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Preventing Sexual Harassment Liability

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Few workplace issues generate greater emotional reaction or potential employer liability than claims of sexual harassment. Employers must understand the basic elements of the law, take steps to avoid sexual harassment in the workplace, and be prepared to properly deal with any complaints that may arise. This article describes what constitutes sexual harassment, discusses the importance of establishing a written policy on this subject, and offers suggestions on how an employer should deal with a claim of sexual harassment.

Both federal and Colorado law prohibit sexual harassment in the workplace. Two types of unlawful harassment may occur, "quid pro quo" and hostile working environment. Quid pro quo harassment occurs when sexual favors are demanded of an employee (usually by a supervisor) in exchange for some job benefit, such as a raise, a promotion, or simply not getting fired. Proven instances of quid pro quo demands will usually constitute unlawful sexual harassment. A hostile working environment can be created and constitute sexual harassment if:

- the employee is subjected to sexual advances, requests for sexual favors, or

other verbal or physical conduct of a sexual nature;
- the conduct is unwelcome; and
- the conduct is sufficiently severe or pervasive to alter the conditions of the employee's employment and create an abusive working environment.

Just because an employee submits to sexual harassment does not necessarily mean that it was "welcome." While an isolated verbal comment or advance of a sexual nature will probably not be sufficient to create an unlawful hostile working environment, repeated behavior of this nature, or perhaps a single instance of severe conduct such as physical assault, may cross the line and be unlawful. Courts will generally look at whether a reasonable person would find the conduct sufficiently offensive to create a hostile working environment.

An employer may potentially be held liable for sexual harassment that is perpetrated by supervisors, by non-supervisory co-employees, or even by non-employees such as customers or vendors. The Supreme Court has ruled that general principles of agency law will usually determine whether an employer can be held liable for harassment. If a supervisor uses his or her position to make sexual demands upon a subordinate in exchange for a raise or other job benefit, the harassment has a direct connection to the job duties of the supervisor, and the employer may well be held responsible for the supervisor's misuse of the authority given by the employer. In cases of hostile working environment or harassment by non-management personnel, however, the employer may be liable only if it knew or had reason to know of the harassment and failed to take appropriate corrective action.

Every employer should have a written policy prohibiting sexual harassment. The policy should briefly define sexual harassment and identify two or more individuals to whom complaints of harassment may be submitted (usually the director of human resources or office manager, and at least one other person, perhaps the president or other high ranking management representative). The policy should state that harassment will be grounds for disciplinary action up to and including immediate discharge. Such a policy, combined with employee meetings or training sessions on this subject, should help prevent sexual harassment. An "ounce of prevention" can help avoid both legal liability and the harm to employee morale that can result from workplace harassment.

Employers who do establish a strong policy and conduct training to make clear that sexual harassment will not be tolerated may still some day find themselves faced with a complaint of sexual harassment in the workplace. The sexual harassment policy provides an important complaint procedure so that any proven harassment may be stopped as soon as possible. The Supreme Court has indicated that if such a policy exists and the victim does not report the harassment, the victim may not be able to recover damages from the employer. In a 1995 decision, the federal Court of Appeals in Washington D.C. ruled that an employer was not liable for extreme sexual harassment that continued for an extended period of time and culminated in a sexual assault, stating that the victim, who failed to report the misconduct to her employer under its sexual harassment policy, should have known that the employer would have taken corrective action.

When a complaint is received, how the employer deals with that complaint may well make the difference between an effective, low cost resolution on the one hand, and staggering legal liability on the other. Many federal courts have ruled that if an employer does take prompt and effective corrective action in response to a complaint of sexual harassment, the employer will not be held liable to the victim.

The first step is to make certain that the complaint is promptly given to the appropriate person for investigation. All supervisors should be trained that any complaint of sexual harassment which they may receive must be forwarded immediately to a designated person, usually the director of human resources or office manager. First level supervisors should not attempt to investigate such claims themselves. Even if no complaint is filed, supervisors who observe conduct that may constitute sexual harassment should report it for proper investigation.

After the complaint is received, the employer must decide whether it will investigate the complaint itself, or seek outside assistance. The more serious the complaint and the more unfamiliar the employer is with investigating such matters, the better advised it is to get professional help. If the employer decides to investigate the matter itself, however, here are some key points to keep in mind.

Begin and complete the investigation as expeditiously as possible. Some court decisions have held employers liable for sexual harassment based upon their slow response to a complaint. Consider taking appropriate protective measures while the investigation is being conducted. If possible, attempt to reduce or eliminate temporarily workplace interaction between the complainant and the accused In cases involving serious allegations, some employers offer the complainant reassignment or leave with pay during the investigation, but the decision should be up to the complainant. Do not take any action, including involuntary reassignment of the complainant to less desirable job duties, which might be interpreted as punishing the complainant for submitting the complaint. In some cases the employer might consider placing the accused on leave of absence during the investigation.

