

The #MeToo Effect on Your Company

Labor & Employment Law Update

By Beverly Alfon on November 13, 2018

As we draw closer to the end of 2018, let's reflect a bit and look forward with purpose. The U.S. Equal Employment Opportunity Commission (EEOC) recently released preliminary FY 2018 sexual harassment data that is consistent with the #MeToo movement:

- Sexual harassment charges increased by more than 12 percent – the first increase in at least eight years;
- EEOC focused on harassment claims and filed 66 harassment lawsuits; and
- EEOC recovered nearly \$70 million for sex harassment victims (up from \$47.5 million in 2017).

These statistics do not include the many charges that individuals have filed with state agencies, internal complaints made with employers, lawsuits filed by employees in state or federal courts, or settlements of those claims.

These notable statistics come just one year after the EEOC released an online resource, Promising Practices for Preventing Harassment, in which the agency focused on a checklist of four core elements to “enhance employers’ compliance efforts” when it comes to addressing workplace harassment.

- **Leadership and Accountability** – Consistent and demonstrated commitment of senior leaders to maintain a culture in which harassment is not tolerated. Such commitment should be demonstrated, by allocating workplace time to training on harassment, consistently disciplining any employees who harass others, and seeking out feedback from employees on the effectiveness of the employer’s anti-harassment measures.
- **Comprehensive and Effective Harassment Policy** – Policy should be clear and communicated to all employees, at every level of the organization. The policy should explicitly apply to applicants and every type of employee, and must make clear that the employer will not tolerate harassment of employees by anyone, including customers, clients, or any other individuals at the worksite. The policy should be easily understandable and periodically reviewed and updated.

- **Effective and Accessible Harassment Complaint Systems** – The system should welcome questions, concerns and complaints. It should encourage employees to report potential problems, and provide for prompt, thorough and neutral investigations. It should be flexible enough to allow employees to choose from multiple channels to make their complaint.
- **Effective Harassment Training** – Employees need to be aware of leadership values, the policy and complaint systems. Regular, interactive, and comprehensive training of all employees must be understandable and tailored to the specific workforce.

These guidelines are significant because they are issued by the federal agency that is charged with enforcing federal anti-discrimination laws – and courts are starting to take notice. Under Title VII of the federal Civil Rights Act, even if an employee does not suffer an adverse employment action (e.g., demotion, termination, etc.), an employer can be held liable for harassment by a supervisor. However, the employer may avoid liability if it can prove that (a) the employer exercised reasonable care to prevent/correct any harassment; and (b) the employee unreasonably failed to take advantage of any preventive or corrective opportunities provided by the employer or to avoid harm otherwise.

As a result, most employers have an anti-harassment policy in their handbooks for the purpose of defending against claims. Recently, however, a federal appellate court acknowledged the existence of an employer's anti-harassment policy, but specifically asked, "Was the policy in place effective?" In *Minarsky v. Susquehanna County*, No. 17-2646 (3d Cir. 2018), the plaintiff alleged that she had been harassed by her supervisor for a number of years.

The district court granted summary judgment to the employer under the *Faragher/Ellerth* standard because she never complained to her employer about the harassment. However, the Third Circuit appellate court reversed and remanded the case based on evidence that although the supervisor was reprimanded twice and ultimately fired, the supervisor's conduct toward the plaintiff was not isolated. Other employees previously complained about similar behavior by the supervisor, and the employer took no action in response.

The court held that whether the employer took reasonable care to detect and eliminate the harassment and whether Minarsky acted reasonably in not availing herself of the employer's anti-harassment safeguards should be decided by a jury. The mere existence of an anti-harassment policy and the plaintiff's failure to make a complaint pursuant to that policy was not sufficient for the appellate court to uphold summary judgment for the employer.

On the legislative front, California, New York (both city and state), and Delaware, have passed laws that now require employers to train all employees on harassment prevention. New York City requires bystander intervention training. California has specific time and content requirements for its training. Notably,

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these all seem to be in line with what the EEOC's Task Force on the Study of Harassment in the Workplace called for in its 2016 report and again in its 2017 compliance guide. In this growing number of states and cities, employers are no longer allowed to shirk off training for fear of "stirring the pot," or out of a reluctance to commit resources to anti-harassment efforts.

All of this points to is a rising legal standard for what will suffice to establish an affirmative defense for employers. A dormant anti-harassment policy in the employee handbook will no longer cut it.

BOTTOM LINE: In this period of heightened awareness, **control what you can** by fully implementing the terms of your anti-harassment policies so that your company is in its best defensible position when these harassment claims arise. While we understand that not all employers have the resources to devote to the loftier goals encouraged by the EEOC, there are three concrete steps that you can take to begin mitigating your risks:

1. Confirm the last time that your company educated all employees on your anti-harassment policy and complaint procedures – and consider another round of training for all levels of employees;
2. Seek a legal audit of your company's complaint process; and,
3. Seek a legal audit of your company's investigation procedures (i.e., whether best practices for investigation, documentation and follow-up are being utilized).

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