

How to Reduce Your Risk of Sexual Harassment Claims & Litigation

by Lowell Pearson, JD

This is the second of two articles that describes essential and effective employment policies.



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Introduction

In the July/August issue of *Missouri Medicine*, in “The Eight Steps to an Effective Employment Termination Policy,” I identified the essential components of a policy regarding the termination of employees. Now, in Part II of a series of articles on employment law, I discuss the keys to developing a system to reduce sexual harassment in the workplace and exposure from such lawsuits.

What is Sexual Harassment?

The starting point is a question: What is “sexual harassment?” American Medical Association Opinion 3.08 states that “Sexual harassment is unethical,” and defines it as follows:

Sexual harassment may be defined as sexual advances, requests for sexual favors, and other verbal or physical conduct of a sexual nature when (1) such conduct interferes with an individual’s work or academic performance or creates an intimidating, hostile, or offensive work or academic environment or (2) accepting or rejecting such conduct affects or may be perceived to affect employment decisions or academic evaluations concerning the individual.

A more formal definition, from the federal Equal Employment Opportunity Commission, is as follows:

1. Unwelcome sexual advances, requests for sexual favors, and other verbal or physical conduct of a sexual nature where,

A. Submission to such conduct is made either implicitly or explicitly a term or condition of employment; or

B. Submission to or rejection of such conduct by an individual is used as a basis for employment decisions affecting such individual.

2. Unwelcome sexual advances, requests for sexual favors, and other verbal or physical conduct of a sexual nature, where such conduct has the purpose or effect of unreasonably interfering with the individual’s work performance or creating an intimidating, hostile, or offensive working environment.

For years, the law has recognized two types of sexual harassment. One type is usually called “*quid pro quo*” harassment. In *quid pro quo* harassment, an employer or supervisor conditions an employment benefit on submission to sexual advances or takes an adverse employment action based on rejection of sexual advances. While *quid pro quo* cases receive substantial media attention because of their often salacious facts, they occur infrequently. But when they do occur, they frequently result in large jury verdicts.

The other type of sexual harassment is called “hostile work environment.” This type of sexual harassment can arise where

workplace conduct includes bad language, sexual banter, teasing of a sexual nature, sexual horseplay, posting of inappropriate pictures, and the like. To be actionable, the

medicine. Unfortunately, the facts are otherwise, and the medical community is addressing the topic. As noted above, American Medical Association Opinion 3.08 states that

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1. Create & Nurture a Zero-Tolerance Culture
2. State a Zero-Tolerance Anti-Harassment Policy
3. Prevent Retaliation
4. Keep Complaints Confidential to the Extent Possible
5. Make Complaint Procedures Accessible
6. Publicize the Policy and Train Employees On It
7. Conduct Effective Investigations
8. Take Appropriate Remedial Action
9. Learn & Then Improve the Organization

1. Create & Nurture a Zero-Tolerance Culture

There is no greater cliché in employment law than an employer stating, “We have a zero-tolerance policy regarding sexual harassment.” In conducting research for this article, I saw scores of articles on the Internet saying words like “the first step in a sexual harassment prevention policy is to have a zero-tolerance policy.” While I endorse having such a policy (see the next point), a policy alone is not enough. A policy is merely a statement on a piece of paper that may or may not be read, probably will not be followed, and lacks meaning.

What employers should strive for is something much more basic and valuable than a policy against sexual harassment, it is a culture against such harassment. A culture that rejects harassment

not because of the fear of lawsuits, but because it is inefficient, a distraction from serious work, unethical, and wrong. A culture where employees have no desire to harass, because they are part of a satisfying team. A culture where employees police themselves and each other to avoid and address inappropriate workplace behavior, of any type. And finally, a culture where employees are encouraged to bring forward complaints of sexual harassment (which should be rare) so they can be addressed and resolved far short of litigation.

