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Perspectives

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Training Supervisors to Prevent Workplace Harassment

By Dan Wilczek

In 25 years of defending employers against claims of harassment, I have observed a frequent common denominator in cases where the employer was found liable: failure to properly educate and empower first-line supervisors on harassment prevention. The investigation following a claim of harassment often brings this problem to light. Attorneys and human resource (HR) professionals realize that the claim could potentially have been avoided, or the defense made stronger, if the supervisor had been better equipped to deal with harassing behavior. An important lesson from harassment lawsuits is that juries focus on how an employer responded to complaints of harassment. Supervisors are the crucial first link in recognizing harassment and initiating the employer's response.

Harassment Law and Policies Prohibiting Harassment

There are two types of unlawful harassment.

Quid pro quo harassment occurs when a supervisor uses power to obtain a nonwork-related "benefit" from a subordinate, such as a sexual favor.

Hostile environment harassment arises when all of the following occur:

- An employee is subjected to offensive conduct because he or she is in a legally protected group.
- The conduct is unwelcome.
- The conduct is severe or pervasive.
- A reasonable person would believe the conduct creates a hostile working environment.

At a minimum, educational institutions should adopt a policy prohibiting all types of unlawful harassment. Many institutions mistakenly rely on just a sexual harassment policy. However, harassment based on other characteristics also violates the law and should be expressly prohibited.

About the Author

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Policies should cover harassment based on every legally protected category in the jurisdiction, including race, religion, color, national origin, age, and disability. In addition, some jurisdictions and institutional policies prohibit harassment based on sexual orientation and gender identity. Courts have uniformly held that the same standards originally developed in sexual harassment cases now apply to all types of unlawful harassment, and courts have penalized employers whose harassment policies do not encompass all types of unlawful harassment.

The policy must be effectively communicated to all employees and must contain a clear complaint procedure that they can use to report prohibited harassment. All harassment policies should also include a provision prohibiting retaliation against anyone making a harassment complaint or a person who participated in the investigation, such as a witness.

If an employer has such a policy, it may be able to avoid legal liability by showing it took timely and effective action to stop the harassment. Essentially, the law in many cases gives employers a chance to fix the problem after it occurs. But this defense can easily be squandered if it is shown that the employer should have known about the harassment and took no action or that the employer did not respond properly to a complaint.

Identifying Supervisors

Supervisors play a critical role in ensuring that the institution's policy prohibiting harassment is effective. As a general rule, any employee with authority over another employee is a supervisor. At many educational institutions, there is confusion as to who is a supervisor or will legally be regarded as one. For example, department chairs will typically be considered supervisors, but they often consider themselves more closely aligned with faculty than the administration. The importance of collegiality and the fact that the chair's duties are often rotated among department members causes many department chairs not to recognize (or not want to recognize) that they are some of the most important supervisors on campus and play a key role in avoiding liability.

Training Supervisors on Harassment Law

Institutions do not need to turn supervisors into lawyers, but they do need to equip their supervisors with the knowledge to react appropriately in common situations. Institutions should develop policies and procedures that are easy for supervisors to use. Although supervisors need a basic understanding of the two types of unlawful harassment, I recommend that employers use a broad definition of harassment in supervisor training. This definition includes both unlawful and inappropriate workplace behavior and clarifies that workplace harassment is simply mean-spirited behavior, such as:

- Picking on someone
- Making fun of someone
- Treating someone like a second-class citizen
- Yelling at someone
- Subjecting someone to offensive behavior

One advantage of a broad definition is that supervisors need not try to apply legal definitions to ambiguous situations that may not clearly be motivated by unlawful discrimination or that may later evolve into unlawful conduct.

Supervisors need to understand their responsibility to report harassment through the channels directed by their institution's policy. With a broad policy in place, the supervisor will know to report all behavior that could be harassment and let the experts decide the potential implications and appropriate response. Supervisors can then let HR professionals and attorneys decide whether the harassment is based on a protected characteristic or sufficiently severe or pervasive to constitute a hostile environment.

