

## **DEALING WITH SEXUAL HARASSMENT: ISSUES OF DISCIPLINE**

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### **ABSTRACT**

This article deals with issues that arise when disciplining the alleged perpetrators in sexual harassment cases. It lays out a number of guides to help organizations deal with sexual harassment and examines three recent cases to provide insights into the basis for proving charges and anticipating possible defenses to those charges. This article highlights the need for clear rules that specify penalties, for impartial and complete investigations, clear specification of charges, and due process.

During its 1997-98 term, the United States Supreme Court issued four decisions about sexual harassment. In the previous 12 years it had issued only two. Two of the 1997-98 cases include issues that may directly increase an employer's potential liability. One ruling indicated that the employer was liable for sexual harassment by a supervisor even without any tangible detriment to the employee [1]. The other decision made the employer liable for supervisory actions creating a hostile environment even when the actions were not carried out and the employee voluntarily quit her position without filing a complaint [2]. These two decisions, along with scores of decisions by the courts of appeals, have created a legal environment more favorable to lawsuits by the plaintiffs.

The most viable employer defense to sexual harassment lawsuits is to deal with the case properly before it gets to the courts. This article contends that the effective internal processing of sexual harassment cases has at least three dimensions. One of these is concerned with the employer's policies; a second, with the investigation of complaints; and the third with the specification of the charges. This article

discusses these three topics and then examines three cases to illustrate how sexual harassment cases should and should not be handled.

## ORGANIZATIONAL GUIDES ON SEXUAL HARASSMENT

### The Employer's Sexual Harassment Policies

The employer's policies should state its overall goal in preventing sexual harassment, list examples of sexual harassment, set guidelines for the work environment, explain a confidential and user-friendly complaint process, and list penalties for the perpetrators.

While the general goal of all sexual harassment policies is to prevent a hostile work environment, the employer should not expect that a well-defined policy will by itself eliminate this problem. Generally, employees who engage in sexual harassment do not see themselves as crossing the line. When confronted with specific violations, they almost always defend their actions by criticizing the policy or the alleged victim. Furthermore, unless the policy is crystal clear and highly specific, the issue often becomes whether the alleged conduct merits the discipline imposed, unless there is a specific warning for a previous offense.

But the absence of a sexual harassment policy, or the presence only of a very general statement, makes any imposition of discipline harder to justify. In such cases, the alleged victims must be able to describe why they were offended, so their standards can be compared to a "reasonable person standard." This is much more difficult to prove than violations of a fairly precise sexual harassment policy [3]. Effective sexual harassment policies require provisions for taking serious disciplinary actions against alleged perpetrators when the policy is violated. Although the internal complaint processes may play a critical role, it is primarily the employer's actions that send a clear signal to employees as to what conduct will and will not be tolerated. Employers who think the problem is solved by listening to the victim or transferring him or her without imposing discipline against the alleged harasser invite disaster when a later complaint cannot be resolved in this manner.

An effective sexual harassment policy has two parts. The first part deals with defining sexual harassment and includes a process for training and disseminating the policy. The second process sets up specific complaint mechanisms. Since these policies are required by *Equal Employment Opportunity Commission (EEOC) Guidelines* [4], they are usually disseminated as part of the employer's affirmative action effort. Because specific EEO guidelines do not exist for due process requirements found in most disciplinary procedures, these vary widely. In a unionized environment, many of the disciplinary elements of the harassment policy are set by the collective bargaining agreement and past practice. In the public sector, additional formal civil service protections protect both represented

and nonrepresented employees. The disciplinary interface has two principal parts: 1) the investigation phase and 2) the specification of charges, which provides the basis for subsequent disciplinary action.

### **The Investigation Phase**

As is true in any disciplinary matter, if the investigation of a sexual harassment complaint is poor, it may become impossible to impose discipline. It is true that the courts and arbitrators have made some narrow exceptions for after-acquired evidence. And it is also true that there is a great deal of tension between attempts to resolve complaints informally and attempts to gather evidence that can be used later in a formal disciplinary proceeding. Still, there is no substitute for evidence gathered prior to taking disciplinary action.

