

SEXUAL HARASSMENT MISTAKES EMPLOYERS MAKE



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Sexual harassment claims can quickly become a nightmare for employers, but so many aspects of the nightmare are caused in part by the employer's own actions. The employer has opportunities to mitigate the damage in two key areas – the sexual harassment policy itself before the alleged harassment incident and the investigation that takes place afterward. This post will look at mistakes made in these two particular areas that can hurt employers and lead to potentially costly damages.

Mistakes in Sexual Harassment Policies

Sexual harassment policies themselves can create multiple headaches in enforcement. A sexual harassment policy that requires an accuser to report solely up through the chain of command, for instance, is highly problematic. While this reporting system works in theory, it doesn't account for conflicts that occur when the alleged harasser is in the chain of command itself. A well-crafted sexual harassment policy should create an alternate reporting channel, providing opportunities for an employee to make a report in a system free from bias. This reporting shouldn't rely solely on written statements from the accused or witnesses, either, as an accuser may feel too intimidated to create a written record of her or his own volition. The system should allow for verbal statements that can initiate an investigation.

Sexual harassment plans that don't ban intimate relationships between those in direct reporting relationship run the risk that these relationships turn sour and create harassment issues in the workplace. At the very least, create a policy whereby supervisors and subordinates must report a relationship to management at higher levels as soon as practicable. This makes management at least aware of the relationship and can help the employer discern favoritism or harassment.

In addition to crafting sexual harassment policies, employers must train their employees on them. The best sexual harassment policy ever written is only as good as the understanding of the employees governed by it. The policy should be clear and easy to understand, and employees should be thoroughly instructed in impermissible conduct and how to report it. Supervisors should be trained on a regular basis, and they should be required to report sexually harassing conduct or

claims to HR as soon as they are aware of them to allow the investigation process to begin immediately.

Mistakes in Sexual Harassment Investigations

The first way in which employers fail in sexual harassment claims is to not take a claim seriously or investigate it thoroughly. Every single claim that comes to the attention of the employer should be treated with the gravity and attention of all other claims. The identity and character of the claimant and the accused are irrelevant; it does not matter if the accuser is known for making wild accusations about others or if the accused is known for being an upstanding, friendly person. Conduct an investigation in a good faith without any subjectivity. Not only should an unbiased investigation take place for every claim, but the investigation should begin immediately. The investigation should also be thorough, reviewing all records, evaluating all evidence and interviewing all witnesses with relevant information. All aspects of the investigation should also be kept confidential as well.

Employers also fail to take the time to make the accused aware that retaliation against an accuser is unacceptable in any way. Retaliation by an employer is a violation of every anti-discrimination law at the federal level, accounting for 42.8% of all EEOC charges in FY 2014.¹ Employers should also take the time to assure the accuser that the claim is taken seriously. The accuser and the accused should be promptly separated and remain so for at least the duration of the investigation (as long as the accuser is not given an effective demotion that might appear to be retaliatory).

Finally, the employer should follow up with the accuser, especially if the accused remains employed with the employer. The employer should monitor the relationship between accuser and accused closely, with assurances to the accuser that the conduct will not be permitted (especially if the investigation was ultimately inconclusive or resulted in only minor penalties for the accused).

¹ Equal Employment Opportunity Commission, Charge Statistics FY 1997 through FY 2014 <http://eeoc.gov/eeoc/statistics/enforcement/charges.cfm> (Last accessed March 27, 2015)

