4th Labor & Employment Seminar

Kamer Zucker & Abbott

September 21, 2001

STRATEGIES FOR RESPONDING TO SEXUAL HARASSMENT COMPLAINTS: AN ANNOTATED CHECKLIST WITH "TIPS" LEARNED FROM RECENT CASES

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The need for a systematic strategy for sexual harassment awareness, prevention and resolution flows from the rapidly-developing rules regarding the circumstances under which courts will hold employers liable for harassment. The rules pertaining to such liability differ depending upon ***who*** carries out the harassment: supervisor or manager versus non-supervisory co-worker of the victim. These rules must be kept in mind whenever confronted with such issues.

Moreover, in 1999, the Supreme Court indicated that employers who engage in good faith efforts toward non-discrimination may be able to escape liability for punitive damages even if discrimination or harassment is found by a court or jury.[1]

Employer liability for actions of supervisors or managers.

In two 1998 decisions, the United States Supreme Court put forward a general rule regarding liability for harassment carried out by supervisors or managers: The employer is liable for such harassment.[2] With these same cases, the Court also provided a road-map to employers on prevention of liability for inappropriate actions by supervisors and managers, through fulfillment of the two-pronged affirmative defense:

> (1) that the employer had "exercised reasonable care to prevent and correct promptly any sexually harassing behavior"; and
>
> (2) that the plaintiff employee "must have unreasonably failed to take advantage of any preventive or corrective opportunities provided by the employer or to avoid harm otherwise."[3]

Because this constitutes an "affirmative defense," the employer must ***prove*** each element. This obligation places considerable burdens upon employers. However, employers increasingly are winning these cases based upon such proof.

Importantly, this defense is only available if the harassment has ***not*** culminated in a "tangible employment action" (termination, failure to promote, and other significant actions) against the victim[4] due to rejection of sexual behavior or otherwise as a consequence of the harassment. If a supervisor guilty of sexual harassment bestows "tangible" benefits – not carrying out a deserved discharge or promoting an undeserving employee – in return for an employee's silence or participation, a "tangible" employment action may be found.[5] Where a victim claims a "tangible employment action" so as to defeat the employer's defense, courts look to traditional views of causation; whether the employee can prove a causal link between the alleged harassment and the adverse action.[6]

Employer liability for co-worker harassment.

By contrast to supervisor liability, there is no such hard-and-fast rule on employer liability when harassment is carried out by non-supervisory co-workers. A negligence standard applies. Once an employer either knows or "should have known" that harassment has taken place, a remedial obligation arises. The company is liable for such harassment unless it has "take[n] adequate remedial measures . . . ."[7] In the Ninth Circuit, which includes Nevada, the remedies taken should be "reasonably calculated to end the harassment."[8] The efficacy of this remedy depends upon the nature of the steps taken:

> The reasonableness of the remedy also depends on its ability to (1) 'stop harassment by the person who engaged in harassment;' and (2) 'persuade potential harassers to refrain from unlawful conduct.'[9]

If the employer undertakes no remedy, or where the remedy both "does not end the current harassment and deter future harassment," the employer will be liable.[10]

REASONABLE EFFORTS TO PREVENT HARASSMENT

Contents of the Anti-Harassment Policy.

- A statement placing the company's imprimatur upon the anti-harassment policy. Emphasize the responsibility of every manager to take action when a sexual harassment situation arises. Strongly instruct managers to watch, report and remedy any and all harassment.[11]
- A commitment that violations of this policy will result in appropriate discipline, up to and including discharge.
- Scope of harassment prohibited–
  - Types of prohibited harassment:
    - Sexual, racial, national origin and religion protected by Title VII of the Civil Rights Act[12]
    - disability or perceived disability (ADA)[13]
    - age (ADEA)[14]
    - sexual orientation or perceived sexual orientation (Nevada statute)[15]
    - effeminate characteristics in a male resulting from a failure to behave in a given sexual stereotype, or failure to conform to any gender-based stereotype.[16]
    - health status, leave status, marital status, and/political beliefs.