The classic situation comes about when the employer resolves an employee's informal complaint of sexual harassment by agreeing to a voluntary transfer the victim requests because of privacy considerations. If a second employee later makes a similar claim, the employer may not be able to introduce the prior complaint as evidence of a pattern and practice. The attempt will probably fail because there was no investigation to substantiate the initial complaint. This is a fairly common problem because many complainants demand confidentiality as the *quid pro quo* for dropping the complaint. This leaves open the question of whether an employer can make any record of or take action on any complaint that is not independently investigated or verified at the request of the alleged victim.

Any potential complainant should be told that a charge of sexual harassment is a serious matter and that no action based on the allegations can be taken against an individual without a signed statement that triggers an impartial investigation. Taking this approach may discourage some complaints and make it more difficult to resolve some matters informally, but the alternative is to leave the employer unable to take any disciplinary action. Sometimes a mere discussion of the problem between the alleged victim and a sexual harassment officer can resolve the issue. If the alleged victim asks that the company take no action against the accused, it is critical that the employer not take any further action.

An impartial investigation and documentation of a sexual harassment complaint is not outrageously burdensome. The first step is a signed, sworn statement. The use of the four W's (who, what, where, and when) in that statement are critical to its success in a disciplinary scenario. For example, when a supervisor is accused of sexual harassment, the signed statement should give the times, places, people involved, and a detailed account of what was said or done. The next step involves interviewing the witnesses to gather signed statements and to verify the facts (e.g., checking hotel registrations). Finally, there is the interview with the accused individual. If the employer is contemplating disciplinary action, the individual should be told that it is a disciplinary interview. If the individual refuses to discuss the matter or denies the allegations, the employer has the basis for a suspension to

prevent retaliation, provided that the other parts of the investigation have been completed.

It is critical that the employer get signed statements from the accused and the witnesses. While there are many arguments about whether signed statements are admissible in disciplinary hearings, such statements are invaluable as memory-joggers particularly when, as in many court cases, years pass before the case comes to trial. Formal signed statements also inhibit the individual's ability to change his/her position.

If the alleged victim refuses to sign a statement or refuses to allow an investigation that could reveal his/her identity, the employer must inform the victim that action cannot proceed against the accused individual. Without a formal complaint, there is no meaningful basis for establishing misconduct. But this does not mean that the employer cannot try to address some of the victim's concerns. Nor does it mean that the employer cannot take action against the accused individual for violating work rules, such as dating between supervisors and subordinates, provided that there is independent verification.

### **The Charge Specification**

The issue of appropriate charge specification is almost as important as the initial investigation. The general charge should include the words "sexual harassment" for that to be an issue in the case. The critical question becomes: How specifically should the allegations of misconduct be stated in the charges?

For example, should the charge contain the names of the individuals, dates, times, and places or does it merely mention a general policy infraction? There is no simple answer to this question, but it is generally unwise to name the accusers in the initial charges unless the rules of procedure contained in applicable civil service laws or collective bargaining agreements require exact specification of charges, such as in a criminal proceeding.

This does not mean that the charge should be totally general. At the very least it must be specific in stating that the person is accused of sexually harassing activities that violated company policies and/or federal or state law and the time period over which this activity occurred. If the disciplinary action is contested, the employer must be prepared to specify the exact behaviors, dates, times, and places. The advice of legal counsel is critical at this point and should be sought before the charges are put into writing and given to the individual. A competent outside attorney may also ask to conduct an independent investigation or at least to review the evidence on the infraction before specifying any charge.

