SEXUAL HARASSMENT LESSONS STILL BEING LEARNED

A few months ago, we posted an excellent piece detailing some of the important things an employer should to try and avoid a sexual harassment claim, including how to appropriately respond to one. Apparently, that message hasn't quite seeped in to certain employers out there – at least if the latest wave of sexual harassment cases in the news is any indication.

The first of those came a few weeks ago when the Fourth Circuit Court of Appeals – which covers West Virginia – reversed a sexual harassment ruling which had been issued in the City of Baltimore's favor. In that case, Okoli v. City of Baltimore, the plaintiff's boss forcibly kissed her, propositioned her to have sex with him in a jacuzzi, fondled her, asked her sexually explicit questions about whether she was wearing underwear and would come to work without it, and described a threesome he experienced.

All of this happened over a four month period and, perhaps not surprisingly, the plaintiff objected to or reacted with distain each time it occurred. Later, after the plaintiff rejected his advances a final time and then filed a sexual harassment complaint, he fired her. Under these circumstances, it's no surprise the Fourth Circuit Court ruled as it did. A situation with that type of verbal and physical conduct, objected to by the plaintiff, and all over that short a period of time, is likely to work against the employer almost every time.

The Okoli opinion, however, was nothing compared to the Complaint that was lodged in Utah around the same time. In Anderson v. Lone Peak Controls, the Complaint – a copy of which can be found here – alleged that the plaintiff's direct supervisor repeatedly asked her if he could see her breasts. He also hit her on the buttocks more than once and gave her unsolicited hugs. Perhaps not surprisingly, he additionally viewed pornography in the office and sent pornographic jokes and e-mails to the plaintiff. Further, he told the plaintiff he was installing a shower in the office for them, told her what he liked to do sexually and asked for her preferences, and described to her in great deal how to make 'sex cake'.

It gets worse, folks. Ms. Anderson's supervisor also asked her for oral sex on several occasions and, if that wasn't enough, not only did he issue a work schedule which included 'mini-skirt Monday (no panties allowed)', "wet t-shirt Wednesday", and "no bra Thursday", he also actually asked the plaintiff to sign a document permitting him to sexually harass her in any way he wanted!

Any guess as to how that case is likely to turn out (settle)? Yes, this stuff still goes on in workplaces. Somehow.

Obviously, making sure your supervisors aren't engaging in the idiocy involved in the two cases described above is a good start for employers to avoid these types of claims. Beyond that, having a good sexual harassment policy should be the next goal, as we suggested a few months ago. But what does a good sexual harassment policy include?

First of all, any such policy shouldn't just prohibit *sexual* harassment; it should prohibit harassment of any kind. In addition, the policy needs to state in very broad terms what type of behavior is prohibited and unambiguously state that such conduct won't be tolerated. Further, it needs to set forth a complaint and investigation procedure, and that aspect of the policy should account for the situation where an employee's direct supervisor or someone in HR – who the employee might typically report such conduct to – is the harasser. Moreover, when complaints are lodged, they must be dealt with promptly and in a way which not only serves to put a stop to any harassing behavior, but also protects against retaliation.

Another critical thing an employer needs to do in order to try and avoid situations like those in the Anderson and Okoli cases is train their employees on their sexual harassment policy. This is something we talked about a few months ago as well. Get your employees together and explain to them the types of conduct which are prohibited by law. Teach them how to properly respond to complaints, or who to go to in order for a prompt response to be undertaken. Then train them again. Documenting all of your training is a good thing to do, too, by the way.

Now, sometimes the train will run away from you and no matter what you do, rogue employees are going to engage in obnoxious and offensive behavior. And other times, employees who advance these claims will have already shot themselves in the foot, like the employee who lost what may have been a credible sexual harassment case in Pennsylvania last month after she was determined by a federal court there to have used explicit language and e-mails with sexual jokes and innuendo, so that an environment where she was subject to comments about her "tan and smooth" legs, about her "beat me, bite me" shoes, about her being called "darling" and "hon", and about being told she was "foolish not to use her assets" was not considered hostile and unwelcome to her. These situations are mostly out of your hands.

Those detours aside, sexual harassment remains a very real risk for employers, and addressing it before you end up in court takes effort. Still, employers dealing with sexual harassment – like with many other HR headaches – are better served putting time in on the front end than they are paying their lawyer on the back end.