- < Harassment by whom? Prohibit harassment ***by*** any person (employees, managers, visitors, vendors, customers) ***toward*** any other person.
- < Means of harassment–
  - < Use of office technology to accomplish the harassment (e-mail, computers, voice mail, etc.)
  - < Anticipate special situations where harassment may occur: company parties, out-of-town trips, and use of company "perks" and facilities.

‘ Make it understandable: Define sexual and other forms of harassment and provide examples of prohibited conduct.[17]

‘ Provide a statement that supervisors do not have the authority to force any change in an employee's job status on the basis of denial of sexual favors or receptiveness to sexual behavior or talk. While this will not immunize the employer from liability in the event of a "tangible employment action," such a statement will put employees on notice of conduct which they do not have to tolerate.

‘ If appropriate, accurately translate the policy into other languages.[18]

‘ A statement that the company will take appropriate steps to end any harassment found to have occurred.

‘ Inform employees that communication to management of a harassment complaint will trigger a prompt and appropriately remedial response.[19]

‘ Describe a "user-friendly" complaint procedure:[20]

- ‘ State commitment to prompt investigation and remedying of all complaints or occurrences brought to the company's attention.
- ‘ Employees should be advised that they are required to participate when the employer conducts an investigation.
- ‘ Provide alternate avenues for complaints, such as a "hotline" or human resources office, so that an employee can avoid dealing with a supervisor who potentially can be the source of the problem.[21]
- ‘ Designate specific individual(s) to receive complaints. Such specificity will help the company detect any emerging patterns, such as harassment behavior by a specific person, department, shift, work group, etc.
  - ‘ Designate both males and a females, to ensure that female victims feel comfortable reporting such harassment.
  - ‘ There is a growing trend for companies to take the immediate supervisor, and even any manager outside of human resources or the affirmative action office, out of the reporting chain. These companies require all harassment to be reported only to human resources or other similarly specialized department and/or individual. The decision whether to fashion the reporting process in such a restrictive way should be based upon a consideration of all relevant factors, including but not limited to the company's particular culture, the availability of human resources personnel in companies operating outside the "normal" daytime working hours, whether human resources personnel also are closely identified with disciplinary actions (which might discourage reporting), the relative levels of sophistication of the human resources office staff and of management/supervisory personnel, the company's history of harassment complaints, other preventive efforts, and the like.
  - ‘ Instruct all managers who learn of harassment to report harassment to human resources, and hold them accountable for any failure to do so.[22]

‘ Strictly prohibit retaliation against complainants and witnesses who give information in the course of an investigation.

‘ Consider leaving out provisions that threaten discipline for "false complaints."

Implementation of the Policy and Prevention Strategy.

‘ Plan the steps and scope of implementation to make the program comprehensive. In planning for an effective strategy, take into consideration the company's management structure, employee sophistication, history of harassment issues, and internal culture.

‘ Education on the policy:

- ‘ Require all employees to sign for receipt of the policy when the policy is implemented and at the start of employment for all who are hired thereafter. The sign-off sheet should contain the employee's acknowledgment of his/her responsibility to read the policy.
- ‘ Reissue the policy periodically.
- ‘ Review the policy in new-employee orientation. Keep a sign-in sheet or other record of attendance at this orientation.
- ‘ Include the policy in employee handbook; retain a copy of the receipt for the policy in the employee's personnel file.
- ‘ Post the policy conspicuously on bulletin boards where it is likely to be seen by employees.[23]
- ‘ Post the policy to employee-only accessible computer sites.
- ‘ Include reminders in employee newsletters or other publications.

