

Sexual Harassment Training for Key Management Employees

Presented by:
Attorney Meredith Sayre &
Shaun Murphy

Agenda

1. History of Sexual Harassment
2. Sexual harassment judgments/EEOC Task Force
3. Organizational Culture, Prevention, Accountability
4. Creating policy and procedure on sexual harassment
5. Complaint Procedure
6. Compliance Training on Supervisory Responsibilities
7. Employee Education/Civility Training/Concerns about Backlash
8. Dating Guidelines
9. Other issues/suggestions
10. Summary
11. Questions/Thank you!

What Is Sexual Harassment?

- Unwelcome sexual advances.
- Requests for sexual favors.
- Other verbal or physical conduct of a sexual nature that affects an individual's employment, unreasonably interferes with his or her work performance, or creates an intimidating, hostile or offensive work environment.

What Is Sexual Harassment? (cont.)

The two forms of sexual harassment are:

- Quid pro quo (Latin for “this for that” or “something for something”).
- Hostile work environment.

What Is Sexual Harassment? (cont.)

- Quid Pro Quo:
- Tangible employment action against the victim.
- Involves monetary loss or change in job.
- Example: Mary Smith receives smaller pay increase based on performance than other employees with similar performance because she refused to go out with her supervisor, John Doe.

What Is Sexual Harassment? (cont.)

- Hostile Work Environment:
- Speech or conduct that is severe and/or pervasive enough to create an abusive or hostile work environment.
- Example: Mike Maloney is leering at and intentionally brushing against Sally Davis.

What Is Sexual Harassment? (cont.)

- Hostile Work Environment (cont.)
- In addition to speech and/or conduct, covers explicit or suggestive items that are e-mailed, texted, electronically provided or displayed in the workplace that interfere with job performance or that create an abusive or hostile work environment.
- Example: Jill Jones texts and instant messages her co-workers with sexually explicit jokes and pictures.

What Is Sexual Harassment? (cont.)

- Who can commit sexual harassment:
 - Employees at all levels.
 - Customers or vendors.
 - Members of the same sex or opposite sex.
- Who can be a victim of sexual harassment:
 - Individual or individuals targeted by statements or actions.
 - Bystanders or witnesses not directly targeted.

A lot of progress

1. Title VII of the Civil Rights Act of 1964

Title VII of the Civil Rights Act of 1964 prohibits employment discrimination based on race, color, religion, sex and national origin

In 1986, the U.S. Supreme Court held in the landmark case of Meritor Savings Bank v. Vinson that workplace harassment is an actionable form of discrimination prohibited by Title VII of the Civil Rights Act of 1964.

The 1993 U.S. Supreme Court case Harris V. Forklift Systems. Inc. states “Certainly Title VII bars conduct that would seriously affect a reasonable person’s psychological well being, but the statute is not limited to such conduct. So long as the environment would reasonably be perceived, and is perceived, as a hostile or abusive...there is no need for it also to be psychologically injurious (in order to find that it violates Title VII).”

A lot of progress....

- In 1998, the Supreme Court, in Faragher v. City of Boca Raton and Burlington Industries, Inc. v. Ellerth identified the circumstances in which employers will be held liable for acts of sexual harassment carried out by their supervisory personnel. The Court ruled that employers are liable when the sexual harassment has culminated in a tangible employment action directed against the harassed employee (*i.e.*, employee is terminated or demoted after rejecting a supervisor's sexual advance). The Court further ruled that employers are permitted to establish an affirmative defense to the claim, if it can show no tangible action was taken against the harassed employee and two additional elements: (1) the employer had communicated and established an effective procedure for employees to seek redress from sexual harassment; and (2) the harassed employee failed to take advantage of this procedure. If an employer can show all of these elements, then it will not be held responsible for the sexual harassment by its supervisory personnel.

A lot of progress

In the 1998 case of Oncale v. Sundowner Offshore Services, the Supreme Court unanimously ruled that sex discrimination consisting of same-sex sexual harassment is actionable under Title VII. The Court reiterated that the plaintiff must prove that there was discrimination because of sex and that the harassment was severe.

