An Employer's Guide to Preventing Sexual Harassment Claims

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I. INTRODUCTION

"It is now well recognized," the United States Supreme Court noted in a 1998 decision, "that hostile environment sexual harassment by supervisors (and for that matter, co-employees) is a persistent problem in the workplace." 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. 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 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 in 1998 by the United States Supreme Court, however it is clear that, in order 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.

The final section of this paper, "Sexual Harassment Risk Management" focuses on prevention of claims, and on positioning an employer to be in the best position possible to successfully respond to claims which are made.

II. WHAT IS ENCOMPASSED BY SEXUAL HARASSMENT

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.

III. PROVING A CLAIM OF SEXUAL HARASSMENT

In order to establish a prima facie case of sexual harassment, the individual bringing the 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, the plaintiff must establish a reason why the employer should be liable for the acts of the co-employee or a third party. Very broadly speaking, 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. Often there are not many, 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 had taken reasonable measures to prevent sexual harassment.

In assessing the environment, 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." A majority of the cases appear to favor a "reasonable person" standard, but the federal cases governing Pennsylvania have continued to reference a "reasonable woman" standard.

Among those factors frequently 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 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, this 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. Recently the Supreme Court of the United States, outlined the parameters of sexual harassment claims, and determined what criteria should be applied in determining if an employer should be liable for a sexually hostile environment. In Farragher v. City of Boca Raton, the court held that the city could be liable for sexual harassment imposed upon a female lifeguard by supervising male lifeguards, even though, before she quit, the victim had not made any complaint. The Supreme Court, based its decision, in part, on evidence that the city's sexual harassment policy had never reached any of the lifeguards. The court's holding made it 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.

The court held that 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." The court declined to hold that a sexual harassment policy was essential to proving this defense, but explicitly noted that the "promulgation of an anti-harassment policy with complaint procedure" is relevant to establishing the first element of the defense. 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." The court held that no affirmative defense was available to the employer where there was proof that a supervisor's harassment "culminates in a tangible employment action, such as discharge, demotion, or undesirable reassignment."

Although the Farragher case did not deal specifically with harassment by non-supervisors, courts are likely to at least consider the decision when resolving cases involving harassment by non-supervisors. In these cases, it is predictable that the courts will conclude that 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 examining this issue, it is certain that the courts will look to the company's sexual harassment policies and whether they were structured to reasonably prevent the type of harassment which occurred.

IV. SEXUAL HARASSMENT RISK MANAGEMENT - - A "Must-Do" List to Avoid Sexual Harassment Claims

(a) 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:

1. Whether the policy truly engenders a work environment in which sexual harassment will not be tolerated; in other words, was it reasonably designed to eliminate workplace sexual harassment;

2. Whether the policies were actually followed by the employer and by employees;

3. Whether the policies provided an effective means for making a complaint; and

4. 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.

(b) Widely disseminate of 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.

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 complaint procedure which was available.

(c) 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.

(d) 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.

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).

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.

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.

(e) 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.

What can be done when an investigation is inconclusive? In such situations, common sense plays a big role. Efforts should be undertaken to develop a response which is neither oppressive nor embarrassing either to 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.

(f) 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.

It is important, also, 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.

(g) 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, the employer's consistency in dealing with employees 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.

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