- Document preventive efforts by maintaining careful records of the text of all policies actually distributed and those that are posted. Avoid disposing of outdated versions of employee handbooks or policies as they may be needed to prove the employer's affirmative defense later in the event of a claim.
- Provide mandatory in-house training for supervisory and non-supervisory employees, keeping records of attendance in both the employee's personnel file and in the appropriate training records.
- Develop training manuals for supervisors and rank-and-file employees, to –
  - explain to all employees the conduct they do not have to tolerate, giving examples.
  - provide role-plays and other techniques to sensitize employees regarding unacceptable behaviors.
  - provide case studies to demonstrate how some relatively common situations have resulted in harassment liability.
  - include "how-to" manuals for managers on appropriate methods for dealing with and/or detecting harassment situations.
- Maintain accurate records of attendance at training sessions and the substantive content of those sessions (sign-in sheets, certificates of attendance, overheads, Power Point presentations (hard copy and on-line), materials distributed, videotapes). These materials are likely to be requested by your own attorney in the event of litigation – to support the employer's burden to prove the elements of the affirmative defense. EEOC or NERC may also request them. The custodian of these records must be able to track and testify accurately to the nature of all training conducted and its contents, the materials used, as well as when it occurred and who attended.
- Give refresher training annually, to all employees.
- Require internal review of tangible employment actions, to help avoid situations in which a manager or supervisor makes an inappropriate decision, based upon inappropriate criteria that may include issues related to harassment. Such reviewable actions are:
  - discharge
  - demotion
  - promotion
  - reassignment
  - cut in pay or benefits[24]
  - performance evaluation that will affect compensation or benefits
- Select, designate and train persons to receive and investigate complaints:
  - Investigators should be persons who are, and are likely to be perceived as, impartial and sympathetic.
  - Train investigators in investigation techniques for sexual and other harassment cases, to help ensure completeness of the investigations.[25]
  - Consider the gender of investigators.
- Evaluate managers and supervisors based upon their own compliance with the policy, as well as the compliance of their subordinates and/or department. Appropriate actions in this area should be noted favorably and rewarded. If a manager or supervisor is "soft" on harassment, this should be noted unfavorably. Make sure managers know this will occur.
- Utilize exit interviews, which may result in disclosure of harassment that previously went undetected, and/or possible reversal of tangible employment decisions and the remedying of harassment.
- Periodically evaluate the effectiveness of your preventive strategy.

Elements of Supervisory/Management Training.

- Stress the company's condemnation of harassment.
- Punctuate the importance of the policy by having highest management present and attending the class.
- Insist on managers' conformance with the letter and spirit of the policy. Train supervisors that there can be no favoritism, and no personnel decisions based upon reaction to sexual conduct or other prohibited factors.
- Emphasize that "intent" of the harasser is not the key to whether some action is harassment; focus employees upon avoiding an inappropriate "impact" upon the victim.
- Require supervisory personnel to address harassment when they observe or hear of it. Insist that those who receive a complaint of or who detect harassment report it to a specific source.
- Inform employees you will address the supervisor's behavior and/or response to harassment situations during performance evaluations (or for compensation, bonuses, etc.).
- Require internal consultation for any tangible employment actions that are taken to avoid both harassment liability and retaliation claims.
- Stress the non-retaliation policy, even in situations in which the complaint may not seem to be valid. Note that retaliation claims can arise from actions far less severe than termination or other discipline, such as changes in responsibilities. Inform them the supervisor who retaliates commits a separate violation of the law and of company

policy, and has a responsibility to prevent retaliation among members of his/her work group.

- Train managers that, even though they may believe a complaint is not valid, they need to tread carefully in follow-up to a complaint. Without careful involvement of Human Resources, no action should ever be taken for the making of a "false" complaint.

Elements of Training for Non-Management Employees.

- Stress the company's condemnation and intolerance of sexual and other harassment.
- Define and give examples of sexual harassment, stressing both "zero tolerance" and the fact that the "intent" of the harasser is not the key to whether some action is harassment, focusing upon the "impact" on the victim and his/her work environment.
- Stress the company's policy that supervisors have no authority to force any change in an employee's job status on the basis of denial of sexual favors.
- Educate employees on the complaint procedure: when and how to complain, and what will happen once a complaint is filed.
- Emphasize the company's non-retaliation policy.

EFFECTIVELY REMEDYING HARASSMENT

Effective Reaction to the Harassment Complaint or Situation.

