

MODERN MANAGEMENT

**HARASSMENT
IN THE WORKPLACE:
Reducing an Employer's Risks**

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Introduction

Harassment is a type of discrimination. It is just as illegal to harass a person because of their sex as it is because of another “protected characteristic” or activity, such as:

- Age
- Race
- Color
- Religion
- National origin
- Disability

Harassment affects all employees; managers and the managed alike. Employees lose self-esteem, dignity, promotions, and sometimes, their jobs. Managers lose respect, teamwork, and sometimes, their jobs. Employers lose productivity, trust and employees.

Overview

According to Equal Employment Opportunity Commission (EEOC) charge statistics, harassment charges represent a significant percentage of the commission’s charge docket, which has increased in the past decade. Ten years ago, harassment charges made up nearly 29% of all charges filed with the EEOC. Now, harassment charges make up nearly 32% of the total charges filed. Of those harassment charges, the largest portions were charges concerning racial harassment, followed somewhat closely by charges concerning sexual harassment.

The number of sexual harassment complaints in the workplace has remained steady for the past ten years at 30%. The largest increase in charges concerned retaliation, which increased nearly 10%.

This booklet informs employers about the types of behavior that might be considered illegal harassment. It provides guidance on the prevention of harassment in the workplace. It also contains suggestions for effective complaint handling and corrective action.

Why Employers Should Eliminate Harassment

1. It is illegal. Harassment on the basis of certain legally protected characteristics, such as race, color, age, national origin, disability, or religion is a form of illegal discrimination. It is prohibited by federal law (Title VII of the Civil Rights Act, the Age Discrimination in Employment Act, the Americans with Disabilities Act, Executive Order 11246), State discrimination statutes, some local ordinances, and State tort laws. Other characteristics may be protected by State and local laws and ordinances such as sexual orientation.

2. It imposes direct costs on employers. Ten years ago, the EEOC helped to secure \$176.7 million in benefits for employees. This figure does not include monies obtained through litigation (but does include settlement of EEOC cases). Ten years later, however, this figure has increased dramatically to \$290.6 million in benefits for employees. Interestingly, the percentage of settlements increased from 3.8% to 12.2%. It appears, therefore, that employers are recognizing the benefit of early resolution.
3. In addition to these direct costs, employers found guilty of harassment in litigation face the possibility of significant damage awards. Not only can employers be liable for (1) back pay; (2) front pay or reinstatement; and (3) compensatory damages; they can also be found liable for (4) attorney's fees and costs of the claimant; and (5) punitive or liquidated damages if found to have willfully violated the law.

Harassment claims can be made by a single individual or may be part of a class action lawsuit, involving multiple claimants. The EEOC can bring an action on behalf of an affected class as well. Harassment claims may involve criminal conduct as well, such as assault and battery, where applicable.

4. The employer also suffers the direct and indirect costs of litigation. The direct costs can include attorneys' fees, costs and expert fees. The indirect costs can include down time for employer witnesses as well as workplace disruption.
5. Harassment claims can harm the reputation of the employer, company, its managers, employees, and their families.

Illegal Harassment

Harassment is illegal if it involves discriminatory treatment based on race, color, sex (with or without sexual conduct), religion, national origin, age, disability, or because the employee opposed job discrimination or participated in an investigation or complaint proceeding. Recent case law has indicated that this participation can include an employer's internal investigation or complaint proceeding. Federal law does not prohibit simple teasing, offhand comments or stray remarks, or isolated incidents that are not serious. The conduct must be sufficiently frequent or severe to create a hostile work environment. It must permeate the workplace. One act can be actionable, however, if it is severe enough. The conduct must be both (1) offensive to the victim; and (2) offensive to a reasonable person of ordinary sensibilities.

The harassment by a supervisor must result in a "tangible employment action," such as hiring, firing, failure to promote, demotion, transfer or a denial of certain workplace benefits for strict liability to apply. Otherwise, the employer must be found to have known or should have known of the harassing conduct of co-workers for liability to be imposed.