In summary, the three elements critical to the success of an employer charge of sexual harassment are the preexisting employer's policies barring harassment, the quality of the initial investigation, and the specification of charges. A successful defense against charges by the alleged harasser can be based on an attack on employer policies, an attack on the employer's impartial investigation, or on the

ability of the accused to show that the employer was unable to prove the specific charges. All of these tactics are standards, since they do not require launching any affirmative defense that would require the accused harasser to testify in his/her own behalf and subject the accused to cross-examination.

## CASES ON POINT

### A Claim of Innocent Pornography

The first example involves sexual harassment between employees at an equal level. The accused employee had made a practice of showing female co-workers nude photographs of himself having sex with his wife. Their work environment was an isolated toll booth on an interstate highway. The individual was discharged in accordance with civil service procedures and hired his own counsel to obtain reinstatement under the hearing procedures provided under the law.

The case started when a female co-worker approached her immediate supervisor and demanded that she never again be placed on the night shift with the accused employee. When questioned, she described being approached by her co-worker with the aforementioned “family photos,” which both frightened and disgusted her. The supervisor approached the accused employee. He admitted the incident but claimed that his fellow employee had welcomed the opportunity to look at the photos, but, nonetheless, he promised never to approach her again.

When the female employee was scheduled to work with the accused again, she said she would not report to work, whereupon her supervisor told her she would have to file a complaint against the accused or be disciplined for not showing up. She filed the complaint along with the supervisor’s request for a transfer of the accused employee to which the accused employee had agreed. This material ended up in the Human Resource office for approval. The Human Resource Officer (HRO), instead of granting the transfer request, began an investigation.

The HRO interviewed the female employee and had her sign a statement describing the incident in detail. The HRO supervisor then looked up four other female employees who had worked with the accused alone in that location and asked them whether they had experienced any problems. All four reported similar incidents with “family photos.” The HRO officer again asked for and received written statements detailing all the specifics of each incident, from all the employees that she had interviewed.

The HRO asked the accused employee to make a statement. He said the incident had only occurred once and promised not to do it again. The HRO did not reveal the results of her investigation and, based on his statements, suspended him without pay with intent to discharge. Three days later, the accused was sent a discharge letter specifying three charges.

1. The specific complaint of harassment made by the first female employee.
2. Lying about the incident and other issues during the interview.
3. Violating the employer's general policy prohibiting sexual harassment.

The letter closed by citing four other incidents with dates, times, and places.

The employee initially was represented by his union, but the union subsequently agreed to withdraw from the matter because the accused wanted his own counsel. Eventually, a hearing was held, and the employer came to the hearing with statements, signed complaints, and employee records. The employer had been forced to subpoena all five employees to testify. They refused to come forward voluntarily since all had been promised during the initial investigation that they would not have to testify. Eventually all five "victims" did testify but all declined to file a formal complaint, including the individual who had signed the initial complaint. She said she had signed the complaint because she was under duress at that time.

The accused employee's counsel argued that there were no victims. While admitting that the accused employee's actions were in poor taste, counsel argued further that they did not constitute sexual harassment in violation of the employer's policy. The workplace was described as a "very raunchy place to work" and the behavior commonplace. Counsel additionally questioned whether the material constituted pornography in violation of the employer's policy. The employer's rebuttal focused on the accused employee's false initial statement (i.e., that there had been only one incident and that the female employee had wished to see his photos), his established pattern and practice, and argued that his reinstatement would put the employer at risk for future complaints. The defense put the accused employee on the stand to provide an affirmative defense and a promise of reform if given a second chance. But under cross-examination, he contradicted himself on several key issues and admitted that he was a "liar and pervert."

The decision found the accused employee guilty of charges #2 and #3 but innocent of charge #1 (the original employee's complaint). The ruling on charge #1 was based on the complainant's refusal to follow up on her original sexual harassment complaint. She also testified that she did not want to get her co-worker fired and would have withdrawn the complaint if she had anticipated this outcome. The employer won this case because of the strength of its initial investigation, particularly the signed statements detailing the who, where, what, and when of each incident. Even those witnesses who tried to downplay their original statements when they realized the accused employee was facing discharge found it difficult to deviate from their signed statements.