Many articles on sexual harassment fail to make the simple point that the best way to reduce sexual harassment claims is to reduce sexual harassment itself. Except

inappropriate conduct must be so “severe or pervasive” that it alters the terms and conditions of an employee’s work. The majority of sexual harassment claims are hostile work environment claims. Hostile work environment claims are not necessarily based on offensive behavior by supervisors or managers. Complaints are often made by one employee about peers or even lower level employees. Most people who engage in sexual language, teasing, or other sexually inappropriate conduct do not do so when the boss is around. Indeed, the employer is sometimes the last to know that such activity is occurring.

One might assume that sexual harassment is not a problem in

sexual harassment is unethical. In 2004, the AMA’s Board of Trustees adopted Report 25-I-04 titled “Addressing and Preventing Sexual Harassment in Medicine.” That Report noted these findings:

- ◆ A 1998 study published in *Internal Medicine* revealed that 36 percent of female physicians reported having experienced sexual harassment.

- ◆ A study published in *Academic Medicine* showed that 15 percent of medical student respondents reported mistreatment in medical school, including sexual harassment.

With this background in mind, what can employer do to reduce the risk of sexual harassment claims?

in rare cases of false claims, there should be no sexual harassment claims and lawsuits where there is no sexual harassment. One beauty of the culture I advocate is that it provides the best preventative measure to claims and lawsuits. Not coincidentally, it also promotes a vibrant, effective, and economically efficient workplace.

2. State a Zero-Tolerance Anti-Harassment Policy

Even though you really are striving for a no-tolerance culture, not just a policy, you still need to state in a policy that all forms of harassment are against company policy and will not be tolerated.

An anti-harassment policy should prohibit all types of harassment (not just sexual). Having such a policy is not a total defense to claims and lawsuits, but the absence of a policy will make it very difficult for an employer to prove it has instituted preventative measures. Moreover, the policy gives employees both an understanding and notice of how the employer will treat and respond to allegations of harassment.

Anti-harassment policies and complaint procedures should contain, at a minimum, the following elements: (1) a description of prohibited behavior; (2) a statement that such behavior will not be tolerated and that those who engage in it will be disciplined; (3) a no-retaliation provision; (4) a complaint procedure; (5) a description of the investigative process that ensures prompt and effective action; and (6) assurances of confidentiality to the extent feasible and an assurance that prompt and appropriate corrective action will be taken.

3. Prevent Retaliation

Your zero-tolerance culture and your written policy must prohibit retaliation against those who report harassment. The law strictly bars retaliation of any type against those who report harassment. Indeed, there are many cases where employers prevail on the underlying sexual harassment claim, but lose on the retaliation claim.

This means that supervisors and managers must understand and treat seriously a policy that employees who report harassment will not be punished, will not be teased, will not be talked about, and that their complaints will not become a topic of office gossip. It also means that those who engage in acts described in this paragraph must be subject to discipline, using the company's normal disciplinary system. The bar on retaliation should be stated not only in the sexual harassment policy, but also in any personnel policies that the company has. And finally, the bar on retaliation must be rigorously enforced.

4. Keep Complaints Confidential

The policy should explain that, to the extent possible, complaints will be dealt with in a confidential manner. It is important, however, not to promise complete confidentiality, because sometimes the investigation will necessarily reveal or disclose the identity of the reporting person and facts that person might prefer remain private. Employees or independent agents who conduct investigations must be trained in the importance of protecting confidentiality, where possible, and in questioning techniques that maximize confidentiality. But where there is a choice to be made between confidentiality and the integrity of the investigation, normally confidentiality should give way. Finally, information relating to an investigation

should be kept private with strict security protocols for files and electronic data.

5. Make Complaint Procedures Accessible

Employers often make the mistake of thinking that sexual harassment complaints should be discouraged. This mistake, in my experience, is grounded in the natural distaste for events that can impose bad results (like a lawsuit), but also in a lack of knowledge of the law. In truth, employers should want every instance of sexual harassment to be brought forward in an internal complaint procedure. First, an effective and accessible internal procedure is an essential part of the employer's legal defense to a sexual harassment claim. But more fundamentally, the internal procedure often works, and the accusing employee never files a claim because he or she is satisfied with the resolution. Thus, the sexual harassment policy should clearly define complaint procedures and ensure that the procedures do not present unreasonable obstacles so that all employees may readily take advantage of them.