- Convey the appropriate attitude when accepting the complaint. The investigator is:
  - trying to obtain information to determine whether the anti-harassment policy has been violated
  - starting to make preliminary judgments regarding credibility of the complainant
  - neither confrontational nor judgmental (avoid commenting or asking why the employee did not take certain actions in response to the harassment).
- React even though the complainant does not use the words "sexual harassment" or even "harassment." Gently probe to get to the precise conduct involved.[26]
- React even if the first notice of the complaint is through a report to an outside agency, such as the Nevada Equal Rights Commission, Equal Employment Opportunity Commission, or an unemployment claim.[27]
- Investigate promptly and take no more than a few days to complete absent extenuating circumstances.
- Consider steps to ensure no harassment can take place during even a short investigation. Frequently, companies will suspend the accused pending investigation. This not only ensures no harassment or retaliation can occur, but also can avoid interference with the investigation through subtle or actual intimidation of witnesses. On occasion, with care to ensure no retaliation, a victim can be offered ***paid*** leave.
- Interview all persons with potential knowledge of relevant facts:
  - At least one thorough interview with the complainant in which the questions are open-ended, encouraging the giving of specifics ("please describe what happened").
    - If a complainant refuses to speak without an attorney being present, do not bar the attorney. Consider having a court reporter present, and/or restricting the attorney's role to that of an observer, with no right to object to questions or to otherwise obstruct the process.
    - The investigator should inform the complainant he/she wants to know immediately if the person encounters further harassment or additional conduct that could be viewed as retaliation for the complaint having been made.
  - Accused harassers. To avoid retaliation claims, initially avoid disclosing the name of the complainant by focusing upon questions as to the conduct of which he/she is accused. Go over each allegation separately and obtain the response.
  - Persons identified by both of the parties as having knowledge of the situation.
  - Persons in a position to observe the working relationship of the complainant and the accused.
  - Character witnesses are rarely of help in any investigation unless they also have specific personal knowledge of relevant facts.
  - Individuals who can (or may not) corroborate portions of either party's "story" on non-sexual details.
- Document activities and facts gathered in course of investigation:
  - At each step, document the information received.
  - If documents, such as employee schedules, telephone records, time cards, computer or other documents must be consulted, copies should be made for the investigation file.
    - Arrangements should be made to preserve all originals of such documents.
- Maintain an appropriate level of confidentiality, including documentation received or prepared. Disclose the existence of the complaint and information gathered during the investigation only on a "need to know" basis.
- Advise each person interviewed that company policy requires them to keep the matter confidential.

- Everyone in management and human resources should avoid labeling any conduct as "sexual harassment" or a person as a "sexual harasser" at the investigatory stage, since the facts have not been well-developed; this violates privacy and the allegations may not be sustainable after an investigation (resulting in possible employer liability for libel, invasion of privacy, slander or infliction of emotional distress).
- Investigatory notes, reports, and written statements should not be stored in employee personnel files, particularly that of the victim. Maintain a separate investigation file and keep that file in a secure place to which access is strictly limited. If disciplinary action is taken, evidence of the discipline and supporting documentation can be retained in the harasser's personnel file; if there is no discipline, the investigation file should be maintained separately.
- Bringing the investigation to an end:
  - *Determine factually what really happened.* Whatever the conclusion reached, the conclusion and its reasoning should be well-documented in order to make clear the thought process at the time, and what information went into that determination.[28]
  - *Does the conduct found to have occurred violate the company's anti-harassment policy and/or any other company policy*?
    - If so, action must be taken to remedy the harassment.
  - *If an accused admits to harassing behavior,* he/she must be immediately told to stop it and further action – including discipline – must be considered if it is believed that such action is necessary to ensure that the harassment exists.
  - *Documentation* of the results. In writing up conclusions (including investigation reports and/or discipline of perpetrators), focus upon violation of the ***company's policy***; avoid discussing the violation in terms of violation of the applicable law such as Title VII or EEOC regulations.
    - Violations of the company's zero tolerance or anti-harassment policy are not synonymous. As one example: One instance of verbal or even physical harassment behavior most likely does not create a hostile work environment.[29] However, one instance of such behavior, if confirmed, can and should lead to corrective or disciplinary action.[30]
    - The purpose of anti-harassment efforts is to ***avoid*** legal liability by stopping harassment before it can develop into a hostile work environment. Therefore, legal conclusions are not needed in order to take action.
    - If not carefully drafted, such discussions could result in a court finding these to be "admissions" of liability in the event of litigation.
- An employer should create an index or other record to allow it to produce documentation, where needed, of the harassment complaints which have been received and the action taken on them.

