An Employer's Guide to Managing the Risk of Sexual Harassment Claims

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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.

Guidelines issued by the Equal Employment Opportunity Commission have defined sexual harassment as follows:

> "Unwelcome sexual advances, requests for sexual favors, and other verbal or physical conduct of a sexual nature constitutes sexual harassment when (1) submission to such conduct is made either explicitly or implicitly a term or condition of an individual's employment, (2) submission to or rejection of such conduct by an individual is used as the basis for employment decisions affecting such individual, or (3) such conduct has the purpose or effect of unreasonably interfering with an individual's work performance or creating an intimidating, hostile, or offensive working environment."

Frequently, courts divide sexual harassment lawsuits into two categories: "quid pro quo" claims, and lawsuits based upon an "hostile environment." In a quid pro quo case, the plaintiff alleges that sexual considerations resulted in an adverse employment decision. A hostile environment claim is one in which the plaintiff alleges that she or he was subjected to "unwelcome" conduct of a sexual nature which was so pervasive that it altered the conditions of employment and thereby created an abusive working environment.

Although the types of conduct which can evoke sexual harassment claims are rather broad, most lawsuits arise from allegations that fall within a number of common areas:

1. Unwanted sexual jokes, teasing remarks.
2. Unwanted suggestive looks or gestures, or ogling.
3. Unwanted touching or cornering.
4. Unwanted pressure for dates or romantic relationships.
5. Unwanted pressure for sexual favors.
6. Unwanted phone calls, letters, cards, and other communications.
7. Actual assaults or attempted rape.

PROVING A CLAIM OF SEXUAL HARASSMENT

An individual bringing a sexual harassment lawsuit must prove that he or she was subject to unwelcome sexual harassment. Importantly, it must also be shown that the harassment alleged was based in some way upon sex. In 1998, the United States Supreme Court specifically allowed same sex harassment claims.

In quid pro quo cases, the plaintiff must also establish that, as a reaction to the harassment, some significant aspect of his or her employment was affected. In other words, there must have been a tangible consequence. In hostile environment cases, the plaintiff must prove that the sexual harassment was so severe and pervasive that the conditions of employment have actually been altered and that an abusive working environment has been created.

The complaining party also must establish a basis for imposing "respondeat superior liability" upon the employer, where either a non-supervisory person or a third party is the alleged harasser. This is the doctrine which establishes a basis for an employer to be liable as a result of an act or omission of its employee. Responsibility generally is conferred upon an employer when it is proven that the employer knew or had reason to know of the abusive situation prior to it affecting the plaintiff.

If a supervisor is the harasser, the employer will be liable *unless* the employer proves (a) that it exercised reasonable care to prevent the harassment, *and* (b) that the employee being harassed unreasonably failed to take advantage of corrective measures which were available.

A. Quid Pro Quo Sexual Harassment

The key component of a quid pro quo sexual harassment case is that the plaintiff claims some workplace consequence as a result of a sexual factor. Frequently, the claim is that the person was adversely affected as a result of rejecting sexual overtures.

In many instances, quid pro quo cases present the classic situation of one person's word against another's. Often there are few, if any, independent witnesses. The credibility of the involved parties can be a very significant issue.

In quid pro quo cases, there need not be any pattern of sexual harassment for liability to ensue. Nor does the law require the atmosphere to be pervasively hostile. A single significant employment decision by a superior, which is found to be in retaliation for refusing to grant sexual favors, will subject an employer to liability. If such an event is found to have occurred, the employer will not be able to defend by arguing that it had not been aware of the supervisor's acts.

B. Hostile Environment Claims

A hostile environment claim arises from a sexual situation which is unwelcome in nature and which creates a hostile or abusive work environment. To prevail, the plaintiff must establish that a condition was pervasive. Seldom will a single occurrence suffice to sustain a cause of action. An employer who did not have notice of a hostile environment, may be able to alleviate liability by responding promptly and effectively once a condition becomes known, if it can be proven that it had taken reasonable measures beforehand to prevent sexual harassment.