Examples

Conduct that may be regarded as harassment includes:

- Using derogatory or inflammatory language including comments or jokes that make fun of or belittle an individual because of inherent personal characteristics such as ethnicity, sex, gender, race, age, sexual orientation, religion, or disability;
- Epithets, slurs, derogatory nicknames, negative stereotyping disparaging remarks or intimidating acts based on any of the protected categories listed above;
- Telling or forwarding jokes directed to someone's protected status, such as racial or ethnic jokes, regardless of whether "everyone tells them back and forth";
- Posting, forwarding, showing or displaying in any manner cartoons or drawings that make fun of any group, religious belief, sex, or individual because of his or her protected status;
- Forwarding offensive e-mails, printing them out or displaying them in any manner;
- Utilizing employer communication tools and resources such as the internet, e-mail or voice mail to retrieve, view, display or pass along messages or material that could be considered inappropriate, offensive and/or unprofessional. Written or electronic communications or other graphic materials that are of a sexual nature or present a person's personal characteristics, such as race or ethnicity, in a hostile or offensive manner are inappropriate and should be prohibited under the employer's anti-harassment policy.
- Suggestive or offensive gestures or motions and/or physical contacts and threats;
- Non-verbal body language, such as staring, glaring or leering;
- Harsh treatment and differential job assignments;
- Retaliation for reporting or threatening to report harassment.

If the conduct is by a supervisor and it results in a tangible employment action, the employer is strictly liable under the Supreme Court case law. If the conduct does not result in a tangible employment action, the employer may be entitled to assert an affirmative defense of liability, but the burden is on the employer to prove the affirmative defense. If the conduct is that of a co-employee, actual or constructive knowledge by the employer is the determining factor in imposing vicarious liability on the employer.

Sexual Harassment

Illegal harassment is not limited to harassment because of sex. However, the theories behind the prohibition of sexual harassment have developed more completely in the case law. Thus, although the following sections deal specifically with sexual harassment, the principles are applicable to other forms of harassment.

The Law

Title VII of the Civil Rights Act is the major federal law which prohibits both discrimination and harassment based on sex, as do many state anti-harassment and discrimination laws. Sexual harassment includes unwelcomed sexual advances, requests for sexual favors, and other verbal or physical conduct of a sexual nature. Sexual harassment does not have to be motivated by sexual desire, nor does it have to involve the opposite sex.

There are three types of illegal sexual harassment:

1. When a person's submission to sexual harassment is made either explicitly or implicitly a term or condition of his or her employment;
2. When submission to or rejection of this type of conduct is used as a basis for employment decisions affecting the person; or
3. When sexual harassment has the purpose or effect of unreasonably interfering with an individual's work performance, or the terms and conditions of their employment, or creating an intimidating, hostile or offensive work environment.

Examples

Conduct that could be considered sexual harassment includes:

- Unwanted sexual advances;
- Unwanted conduct or comments consistently targeted at only one gender, even if the content is not sexual;
- Demands for sexual favors in exchange for favorable treatment or continued employment;
- Threats and demands to submit to sexual requests in order to obtain or retain any employment benefit;
- Non-verbal conduct such as friendly pats, squeezes or "accidentally" brushing against someone's body;

- Verbal conduct such as derogatory comments, sex-specific comments, slurs, insults or verbal abuse of a sexual nature;
- Comments which the recipient indicates are unwelcome, such as sexual invitations; sexual jokes, propositions, and comments or gestures, which are suggestive and/or obscene;
- Using slang names or labels that have sexual connotations;
- Unwanted graphic, verbal commentary about an individual's body, sexual prowess or sexual deficiencies;
- Battery, touching, pinching, assault, coerced sexual acts, blocking of normal movements, unwanted or suggested flirtations, advances, looks, leering, or whistling;
- Visual conduct including sexually explicit, derogatory or offensive printed or visual material such as posters, photographs, pictures, cartoons, drawings, e-mails, notes or gestures;
- Other displays in the workplace of sexually suggestive or offensive objects or pictures;
- Displaying sexual pictures, cartoons or female/male calendars;
- Retaliation for reporting or threatening to report sexual harassment.

