

Harassment Policy and Procedure: Prevention, Response and Remedy

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1. A formal harassment policy is more important now than ever.

Although harassment based on race, religion, national origin or other protected status is unlawful, the most commonly litigated type of harassment is that based upon sex. Not that long ago, an employer, which had gone to the effort to craft a specific anti-harassment policy, was viewed as being on the cutting edge of human resources management. Some employers were hesitant to commit a policy to writing, out of concern that an employee might use it against the employer if the employer failed to strictly enforce the policy. In 1998, however, the United States Supreme Court reviewed several harassment related cases, and issued decisions that, to a degree, shook up the criteria used to define conduct constituting harassment. One of these decisions in particular, Ellerth v. Burlington Indus., 118 S. Ct. 2257 (1998) gave particular emphasis to the manner in which an employer can protect itself from liability for harassment. An employer may be absolved of liability if it can establish two criteria: first, that it exercised reasonable care to prevent and promptly correct harassing behavior, and, secondly, that the employee who was the recipient of the harassment failed to take advantage of the preventive or corrective mechanism. Put another way, if the employer

established a policy against harassment, and put in place a procedure for reporting and dealing with it, an employee will not be heard to complain unless the employee gave the employer an opportunity to deal with the problem before resorting to litigation, and the employer failed to do so. Consequently, a well prepared harassment policy and procedure can be a significant shield against liability. Usually, the policy and procedure will be set forth in an employee handbook, although it can be a stand-alone document.

2. Basic elements of a harassment policy and procedure.

The essential functions of a harassment policy can be broken down into five categories: (1) inform, (2) deter, (3) alert, (4) investigate and (5) remedy. The initial function of the policy is to inform employees that the employer has a firm policy against harassing behavior. It further explains to the employees what type of behavior or activity constitutes harassment, to whom an employee should report harassment, and the possible punishment that may result from harassment of another employee.

The policy provides a defined mechanism to ensure that harassment does not go unrecognized, and that the person to whom it is reported understands what actions must be undertaken on reporting of harassment. The policy will enable the employer to investigate the allegations in an orderly and fair manner, and to take appropriate actions on conclusion of the investigation to protect both the reporting employee and the employer.

3. Informing employees and deterring harassing behavior.

The informational aspect of a harassment policy has three aspects. It defines for the employees the type of conduct constituting harassment. It warns the employees that engaging in harassment can result in sanctions, including termination of employment. The policy also educates employees as to the procedure for reporting harassment, and how the employer will respond to the report.

Some harassment is not intentional, and results from what some employees simply consider “horseplay” or misguided “teasing.” Employees engaging in such activity may not realize the gravity of their actions. If the subject of the behavior appears to take offense, the harasser will defend the action by saying the subject “just can’t take a joke” or “has a chip on his shoulder.” It is useful to define for employees what constitutes harassment. With regard to sexual harassment, the EEOC Technical Assistance Program Manual defines sexual harassment as:

“Unwelcome sexual advances, requests for sexual favors, and other verbal or physical conduct of a sexual nature constitute sexual harassment when (1) the submission to such conduct is made either explicitly or implicitly a term or condition of an individual’s employment, (2) submission to or rejection of such conduct by such individual is used as the basis for employment decisions affecting such individual, or (3) such conduct has the purpose or effect of unreasonably interfering with an individual’s work performance or creating a hostile, or offensive working environment.”

Most employees will readily understand that requesting sexual favors, or retaliating against a subordinate employee for refusing a sexual advance constitute

harassing behavior. The “hostile work environment” is subject to a greater variety of interpretation, and consequently a harassment policy should provide examples of conduct that might constitute or be perceived as harassment. For example:

- Use of any derogatory slang to refer to an individual’s religion, race, national origin, sex or disability.
- Questioning, making remarks or commenting on an individual’s sexual preferences or experience.
- Having on company property any pornographic or sexually suggestive posters, pin-ups, photographs or literature, even if maintained in a personal locker or work area.
- Making sexually suggestive remarks about an individual’s physical attributes.
- Any touching of another person not associated with work necessity or commonly accepted social custom (i.e. shaking hands is almost always acceptable, but putting your hand on another person’s shoulder while standing behind them looking at a computer monitor may not always be appropriate).
- Any activity that might embarrass, annoy or offend another person when the subject of the matter is sex, race, religion, national origin or disability.

Any listing of examples should also note that the list is for informational purposes only, and is not intended to be an exhaustive or exclusive listing of all activities that might constitute harassment. In providing examples of inappropriate conduct, the

employer should also take into consideration the level of sophistication and social culture of the workforce. For some employees, simply prohibiting “inappropriate physical contact” will be sufficient, while others may need to be specifically told that they should not “goose” another employee, even as a joke.

An employee handbook incorporating a harassment component should state that the employer has adopted a firm policy against harassment in the workplace, and that it will investigate any report of harassment. In the event the allegation is substantiated, the offending employee will be subject to disciplinary action, possibly including discharge. The handbook should not specifically set forth the type of discipline to be imposed, or draw a specific correlation between a particular type of harassment and punishment. In this way, the employer retains flexibility in crafting an appropriate resolution to each particular circumstance, in light of the unique facts of the situation. For those employees who might engage in harassing behavior out of a lack of awareness of the serious nature of their conduct, the potential for punishment may cause them to be more cautious in their action. For those employees who might otherwise be motivated to engage in intentional harassment, the possibility of discharge from employment may be a deterrent.