To prove a claim, the hostile nature of the workplace must be established both from the perspective of the plaintiff and from the perspective of a reasonable person. Absent proof of both components, a plaintiff cannot prevail. Unlike the quid pro quo cases, there are frequently witnesses available to support either the plaintiff's or the employer's description of the workplace environment. One of the issues as yet not completely resolved by the courts is whether, in cases where a female is the alleged victim the environment should be assessed

from the perspective of a "reasonable person" or that of a "reasonable woman." Many cases favor a "reasonable person" standard, but in Pennsylvania a "reasonable woman" standard is used.

Among those factors considered in determining whether a hostile environment exists are these:

1. Was the alleged sexual harassment verbal or physical or both;
2. How frequently was it repeated;
3. Was whatever occurred obviously hostile or patently offensive;
4. Was the alleged harasser a co-worker or a supervisor;
5. In addition to the plaintiff, were others also the victims of harassment;
6. Was the harassment directed at more than one individual.

Employers also must be concerned about the possibility of a hostile environment arising from the conduct of a non-employee. Liability may be imputed to the employer if customers, vendors, or clients act improperly with the encouragement or consent of the employer, or if a hostile situation which they create is not remedied by the employer after notice. Relevant factors in assessing an employer's potential liability for third-party conduct include whether the employer knew or should have known about the situation, as well as the extent of the employer's control over the alleged harasser. Third party cases are highly fact specific.

Not uncommonly, an individual will bring a sexual harassment claim, alleging that another employee was favored because of that employee's sexual relationship with a

supervisor. Generally, such a situation, alone, will not establish a hostile environment. An employer or supervisor is not prohibited from giving preferential treatment to a particular individual -- even if that person concomitantly has a sexual relationship with someone in authority -- so long as it is not established that sex was a requirement for the employee to obtain the position.

In defending hostile environment claims, employers often will want to point to the conduct of the alleged victim, either with regard to previous incidents in the workplace, or other matters in the employee's past. Courts are divided on the extent to which such evidence is admissible and, as a general rule of thumb, evidence of past conduct or past incidents will not be allowed unless the employer establishes that it has some bearing on the particular matter at issue.

An employer must be cognizant of the potential for claims on the part of accused persons. If an adverse employment action is taken against an alleged harasser, he (or she) may respond by a claim that he has been wrongfully accused or that he has been disciplined unfairly for discriminatory reasons. Numerous claims of defamation, invasion of privacy, wrongful discharge, and similar causes of action have been filed by employees accused of engaging in sexual harassment.

Sexual harassment case law continues to develop. However it is quite clear that for an employer to successfully defend sexual harassment claims in the future, it must have a strong and workable sexual harassment policy, and it must create an environment in which it is clear

that sexual harassment is forbidden and that a victim has a viable internal means of remedying the problem.

If a plaintiff establishes that a supervisor created a hostile environment, liability may be imposed against the employer, unless *the employer* proves, (a) that it exercised reasonable care to prevent and correct promptly any sexually harassing behavior, and, (b) that the plaintiff unreasonably failed to take advantage of any preventive or corrective opportunities provided by the employer or to avoid harm otherwise. A sexual harassment policy is not essential to proving this defense, but such a defense is very difficult to establish without one. If a proper policy and complaint procedure is in place, and isn't used by the employee, demonstration of such failure will normally suffice to satisfy the employer's burden under the second element of the defense. No affirmative defense is available to an employer where there is proof that a supervisor's harassment culminates in a tangible employment action, such as discharge, demotion, or undesirable reassignment.

In cases involving harassment by non-supervisors, an employer cannot avoid liability through a head-in-the-sand approach. Liability will be imposed upon the employer if it knew or should have known that employees had created a sexually hostile environment for a fellow worker. In considering this issue, courts evaluate a company's sexual harassment policies and whether they were structured to reasonably prevent the type of harassment which occurred.

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