The employer's preexisting policies also played an important part in this case, especially when the original complainants tried to recant their earlier testimony. The employer's policy specifically barred bringing in and showing pornography at the workplace. Even when the witnesses became reluctant to testify against the

accused employee, all agreed that they were shown the sexual material and that such material was barred from the workplace. The employer's training policies, furthermore, had made it clear to all that pornographic materials were barred from the workplace. Although the employees policies were not specific as to what constituted pornography, explicit photographs of the accused having sex easily met the reasonable person's standard of pornography. In fact, all of the witnesses, including the accused, agreed that the pictures were pornographic.

The last aspect of the case was the charges. Each charge was specific, as required by statute, to the objectionable conduct, including dates, times, places, and persons and to the exact violation of the employer's policy. Even though the first charge was not sustained because the original complainant had changed her story after the charges had been issued, the multiple charges gave the employer an array of options in case any one of them could not be sustained. This case also illustrated the dangers of basing a decision on the testimony of one witness.

### **The Stolen Kiss**

This incident involved two food service workers at the same level working in a college cafeteria. The accused worker had a habit of sneaking up behind his female co-workers and grabbing them from behind in order to kiss them on the ear. A new worker was hired and after the first time she experienced this practice, she asked the accused to stop. When he tried it a second time she pushed him away and threatened to tell the supervisor. After he laughed and walked away, she told her supervisor. The supervisor warned the employee not to do it again. The next day, the supervisor observed him doing it to another employee and fired him on the spot.

The union filed a grievance, stating that the employee who had been victimized had not complained and that the fired employee had followed orders not to attempt to kiss the employee who had complained. In this case there was no discharge letter, and there had been no investigation. There was no specific company policy on sexual harassment other than a general policy barring discrimination of all types. The accused worker had a limited education and was only semiliterate, and the union argued that he could not have read the written guidelines. In addition, the two women involved in this case stated that they did not feel harassed.

Lack of investigation, lack of specific company policies on sexual harassment, and the absence of formal charges made the employer's case difficult to document. The employer's contention that the accused had engaged in sexual harassment was contradicted by both women. They testified that they considered the behavior a joke which they both thought was no longer funny. They also testified that the accused was harmless and neither had ever tried or wanted to complain about being sexually harassed. They complained that their supervisor was overreacting and attempting to impose standards in terms of language and conduct that no one had requested.

The employer's termination decision failed on a number of counts. The decision to discharge without a prior investigation limited the employer's charges to the two single incidents. Since the two "victims" denied feeling harassed, there was no evidence to prove the accused guilty of sexual harassment. The testimony of the "victims" left the company without a case to document and subject to the constant attack made during the hearing that its decision was arbitrary and capricious. The lack of any company policies weakened the case further, as did the total absence of training for employees and supervisors with regard to sexual harassment. The alleged harasser was reinstated with back pay. A supervisor's effort to rid the workplace of sexual harassment had actually created a worse situation.

### **The Insensitive Supervisor and His Subordinate's Claim of Harassment**

This case occurred in a paramilitary environment where employees were subject to discipline for failing to follow direct orders. The genesis of the complaint was a lawsuit filed by a female employee alleging a disabling psychological injury because of sexual harassment at work by her immediate supervisor.

The department had recently adopted guidelines on sexual harassment, but the grievant elected to go outside the process because she was facing discharge for failure to report for work. Although the employer had documented a series of work problems about the plaintiff in this action, it had handed the matter over to an outside police investigator to determine whether a complaint was warranted.

This investigator ran up against a "blue wall of silence," where he found himself with no one who would talk about the situation for the record, although his informal discussions led him to believe that the plaintiff's claim was true. This lack of cooperation was remedied with paramilitary order to other potential victims which resulted in four written statements documenting a long series of incidents in which the supervisor treated his female subordinates as his "girls." His behavior included sexual innuendoes, inappropriate language and gestures, physical contact, repeated requests for dates, and finally threats of retaliation if his authority was challenged by any of the "girls" under his command.

