

# *Sexual Harassment in the Workplace*

BY STEFANIE R. MOLL

Sexual harassment in the workplace is prevalent. Today's employers need to know what constitutes sexual harassment, how to respond when a complaint of sexual harassment arises, and how to limit liability for unlawful harassment when it occurs.

### **What constitutes sexual harassment?**

The Equal Employment Opportunity Commission defines harassment as unwelcome sexual advances, requests for sexual favors, and other verbal or physical conduct of a sexual nature when (1) 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 an 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 an intimidating, hostile, or offensive working environment.

### **What are some specific examples of behavior that could be considered sexually harassing?**

Direct or indirect threats or bribes for unwanted sexual activity; sexual innuendoes and comments; intrusive, sexually explicit questions; sexually suggestive jokes; vulgar behavior; unwelcome touching or brushing against a person; spreading rumors about a person's sexuality or failure to conform to gender "norms"; pervasive displays of pictures, calendars, cartoons, or other materials with sexually explicit or graphic content; bullying an employee based on his or her



gender; and attempted or actual sexual assault.

### **Are there different types of harassment?**

Historically, courts have recognized quid pro quo harassment and hostile work environment harassment as the two major categories of actionable sexual harassment.

### **What is quid pro quo harassment?**

Quid pro quo or economic harassment occurs when submission to or rejection of sexual conduct by an employee is used as the basis for employment decisions affecting such employee. For example, this type of harassment aris-

es when an employee is terminated for refusing to submit to a supervisor's sexual demands, or when an employee's submission to the unwelcome advances was an express or implied condition of receiving job benefits.

### **What is hostile work environment harassment?**

Hostile work environment sexual harassment does not involve a tangible adverse employment action or detriment. Sexual harassment occurs in this instance when an employee is subjected to sexual innuendoes, remarks, and physical acts so severe or pervasive as to alter the conditions of employment and create an abusive work environment.

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### When are employers liable for harassment?

In the case of quid pro quo harassment, an employer is liable to a victimized employee for harassment by a supervisor. No defense is available to the employer if the tangible employment action suffered by the employee resulted from the employee's acceptance or rejection of a supervisor's alleged sexual harassment. In the case of hostile work environment harassment, if a co-employee is the harasser, the employer will be liable *if* the employer knew or should have known of the harassment and failed to take prompt, effective, remedial action. If the harasser is a supervisor, the employer may still be liable. Depending on whether an adverse action was taken against the employee, however, the employer may have an affirmative defense that it exercised reasonable care to prevent and promptly correct any sexually harassing behavior, and the employee unreasonably failed to utilize any preventive or corrective opportunities or to otherwise avoid harm.

### Are employers liable for harassment by non-employees?

Employers may be liable for the conduct of independent contractors, customers, and other non-employees if the employer knew or should have known of the harassing conduct, yet failed to take immediate and appropriate corrective action. Simply put, employers are required to provide their employees with a harassment-free workplace.

### How can an employer limit its liability for unlawful harassment?

All employers should adopt a written anti-harassment policy. Such a policy, if effectively communicated and followed, can help an employer articulate an affirmative defense to avoid liability for a hostile work environment.

When sexual harassment complaints occur, employers must promptly and thoroughly investigate the complaints. In conducting the investigation, an employer should interview the complainant, the alleged harasser, and any identified witnesses. An employer may consider obtaining written statements from those interviewed. Regardless, the employer should document the investigation and the conclusions reached, and communicate these conclusions to the complaining party. Address meritorious harassment complaints by promptly disciplining, transferring, or even terminating the alleged harasser.

Finally, to avail itself of the affirmative defense provided in certain instances, an employer must screen, train, and carefully monitor its supervisors and managers. Employers should provide their supervisors and managers with adequate training to ensure that company policies and practices with respect to sexual harassment are applied and uniformly followed. Employers should also educate supervisors about what company policy prohibits by specifically identifying examples of unacceptable conduct. Furthermore, supervisors should be instructed on how to respond if unacceptable behavior is observed or reported.

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