Burlington Northern & Santa Fe (BNSF) Railway Co. v. White, 548 U.S. 53 (2006) is a sexual harassment and retaliatory discrimination case. The Supreme Court held that in order to prevail on a claim of retaliatory discrimination, “plaintiff must show that a reasonable employee would have found the challenged action materially adverse, which in this context means it well might have dissuaded a reasonable worker from making or supporting a charge of discrimination.

A lot of progress...

2. EEOC Sexual Harassment Task Force

Workplace Harassment Remains a Persistent Problem. Almost fully one third of the approximately 90,000 charges received by EEOC in fiscal year 2015 included an allegation of workplace harassment.

In 2015, the Equal Employment Opportunity Commission (“EEOC”) formed a select task force to gain insight on how to prevent harassment in the workplace. The task force members reflected a broad range of experience and expertise. They consulted with a broad range of professionals and practitioners to gain insight on sexual harassment in the workplace. The focus of the task force was prevention.

A lot of progress

EEOC Task Force Focus:

1. Organizational Culture, Leadership & Accountability
2. Prevention, Policies & Procedures
3. Compliance Training
4. Workplace Civility and Bystander Intervention Training
5. EEOC's own Outreach programs

Organizational Culture, Prevention, Accountability

Leadership and Accountability Are Critical. Workplace culture has the greatest impact on allowing harassment to flourish, or conversely, in preventing harassment.

- Top down.
- Workplace assessments.
- Devote sufficient resources to prevention efforts.
- Diversity and inclusion strategy.
- Accountability.

Creating Policy

1. Need a policy (or policies) specific to harassment:

a. Scope

- i. Sexual harassment
- ii. Other kinds of unlawful harassment
(race, ethnicity, age, disability, etc.)

b. Options

- i. One policy
- ii. Two linked policies

2. Include practical, customized examples

a. Focusing on inappropriateness and not illegality

b. Include both

- i. Obvious
- ii. Less obvious

Creating Policy (cont.)

3. Make clear the policy's application to:
 - a. Electronic communications, including e-mail, text messages, social media, etc.
 - b. Not only work but also off-duty but work-related events (and potentially event unrelated to work)
 - c. Non-employees – vendors, guests/clients, contractors, etc.
4. Refrain from behaviors that constitute unlawful harassment and other inappropriate conduct, even if not unlawful in and of itself.

Complaint Procedures

- ***Workplace Harassment Too Often Goes Unreported.*** Common workplace-based responses by those who experience sex-based harassment are to avoid the harasser, deny or downplay the gravity of the situation, or attempt to ignore, forget, or endure the behavior.
1. Make explicit complaint procedure is available to employees to use to raise concerns about:
 - a. All kinds of unlawful harassment (or unacceptable conduct)
 - [discrimination, retaliation and failure to accommodate, too]
 - b. Conduct by employees and non-employees alike
 - c. Experienced, witnessed or otherwise became aware of (bystander)

Complaint Procedure (cont.)

2. Point of contact

- a. Supervisory by-pass provision (minimum requirement)
- b. Multiple points of access (recommended) – Department Head, Security, HR

3. Non-retaliation statement

- a. Who is covered
- b. What is prohibited
- c. Fact complaint lacks legal merit is not a defense

4. Confidentiality

- a. Important but not absolute
- b. Need to know basis - Keep it Confidential
- c. Can't control what others may reveal

Complaint Procedure (cont.)

5. Corrective actions

- a. Make clear applies not only to unlawful but also to inappropriate conduct, even if not unlawful in and of itself
- b. Include reference to discipline, up to and including termination of the employment or other relationship
- c. Discipline should be prompt and proportionate to the severity of the infraction.
- d. Discipline should be consistent
- e. Supervisors and Managers should be held accountable for preventing and/or responding to workplace harassment.

Complaint Procedure (cont.)