Remarkably, all four of the women who had documented his behavior defended it as not mean-spirited but as being typical of a man his age and background with the department and the U.S. military. While they had made it clear in direct comments to him that they wished him to stop, none was willing to file formal or informal complaints. None of them wanted to see disciplinary actions taken against the accused. In fact, all the employees documented his ability to perform his job and acknowledged his assistance in training and helping them. They simply wanted him to make an effort to clean up his act. His record as a supervisor and as an employee was exemplary in all other respects, and he had been promoted several times.

The upper-level management team that reviewed the report took a different view. They decided to suspend the supervisor without pay in anticipation of discharge because of a pattern and practice of sexual harassment. The union grieved the discipline and, after several court challenges, the matter ended up in front of a hearing officer. At the hearing, the union challenged management's investigation, specification of charges, the sexual harassment policy, the disciplinary process, the evidence offered to prove the offense, and finally the type of discipline.

But the discharge was sustained because management had conducted a thoroughly professional and documented investigation, had adopted and implemented a defensible sexual harassment policy, had specified charges in such way that they could be documented without requiring individuals to file complaints of harassment, and had engaged a competent legal team to handle the case.

The supervisor's attorney was able to impeach the credibility of the initial accuser, respecify the charges in a way that made them much more difficult to prove, question the whole concept of what constituted sexual harassment in that type of work environment, and keep the accused from impeaching himself by refusing to allow him to be questioned at any time during the process. But, in the end, the employer was able to prove that the supervisor was in fact engaging in harassment that he knew, through his prior training as a supervisor, was against explicit department policy. This strategy could have resulted in demotion instead of discharge (which was informally offered but turned down by the defense), but the defense tactic of having the accused refuse to answer any questions also crippled any effort on its part to show that the grievant would not carry out his threats of retaliation if he returned to work in any capacity.

## CONCLUSIONS

At a minimum, this article and these cases should illustrate to employers the importance of a comprehensive antiharassment policy that specifies the penalties for infractions, impartial investigations of complaints, thorough documentation—including signed statements from complainants and witnesses—and careful specification of charges. The cases suggest that sexual harassment is probably more a peer phenomenon than a supervisor-subordinate one. They also illustrate the tendency of complainants and witnesses to alter their testimony or drop their charges when they come to the realization that one of their co-workers might be fired.

The three cases also illustrate that the sexual harassment complaint process can often be rightly described as a no-win situation, particularly when the matter goes to trial. The "victims" rarely feel good about filing a complaint and often feel threatened by the reactions of fellow employees. Their co-workers often accuse them either of overreacting or of relying on supervisors to resolve what they feel is an interpersonal dispute. Any persons accused of sexual harassment will also feel

like “victims” because even if they prevail in defeating the complaint, they often perceive their career as under a cloud of suspicion. The process is so painful for all involved, including those charged with investigating complaints, that smaller complaints may be ignored until the problem is so great that drastic action has to be taken.

A good sexual harassment policy should not be afraid to take on small issues in order to raise workplace standards to a level where all employees feel comfortable and no employee fears to come forward with his or her complaints. In such an atmosphere, the problems of sexual harassment can be dealt with at an early stage, before the always painful process of serious internal discipline or external litigation begins.

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#### ENDNOTES

1. *Faragher v. City of Boca Raton*, 118 S. Ct. 2275, 1998.
2. *Burlington Industries v. Ellerth*, 118 S. Ct. 2257, 1998.
3. *Lipsett v. University of Puerto Rico*, 864 F. 2d 881, 1st Cir., 1988.
4. Equal Employment Opportunity Commission, *Policy Guidelines on Current Issues of Sexual Harassment*, Washington, D.C., March 29, 1990.
5. All of these cases come from the author's unpublished files of arbitration cases.

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