

# Don't Be a Statistic: How Your Business Can Reduce Employee Claims in Two Easy Steps

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United States Equal Employment Opportunity Commission statistics show that, for the six months that ended April 30, the number of job discrimination claims -- compared to a year earlier -- is up 60%. It is anybody's guess if this pattern will continue. What is certain, however, is that proactive employers can buck this trend by educating employees and supervisors how to identify and avoid unlawful harassment in the workplace. Pair that with instruction for employees about how to report claims of unlawful harassment and guidance for supervisors on how to address employee complaints, and businesses greatly reduce the risk of having to defend employment litigation.

All this can be accomplished in two easy steps.

## *Step 1: Educate All Employees About Unlawful Harassment.*

Most businesses have employee handbooks, many of which contain anti-harassment policies. Anti-harassment policies vary widely in length and scope. The EEOC says that, at a minimum, an anti-harassment policy should contain the following elements:<sup>1</sup>

- A clear explanation of prohibited conduct;

- Assurance that employees who make complaints of harassment or provide information related to such complaints will be protected against retaliation;
- A clearly described complaint process that provides accessible avenues of complaint;
- Assurance that the employer will protect the confidentiality of harassment complaints to the extent possible;
- A complaint process that provides a prompt, thorough, and impartial investigation; and
- Assurance that the employer will take immediate and appropriate corrective action when it determines that harassment has occurred.

Even if an anti-harassment policy satisfies the minimum legal requirements, what good is that policy if employees don't read it? Not much. Think about it. During orientation, employees receive an employee handbook along with a stack of other documents. Employees may read the anti-harassment policy once -- it at all. Yes, in the event of litigation, an employer can argue that it provided an anti-harassment policy that meets (or exceeds) the minimum requirements, and the employee failed to follow the policy. And that argument may carry the day, but at what cost? The thousands of

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dollars spent to defend a lawsuit, plus the distraction and drain on human capital, grossly outweigh any potential courtroom victory.

Therefore, an anti-harassment policy is not worth the paper it's printed on unless a business educates its employees on the contents of the policy. Pairing a handbook with an anti-harassment training program can help to avoid litigation altogether.

The training serves two purposes. First, it ensures that all employees – whether or not they read their employee handbook – understand how to avoid unlawful harassment in the workplace. The training also encourages employees to spot violations of the policy and to complain through the proper channels – usually to a supervisor and to Human Resources.

Second, the training helps protect the company. How does *encouraging* employees to complain help the company? Because it allows the company to investigate and internally address smaller issues of discrimination before they become external issues; i.e., lawsuits. If an employer does not know about an issue of unlawful harassment in the workplace, it can't investigate and it can't remedy the situation. Therefore, reporting is crucial because it should trigger a response from the employer. And employees who perceive themselves as victims of unlawful discrimination are less likely to file a lawsuit if they feel that their employer is responsive to their concerns and is willing to act quickly and effectively to address those concerns. Not only do those employees file fewer lawsuits, but because they feel that the company is receptive to their concerns, they remain with the company in a positive working environment built on mutual respect and trust.

At orientation and, again, every one-to-two years, an employer should have anti-harassment training for all employees and supervisors. Although someone from Human Resources can serve as the instructor, a company should consider having a

trained third-party, such as outside employment counsel, teach the classes.

During the class, the instructor must hit several points:

- **Define unlawful harassment in lay terms.** Forget the legalese and focus on the many categories and examples of behavior that violate the anti-harassment policy.
- **Reinforce that *anyone* can be a victim and anyone can be a harasser.** This includes customers, vendors, and other third-parties that do business with the company.
- **Talk about the many methods of unlawful harassment.** Face-to-face is obvious. Telephone and email are fairly common too. However, remind employees that other forms of communication carry the same risks. Social networking sites like Facebook and MySpace can pose problems. Text messages create another minefield because they can be stored forever. (It is uncanny how many employee-victims save every inflammatory text message).
- **Instruct employees that each of them has an obligation to report claims of unlawful harassment.** This holds true even if the employee only witnesses the conduct, and is not a direct victim. Remind employees that if the company never receives a complaint, the company will not be able to address the situation or determine whether if the complaint is an isolated incident. Accordingly, there is an exponentially increased risk of future exposure.
- **Explain *how* to report claims of unlawful harassment.** Emphasize to employees that if they experience or witness unlawful harassment in the workplace, they should make a verbal

