

REDUCING RISK THROUGH POLICY DEVELOPMENT

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U.S. Supreme Court and federal Court of Appeals and District Court opinions have made it clear that employers will be legally liable for workplace harassment by supervisors that results in a tangible employment action (e.g., refusal to hire, termination, failing to promote, undesirable reassignment, significant change in benefits). Liability may result even if the highest levels of management did not know about the harassment. If harassment by a supervisor does not result in a tangible employment action, the employer may be able to avoid liability if it can prove that it exercised reasonable care to prevent and promptly correct harassment and the employee unreasonably failed to take advantage of any preventive or corrective measures provided by the employer.

Employers will be liable for sexual harassment by non-supervisors if the employer knew or should have known of the harassment and failed to take prompt action reasonably calculated to be effective in putting an end to the harassment.

An important lesson to learn from these cases is that you should have a good workplace harassment policy, regular training, and an effective and credible procedure for investigating and resolving reports of harassment. Because you may be liable for certain types of harassment even if you were not aware of the conduct, it makes sense to encourage your employees to report concerns of harassment so that you have an opportunity to resolve the issue before the employee seeks assistance from outside sources like an attorney, union, the EEOC, or the courts.

When developing policies and procedures, consider the following:

- Remind employees that you are committed to providing a workplace free of discrimination and harassment.
- Identify who is affected by your policy. Address harassment by employees and non-employees. Address harassment on and off your owned or leased premises and during all work functions, including holiday parties and other social gatherings.
- Identify the type of conduct that is covered. Give examples of prohibited statements, physical conduct, computer use, postings, etc.
- Explain what employees should do when they believe your policy has been violated. Clearly explain how employees should report inappropriate conduct, whether it happens to them or they witness it happening to others. Identify at least four people (2 male, 2 female) to whom reports should be made, including their names and telephone numbers/extensions.
- Explain what you will do when you receive a report, such as: conduct a prompt and thorough investigation, keep the report and investigation as confidential as practicable (but do not promise complete confidentiality), discipline violators of the policy (up to and including discharge), and hold supervisors and managers accountable to report or follow-up on any report that they receive.

- Assure employees that they will not be retaliated against for reporting harassment or for participating in the investigation process.
- Train employees on your policy at regular intervals and make sure all new employees know and understand your policy. Document the subject matter covered and attendees at each such training session.

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