productivity from those engaged in litigation-related tasks.

The primary goal for employers, obviously, is to have a workplace free of sexual harassment. But, given the fact that no employer can assure that that objective always will be met, employers must commit themselves to an action plan which demonstrates the company's efforts to prevent sexual harassment and to make all employees aware of the employer's strong views on the issue. Every effort should be undertaken to deal promptly with any problems of a sexual nature, in a conscientious, fair and effective manner.

There are a variety of ways in which an employer can substantially enhance its chances of defeating a claim of sexual harassment if one is filed. Based on decisions by the United States Supreme Court, it is clear that, to successfully defend most cases, an employer must:

1. Be able to prove the existence of a credible and comprehensive sexual harassment policy;
2. Be able to prove that all involved employees were aware of the policy and understood it;
3. Be able to point to a complaint process which provides a reasonable vehicle for reporting sexual harassment;
4. Be able to document that it engaged in prompt and effective remedial action once it was on notice of any sexual harassment problem; and
5. Be able to rebut any claims that the complaining party received or was at risk to receive retaliation for making a complaint.

SEXUAL HARASSMENT RISK MANAGEMENT - - A “Must-Do” List to Avoid Sexual Harassment Claims

An employer’s risk management plan to avoid sexual harassment claims should include the components:

- (1) Create a culture in which it is clear that sexual harassment will not be tolerated

An employer must have a strong sexual harassment policy which specifies that the employer will not tolerate sexual harassment, and which affords an employee with a meaningful means to make a complaint if sexual harassment occurs. The company must make it clear that the policy is important and that it is applicable to everyone -- including managers, supervisors, and third parties on the premises.

In evaluating a company’s sexual harassment policy, courts will examine:

- (a). Whether the policy was reasonably designed to eliminate workplace sexual harassment; in other words, whether the policy truly engenders a work environment in which sexual harassment will not be tolerated;
- (b). Whether the policy was actually followed by the employer and by employees;
- (c). Whether the policy provided an effective means for making a complaint; and
- (d). Whether the employer guarded against retaliation for making a complaint.

If these questions can be answered affirmatively, the employer will have taken the first step toward preventing and defending sexual harassment claims.

(2) Widely disseminate the sexual harassment policy

A sexual harassment policy will not be helpful in affording a company with a defense to claims of sexual harassment unless the employer disseminates the policy throughout the organization. The policy must be known and understood by all employees. The policy should be posted. The importance of the policy and the need to comply with the procedures outlined by the policy should be reinforced periodically through training sessions or seminars. These programs should emphasize compliance with the policy, the recognition of problem areas, the utilization of proper procedures, and the formulation and implementation of an appropriate response.

(3) Be able to prove knowledge of the policy and proper procedures

The company should be prepared to prove that all employees were aware of the policy. When seminars are held, there should be attendance logs, which are maintained for years into the future. When policies or updates are distributed, receipts should be acquired and copies should be placed into individual's human resource department file. Evidence of this nature will help an employer to counter a harassed employee's allegation that he or she was not aware of the company's policy or of the company's complaint procedure.

- (4) Make it absolutely clear that the sexual harassment policy unambiguously bans sexual harassment in all forms

The sexual harassment policy should unambiguously affirm that sexual harassment is prohibited and that the employer is committed to a workplace free of sexual harassment. The policy should make it plain that it applies to all employees, and even to vendors and customers. So that all individuals in the workplace have a better idea of what is included, the policy should define terms and behaviors to which it makes reference. For example, the concepts of quid pro quo sexual harassment and hostile environment sexual harassment should be explained. Fundamentally, the policy should make it clear how people are expected to behave and what is unacceptable conduct. The policy should specifically warn that anyone who violates it will be disciplined up to and including discharge. It is appropriate for the policy to explain that any repeat offenses will be dealt with even more harshly than initial offense, but that a person may be dismissed for a first offense if it is of great enough significance.

- (5) Provide all employees with a workable and reasonable complaint protocol

The company's sexual harassment policy should identify clear cut procedures to be followed. It must have a mechanism whereby a complaint can be made in an alternative manner if the harasser is the person who normally would be the recipient of the complaint. The policy also should state in unequivocal terms that no retaliation will occur for making complaints under the policy.

There are benefits from having both an informal process and a formal process. The person to whom the initial report of sexual harassment is made should have discretion to decide if the situation is one which might be resolved informally. The policy should specify that investigations are to occur promptly.

The policy should outline the formal grievance procedure. The complaint procedure should be designed to afford the person receiving the complaint with as much information as possible. The employee who is complaining should be required to set forth specifics -- including names, dates, incidents, and a description of similar events. As part of the report-making process, the employee should give consent to the company to investigate. If the employee refuses to give such consent, the employer should obtain a signed document from the employee specifying that its investigation was restricted by the employee's refusal to consent. In some instances, depending on the nature of the complaint, it may be incumbent on the employer to investigate a charge even if the employee has not specifically consented. The policy should specify that reports and investigations will be confidential but that there will be a need to act upon complaints and that certain disclosures may be necessary in order to get to

the root of a problem. The policy should promise prompt and effective action to remedy a situation involving harassment.

