



It is Time to Tune-Up Your No Harassment Program With the Recent Uptick in Sex Harassment Claims

Prepared by:
D. Albert Brannen
Fisher & Phillips LLP

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It is Time to Tune-Up Your No Harassment Program With the Recent Uptick in Sex Harassment Claims

By D. Albert Brannen

Lately, we are hearing almost every week about another other high-profile celebrity, politician or executive who has been accused of sexual harassment. Victims now feel empowered to publicly share their stories, even from many years ago. As a result, employers need to wake up, candidly assess their workplace conditions and take a fresh look at their anti-harassment policies and training programs. This article reviews the tried and true methods for preventing workplace harassment and offers some new ideas for making anti-harassment programs more effective.

Essential Elements of an Anti-Harassment Policy

Court decisions provide lots of guidance on the elements of successful anti-harassment policy, including that the policy should:

- define harassment and provide specific examples of conduct that would be considered harassment (for example, off-color jokes, unsolicited hugs or shoulder rubs, sharing pornographic images, etc.);
- encourage employees to report concerns about potential harassment immediately;
- provide several direct avenues for the employee to report their concerns;
- state that no supervisor has authority to require an employee to submit to sexual advances as a condition of initial or continued employment;
- state that the consequence of violating the policy will be severe disciplinary action up to and including immediate termination of employment; and,
- state that anyone who reports an alleged violation of the policy, participates in an investigation or opposes an employment practice because it allegedly violates the policy of no discrimination or no harassment will not be subject to retaliation.

Procedures for Implementing the Policy

You need to ensure that your workforce is aware of your position on sexual harassment if you want the policy to be effective. Among other things, you should:

- distribute and review the policy as part of the onboarding process;
- post the policy on bulletin boards and your intranet site for easy access by employees;
- have a high-level management official periodically redistribute the policy to employees with a cover message reinforcing the company's commitment to maintaining a workplace free of discrimination, harassment and retaliation;
- require employees and managers to attend periodic training; and
- document every time an employee is given a copy of the policy or trained to comply with the policy, including documenting in an agenda or notes for meetings where the policy is discussed.

Investigate Reported Violations

Once you receive a report of sexual harassment, you must investigate it quickly and thoroughly. If you delay your investigation until work slows down or until an important project is completed, you will send a signal to your workforce that you are not totally committed to your policy. Moreover, you could face hostile questioning under oath in a subsequent lawsuit about what you were doing that was so important that it trumped the protection of your workers from harassment.

There is no cookie-cutter approach to investigations because they all depend on the circumstances, but a reasonable investigation may include:

- obtaining a written report from the victim so you have a clear and specific understanding of the issues (but don't delay your investigation if for some reason a written report can't be generated);
- interview witnesses who may have information relevant to the claims;
- collect, review and preserve evidence to support the claims or defenses – emails, texts, documents, photos, etc.;
- document your investigation by taking notes during interviews and review of the evidence (but be careful to keep the notes focused on objective information and free of conclusions and opinions and be ready for your notes to be an exhibit in a lawsuit one day);
- during the investigation, take reasonable steps, if possible, to ensure the victim is not forced to work side-by-side with the accused. This might mean reassigning the accused worker to a different assignment or suspending the accused; and
- don't ignore older complaints or even anonymous ones - you have a duty to conduct a reasonable investigation into the circumstances of each case.

Consistently Enforce Your Standards

Your goal in preparing a response to an accusation is to take action sufficient to ensure that the inappropriate behavior is not reasonably likely to occur again. In some situations involving isolated remarks or mild misconduct, it might be sufficient to give a documented verbal warning to the employee along with an acknowledged copy of your sexual harassment policy. In more severe situations, the only reasonable possible response is termination. In between the two are a whole host of possible options, including mandatory professionalism classes, behavioral improvement plans, suspensions, demotions, transfers, etc.

Whatever disciplinary action you take, you need to be consistent with similar situations that may have occurred. Inconsistent enforcement may lead to claims of discrimination and may undermine the respect employees have for you and the policy. Employees may also be less likely to report violations and become less engaged in their work.

More Actions Are Required to Make Sure Your Program Is Effective

A report issued by the EEOC in 2016 observed that most employer harassment prevention programs are not effective and that more than 70% of all victims of harassment still do not report the harassment. That report concluded with some excellent recommendations for improving the effectiveness of anti-harassment programs, which included:

- realization that compliance requires a commitment of organizational resources;
- top-level management MUST support and be involved in communicating the employer's commitment to a harassment-free workplace;
- the focus of the policy and training should be on respect and civility more than simply on legal compliance;
- communication of the policy must be frequent and should include distribution via electronic and social media methods;
- training should be regular, live, interactive and tailored to the workplace, with specific examples and workshops;
- training should include an emphasis on "bystander intervention" to protect victims who are vulnerable or may not be as likely to report a concern that the policy may have been violated;
- mid-level and lower-level supervisors, who are often the first responders or more likely to observe violations of the policy, should receive special training about their roles in maintaining compliance with the policy; and
- reporting procedures should be multi-faceted, offering a range of methods, multiple points of contact, and where possible, geographic and organizational diversity;
- robust efforts are required to insure that no one who expresses concerns is subjected to retaliation.

Conclusion

More pressure exists now for employers to provide a safe and professional working environment for all workers. Those employers who choose to take a fresh look at their anti-harassment programs and improve them will likely be rewarded with less litigation, more satisfied and engaged employees and a better reputation.

D. Albert Brannen is Managing Partner in the Atlanta office of Fisher & Phillips LLP, a national law firm which represents employers in labor, employment, employee benefits, business immigration, workplace safety and civil rights matters. He can be reached at dabrannen@fisherphillips.com or 404-240-4235.

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