Determining the Appropriate Remedy or Response to Confirmed Harassment.

- What is the appropriate action to both stop harassment and prevent any recurrence? Among the guidelines outlined in relevant case law are –
  - The remedy must stop harassment, and deter and prevent recurrence and retaliation.
    - The Ninth Circuit Court, in one case, held the following to be sufficient in a co-worker hostile environment case: informing co-worker of allegations and their seriousness, ordering co-worker to stay away from employee, and moving co-worker to different shift.[31]
  - The response must include disciplinary action or similar condemnation of harassment relative to the perpetrator. The Ninth Circuit Court of Appeals has come down clear on the side of condemning harassment through the use of discipline, irrespective of the further steps taken as part of the remedy.[32] Under a new Ninth Circuit case, the action taken does not have to be expressly called "discipline" as long as the appropriate condemnation takes place.[33]
- Take steps to make certain the harasser does not repeat the objectionable conduct toward that victim or anyone else, and that no one retaliates because of the complaint.
- Do not punish the victim by making changes in the victim's work situation, shift, etc. that render the job less desirable or demeaning.
  - Such action could be viewed as retaliation for making a complaint.
  - Other employees who may be victims could be discouraged from raising complaints they have now or in the future if they become aware that someone who has brought a complaint of harassment has ended up in a worse job or worse shift.
- Consider re-training of individuals or groups of employees if the problem involves more than one individual in a particular work group or department, or if the investigation discloses that employees and/or supervisors in a particular work group or area are not sensitive to the implications of sexual or other harassment or to your policy.

- Inform the complainant face-to-face and in writing of action taken in response to the complaint.
- Follow-up with the complainant to ensure that there is no retaliation or repetition of the harassment.
  - Follow-up, at intervals, should be initiated by the employer; do not rely just upon a request that the employee report any resumption of the objectionable conduct or retaliation. Follow-up should be frequent, and is particularly critical if there is any chance the victim and the harasser will continue to have contact at work.
  - Keep records of these follow-ups.
  - Remember that acts of retaliation also can occur even if the accused harasser is terminated or transferred, or if other employees, such as the harasser's friends, decide to punish the victim for complaining. It is not infrequent that co-workers overreact by being less friendly or even hostile to the victim or supportive witnesses. As long as the employee's ability to perform the job is not hampered (such as by the giving of necessary information), the conduct likely will not be considered to be "retaliation."

What About Inconclusive Investigations?

Despite best efforts, it is not uncommon for an investigator to be unable to reach a conclusion as to whether harassment occurred. In those cases, given the employer's burden to establish the affirmative defense, an additional review of the situation should be conducted:

1. ***Re-examine all aspects of the investigation***: Has a thorough, good-faith investigation been conducted, with all potential witnesses interviewed, and all possible documents examined? Review the conclusions reached with another person at a confidential level within the company.
2. ***Discuss results with the complainant***. This will allow the employer to obtain any additional information the complaining party may have developed or failed to disclose earlier, or to learn about additional witnesses or evidence. The investigator will be able to gauge the reaction to this news as well as inform him or her of the need to stay in touch to make certain no more harassment occurs and that there is no retaliation. Follow this up with a memorandum to the employee, documenting the conversation.
3. ***Advise the accused, in-person and in-writing, of the reasons for the conclusion, and that conduct that has been alleged to have occurred is illegal and against company policy***. Warn the accused that any retaliation for the complaint is a violation of company policy. Even if there is no disciplinary action, the employer should document that these steps have been taken. If there is another complaint, even years down the road, the company must be able to demonstrate that it took as much action as it could to prevent any recurrence.
4. ***Consider re-training*** in the anti-harassment policy.

1. *Kolstad v. American Dental Assn*, 527 U.S. 526, 545-546 (1999).

