

AVOIDING SEXUAL HARASSMENT CLAIMS

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In the last few months we've seen a flurry of harassment and sexual assault allegations, resignations, investigations, and news reports of all of these things that have dominated the headlines. It's a good time to remind employers of their obligations and best practices when it comes to these issues in order to minimize, or avoid altogether, liability associated with such claims.

Well-established United States Supreme Court case law makes clear that an employer who receives information about a potential harassment situation in the workplace can avoid liability if the employer promptly investigates and takes prompt and appropriate action to eliminate the harassment. The following are key points to keep in mind:

1. If supervisors have reason to believe there is a harassment situation occurring, whether there has been a formal complaint or not, the duty to act begins.

Often, we hear that the victim or witness haven't yet filed a formal complaint, or haven't reduced the complaint to writing, and so employers think they can wait until such things happen. Even if your policy requires a formal or written complaint, the duty to act begins when you know, or have enough information to have a reasonably good idea, that harassment may be occurring.

Don't act alone; the AMRRP's Personnel Assistance Lifeline (PAL) is a free service to members and will allow you to consult with employment law counsel on the process.

2. Investigate.

Sometimes the allegations are such that an outside investigator is warranted. However, in most situations this is an investigation that can be performed internally. Things to consider in the investigation are whether there is competent evidence that there has been verbal, physical, or visual conduct that would be offensive to a reasonable person, and based on sex. Note, however, that any protected category – including things such as race, religion, disability, and age – can serve as a basis for a harassment claim if the offensive conduct is severe or pervasive enough. Among other things, examples of verbal conduct are:

- Demands for sexual favors
- Sexually-graphic statements
- Demeaning jokes of a sexual nature
- The description of an employee's anatomy or body in direct sexual or sexually-suggestive terms
- Dirty jokes
- Describing sexual experiences and preferences

Among others, some examples of physical conduct are:

- Unwanted touching
- Touching a body part, particularly in an area that cannot be explained as inadvertent
- Encroaching upon an individual's physical space
- Blocking an individual's movement

- Messages

And a non-exhaustive list of visual conduct are things like:

- Pornography
- Sexually-suggestive e-mails or screen savers on computers
- Cartoons or pictures that depict either sex in a demeaning way
- Other individuals engaged in potentially offensive sexual behavior, even of a non-graphic nature

3. Make findings of fact.

Determine whether the evidence supports that the type of conduct noted above has occurred. Importantly, do not conclude based on your findings that unlawful harassment has in fact occurred. That is a legal determination. Keep your findings to whether the conduct occurred and at most, whether the conduct violates the employer's policies.

4. Take action based on the findings.

The victim needs to be made aware of the findings so that the victim (and the other employees for that matter) know that you took the allegations seriously. If the findings demonstrate that violations of the policies have occurred, the employer needs to take action to make sure the conduct doesn't happen again. That usually means disciplining the employee or employees who engaged in the harassment (up to, and including, termination).

5. Train your supervisors and employees.

Supervisors and employees should be trained on their duties and responsibilities with regard to preventing harassment in the workplace. Specifically, the EEOC has issued guidance on certain types of trainings that should be done with regard to retaliation in the midst of a harassment complaint. In addition to the PAL program offered by AMRRP, members also have the benefit of engaging employment counsel to conduct specialized trainings for their employees and supervisors at a reduced flat fee of \$1,500.

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