

## **An Employer's Mid-Winter Blues: Investigating Those Post-Holiday Sexual Harassment Claims**

**By Karen Sutherland**

*Karen Sutherland is the Chair of Ogden Murphy Wallace, P.L.L.C.'s Employment Law Practice Group. She represents employers on workplace issues. Her employment law experience includes (among other things) investigating harassment and discrimination claims, sexual harassment training, employee handbooks, defending cities, counties and private employers regarding state and federal sex, age and disability discrimination law, breach of employment contract claims, Trade Secrets Act claims, tortious interference and defamation. Ms. Sutherland is licensed to practice law in Washington State only. This article is based on Washington State and Federal law.*

Now that the dried-out mistletoe's been thrown away and the party hats and lampshades have been removed from employee coiffures, it's business as usual for most businesses. Or is it? The rambunctious, overimbibing "party animal" at the office party may well be your biggest headache for 1999 as the sexual harassment claims roll in with the new year.

Freewheeling celebrations at office parties and retreats lead to sexual harassment claims because the same laws against sexual harassment that apply in the workplace also can apply to work-sponsored social events. If an employee complains about the conduct of an overly-friendly person at an employer-sponsored party, the employer should treat the complaint the same as any workplace sexual harassment complaint. There should be an investigation, appropriate discipline if the complaint is verified, follow up to be sure it does not happen again, and an assurance that there will be no retaliation against the complaining employee.

But how does an employer investigate a sexual harassment complaint? Here are some tips:

- Interviews are the primary method of obtaining information during the course of investigating employee misconduct. In the interview, the investigator should attempt to get as much information as possible from the person who made the complaint and any witnesses by asking open-ended questions.
- If you have been accused of harassment, if you have a personality conflict with the person who made the complaint, if you are close friends with the alleged harasser, or if you have any other conflict or bias relating to the complaint, someone other than you should conduct the investigation.
- In some circumstances, it may be advisable to have an independent investigator who is not affiliated with the employer (such as an attorney or human resources consultant) conduct or supervise the investigation.
- Do not require a formal, written complaint before conducting an investigation. Treat verbal complaints the same as written complaints.
- Do not give the impression that there are people in the organization that are above discipline or "immune" to harassment complaints.
- Be attuned to hypothetical sexual harassment questions. They may be a "test" by the employee to see how the employer will respond to an actual complaint that the employee is hesitant to mention.
- Make sure all supervisors and managers, even those who are not the "official" person for responding to complaints, follow up on any possible harassment situations, no matter how they come to the supervisor's or manager's attention.

- Take all complaints seriously, even if the complaint comes from a habitual complainer or someone with a tendency to "cry wolf."
- Do not tell the complainant that he or she is "opening a can of worms," or that the complaint will hurt the organization or damage the alleged harasser's reputation, or otherwise discourage the employee from reporting.
- Retaliation against employees who make a complaint or participate in an investigation is prohibited by law. Make sure that your treatment of employees and supervisors who have made a harassment complaint or participated in an investigation cannot be interpreted as retaliation. For example, discipline, a change in shifts, a transfer, the amount of a raise, the lack of a promotion, "cold" treatment or other adverse employment actions following a complaint or following participation in an investigation may be considered to be retaliation. Do not treat anyone who has filed a complaint or participated in an investigation differently from other employees. If you are unsure about whether an action could be interpreted as retaliatory, ask another manager or an employment attorney for their input.
- Prompt remedial action should be taken following an investigation if the complaint is confirmed.

There are also preventive steps employers can take with an eye to the future. Consider adopting these as part of your businesses' New Year's resolutions:

- Develop an effective complaint reporting procedure so that the employer will be aware that there is a need for an investigation as early as possible.
- Adopt a clear sexual harassment policy that is distributed to everyone, and make sure all employees sign an acknowledgement that they have received the policy and have read it and understand it.
- Require sexual harassment training. Ideally, all employees should receive the training because many questions about harassment and discrimination that are not answerable in a policy arise during the training sessions. At the very least, all managers and supervisors should be trained. The U.S. Supreme Court ruled last summer that sexual harassment training and policies can be a defense to a "hostile work environment" sexual harassment claim.
- Managerial and supervisor sexual harassment training is doubly important because businesses are strictly liable for harassment by supervisors, even if the business does not know that the harassment is occurring. Also, a business is liable for sexual harassment if any manager or supervisor knows about it, even if the HR Department or the complainant's own supervisor is unaware of the conduct.
- Consider purchasing employment practices liability coverage from your insurer. Without it, harassment and discrimination claims are not covered by standard business (CGL) insurance policies, and defending a claim (even if you win) can cost six figures.

Happy New Year!

---

*These materials are not intended and should not be used as legal advice or other recommendation. If you need a legal opinion on a specific issue or factual situation, please contact an attorney. Anyone using these materials should not rely on them as a substitute for legal advice.*