2. *Faragher v. City of Boca Raton*, 524 U.S. 775 (1998).

3. *Faragher*, 524 U.S. at 780. Recent cases have held the employee had unreasonably failed to report harassment and so could not assert a claim. In one, a Spanish-speaking employee had several times complained to human resources about other negative treatment on the job but had failed to complain about alleged sexual harassment. (*Zelaya v. Eastern and Western Hotel Corporation*, No. 99-16179, 2001 WL 219897 (9th Cir. March 5, 2001) (Although the decision is unpublished, a copy may be reviewed on WestLaw (for those with accounts) or by request to KZ&A). Another employee delayed reporting a claim while she was evaluating whether the perpetrator was a "predator" or "interested man," and the court held she had not acted reasonably. (*Matvia v. Bald Head Island Management, Inc.,* __ F.3d __, 2001 WL 861980 (4th Cir. July 31, 2001)).

4. *Burlington Industries v. Ellerth*, 524 U.S. 742, 765 (1998).

5. *Matvia v. Bald Head Island Management, Inc.,* __ F.3d __, 2001 WL 861980 (4th Cir. July 31, 2001).

6. *Faragher*, *supra.* If the employee cannot prove a causal connection between the sexual harassment and a later tangible action, the employer will be able to assert the affirmative defense. *Nichols v. Azteca Restaurant Enterprises, Inc.*, ___ F.3d ___, 2001 WL 792488 (9th Cir. 2001).

7. Two of the most recent cases upholding this test's applicability for non-supervisors are *Nichols v. Azteca Restaurant Enterprises*, ___ F.3d ___, 86 FEP Cases (BNA) 336, 2001 WL 792488 (9th Cir. 2001); and *Yamaguchi v. United States Dep't of the Air Force*, 109 F.3d 1475, 1482 (9th Cir. 1997).

8. *Ellison v. Brady*, 924 F.2d 872, 882 (9th Cir. 1991).

9. *Nichols v. Azteca*; *Ellison*, 924 F.2d at 882.

10. *Fuller v. City of Oakland*, 47 F.3d 1522, 67 FEP Cases (BNA) 153 (9th Cir. 1996).

11. See *Coates v. Sundor Brands, Inc.,* 160 F.3d 688, 694 (11th Cir. 1998), where the policy approved by the Court contained such a statement to managers.

12. 42 U.S.C. § 2000e, *et seq.*

13. Americans With Disabilities Act, 42 U.S.C. §§ 12101-12213.

14. Age Discrimination in Employment Act, 29 U.S.C. 626, *et seq.*

15. NRS 613.330(1) (as amended in 1999 to add prohibitions of sexual orientation discrimination).

16. *Nichols v. Azteca Restaurant Enterprises*, ___ F.3d ___, 86 FEP Cases (BNA) 336, 2001 WL 792488 (9th Cir. 2001).

17. *Montero v. AGCO Corp.*, 192 F.3d 856 (9th Cir. 1999)

18. *Wilson v. Elko County School District*, No. CV-N-97-140 (D. Nev. December 24, 1998). In *Zelaya v. Eastern and Western Hotel Corporation*, No. 99-16179, 2001 WL 219897 (9th Cir. March 5, 2001) (9th Cir. 2001) (unpublished decision, see footnote 3 above), the employer had translated the policy into Spanish, and thereby had taken an extra measure to inform employees of their obligations to avoid harassment and of the complaint procedure. The Court applied the affirmative defense to insulate the employer from liability.

19. *Whitmore v. O'Connor Management, Inc.*, No. 97-1273, 1998 WL 481077, at *3 (8th Cir. Aug. 18, 1998).

20. In *Coates v. Sundor Brands, Inc.,* 160 F.3d 688 (11th Cir. 1998), the court found the employer satisfied the requirements of the affirmative defense, first noting the "user-friendly" policy that was "officially promulgated by the company" (provided to all employees). Second, the employer "exercised reasonable care to prevent sexual harassment." The policy itself had several important elements, including advising employees that "[a]ny employee who feels he or she is being sexually harassed should immediately contact their line manager, Personnel Contact, or other manager with whom they feel comfortable."