For example, assume that Sue tells her supervisor that "Joe is a jerk." The supervisor readily agrees. Joe is a jerk—to everyone. Should the supervisor respond differently if Sue said "Joe is a jerk to women"? By defining prohibited harassment broadly, the institution protects the supervisor by giving him or her a clear, easy-to-follow guideline. The supervisor is not required to evaluate if Sue's complaint that "Joe is a jerk" is a complaint of harassment on the basis of sex. It is a complaint of inappropriate behavior that the supervisor must report. Don't put the supervisor in a position where the supervisor is forced to evaluate and distinguish between general workplace misbehavior and unlawful harassment.

All supervisor training on harassment should emphasize the supervisor's responsibility to model good behavior. An employer has the right to expect more of its supervisors. That expectation should be expressly stated and enforced. For example, I advise many of my clients to include criteria in the evaluation of supervisors such as "supports the institution's commitment to diversity" and "promotes a respectful work environment for all employees." This not only addresses the risk of quid pro quo harassment but also helps to establish a standard of behavior.

Reporting Instructions for Harassment Complaints

As noted earlier, institutions need to adopt a clear procedure for employees to report a concern or make a complaint about workplace harassment. Some institutions allow employees to make harassment complaints to their supervisors. I believe a better model is to designate a few positions or individuals to whom complaints of harassment may be made and provide contact information for those positions. Under this model, employees are required to "declare" they are making a complaint of harassment, as opposed to some other more typical day-to-day concern, by going outside the normal chain of command. If Sue did not follow the procedure of reporting her complaint about Joe to an individual designated in the policy prohibiting harassment, she would later have difficulty claiming that her "Joe is a jerk" comment to her supervisor was, in fact, a complaint of prohibited harassment. By designating a few persons as complaint takers, the institution can also ensure that they have been carefully trained. The institution can then have greater confidence that complaints will be handled in an appropriate and consistent manner.

Emphasizing Supervisors' Responsibilities

Supervisors are sometimes inclined to see harassment issues as an "HR problem" and disregard them, thinking they have more pressing responsibilities and problems to deal with. In part, I believe that is true.

Responding to workplace harassment is an HR problem—and HR will play a major role in addressing harassment issues. But supervisors need to understand that they must be vigilant in watching for harassment, stopping harassment when they witness it, and reporting any complaints they receive to HR. Unfortunately, supervisors at some educational institutions do not feel comfortable going to HR and prefer to deal with complaints informally on a colleague-to-colleague basis, but informal actions are often ineffective and may create the impression that the complaint was not taken seriously.

Supervisors are the eyes and ears of the institution. Under the law, a supervisor's knowledge is often imputed to the institution, meaning that institution may lose the ability to show that it took timely and effective action to stop the harassment. Supervisors must, therefore, be vigilant in monitoring their areas of responsibility. They must intercede to stop any harassment they see or otherwise know about. And they must be sensitive in listening to employee concerns.

Supervisors must also understand that they are to report all concerns about possible harassment, whether based on the supervisor's own knowledge or a complaint by an employee. The message to supervisors should be, "If in doubt, report." Sometimes, faculty supervisors prefer to report issues to a high-level academic administrator. Although not ideal, this procedure is workable so long as the high-level administrators who receive the reports coordinate the investigation and resolution with HR and legal counsel.

The combination of providing a broad definition of harassment and a clearly defined responsibility to report the harassment should increase the number of reports, thereby maximizing the opportunity for the institution's experts to analyze, investigate, and respond to harassment. HR can determine if the incident raises legal concerns. As a result, both supervisors and HR are assigned roles and responsibilities consistent with their training and responsibilities.

Training Supervisors on Confidentiality Promises

Many supervisors are not trained in how to deal with a complainant who asks the supervisor to promise confidentiality. Sooner or later, most supervisors will have an employee say something like this: "Sue, I want to talk to you about something important, but you have to promise to keep it confidential," or "… not to tell Dave," or "… not to do anything." The supervisor wants to hear the employee's concern and is afraid that if she does not agree to the precondition, she will not have a chance to address whatever the problem might be. The natural reaction for the supervisor is to agree to keep the discussion confidential because she wants to hear the employee's concern.