Court Guidance

Employers will be held strictly liable for sexual harassment by a supervisor that results in a tangible employment action. If the harassment does not lead to a tangible employment action, the employer is entitled to pursue an affirmative defense. Thus, the employer may be held liable unless it proves that:

- It exercised reasonable care to prevent and promptly correct harassment; and
- The employee unreasonably failed to take advantage of preventative or corrective measures provided by the employer or unreasonably failed to avoid harm otherwise.

Tangible Employment Action

The Supreme Court has defined tangible employment action as constituting "a significant exchange in employment status, such as hiring, firing, failing to promote, reassignment with significantly different responsibilities, or a decision covering a

significant change in benefits...A tangible employment in most cases inflicts direct economic harm...Tangible employment actions fall within the special province of the supervisor." Most recently, the Supreme Court, in a sexual harassment case, found that a resignation could be a tangible employment action in the context of abusive behavior by several supervisors that led to the employee's resignation. In that case, several attempts to report the behavior to the employer fell on deaf ears.

Where there is no tangible employment action, courts look at the totality of the circumstances to attempt to determine whether a "hostile work environment" existed. A hostile work environment is one in which the workplace is permeated with regular or repeated actions or objects, relating, in a negative way, to the employee's sex, age, race, national origin, disability, or religion, that unreasonably interfere with job performance or the employee's terms and conditions of employment.

When Is A Workplace Environment Hostile?

There are a number of factors that courts consider in determining whether a work environment is hostile. These include:

- The nature and severity of the conduct;
- Whether the conduct was verbal, physical or both;
- The frequency of the conduct;
- Whether the harasser is a supervisor or co-worker;
- The number of employees participating in the conduct;
- The number of victims of the conduct.

Generally, a single incident or isolated event of offensive conduct will not create an abusive atmosphere. Yet, if the conduct is severe enough, then even a single event can create a hostile work environment. For instance, a single instance of sexual touching can lead the EEOC as well as a court or jury to conclude that there has been illegal harassment.

Who Are Supervisors?

According to the EEOC, supervisors are employees who have either:

1. The authority to undertake or recommend a tangible employment decision affecting the employee; or
2. The authority to direct the employee's daily work activities.

An employer is liable for non-supervisor harassment if the employer was aware, or should have been aware, of the harassing conduct and failed to take reasonable prompt remedial action to halt the conduct.

Employer Focus For Harassment

Employers should focus on whether or not the behavior was "unwelcome," rather than the "voluntariness" of the victim's participation in considering allegations of harassment. Behavior is unlawful when it is "unwelcome," that is, the employee did not solicit or invite it and regards the behavior as undesirable or offensive. Evidence of welcomeness may be allowed and it can include the complainant's speech or behavior in the workplace. For example, in a sexual harassment situation it could include the fact that the alleged complainant dressed provocatively or engaged in sexually suggestive speech or behavior.

Many courts, however, have ruled that an employee's behavior outside of the workplace is neither discoverable in litigation nor admissible at trial. Thus, the focus should be on the workplace behavior.

Some courts have found that propositions or sexual remarks by co-workers prompted by an employee's own sexual aggressiveness and sexually explicit conversations not actionable. If co-workers mutually exchange sexual comments and jokes, their behavior may not constitute sexual harassment, vis-à-vis, one another. But, where an employee finds another employee's sexual comments offensive and demeaning and objects to these comments, the first employee's behavior may constitute sexual harassment. An employer's anti-harassment policy is triggered if an employee makes a harassment complaint for comments overheard and found offensive.

Often, there are situations where the employee originally participated willingly, but then decided to end the participation and then claims the conduct was harassment. In that instance, the complaining employee must clearly show that the behavior became unwelcome.