21. *See* Peter Aronson, NATIONAL LAW JOURNAL, "Justices' Sex Harassment Decisions Spark Fears," p. A14 (November 9, 1998).

22. *Coates v. Sundor Brands, Inc.,* 160 F.3d 688 (11th Cir. 1998)

23. *Sconce v. Tandy Corp.*, 9 F. Supp. 2d 773, 776 (W.D. Ky. 1998).

24. *Nichols v. Azteca Restaurant Enterprises, Inc.*, ___ F.3d ___, 86 FEP Cases (BNA) 336, 2001 WL 792488 (9th Cir. 2001).

25. Carefully consider the situation before utilizing former law enforcement or internal security personnel, as these individuals frequently do not have the background or experience to properly and sensitively conduct a sexual harassment investigation.

26. In *Haugerud v. Amery School District*, No. 00-1911 (7th Cir. August 2, 2001), the court held the employer had not acted appropriately, and so was not entitled to prevail on the affirmative defense, where the employer did not act after the employee's husband and co-worker complained on her behalf. The court held the employer inappropriately relied upon the fact the employee did not make a written complaint before she filed with the EEOC; the court noted the employer's own policy permitted the employee to make either an internal complaint ***or*** complain to EEOC. The employer also did not react after the employee filed with EEOC.

27. See *Haugerud v. Amery School District*, No. 00-1911 (7th Cir. August 2, 2001).

28. The need for a well-documented investigation and thought process is particularly needed if disciplinary action will be taken as to the perpetrator, who also may file a wrongful termination lawsuit or a discrimination charge or lawsuit. This proof will be needed to assert a legitimate, non-discriminatory reason for the discipline in the event of such a discrimination suit. In the event of a breach of contract claim, the company must be able to demonstrate it undertook a good faith investigation before reaching the conclusion it reached, then enforced its policies. *Southwest Gas Co. v. Vargas*, 111 Nev. 1064, 1071, 901 P.2d 693, 697 (1995).

29. In *Clark County School District v. Breeden*, 121 S.Ct. 1508, 85 FEP Cases (BNA) 730 (2001), the court held that one instance of a mild verbal sexual reference would not violate Title VII by creating a hostile work environment. The employee, a high-level manager in human resources, had read, as part of her job screening applicants, a reference in a police officer candidate's psychological evaluation in which he recounted a sexual reference made to a female employee at a prior job ("making love to you is like making love to the Grand Canyon . . . "). This remark did not "bother" or "upset" her, but in a later meeting on the report her male supervisor read the reference, said, "I don't know what that means," then laughed after Breeden's male subordinate said, "I'll tell you later." Neither before nor after the incident were there any other sexual remarks or other conduct. The Court held that "no reasonable person" could believe such an exchange was sexual harassment; that this was not "very serious" as the Supreme Court's cases require for proof of a sexual harassment claim.

In 2000 in *Brooks v. City of San Mateo*, 229 F.3d 917 (9th Cir. 2000), the Ninth Circuit Court of Appeals issued a similar ruling in the case of one employee who reported that a male employee had touched her stomach and then her breast under her sweater; the perpetrator and the female plaintiff never worked together again. The employer acted swiftly to review the matter and remove the harassers from the workplace.

30. In *Fuller v. City of Oakland*, 47 F.3d 1522, 67 FEP Cases (BNA) 153 (9th Cir. 1996), by the time the employer learned of the harassment, it had stopped and no disciplinary action had been taken against the accused. The harassers had, in fact, received a promotion. The court faulted the City for not having taken disciplinary action even though the harassment had ceased. See also *Intelkofer v. Turnage*, 973 F.2d 773 (9th Cir. 1992).

31. *Star v. West*, 237 F.3d 1036 (9th Cir. 2001).

32. *Fuller v. City of Oakland*, 47 F.3d 1522, 67 FEP Cases (BNA) 153 (9th Cir. 1996).

33. *Star v. West*, 237 F.3d 1036 (9th Cir. 2001).