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Preventing Harassment It's Not Just Sexual

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Non-Sexual Harassment Claims Are On the Rise

- \$1 million verdict for racial jokes/comments ignored by supervisor
- EEOC's vigilance for Anti-Arab and Anti-Muslim harassment
- U.S. Secret Service Agent suspended for anti-Muslim graffiti

"Other Harassment"

- Racial
- National Origin
- Religion
- Gender
- Disability
- Perceived Disability
- Gender
- Sexual orientation
- Union or other protected concerted activity
- Retaliation for any legally protected conduct

Sexual Harassment Legal Standards Apply -



- Subjected to verbal or physical conduct due to protected characteristic
- Unwelcome
- Sufficiently severe or pervasive to create hostile environment

Legal Standards-Basics

- *Harris vs. Forklift Systems*: offensive to a reasonable person under the circumstances
- *Faragher vs. City of Boca Raton*: Must be "extreme" to lead to liability
- *Oncale vs. Sundowner*: law does not create workplace "code of civility"
- *CCSD vs. Breeden*: "must be extremely serious"

Harassment Behaviors



- Comments
- Jokes
- Stereotyping
- Graffiti
- Postings
- Different treatment
- Physical actions

Swinton vs. Potomac Corp.

Failure of Employer = Liability for Racial Harassment

- Considerable, ongoing verbal racial harassment.
- Line supervisor heard/observed and failed to halt or report harassment – providing reason for no report by victim.
- Policy listed line supervisor as a recipient of harassment complaints.

Retaliatory Harassment

- Recognized by Ninth Circuit Court of Appeals – *Ray vs. Henderson* (2000)
- Same standards & defenses as other forms of harassment
- Conduct actionable if “would deter reasonable person” from protected activity
- Action can help create HWE if it is retaliatory for any protected action

Retaliatory Harassment: Types of Protected Conduct

- Discrimination charge or lawsuit
- Seeking disability or religious accommodation
- Protesting discrimination or harassment
- Workers compensation claim
- Protesting/reporting illegal conduct
- Refusal to work in unsafe conditions
- NLRA section 7 activity
- NLRB charge
- Sarbanes-Oxley

Sexual Orientation Harassment

- **State Law: NRS 613.330**
- **Title VII: Harassment “because of sex” may include sexual orientation harassment**

Rene vs. MGM Grand Hotel, Inc.

- Focus on basics: the EEOC's Regulation.
- Puts focus upon "sexual" nature of conduct.
- If conduct is "sexual," then motivation is not as relevant.
- Sexual orientation is not protected category under Title VII.
- Note: Nevada law (NRS 613) prohibits all discrimination due to sexual orientation.

"Second Hand" Harassment

- Harassment of *others* witnessed by victim.
- Harassment comments known only to victim because told by *others*.

What Makes a Hostile Work Environment?

- Frequency of harassment behavior.
- Severity.
- Physically threatening or humiliating?
- Mere offensive utterance?
- Did behavior unreasonably interfere with work performance?

Overview

- Liability more likely where harassment behavior commonplace and ongoing
- Less exposure for fewer incidents, of even vulgar language
- More serious if accompanied by different treatment
- Less overt statements and harassment

DEFENSES

Supervisory Harassment: Company's Affirmative Defense

So Long as No "Tangible Employment Action"

- Employer exercised reasonable care to prevent and remedy harassment.
- Victim *unreasonably* failed to take advantage of preventative or corrective opportunities provided by the employer, or to avoid harm otherwise.

Co-Worker Harassment

- Employer knew or should have known of harassment behavior.
- Company failed to take prompt and appropriate remedial action to stop the harassment.

Swenson vs. Potter

Two Stages of Remedial Action

- **Temporary Measures**

- Obligation to undertake appropriate temporary steps to address while investigating whether complaint is justified.
- Prompt investigation “puts employees on notice” of seriousness of the allegations.
- Effectively separating complainant from accused harasser.

Swenson vs. Potter

Two Stages of Remedial Action

- **Permanent Remedial Steps**
 - Appropriate separation of harasser-harassée.
 - Steps to ameliorate the effects upon the victim.
 - Discipline where appropriate.
 - Steps to separate even if cannot confirm justification for complaint.

Swenson vs. Potter

"Transfer of the Victim" Issues

- Cannot transfer to "less desirable location."
- Not every transfer adversely affects the job:
 - Pay and benefits must be the same.
 - Longer commute or inconvenient work schedule disfavored.
- Employer may consider –
 - Ease of moving employees.
 - Respective importance to business operations.

Swenson vs. Potter

- Court struck balance of fairness to all sides.
- Good faith, fair investigation – but not perfection – is required.
- Swiftiness of response significant.
- Remedial interaction with plaintiff should be ongoing.