Attempt to keep the investigation as confidential as possible, but do not guarantee absolute confidentiality to any of the parties. It will usually be necessary to interview potential witnesses, and often some of the allegations must be disclosed in order to conduct the investigation. When interviewing witnesses, ask each of them to keep the matter confidential.

The first person to interview is the complainant. Gather as much information as possible, including specific details of what happened, when, where, and whether there are any other witnesses or supporting evidence. Explore each allegation thoroughly, and then ask if there was any other objectionable conduct. Ask the complainant how he or she responded to the alleged conduct, including whether the complainant expressed in any way that the conduct was unwelcome. Ask when the complainant first complained about this conduct, and to whom. If a complaint was made much earlier to a supervisor who ignored the complaint, the situation is much more serious. Advise the complainant that any further alleged misconduct must be reported immediately.

The accused is usually the next person to be interviewed. Explain the company's

policy against sexual harassment, the need to investigate, and that any sort of retaliation against the complainant is strictly prohibited. Ask the accused for his or her version of events, getting as much detail as possible. If the accused denies the allegations or claims that some or all of the accused's behavior was mutual or otherwise welcomed by the complainant, ask for any supporting evidence or witnesses that the accused can identify. If the complaint is denied, explore with the accused whether the complainant would have any motive to fabricate a complaint.

Next interview any other witnesses who have been identified. Consider interviewing other employees of the same sex as the complainant who have worked with the accused, to see whether they had any similar experiences.

After you have gathered as much information as feasible, evaluate the evidence to arrive at a conclusion. Consider the demeanor of the complainant and the accused, whether there are any inconsistencies in either of their stories, any possible motives for fabrication, the statements from other witnesses, any other available evidence, and whether there have ever been any similar complaints asserted against this accused person. In a court of law, the complainant's burden of proof is met if the evidence as a whole makes it more likely than not that the allegations are true; it is not necessary that the allegations be proven "beyond a reasonable doubt," which is the standard of proof in a criminal case.

If the investigation is inconclusive, for example if it is simply a case of the complainant's word against the accused's word, the report should state that the investigation was unable to confirm the allegations of the complaint. Disciplinary action is probably not warranted in this situation, but the accused should be counseled that the company will not tolerate sexual harassment and will take action if any harassment is found to have occurred. The employer should consider offering reassignment to the complainant or taking other appropriate action to minimize future contact between the complainant and the accused.

If the investigation substantiates the allegations of the complaint, disciplinary action must be taken against the harasser. Discipline may range from a written warning to immediate discharge. The employer should consider the seriousness of the harassment and any past history of similar problems on the part of the harasser. The corrective action must be reasonably calculated to put an end to the harassment. If the harasser is not discharged, he or she should be warned that any future harassment or retaliation may result in discharge, and the employer should take any other appropriate action to avoid further problems between these two employees.

Because state and federal law protect employees who complain in good faith about discrimination or harassment, employers should avoid any disciplinary action or other retaliation against the complainant, even if the employer believes that the complaint was probably false. If the employer has very strong evidence that a complaint was fabricated, disciplinary action against the complainant might be considered, but the employer should seek legal counsel before taking such action.

A written report should be prepared summarizing the allegations, the accused's response, other evidence, all conclusions, and the action to be taken. The employer

should then inform the complainant and the accused of the results of the investigation. The employer may choose to allow both parties to read the report, but it is probably best not to give them copies of the report, in order to preserve confidentiality. Ask both parties if there is any additional evidence they can identify, or if there is anything in the report that they believe to be inaccurate. Ask the complainant if he or she is satisfied with any actions taken by the company. Then consider whether any additional investigation or action needs to be done. After concluding the investigation and taking any immediately appropriate corrective action, continue to monitor the situation to ensure that no further problems develop.

The consequences of failing to prevent or correct sexual harassment can be quite severe. Under federal law, a plaintiff in a sexual harassment lawsuit now has the right to a trial before a jury, which may be more sympathetic than a judge. A successful plaintiff may recover lost wages, attorney fees, plus emotional distress and punitive damages up to $300,000, depending on the size of the employer's workforce. Claims of sexual harassment may also result in harmful publicity for employers. No employer can afford to bury its head in the sand on this subject. Complete protection from the disruptive effects and possible liability caused by sexual harassment is not possible. By implementing a sexual harassment policy, training its employees, and taking prompt action to deal effectively with any complaint, employers can greatly reduce the risk of a damaging sexual harassment claim in the workplace.