

Hostile Work Environment Refresher: What Employers Should (Still) Be Thinking About

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Workplace harassment is back in the news again recently, both in terms of allegations against high-profile public figures and the increasing frequency with which juries have been awarding multi-million dollar verdicts to employees. With this heightened awareness of workplace harassment of all types, a refresher of workplace harassment basics and steps every employer can take to avoid harassment claims is particularly timely.

What Are The Legal Basics Of Workplace Harassment?

Generally, "sexual harassment" is:

Unwelcome, offensive conduct of a sexual nature that makes someone uncomfortable or embarrassed. Sexual harassment encompasses unwelcome sexual advances, requests for sexual favors, and other physical or verbal conduct that enters into employment decisions and/or conduct that unreasonably interferes with an individual's work performance or creates an intimidating, hostile, or offensive working environment. It is also the act of persistently engaging in words, gestures, and actions which tend to annoy, alarm, offend, embarrass, intimidate, demean, or verbally abuse another person.

Courts have grouped sexual harassment into two, separate categories - (1) harassment that results in a tangible employment action (the former "quid pro quo"); and (2) harassment that creates a hostile work environment:

- **Tangible employment action harassment** occurs when submission to or rejection of sexual advances is used as a basis for employment decisions. In other words, this type of harassment encompasses sexual favors in return for employment rewards, threats if sexual favors are not provided, and punishment for not agreeing to a sexual advance. A "tangible employment action" means a significant change in employment status. Examples include hiring, firing, promotion, demotion, undesirable reassignment, a decision causing a significant change in benefits, compensation decisions, and work assignment.
- **Hostile work environment harassment** occurs when unwelcome physical advances, verbal conduct, or even non-verbal conduct creates an intimidating, hostile, or offensive working environment or unreasonably interferes with an individual's work performance. Moreover, hostile

environment sexual harassment may be deemed to have occurred whether the conduct is communicated verbally, physically, pictorially, electronically, or in writing. To constitute hostile environment sexual harassment, there must usually be a pattern of offensive conduct. However, an isolated incident can create a hostile environment if it is outrageous and severe. In this regard, the more frequent the conduct, the less severe it need be to create a hostile environment. Conversely, the less frequent the conduct, the more severe it must be. However, the sporadic use of abusive language, gender-related jokes, and occasional teasing are not generally deemed to be pervasive or severe, but rather ordinary difficulties of the workplace.

In cases where no tangible employment action has occurred, an employer can raise an affirmative defense to liability by proving both that – (1) the employer exercised reasonable care to prevent and correct promptly harassing conduct; and (2) the employee failed to take advantage of any preventive or corrective opportunities or otherwise to avoid harm. This affirmative defense means that, as discussed below, it is critical for employers to have a strong anti-harassment policy as well as an effective complaint procedure in place.

Finally, retaliation against an employee for complaining of workplace harassment is also prohibited. Employers should be mindful that taking actions against an employee who has either complained of harassment or who has supported the harassment claim of another employee may lead to a separate claim for retaliation, even in situations where the underlying harassment claim is not valid.

Is Everything About Sex These Days?

Employers and employees in today's workplace have little difficulty recognizing overt forms of sexual harassment like explicit requests or demands for sexual relations, indecent exposure in view of co-workers, or unwelcome touching of an individual's body. However, it is important to keep in mind that unlawful harassment encompasses a broad range of subtle forms of inappropriate conduct that may be more difficult for employers to recognize:

- Repeated requests for some type of after-work social activity such as dinner or “drinks”;
- Making crude comments, telling sexual jokes or describing sexual activities;
- Unnecessary physical contact;
- Showing sexual photos or looking at pornography in the workplace (even if not overt or out in the open);
- Giving preferential treatment to those who engage in consensual sexual activity;

- Derogatory or demeaning conduct based on any protected characteristic (race, color, religion, age, national origin, disability, and gender). This includes jokes, nicknames, and stereotypes which are based on or insult these protected characteristics; and
- Harassment based on gender is prohibited even if no sexual conduct is involved.

What Can Employers Do To Avoid Workplace Harassment?

Employers should be proactive in preventing and addressing harassment issues, both from a legal standpoint and the standpoint of supporting positive workplace morale. The following measures are essential to addressing workplace harassment:

- Implement a comprehensive anti-harassment policy which expressly prohibits all forms of verbal and non-verbal harassment, including touching, lewd comments, jokes or references, epithets, slurs and nicknames. The policy should explain that such conduct by managers, supervisors, employees, customers, and third parties is also prohibited. The policy should contain a strong anti-retaliation provision applicable to all complaints.
- Incorporate a complaint procedure for employees who believe they have been harassed or have witnessed harassing conduct. Employees should have multiple options for submitting complaints to avoid being forced to make complaints to the alleged harasser. Encourage employees to come forward with complaints where necessary.
- Ensure that these policies are properly communicated and distributed to all employees. Policy distribution and acknowledgement during new hire orientation is important as well as annual or bi-annual refreshers so that employees are reminded of the employer's rules and expectations for workplace conduct.
- Train all employees on the importance of anti-harassment and anti-retaliation policies, including both supervisors and non-supervisors. Set the tone that compliance is critical enough to necessitate training from the top to bottom of the organization.
- Safeguard against retaliation by conducting prompt, confidential investigations. Communicate to employees that complaints will result in discipline against the harasser, including termination where appropriate.
- Take action where necessary to address and eliminate harassing conduct. Such actions may include changing the employee's supervisor; reversing an unwarranted tangible action (such as demotion, pay reduction, or schedule change); disciplinary action up to termination of the harasser; individualized coaching/training; or a combination of these actions.

- Create an active, visible human resources presence in the workplace so that employees are familiar with and feel comfortable addressing workplace issues with human resources personnel.

Where Can Employers Get More Information?

For more information on these issues, the EEOC provides extensive enforcement and policy guidance on employer liability for harassment:

- Enforcement Guidance on Vicarious Employer Liability for Unlawful Harassment by Supervisors
- Policy Guidance on Current Issues of Sexual Harassment
- Video on sexual harassment provided by The Florida Commission on Human Relations

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