Unfortunately, the natural reaction is wrong. A supervisor should never agree to keep what is said confidential—or not to do anything with the information. Instead, the supervisor can say something along the following lines.

"Mark, I want to hear your concerns, but I can't promise to keep what you say confidential. Depending on what you tell me, I may have an obligation to report it, or take some other action. If I do have to report it, I will only talk to people at the institution who have a need to know, and confidentiality will be maintained to the extent possible. I can give you a better idea after we talk. What's on your mind?"

If the employee then refuses to talk, it is the employee's decision, and the employer will have no responsibility to respond to the undisclosed complaint. But if that occurs, the exchange should be documented. In these situations, an email often works well.

"Mark, I wanted to follow up on our conversation Thursday. You wanted to talk to me about something you said was important but wanted me to promise that I would keep what you said confidential. I told you I could not do that. You then decided not to tell me what was on your mind. I encourage you to talk to me. You said it was important, and I would like to do whatever I can to help. If you would rather talk to someone else, you can call _____ (xxx-xxxx) in Human Resources."

Training Supervisors on Retaliation

In many lawsuits that I have handled, retaliation following a complaint of harassment is more problematic to defend than the harassment claim itself. Often, the underlying harassment claim is dismissed by the court, but the retaliation claim stays in and goes to a jury. Why is retaliation so common and so difficult to defend? Because it is a natural human reaction that juries understand. It is very difficult for the target of a harassment complaint to treat the complainant as if nothing happened. It is also important to remember that the protection against retaliation applies to all good faith complaints, regardless of whether the subsequent investigation confirms that harassment occurred. Sometimes the target of the complaint freezes the complainant out. Other times, he or she finds a way to get back at the complainant. The Supreme Court defines retaliation as "actions that [are] materially adverse to a reasonable employee" and are "harmful to the point that they could well dissuade a reasonable worker from making or supporting a charge of discrimination." For example, under this definition, refusal to invite a co-worker to lunch would be seen as trivial and would not be retaliation. In contrast, exclusion from a weekly training lunch might well deter a reasonable employee from complaining and could constitute retaliation.

As with harassment, the determination of whether retaliation is unlawful is best left to attorneys and HR professionals. The role of the supervisor is to be vigilant and report any conduct that might seem like retaliation. Situations in which a supervisor is aware that he or she is the subject of a harassment complaint present special challenges. Supervisors in those situations need to be educated about what constitutes retaliation and reminded that retaliation will not be tolerated. Procedures should be established to ensure that in such situations the supervisor no longer has independent authority to make significant employment decisions regarding the complaining employee. Instead, HR or the supervisor's manager should be required to review and approve all such decisions.

Emphasizing Supervisor Liability

There is another reason supervisors should take this responsibility seriously. They could be personally liable if they fail to respond to situations in which employees under their supervision are being harassed or if they fail to report a complaint.

Personal liability is likely in cases of quid pro quo harassment by a supervisor. In addition, many state discrimination laws allow individuals to be liable for "aiding and abetting" discrimination. Common law

causes of action, such as battery and intentional or negligent infliction of emotional distress, are sometimes asserted against supervisors.

At a minimum, the supervisor will be a key witness in any legal dispute, and the supervisor's actions will be scrutinized. The supervisor may be portrayed as the person who failed to protect employees from unlawful behavior. Even if the supervisor is not named as an individual defendant, the supervisor will feel his or her integrity, fairness, and competence are being attacked.

Conclusion

My experience as an employment lawyer shows that first-line supervisors play an essential role in preventing and establishing strong grounds for defending against claims of unlawful harassment. Employers should give them the tools and training that they need to perform that role effectively— and their roles need to be defined in a way that maximizes their chances of success.