Anti-Harassment Policies Key To Limiting Employer Liability

Sexual harassment claims and lawsuits continue to multiply throughout Ohio and the nation. Under both Ohio and federal law, however, unlawful workplace harassment is not limited to claims based on sex. Harassment on the basis of race, religion, color, national origin, age or disability is also prohibited. Businesses may be held liable not only for harassment by supervisors and managers, but also for harassment by co-employees or even customers. To combat unlawful harassment and to minimize their potential liability for such claims, employers should develop and implement effective anti-harassment policies and complaint procedures.

Unfortunately, no anti-harassment policy or complaint procedure will relieve an employer from liability for harassment by supervisors or managers that takes the form of a *tangible employment action*, such as firing, demoting or denying a raise to an employee who resists his or her supervisor's advances. Under these circumstances, the employer will be held strictly liable for the supervisor's actions. Even here, however, the presence of a well-publicized and consistently enforced policy against harassment may at least limit or preclude the employer's liability for punitive damages.

On the other hand, where the harassment does *not* involve a tangible employment action by the employee's supervisor but merely creates a "hostile environment," an appropriately designed and implemented anti-harassment policy and complaint procedure may allow the employer to avoid liability completely for such "hostile environment" claims.

According to recent federal and state decisions, even in cases where it is the employee's supervisor or manager who is creating the unlawful hostile environment, the employer will not be held liable for such harassment if it can prove:

1) the employer exercised reasonable care to prevent and promptly corrected any harassing behavior; and
2) the complaining party unreasonably failed to take advantage of any preventive or corrective opportunities provided by the employer or to avoid harm otherwise.

A "supervisor" in this context is a person who can hire, fire, promote or discipline. The United States Supreme Court decided a case, *Vance v. Ball State University*, on June 24, 2013, that addressed the issue of whether the term "supervisor" also extends to someone who oversees an employee's work and assigns daily tasks, or if a person with this oversight is merely a co-worker. The U.S. Supreme Court determined that an employee is a "supervisor" for liability purposes *only* if the employer has given that person the power to take tangible employment actions against the victim of workplace harassment.

Further, an employer may be held liable if the harassment incident is severe (such as a sexual assault), even if the incident happened only once and the employer had a policy against sexual harassment and responded immediately and effectively to the employee's complaint. Nevertheless, the existence of an appropriate policy and complaint procedure should at least limit the employer's liability for punitive damages in such a circumstance.

Although the law in this area is still evolving, an employer with an effective anti-harassment policy and complaint procedure may enjoy greater protection from liability in cases involving co-employee or customer harassment than in cases of supervisory harassment. Prompt and effective action in response to an employee's complaint of harassment by a co-worker or customer may

completely insulate the employer from any type of liability. Indeed, some courts have held that the employer may be liable for co-worker or customer harassment *only* if it knew or should have known of unlawful harassment, and its actions upon learning of the harassment were so inadequate as to show indifference to that harassment.

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