

Sexual Harassment Review: What Employers Need to Know

By Mark Kingseed and Laura Wilson, Coolidge Wall Co., L.P.A.

As employment lawyers, we have seen a growing trend of sexual harassment complaints made to employers. Sexual harassment can occur in any workplace. Frequently, a prompt and appropriate response can prevent an employer from being held liable for the inappropriate conduct of its employees.

Sexual harassment falls into two categories, each with attendant risks of liability to the employer. The first, Quid Pro Quo harassment is what many think about as the “typical” sexual harassment claim. It occurs when a supervisor takes a tangible employment action against an employee. A good example of this is a supervisor proposing to exchange a tangible employment action (promotion, raise, etc.) for sexual favors. Because the supervisor is acting as an agent of the employer, employers will be held liable for this conduct regardless of whether the employer actually knew about the harassment or was reckless in that regard.

The second form of sexual harassment is hostile work environment harassment. These claims are more common than Quid Pro Quo claims and the liability of the employer is more closely tied to the employer’s action or inaction in each case. A hostile work environment occurs when an employee is subject to unwelcome harassment, which unreasonably interferes with work performance or creates a hostile or offensive work environment, which is severe and pervasive. It is important to note that the court will look at whether a reasonable person would find the environment objectively hostile, in addition to looking at whether the employee found the conduct subjectively hostile and severe or pervasive.

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An employer's liability in hostile work environment claims depends on a number of factors. Initially, if the employee was harassed by a co-worker, the employer will only be held liable if it failed to take reasonable action. This means that the employer either tolerated or condoned the situation or that the employer knew or should have known of the alleged conduct and failed to take remedial action. While it is obvious that the employer will be found to have actual notice where the conduct has been reported to the employer or the employer has actually witnessed the conduct, the courts may also find the employer liable if it had constructive notice of the conduct. Constructive notice will be found if the employee reports the conduct to anyone with the authority to correct the behavior. This can include low-level supervisors. An employee's failure to follow the procedures set up in the employee handbook or report the conduct to the "right" person will not be fatal to the harassment claim if the employee can demonstrate the employer had actual or constructive knowledge of the conduct.

If a supervisor creates the hostile work environment, most courts will find the employer liable regardless of whether the employer actually knew about the harassment or was reckless in that regard. As in *Quid Pro Quo* harassment, the supervisor is treated as an agent of the employer, and liability stems from that agency relationship.

Finally, any retaliation against an employee who makes a complaint or files a claim can give rise to liability for the employer. In a claim for retaliation the employee need not be successful in proving the underlying claim. If the employee can prove retaliation for the claim, a separate cause of action exists which can result in liability for the employer even if it responded appropriately with regard to the underlying complaint.

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The first step in avoiding harassment issues is a strong policy in the employee handbook, which should be distributed to every employee. This policy should include such items as the definition of harassment, the policy for reporting harassment and an anti-retaliation statement. Additionally, having an internal policy for the investigation and handling of complaints is also helpful. Finally, training for both supervisors and employees can assist in the prevention of harassment.

If a complaint is made or a claim is filed, it is imperative that employers act promptly upon notification of the complaint to prevent and correct any harassing behavior. Prompt investigation followed up with any appropriate remedial measures is necessary to avoid liability in hostile work environment claims.

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