A harassment policy should inform the employee that, if the employee believes he or she is the subject of harassment, or if he or she believes another employee is being harassed, they can report the matter without fear of retaliation from the alleged harasser or from the employer. The policy should provide for oral or written report to a designated individual or individuals within the company.

If the employer does not have an existing harassment policy, the workforce should be provided meetings or presentations to discuss the nature and provisions of the policy. New hires can be instructed on the policy during orientation or training.

4. Advising the employer of harassing behavior and investigation.

Many harassment policies provide that an employee should report harassment to the employee's immediate superior, or, if that is the person against whom the allegation is made, to another designated person within the company. In deciding whom to designate as a report contact, the employer must take into consideration the nature of the business and the organizational structure.

Although reporting to an employee's immediate superior is often the standard operating procedure, this author has reservation about the wisdom of the practice, particularly since recent Supreme Court decisions have made harassment policies a valuable defensive asset. Employers with a large workforce will have a number of low to mid-level employees who stand in an immediate supervisory capacity to other employees. In such circumstance, each of these supervisory employees must be trained to recognize the significance of a report of harassment. A report might not be as direct as "John is engaging in sexually harassing behavior, and I wish to make a formal report." Rather, it might be a conversation in the break room, when an employee says, "You know, there is a guy in my department who keeps staring at me and always manages to brush against me in the hall. It makes me uncomfortable to walk to my car alone now." If the supervisor does not recognize the conversation as a potential report, or, worse, tells the employee she is just overreacting and to try to relax, the employer's harassment policy is worthless. Consequently, the employer may consider designating a particular person in management

or human resources as the “harassment contact.” The harassment policy should identify the person and how the person can be contacted. As always, an alternate contact should be provided in the event the designated contact is the subject of the report.

Once the employer receives a report, the most pressing decision is whether immediate action is required to protect the complaining employee from additional harassment. This may require that the accused employee be transferred to other duties to minimize contact with the complainant, or even placing the accused employee on temporary leave of absence until the investigation can be completed. Although this may seem like a matter of the accused being “guilty until proven innocent,” the employer’s duty is to protect the complaining employee, and should err on the side of caution.

After making whatever arrangements are appropriate for immediate prevention of additional conduct, the employer should not delay in initiating the investigation. The investigation may be performed in-house by a neutral and unbiased member of management, or the employer may bring in an attorney or other outside assistance for the investigation. The complaining employee, the accused and any other relevant witnesses should be interviewed separately and privately. During the course of the investigation, the nature of the allegation and the information elicited from witnesses should only be disclosed to others who have a legitimate business need to know.

5. Responding to, and remedying, harassing behavior.

After conducting a thorough investigation, an employer may conclude that the harassment simply did not occur, and the complaining employee acted under an ulterior motive, such as a desire to seek revenge for some non-harassing conflict with the suspect employee. While the suspect employee clearly should receive no sanction, a more

difficult question is whether the complaining employee should be punished for false reporting. Caution dictates that the result of such a situation should be neutral. If the employer sanctions the complaining employee, the action may provide the employee an opportunity to claim retaliation for having made the report of harassment.

Another possible result of an investigation is a finding that the alleged action or behavior did take place, but was not actually harassing. Perhaps the employee misperceived comments or is deemed to be unreasonably sensitive to statements or actions that should not offend an individual of ordinary sensibilities. In this circumstance, the employees should be counseled so that future misunderstandings do not occur.

If the employer determines that the allegation of harassment is substantiated, the appropriate remedial action can only be determined on a case-by-case basis. If the harassment was unintentional, or resulted from a lack of sensitivity on the part of the offending employee, counseling may be sufficient. If the offense involves an element of malevolence, punitive action such as demotion, temporary suspension without pay or discharge from employment may be appropriate, both to deter the offending employee and to demonstrate to other employees the employer's commitment to a harassment-free workplace. Remedy may also require permanent reassignment of the offending employee to a duty or location that will prevent or minimize contact with the complaining employee. It is generally not acceptable to minimize contact by reassigning the complaining employee, as this may constitute retaliation for making a complaint, unless the employee requests or is favorably inclined to this method of remedy. The employer should also put in place a mechanism for monitoring the offending employee to ensure

that no further harassment is directed toward the complaining employee or other employees, and for monitoring the complaining employee to ensure that the employee is not subjected to harassment by other employees sympathetic to the offending employee.

The employer should keep confidential all records related to the investigation, but should maintain careful written documentation of the investigation and the basis for the findings of fact and actions taken, in the event subsequent litigation ensues. Once the employer has made a determination and takes action, its findings should only be expressed in general terms insofar as any information is provided to the general workforce. For example, an employer should not state that it found a particular employee guilty of soliciting sexual favors from another employee; rather, it should simply state that it determined the employee had violated a provision of the company's harassment policy.