It is important that responsibility for administration of the complaint procedure be assigned to a high-level manager, or to someone with the authority to enforce remediation recommended by others. There should be a choice of individuals who can receive complaints. If the entity is large enough to have a human resources manager, that person should always be designated to receive complaints. It is important to make multiple avenues available to reporters so that no one feels their only avenue is through the person accused of committing sexual harassment.

6. Publicize the Policy and Train Employees On It

A policy is useless to prevent sexual harassment unless it is known to employees. Therefore, the policy should be included in all handbooks and personnel policy manuals, posted on bulletin boards, distributed to all new hires, and periodically redistributed, with re-training, to existing employees. It should be a major component of new employee orientation. Employees should be expected to sign a form stating that they have received, read, and understand the policy.

Training sessions should be conducted for employees and acknowledgments of the training should be signed by attendees. All supervisors and managers should be trained to recognize and report harassment they observe or hear about, even if there has been no complaint. All employees should be trained in the policy's prohibitions and encouraged to use the complaint procedure when appropriate. Re-training and dissemination of the policy should occur on a periodic basis.

7. Conduct Effective Investigations

Often, employees come to supervisors, managers, or human resources with a complaint of harassment, but ask that it not be investigated. No employer can bear the legal risk of agreeing to such a request, and every claim of sexual harassment must be investigated, even if the reporter requests that the employer not do so. When a person reports and asks that nothing happen, he or she should be told that it is company policy to investigate every claim.

A full description of how to conduct such an investigation would take much longer than the space

available in this article, but there are some general rules.

First, the investigator should be someone outside the line of supervision, experienced in human resources matters, with training in handling such matters. If the company does not have a human resources office, it might consider outsourcing the investigation function.

Second, the investigation should be fair to both the reporter and the accused. In virtually every case, both the reporter and the accused should be questioned in order to get their respective sides of the story, as well as to identify other persons who might have knowledge of the situation.

Third, other persons with relevant information, such as those who are identified as witnesses to the harassment or who should have knowledge of other incidents of harassment by the accused, should be interviewed. Investigators often overlook the need to question employees whose workplaces are near those of the reporter and the accused. Those employees often overhear or witness important information.

Fourth, a search of electronic data and documents, especially e-mail, is usually in order. Even where the claim of harassment is not based on e-mail, evidence that will help prove or disprove the allegations is often present.

8. Take Appropriate Remedial Action

When it is determined that sexual harassment has occurred, prompt remedial action must be taken to end the harassment and prevent future harassment. Often employers rush to the judgment that someone must be fired. Certainly, that is sometimes the case, but the exact nature of the remedial action depends upon the circumstances. The remedial action

should reflect the type and severity of the harassment, the existence of any prior incidents, and the effectiveness or lack thereof of any prior remedial steps.

9. Learn & Then Improve the Organization

The final step is the one that most employers never take. Academics who study organizations talk about the concept of a "learning organization." Such an organization is one that constantly evaluates information and adapts to what it learns. The most agile and effective of these organizations use adverse events not to bemoan their fate or wring their hands, but to learn and then improve.

A sexual harassment complaint, claim, or lawsuit provides information. There are dozens of questions that one might ask upon resolution of the matter: Were the policies inadequate? Did someone fail to follow the procedures? Was the investigation flawed? Did we hire the wrong person? Did we properly train the workforce?

Any one case may or may not reveal an obvious problem, but every complaint, claim or investigation is an opportunity to avoid making the same mistake twice.

Conclusion

There are no "safe harbors" when it comes to sexual harassment prevention. The most successful workplaces are those where the employees are professional, dedicated, and motivated by their work. Employers do, however, have a strong role in creating a zero-tolerance culture; reinforcing it with policies, training, and publication of the company's policies; and investigating and resolving claims. Those are the steps that put any organization in the best legal posture to reduce and defend sexual harassment claims. 