Liability Case Characteristics

Nichols vs. Azteca Restaurant, 9th Circuit Court of Appeals, 2001

- No investigation.
- No questioning of perpetrators.
- No warning to perpetrators.
- Supervisors were harassers.
- Inadequate response.

Inadequate Employer Response

Nichols vs. Azteca Restaurant, 9th Circuit Court of Appeals, 2001

- Told complainant to “report back” if additional incidents occurred.
- Promised “spot checks” in follow-up.
- “Spot-checked” only *once*.

PRACTICAL TIPS

Review and Modify Policies

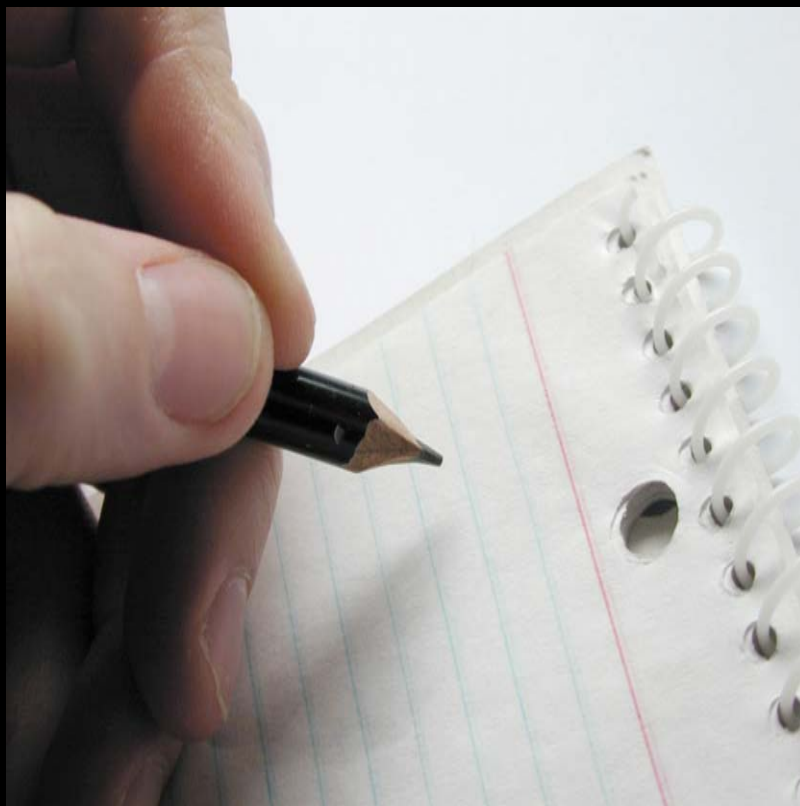


Image: www.freeimages.co.uk

- Review and update all non-discrimination policies.
- Prohibit harassment on any basis.
- Provide examples of “other” harassment.

Policy Considerations

- Use care in designating who can receive harassment complaints.
- Obtain employee receipts for new policy.



Image: www.freeimages.co.uk

Training Enhancements

- Modify programs to include all forms of harassment.
- Consider diversity training.



RESPONDING TO THE HARASSMENT REPORT

Overall Strategies

- Stop harassment found to exist.
- Take advantage of the “affirmative defense” to supervisory harassment.
- Damage control.
- Deter future violations.
- Be able to *demonstrate* compliance.

"Severe or Pervasive" Issues

- Employer's objective is to *prevent* harassment from rising to severe or pervasive level.
- Remedy/correct situation even if it does not rise to level for which plaintiff could recover in court.

"Second-Hand" Harassment

- Must address reported second-hand harassment.
- May be "early warning sign" and prevention opportunity under affirmative defense.
- Include in policies and training.

“Reasonably Calculated to End” Harassment

- Stops the harassment and prevents recurrence.
- Swift and reasonable investigation.
- Discipline of perpetrator.
 - Formal discipline.
 - Threat of termination on recurrence.

Remedial Action

- Removes effects of harassment.
- Deters and prevents recurrence.
- Does not punish the victim.
- Separation of perpetrator and victim.

Remedial Action

- Re-training of individuals or groups of employees.
- Inform complainant face-to-face and in writing of action taken in response to the complaint.
- Follow-up to ensure no recurrence or retaliation.
- Document follow-up efforts & results.

Assessment Stage

- Document reasons for judgments.
- Document *policy* violation, not *legal* violations.
- Document follow-up.

Can You Prove Your Company Takes Steps to Remedy Harassment?

- Indefinitely retain documentation on zero-tolerance training, including materials and attendance.
- Retain all-inclusive investigatory files.
- Develop index system to ensure later retrieval of complaint/response info.