and written complaint to both their direct supervisor and Human Resources. (Of course, if the direct supervisor is the harasser, employees should complain to another supervisor). An employee should not be required to file a written complaint, but if the employee does not want to submit a written complaint, either a supervisor or Human Resources should write up the oral complaint for the employee to review and sign. The instructor should emphasize that a writing alleviates confusion about what the victim has alleged; it's all right there on paper. If the employee later claims in a lawsuit that the employer failed to investigate a particular claim, and that particular claim is not part of the written complaint / write-up, that written document becomes "Exhibit A" for the employer as support for its argument that the employee never actually raised the particular claim.

- **Outline how the company investigates claims of unlawful harassment.** If a formal investigation is necessary, the investigator will interview the victim. The investigator will obtain testimony, documents, and witnesses. The investigator will inform the alleged harasser about the complaint and afford the opportunity to provide testimony, witnesses, and documents in defense of the complaint. Witnesses will get interviewed too and they will have the chance to provide both testimony, documents, and names of other witnesses. The company will conduct a fair and complete investigation into the complaint, keep the victim's supervisor apprised of the ongoing status of the investigation (unless the supervisor is the alleged harasser), maintain appropriate

documentation, and disclose appropriate information to others only on a need-to-know basis consistent with local, state, and federal law. Also mention that the company will inform both the victim and the alleged harasser about the outcome of the investigation.

- **Underscore that the company will not tolerate retaliation.** Remind everyone that subjecting any employee to harassment, intimidation, threats, or coercion for filing a complaint or assisting in an investigation (i.e., retaliation) is a violation of company policy and will result in discipline up to, and including, termination of employment.

Although the training consists of a lot of instructor talking and employee listening, the instructor should encourage and welcome questions. The instructor should offer to stay after the class to entertain questions privately should employees not wish to raise questions in the classroom setting.

Hitting all of these points will help ensure that employees are properly trained on the policy.

#### *Step 2: Train Supervisors How to Address Employee Complaints of Unlawful Harassment*

Having an anti-harassment policy is great. Combining the policy with anti-harassment training for employees is even better. However, if supervisors are ill-prepared to receive and handle employee complaints of unlawful harassment, then the system fails and employers may find themselves exposed to potential liability.

As important as it is to educate and train employees on how to identify and report claims of unlawful harassment, it is equally important for a business to prepare supervisors to address these claims. "Address complaints" does not mean investigate.

Generally, investigating complaints should not be the supervisor's responsibility. Rather, most companies have Human Resources Departments or other trained personnel to handle that responsibility.

Having a single investigator – rather than different supervisors – investigate complaints can also help avoid additional discrimination claims. That is, a single trained investigator tends to conduct uniform investigations, whereas making each direct supervisor responsible for conducting investigations could lead to inconsistent results and perceptions of discrimination. Generally then, the supervisor's role is to receive complaints, report them in writing to the proper channels, and reassure the victims that the company will take their complaints seriously by investigating them thoroughly.

Who qualifies as a supervisor? According to the EEOC, an individual qualifies as an employee's "supervisor" if:<sup>2</sup>

- the individual has authority to undertake or recommend tangible employment decisions (e.g., hiring, firing, promoting, demoting, and reassigning the employee) affecting the employee; *or*
- the individual has authority to direct the employee's daily work activities.

The law charges supervisors with greater responsibility than other employees. An employer is *always* liable for a supervisor's harassment if it culminates in a tangible employment action. However, if it does not, the employer may be able to avoid liability or limit damages by showing that it exercised reasonable care to promptly prevent and correct any harassing behavior. Otherwise, it must show that an employee unreasonably failed to take advantage of any preventive or corrective opportunities provided by the employer or to avoid harm. Because, when an employee does complain about unlawful harassment to a supervisor, the law

deems the company to be on notice too – regardless of whether the supervisor does anything about it. Therefore, if neither the supervisor nor company do anything to address an employee complaint of unlawful harassment, then a lawsuit may follow.