A complaint is not a necessary element particularly where the employee fears retaliation. The victim, as well as the harasser, may be male or female. For sexual harassment, the victim does not have to be of the opposite sex. The harasser can be the victim's supervisor, an agent of the employer, a supervisor in another area, a co-worker, or a non-employee, such as a customer or client. The harassment can occur on or off the work site, yet still be work-related.

Thus, an employer may be responsible for harassment committed by a person authorized to perform work for the employer such as an outside copy service employee working on site, copy machine repair technician, a vending machine delivery person, or even the letter carrier. The victim does not have to be the person harassed but could be anyone affected by the offensive conduct. Harassment of one employee may affect the

work environment to such an extent that other workers may be offended by the conduct, and thus, legitimately claim harassment themselves.

Where Do You Draw The Line?

Drawing the line is not easy. The cases vary vastly with some finding certain conduct constitutes harassment and others finding that the same or similar conduct does not count. The Supreme Court has said that Title VII of the Civil Rights Act is not a civility code. Thus, behavior that might be the crude or rude or even offensive to a particular person may not necessarily rise to the level of illegal harassment.

The Supreme Court has stated that "common sense, and an appropriate sensitivity to social context, will enable courts and juries to distinguish between simple teasing or roughhousing, and conduct which a reasonable person in the plaintiffs position would find severely hostile or abusive." Another court has said: "Title VII cannot remedy every tasteless joke or groundless rumor" that confronts individuals in the workplace. The fact remains, however, that employers are charged with ensuring that harassment does not occur in the workplace no matter how difficult it is to determine what is ultimately illegal. The best way for an employer to meet its duty is to have in place an effective anti-harassment, anti-discrimination, and anti-retaliation policy that prohibits, inhibits, and attempts to eliminate certain conduct before it escalates into illegal harassment.

Prevention

Prevention is the best tool for the elimination of all harassment, including sexual harassment. An employer should take all steps necessary to prevent harassment from occurring, such as affirmatively raising the subject, expressing strong disapproval, developing and implementing appropriate corrective action and sanctions, informing employees of their right and responsibility to raise and how to raise the issue of harassment in the workplace, stressing this responsibility with supervisors, and developing methods to sensitize all concerned.

Anti-Harassment Policy

An anti-harassment policy should contain an explicit prohibition against harassment based on race, sex, national origin, color, religion, age, disability, or protected activity, and an explanation of what types of behavior can constitute harassment. It can include other characteristics such as sexual orientation which is not explicitly protected by federal law but is protected by certain state and local laws. An employer may want to include other protections not otherwise mandated by law. The policy should also contain a clear reporting procedure and a swift investigation process. A statement of the sanctions for harassment and other policy violations should be included as well. The policy should be communicated often and have effective reporting and complaint procedures that show you mean business.

The reporting procedures should encourage those who believe they are victims of harassment and those who witness harassment to come forward before the harassment rises to the "severe and pervasive" level. They should not require a complaint first to the actor or an offending supervisor. In fact, the policy should outline several avenues of complaint and should identify the office or individual(s) who will ultimately receive and process a complaint. The EEOC has recommended that the policy should also include time frames for filing charges with the Commission or state fair employment practices agency.

The policy should ensure as much confidentiality as possible and provide effective remedies, including protection of complainants, reporters and witnesses against retaliation. The policy should assure those reporting harassment and those participating in the investigation that the employer will not retaliate against them for making truthful statements about the harasser or the circumstances being investigated. Recent cases have held policies without such an anti-retaliation provision defective and have denied employees an affirmative defense based on such deficiency.

The policy should explain that all employees have a duty to report harassment, whether they are victims or merely observe or hear what they believe to be conduct in violation of the policy. The policy should affirmatively state that disciplinary action against the offending supervisor or employee, ranging from a reprimand to discharge, depending upon the severity of the conduct, may be imposed.

Employers should tailor their policies to reflect the way the organization does business. For example, if the business uses an e-mail system, employees must understand the system cannot be used for non-work purposes, such as harassment or retaliation.

