HARASSMENT IN THE WORKPLACE: IT ISN’T JUST ABOUT SEX ANYMORE

Although sexual harassment is one of the most common forms of workplace harassment, the reality is that harassment is not just about sex anymore. Indeed, federal and state statutes governing discrimination and harassment in the workplace have been interpreted to prohibit harassment based on a variety of other protected characteristics, including but not limited to race, color, national origin, age, gender, pregnancy, sexual orientation, disability status, and religion.

From a legal standpoint, harassment includes unwelcome conduct that is based on a protected class. Harassment becomes unlawful where (1) enduring the offensive conduct becomes a condition of continued employment; or (2) the conduct is severe or pervasive enough to create a work environment that a reasonable person would consider intimidating, hostile, or abusive. Generally, offensive conduct may include, but is not limited to, jokes, slurs, epithets or name calling, physical assaults or threats, intimidation, ridicule or mockery, insults or put-downs, objects or pictures, and written or graphic material that show hostility to a particular protected group.

A quick look at the EEOC’s enforcement statistics confirms that harassment cases extend well beyond those based on sex. For example, in FY 2012, there were 21,088 harassment charges filed with the EEOC. See http://www.eeoc.gov/eeoc/statistics/enforcement/harassment_new.cfm. Of those harassment charges, 8,302 included allegations of race harassment (see http://www.eeoc.gov/eeoc/statistics/enforcement/race_harassment.cfm) and 7,571 included allegations of sexual harassment (see http://www.eeoc.gov/eeoc/statistics/enforcement/sexual_harassment_new.cfm). The fact that charges alleging race harassment outnumbered charges alleging sexual harassment may come as a surprise to employers who unwittingly equate the concept of “harassment” with “sexual harassment.”

The EEOC’s Strategic Enforcement Plan for 2013-2016 established the prevention of harassment (particularly systemic or class-based harassment) as one of the EEOC’s top priorities for the next few years. Recent EEOC activity confirms that the agency is cracking down on harassment cases, whether they are based on sex or other protected characteristics:

- On September 25, 2013, the EEOC filed a lawsuit against Wells Fargo Bank, N.A. in the District of Nevada, alleging that a female service manager and a female bank teller engaged in same-sex sexual harassment against four female
bank tellers. The lawsuit alleges that the female bank tellers were subjected to graphic sexual comments, gestures, and images; invasive comments about their bodies and sex lives; inappropriate touching and grabbing; and suggestions that they should wear sexually provocative clothing to attract or retain customers and to advance in the workplace.

- On September 24, 2013, the EEOC announced that it had agreed to settle a racial harassment lawsuit that it had filed against U-Haul in the U.S. District Court for the Western District of Tennessee. The lawsuit, which was initially filed in 2011, alleged that a white supervisor regularly subjected black employees to racial slurs and other racially offensive comments (including the “N-word”). The lawsuit was settled for $750,000, an amount that will be divided between eight African-American current and former employees.

- On September 23, 2013, the EEOC filed a lawsuit against Mont Brook, Inc. in the Northern District of Illinois, alleging that the employer harassed an employee because of her disability and unlawfully inquired about her disability. The lawsuit alleges that the company’s president referred to an employee who walks with an abnormal gait as a result of a stroke as a “cripple,” mockingly imitated the way the employee walks, told the employee that she was being a “hysterical basket case” when she objected to his treatment, and asked the employee if she was crippled.

- On September 19, 2013, the EEOC announced that it had agreed to settle a sexual harassment lawsuit that it had filed against WilcoHess in the U.S. District Court for the Northern District of Alabama. The lawsuit, which was initially filed in 2010, alleged that a district manager had engaged in sexually inappropriate and harassing conduct against a number of female employees under his supervision, which included propositions for sex, leering, and sexual touching. The lawsuit was settled for $215,000.

- On September 18, 2013, the EEOC sued Rizza Cadillac, Inc. in the U.S. District Court for the Northern District of Illinois for national origin and religious harassment, alleging that the employer encouraged a work environment that was hostile and offensive to Muslim and Arab sales staff. The EEOC’s lawsuit alleges that the employer’s managers used offensive slurs (such as “terrorist,” “sand n----r,” and “Hezbollah”) and made mocking and insulting references to the Qur’an and the manner in which Muslims pray.

- On September 9, 2013, the EEOC sued Dart Energy and J&R Well Services in the U.S. District Court for the District of Wyoming for race and national origin harassment, alleging that the employer created a hostile work environment for black, Hispanic, and Native American employees. According to the EEOC’s
lawsuit, an area manager and a truck supervisor used racist and ethnic slurs and made offensive racial and ethnic comments to employees in these protected classes.

- On August 28, 2013, the EEOC sued Carolina Mattress Guild, Inc. in the U.S. District Court for the Middle District of North Carolina, alleging that the employer subjected black employees to a racially hostile work environment. According to the EEOC’s complaint, black employees were repeatedly subjected to unwelcome derogatory racial comments and slurs (including the “N-word”) by a white employee.

- On August 13, 2013, the EEOC’s Office of Federal Operations issued a decision in Couch v. Department of Energy, finding in favor of a federal employee who alleged he had been subjected to slurs and comments derogatory to homosexuals in violation of Title VII. This decision is important because federal law currently does not expressly prohibit discrimination or harassment based solely on a person’s sexual orientation (although various states and municipalities do provide such coverage). Nonetheless, the EEOC determined that the slurs and comments were a form of “sex-based epithets” that are within the scope of Title VII’s protections against sex discrimination. Public employers should anticipate that the EEOC will continue to interpret Title VII’s protections against sex discrimination as being broad enough, at least in some instances, to cover allegations involving an employee’s sexual orientation.

Most public employers understand their legal obligation to investigate claims of sexual harassment. Public employers need to understand, however, that the same obligation applies to harassment claims based on other protected characteristics. So, what should public employers do? Here are some tips on best practices employers should follow to avoid harassment claims and to minimize the potential liability associated with such claims:

- Make sure that your organization’s harassment policy covers all forms of harassment -- not just sexual harassment – and that the policy explains the steps employees should follow to file an internal complaint alleging harassment based on any protected characteristic.

- Require all employees (not just supervisors) to attend comprehensive training on the prevention of harassment and your organization’s complaint procedures. Typically, additional training should be provided to supervisors to ensure that they fully understand their unique responsibilities and obligations under applicable laws and your organization’s policies.
Promptly and thoroughly investigate any complaints of harassment based on a protected class. The person who is selected to conduct the investigation should be neutral, objective, and have experience conducting harassment investigations.

Take appropriate remedial/disciplinary action when an investigation reveals that an employee has violated your organization’s harassment policy. Depending on the nature of the violation, the remedial/disciplinary action could include additional training or counseling, a written warning, a suspension, or termination of employment.

Carefully document the investigation process and any remedial/disciplinary action that was taken to remedy the situation. Investigation documents should be kept in an investigation file that is separate from employees’ personnel files.

Make sure that any individual who complains about workplace harassment is not subjected to any retaliatory action. Retaliation against individuals who complain about workplace harassment is itself against the law and can lead to an independent claim against your organization, even if the underlying claim of harassment is ultimately determined to not have merit.

Follow up with the complainant to confirm the organization’s remedial efforts have been successful and to ensure the conduct does not continue to occur. Such follow-up efforts should be documented internally and retained in the separate investigation file.

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