(6) Mandate reports of sexual harassment

Individuals who observe sexual harassment, or who are subjected to it, should be obliged to make a report. One benefit of such a practice is that it tends to provide management with early notice of situations. Additionally, however, it provides a defense to a claim that a situation has been long standing (if there has been no previous report by any employees).

(7) Warn against false reports

Finally, employees should be cautioned against making false complaints. Although the employer does not want to “chill” the complaint process, it, also, does not want to suggest that there will be no consequences if one employee alleges without any basis that someone else is engaging in sexual harassment. Thus, the policy should specify that while it *is* important to complain of sexual harassment, and that all employees are required to do so, that the making of a bogus complaint is also serious workplace misconduct which will be sanctioned.

(8) Undertake good investigations in the event any claim is made

A company which receives a complaint of sexual harassment should respond immediately. Good investigations are an essential component of the response. A limited or incomplete investigation, or one which fails to remedy the situation, will not provide any defense to sexual harassment claims.

The person charged with investigating the complaint should attempt to get unfiltered information from as many people as possible who might have knowledge of the facts and circumstances. When interviewing, it is important to strive to obtain information, rather than to suggest answers. Enough people should be interviewed so that if there are two sides to various issues, both sides will be represented in the material obtained by the interviewer. Those who participate in the investigation, including the witnesses, should be reminded that matters are to remain confidential.

An appropriate and important step in the investigation is that of confronting the harasser with the allegations. In this phase, it is important not to be "accusing," but to focus upon the need to acquire additional information. In the event that there are conflicts in the information obtained from various persons, it is appropriate to re-interview key individuals.

The investigation should be documented. A written report should be prepared. In some cases it is appropriate to obtain signed statements from the witnesses. The company's procedures should include checking to see that the improper conduct has not been repeated and that there have been no reprisals.

- (9) Be certain to afford prompt and effective remedial action in the event any harassment occurs

It is essential for an employer to respond promptly and effectively once an investigation has revealed a situation involving sexual harassment. Unless it was a condition which should have been known to the employer in advance of the complaint, a prompt and effective response may provide a defense. This will only occur, however, if, indeed, the response is prompt and effective. Case law teaches that the promptness required is one of initiating an investigation almost immediately after receiving a complaint and expediting the investigative process thereafter. As a matter of practice, it is appropriate to even more speedily react if there is a report of repeated conduct.

The goal of the employer in responding to a post-complaint investigation should be to do whatever is necessary to prevent a recurrence. This requires more than just verbiage. It may be necessary to separate the involved individuals; remedies such as transferring the harasser may be required; sometimes termination is necessary. The employer is required to undertake all actions necessary to effectively remedy the problem.

- (10) Don't retaliate

It is essential that the employer not engage in any conduct which could be considered to be retaliatory. Employees must be assured that if they do make a legitimate complaint, they will not suffer any adverse workplace consequences. Practically speaking, an employer must be aware that after a complaint has been made by an employee, an employer is

vulnerable for any allegation that anything displeasing to that employee may be alleged to be retaliatory.

(11) Apply common sense, especially when the facts are not clear

Especially when an investigation is inconclusive, common sense plays a big role in helping the employer to make the right decision. In such a case, efforts should be undertaken to develop a response which is neither oppressive nor embarrassing to either the accuser or to the accused. The best solution is to arrive at a resolution which is satisfactory to both individuals. If, under the circumstances, it is not possible for that to occur, the employer must engage in unilateral action which, to a reasonable person or fact finder, will appear to be fair, appropriate, level headed, and justified after considering all of the circumstances as a whole.

(12) Maintain consistency in personnel matters

Since many sexual harassment cases arise in situations where the alleged victim recently has been the subject of a disappointing employment decision, the possibility of a quid pro quo claim underscores the necessity to have clear cut policies and procedures with respect to personnel matters. Since an employer will have automatic liability if it is found that a supervisor has made an employment decision to retaliate for a sexual rebuke, it is important for employers to be able to explain clearly why adverse employment action was taken.

It is helpful if an employer can point to documentation to explain why a particular personnel decision was made. In most cases, if an employee has been disciplined, the details should be contained in the employee's permanent file. In order to prove adherence to its policy and avoid claims of favoring certain employees, or engaging in retaliation, evidence of the employer's consistency in dealing with particular employee issues is important.

Also, the employer must make certain that the documentation is credible. Jurors likely will be instructed that if they do not believe the employer's proffered reason, they are permitted to infer that harassment (or sexual discrimination) occurred. For this reason, also, the credibility and consistency of documentation is vital.

CONCLUSION

An employer will not be successful in preventing all claims of sexual harassment. Yet, if the workplace environment is directed toward preventing sexual harassment, and if strong policies are followed, the number of claims will be reduced, and there will be a much smaller likelihood that an employee will be able to prevail on a claim of sexual harassment.