Imagine what would happen if an employee complains to a direct supervisor about how the employee had been targeted by five co-workers with a series of discriminatory jokes and names. The supervisor who receives the complaint does nothing about it. Instead, the unchecked, unlawful harassment continues to the point whether the employee must endure a daily workplace environment that is so poisonous that the employee has no choice but to resign. The employee then files a discrimination claim against the company. Assuming that the jokes and names were severe or pervasive enough under the law to constitute a "hostile work environment," *the employer has no defense* because it was on notice of the unlawful behavior and failed to exercise reasonable care – let alone take *any* action – to address the unlawful behavior.

Employers can take proactive steps to avoid the above scenario by training their supervisors to address complaints of unlawful discrimination in the workplace. The training for supervisors will look and feel a lot like employee training. Many businesses combine training of employees and supervisors because there is a lot of overlap. For example, both need to be trained on how to identify unlawful harassment, the ways in which a victim can be harassed, and who can be a victim/harasser.

It is very important that supervisor know how to spot unlawful harassment in the workplace. Again, real-world examples of unlawful harassment work best. Also, reinforce that the supervisor must assume responsibility for apprising Human Resources of any instance of potentially unlawful harassment in the workplace – *no matter how*

*minor*. For example, consider the following three, relatively minor occurrences:

- a stray comment such as “baby” or “sweetie”;
- an employee who reports that several of his co-workers are giving him the silent treatment or ignoring the employee’s contributions on a team assignment;
- a pat on the back or a brush on the shoulders.

Each, in isolation, will not expose an employer to liability. However, if a supervisor learns about any of these and does nothing to address the situation, the employer may face both litigation and liability if these relatively minor workplace behaviors persist and become commonplace.

The duty to report includes complaints he receives from other employees and conduct the supervisor witnesses firsthand – even if the victim never complains. Remember that there are many reasons that employees may be reluctant to complain to a supervisor about unlawful harassment in the workplace. Some feel bad about getting the offender – often a direct supervisor – in trouble. Many employees fear retaliation. Others are simply too embarrassed or nervous to come forward. Therefore, the supervisor must assume the reporting role.

During training, alert supervisors of particular danger zones. One is the “confidant” role. That is, if an employee approaches a supervisor and tells that supervisor, “I believe I have been sexually harassed. I want to share the details with you, but you have to agree not to tell anyone for now.” The response has to be, “No. I can’t do that for you.” The supervisor must then encourage the employee to share the details of the incident. Tell supervisors that they should volunteer to go with the victim to Human Resources to make the complaint. Supervisors should also reassure the victim that the company

will investigate the complaint and will only share the details of the investigation on a need-to-know basis. If the victim refuses, the supervisor must report what the supervisors learns to Human Resources.

Another danger zone is “on-the-clock” behavior outside of the office, such as on business travel and work-sponsored social functions. Under the law, it makes no difference if an employee sexually harasses a co-worker in the office, or two time zones away while on a business trip. Therefore, not only must supervisors be mindful of their own behavior during these times, but they need to be prepared to spot and address unlawful harassment that they witnesses out of the office.

Perhaps most troublesome for employers is retaliation. Supervisors must be trained never to retaliate against a complaining employee or a witness. Supervisors should also remind any employee who comes to them with a complaint of unlawful harassment that no one is permitted to retaliate against the employee for complaining.

Supervisors represent the front line between the employer and non-supervisory personnel. They must refrain from engaging in or condoning behavior that violates the anti-harassment policy.

Ultimately, companies that train on how to identify, report, and address unlawful harassment can investigate those claims and, should litigation later ensue, will be able to show that they acted reasonably. An employer that takes steps that are reasonably intended to end unlawful harassment in the workplace has an excellent chance at winning a lawsuit and, more importantly, avoiding a lawsuit altogether. Most importantly, education and training allow an employer to foster a harassment-free workplace. This promotes a work environment predicated on mutual respect and helps ensure employee retention.

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<sup>1</sup> United States Equal Employment Opportunity Commission, *Enforcement Guidance on Vicarious Employer Liability for Unlawful Harassment by Supervisors*.

<sup>2</sup> *Id.*