

## **Lawyers' Alert: Sexual Harassment Prevention For Your Workplace**

**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.*

Sexual harassment claims should be a concern not only in terms of advising clients, but also a little closer to home. Lawyers are not immune to such claims. For example, the well-publicized Clarence Thomas/Anita Hill matter involved lawyers both as the accuser and the accused. More recently, the Weeks v. Baker & McKenzie case, which resulted in a jury verdict of \$6.9 million (judicially reduced to \$3.5 million) in favor of a law firm secretary who had worked for her alleged harasser for less than a month, should convince all lawyers that harassment claims can occur in law firms, and not just in clients' workplaces.

The lawyer's role in harassment law is two-fold; to make sure the lawyer's own house is in order because clients are not likely to follow your advice if you do not follow it yourself, and to provide clients with timely advice and assistance to prevent (or at least minimize) the likelihood of harassment claims against them. Though this article speaks in terms of male to female sexual harassment, it also applies to any other form of sexual, racial, religious, national origin-based, disability-based or any other discrimination or harassment based on membership in a protected class.

### **The Ideal: Sexual Harassment Training as a Preventive Measure**

In an ideal world, the employer provides clear, effective training on all aspects of harassment **before** a problem arises. The training should be based upon the employer's anti-harassment policy, and it should illustrate that policy through examples, role-playing, hypotheticals, quizzes and discussion in a way that enhances every employee's, supervisor's and manager's understanding of appropriate workplace behavior, the claims reporting and investigation process, discipline, and non-retaliation for making a claim.

The training should be conducted by someone with a thorough understanding of the law, and with the ability to teach a not-always-responsive audience. Lawyers with experience in this area and human resources consultants are the most common source of trainers. In-house training by the employer's Human Resources (HR) Department is occasionally done, but may not be effective if the HR representative is not perceived as having sufficient expertise on the subject or sufficient authority to change workplace behavior or management behavior.

## **The Real World: We're All a Big Family, and We're All Adults, So Why Do We Need This Stuff?**

The training scenario described above rarely occurs in real life. A number of employers have no anti-harassment policy, or simply have a phrase in their employee manual stating that the employer does not discriminate on the basis of race, sex, age, national origin, religion, disability or veteran's status. This statement is inadequate because it provides no guidance as to how it is implemented or any promise of non-retaliation.

Most employers also do not conduct training for their employees or managers until after a complaint has been made. Employers may feel that training is an expensive waste of time because the employees, managers and supervisors are all a big family, and are all adults who can take care of themselves.

Training, however, can be quite effective in reducing the number and severity of harassment claims (including false or questionable claims), and can serve as a defense to a harassment case that is based upon a hostile work environment claim.

## **Why Do We Need Training if We Have an Anti-Harassment Policy?**

An anti-sexual harassment policy is ineffective without sexual harassment training because many people need concrete examples of what is and is not appropriate. The nuances of inappropriate behavior are difficult to explain in a written policy. Training provides an opportunity to demonstrate appropriate and (within reason) to demonstrate inappropriate conduct. For example, many people are unaware that some people are offended by certain conduct, such as massages, touching and off-color jokes. Open discussion in a training session allows people to voice the fact that they or others are made uncomfortable by this behavior.

One factor frequently overlooked by lawyers and employers is that many employees cannot read at a level that allows for full comprehension of a written policy. Verbal discussions in the training sessions may be their only real exposure to the policy.

Training allows employees to vent their frustrations at what they perceive to be an unfair law, and gives the trainer an opportunity to explain the reasons for the law and to encourage their cooperation and understanding.

The questions in training may highlight "trouble spots" in the workplace and allow the employer to correct them before they reach a critical level. Training highlights the employer's commitment to the employees' welfare in general and to the anti-sexual harassment policy in particular.

Conducting training after a complaint has been made is not ideal, but will help show that the employer takes harassment claims seriously and does not ignore harassment issues or "sweep them under a rug" when a claim has been settled.

The cost of training is minimal, especially compared to the attorney's fees, lost employee time and costs of a judgment or settlement of a discrimination or harassment claim. The fact that most commercial general liability and errors and omissions insurance policies exclude employee

practices-related claims means that the costs of a suit will have a direct effect on the bottom line (extra coverage can be purchased, but is not yet very widespread).

### **What Should Training Cover?**

Training should start with a solid foundation; namely, an effective anti-sexual harassment policy that:

- Defines and prohibits sexual harassment;
- Encourages prompt reporting of all complaints to an independent representative of the employer;
- Includes a procedure for bypassing one's supervisor in cases where the supervisor is the offender;
- Ensures the expeditious, thorough and impartial investigation and resolution of all complaints;
- Provides for immediate and appropriate remedial action, up to and including termination for violations of the employer's policy;
- Provides for progressive discipline if the harassment reoccurs;
- Applies to all employees, including managers and supervisors;
- Prohibits retaliation against employees; and
- Does not conflict with contractual, civil service or other rights of the employees. If such conflicts exist, the conflicting requirements should be modified to accommodate the need for an effective anti-sexual harassment policy.

Documenting the fact that the employees have received the training and have read the anti-harassment policy may help in the defense of future claims.

### **Guidelines For Investigating a Harassment or Discrimination Claim**

- 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.
- Encourage (but do not require) the complainant to talk to the alleged harasser, if possible.
- 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.
- When an employee complains about sexual harassment, designate a qualified disinterested person to promptly investigate the complaint.

## **After the Investigation, What Next?**

Effective resolution of harassment claims requires a response that is designed to keep the harassment from reoccurring. Depending on the nature of the harassment, resolution could include:

- Verbal or written warning
- Suspension
- Demotion
- Termination
- Transfer
- Changing shifts
- Retraining
- Counseling

If the accused employee admits the conduct or the investigation reveals that the offensive conduct did occur, the discipline should fit the severity of the conduct and be calculated to immediately put a stop to the offensive conduct.

If the investigation was inconclusive, the employer may wish to inform the accused employee that, if additional information surfaces later, appropriate disciplinary action will be taken. The accused should also be advised that he/she shall not retaliate against the complaining employee.

After the investigation is completed, the employer may wish to inform both the accused and the accusing employee of the results of the investigation. There should be periodic followup with the claimant to ensure that the conduct is not reoccurring and that there is no perception of retaliation.

## **Reaching the Goal: Making the Anti-Harassment Policy Part of the Corporate Culture**

The ultimate goal of anti-harassment and anti-discrimination policies and procedures is to create a work environment where inappropriate behavior (and not just blatantly illegal behavior) is not tolerated. This goal can be reached by constant reinforcement and education on the part of management and by peer pressure on the part of co-workers. Informal discussions on events in the daily news, public support of equality in the workplace and swift responses to any possible breaches of the anti-discrimination and anti-harassment policies will go a long way towards a smother running, more productive work environment and towards reducing harassment and discrimination claims.

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