6. Dissemination (along with policy):
 - a. Recipients
 - i. All employees
 - ii. New hires (on boarding process)
 - b. Access
 - i. Intranet
 - ii. Hard copy

Training:

- Annual Training for Employees – Refresher for all employees: sign off on acknowledgement forms
- Annual Training specifically for Supervisors
 - i.e. One on One, Classroom or Web based Training
 - EEOC best practice – Classroom Training
 - if Web-based or recorded then a Facilitator present to answer questions
- Periodic Training by departments – Monthly/Quarterly Meetings - suggested topic
- Tailor to your environment – bulletin boards, emails, etc.

Compliance Training on Supervisory Responsibilities

Training Must Change. Much of the training done over the last 30 years has not worked as a prevention tool – it's been too focused on simply avoiding legal liability. Training is most effective when tailored to the specific workforce and workplace, and to different cohorts of employees. Finally, when trained correctly, middle-managers and first-line supervisors in particular can be an employer's most valuable resource in preventing and stopping harassment.

1. Devote sufficient resources to training generally, and in particular to middle management and front line supervisors.
2. Training must cover how to respond effectively to harassment observed, harassment reported, or to which they have knowledge.
3. Respond proactively to possible unlawful harassment or other inappropriate conduct, even in the absence of a complaint (bystander).

Compliance Training on Supervisory Responsibilities (cont.)

4. All complaints of unlawful harassment or inappropriate conduct should be reported to HR.
5. Remedy unlawful harassment and other inappropriate conduct (even if not unlawful) proportionality. This may involve HR depending on nature or severity.
6. Refrain from unlawful retaliation (broadly defined).
7. Accountability
 - a. Emphasize accountability for compliance.
 - b. Standards for training apply equally to discrimination, retaliation and failure to accommodate.

Supervisor/Manager relationship to the company

- Your role is the embodiment of the company
- 24/7 you're the company
- What a supervisor/manager does or doesn't do is the imputed to the company

Employee Education

1. Focus on:
 - a. Right to be free from inappropriate/offensive behavior
 - b. Responsibility to speak up if uncomfortable/offended
2. With regard to inappropriate behaviors:
 - a. Define broadly
 - b. Focus on inappropriateness, not illegality
3. With regard to responding to inappropriate behaviors:
 - a. Direct confrontation
 - i. Offer strategies
 - ii. But make clear direct confrontation is an option, not requirement
 - b. Complaint procedure
 - i. Explain options in the complaint procedure
 - ii. Stress non-retaliation and corrective actions

Civility Training

1. EEOC Select Task Force : Lack of civility as “gateway drug” to harassment
2. Employees covered by NLRB
 - a. Prior NLRB rule
 - b. Recent NLRB guidance
3. Establishing expectations for employees
4. Supervisors and above
 - a. Identify risk situations
 - b. Situational role plays
 - c. Evaluation criterion

Concerns About Backlash

1. Avoid employees of opposite (or same) sex to avoid harassment claims
2. Avoidance may be unlawful discrimination
3. Must encourage – and monitor:
 - a. Social inclusion
 - b. Mentoring
 - c. Etc.

Dating Guidelines

1. Risks in “supervisor” dating --- or attempting to date – someone over whom he or she has direct or indirect supervisory or institutional authority
 - a. Legal
 - b. Employee relations
2. Approaches to risk
 - a. Dissuade in training
 - b. Require report by supervisor to Human Resources
 - c. Prohibit – Can a company do this? Do you want to do this?
3. Be Cautious
 - a. Supervisor and direct report – Quid pro Quo
 - b. Peers

Other issues/suggestions

1. Training investigators
2. Identifying outside investigators
3. Developing rapid response plan
4. Considering culture surveys
5. Consider gender diversity at all levels and in particular senior levels

Summary

- ***It's on Us***. Harassment in the workplace will not stop on its own – it's on all of us to be part of the fight to stop workplace harassment.
- EEOC Task Force final report also includes detailed recommendations and a number of helpful tools to aid in designing effective anti-harassment policies; developing training curricula; implementing complaint, reporting, and investigation procedures; creating an organizational culture in which harassment is not tolerated; ensuring employees are held accountable; and assessing and responding to workplace “risk factors” for harassment
- EEOC Chart of Risk Factors
- EEOC Checklists for Employers

Questions or comments?

Thank you!