Awareness

Communication of Policy to Employees

Employers must effectively communicate the policy to employees. It should therefore be posted in conspicuous places and/or on e-mail, and published in any employee handbook or policy manual. The key is to periodically remind employees that harassment of any kind is not tolerated.

Training

Employees at all levels should receive training on the policy. While rank and file employees are the most likely to be involved in complaints of illegal harassment, they too frequently receive the least amount of prevention training. Proof of attendance of employees at training sessions should be documented and retained. The training program should include education on the types of conduct that could be considered illegal harassment or harassment in violation of the policy, how to report a complaint of harassment under the policy, and the penalties for harassing or retaliating against another employee.

Employer's Responsibility To Investigate Effectively

An employer who receives a complaint or otherwise learns of alleged harassment in the workplace should investigate the complaint promptly and thoroughly. The employer should take immediate and corrective action to end the harassment and to prevent it from recurring. The investigation process of a complaint and the resulting corrective action should be consistently applied. Those accused of harassment should be dealt with equally: apply the same set of rules for everyone whether they are a senior executive or an entry level employee.

After a harassment complaint has been received, determine if the behavior represents harassment in violation of your policy by asking:

- Does the behavior interfere with the employee's work performance or terms and conditions of employment?
- Does the behavior create an environment that is hostile, intimidating or offensive for an employee?
- Does the behavior make the employee feel demeaned, degraded or embarrassed?
- Did the harassed employee object to the behavior?
- Is the alleged harasser a supervisor or co-worker?
- Was there a tangible employment action?
- Did the behavior occur at the workplace?

Prompt, Thorough, Objective Investigation

Each situation warrants the specific investigation needed. Generally, upon finding that the complaint or report, if true, could be viewed as prohibited harassment, employers should conduct a prompt, thorough, and objective investigation. The type of questions an investigator should ask includes:

- Who was the harasser?
- What did each person involved do?
- What did each person say?
- When and where did the harassment happen?

- What effect has the conduct had on the victim/complainant?
- Who else may know something about the subject of the complaint?
- Are there witnesses?
- What did these witnesses hear or see?
- Are there letters, tapes or e-mails?
- Has this happened before, and if so, how, where, and who was involved?
- Has any other employee been harassed, and if so, how and when?
- What does the harassed employee want the employer to do?

In conducting an investigation, it is imperative to proceed promptly upon the receipt of a complaint or report of harassing behavior. The investigators should document the investigation. No specific form is required in documentation.

The scope of the investigation should be reasonable in light of the particular circumstances. It is also important that there be an end to the investigation, a conclusion drawn, and appropriate action taken. It can be difficult to come to a final conclusion, especially when the information gleaned in the investigation is inconclusive.

Even though the task may seem daunting, employers must sift through all available information, assess credibility of all individuals providing information, and arrive at a conclusion as soon as possible. If, however, the information is so inconsistent that no conclusion is possible, the EEOC has recommended that the employer take further preventative measures, such as training and monitoring, at a minimum.

Conclusion

Harassment in the workplace is not just about sex. Employers have a duty to establish and maintain a workplace free of all types of illegal harassment. The risks associated with failing to do so are too high. Taking steps to prevent and promptly correct harassment will significantly lower exposure to the direct and indirect costs. Employers should include all employees in these preventative measures for maximum effectiveness. Employers should train all supervisors. In the end, employees should be confident that the employer is prepared to guard zealously employees' rights to a workplace free of illegal harassment.

About Lemle & Kelleher, L.L.P.

Lemle & Kelleher is one of the oldest major law firms in Louisiana, tracing its origins to the late 19th century when New Orleans was experiencing a boom as the shipping and commercial center of the South. Building on that genesis, we have diversified and expanded our capabilities for more than 100 years to meet the growing needs of our clients regionally and nationally. Today, Lemle & Kelleher offers responsive, innovative, and experienced legal representation covering a broad range of practice areas. For more information please visit www.lemle.com.

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