Published on *e-Li* (https://eli.ctas.tennessee.edu) September 23, 2019

Workplace Harassment

Dear Reader:

The following document was created from the CTAS electronic library known as e-Li. This online library is maintained daily by CTAS staff and seeks to represent the most current information regarding issues relative to Tennessee county government.

We hope this information will be useful to you; reference to it will assist you with many of the questions that will arise in your tenure with county government. However, the *Tennessee Code Annotated* and other relevant laws or regulations should always be consulted before any action is taken based upon the contents of this document.

Please feel free to contact us if you have questions or comments regarding this information or any other e-Li material.

Sincerely,

The University of Tennessee
County Technical Assistance Service
226 Capitol Blvd. Suite 400
Nashville, TN. 37219
615-532-3555 phone
615-532-3699 fax
ctas@tennessee.edu
www.ctas.tennessee.edu

Table of Contents

Workplace Harassment

Reference Number: CTAS-171

Discrimination in the workplace on the basis of race, color, religion, national origin, sex (whether or not of a sexual nature), age or disability is illegal. Harassment based on any of those factors also is illegal. In addition, an employer can be held liable for retaliation against an individual for opposition to prohibited discrimination or for participation in the complaint process, often referred to as "protected activity." The most common forms of workplace harassment are sexual harassment and racial harassment. (See *EEOC Enforcement Guidance on Vicarious Employer Liability for Unlawful Harassment by Supervisors*, 6/18/99).

Two United States Supreme Court cases dealing with sexual harassment, *Burlington Industries, Inc. v. Ellerth*, 524 U.S. 742, 118 S.Ct. 2257 (1998) and *Faragher v. City of Boca Raton*, 524 U.S. 775, 118 S.Ct. 2275 (1998), changed the way courts look at sexual harassment as well as all other forms of workplace harassment. Prior to these cases, sexual harassment had been thought of separately from any other form of unlawful workplace harassment. After the decisions in *Ellerth* and *Faragher*, however, all unlawful workplace harassment is handled in much the same manner.

The biggest impact of these two cases is the idea of strict liability: The employer is strictly liable for workplace harassment by a supervisor that results in a tangible employment action. There is no defense to this kind of action. Prevention is the only way to avoid liability for this type of harassment.

After the *Ellerth* and *Faragher* cases, there are two basic types of harassment. The first type involves a "tangible employment action" (formerly "quid pro quo"). The other is what is known as "hostile work environment," which involves conduct that is severe or pervasive.

After the United States Supreme Court decisions in *Ellerth* and *Faragher*, it is even more important for employers to be informed about potential problems in the workplace, and to take affirmative steps to prevent and/or stop unlawful harassment. It is now clear that supervisors act on behalf of the employer, and the employer will be held liable for their unlawful conduct that results in a tangible employment action, even if the employer had no knowledge of the situation. In other cases of workplace harassment (those that create a hostile work environment), the employer may defend the action if it can show that: (1) the employer exercised reasonable care to prevent and promptly correct any harassment; *and* (2) the employee unreasonably failed to take advantage of any preventative or corrective opportunities provided by the employer, or to avoid harm otherwise. A strong policy against this type of behavior, and effective complaint/investigatory procedures with appropriate corrective action timely administered, are a must for any employer who wants to avoid liability.

Employer Strict Liability

Reference Number: CTAS-1064

An employer always will be held liable for unlawful workplace harassment by a supervisor that results in a tangible employment action. It is therefore important to determine who is considered to be a "supervisor."

1. A supervisor is one who has authority to undertake or recommend tangible employment actions affecting the employee. As long as a person's recommendation is given substantial weight, the person does not have to be the final decision maker; or
2. A supervisor is one who has authority to direct the employee's daily work activities. Directing an employee's daily work activities includes the authority to increase the employee's workload or assign undesirable tasks, and not simply relaying other officials' instructions regarding work assignments. However, direction of only a limited number of assignments, such as someone who coordinates a work project of limited scope, is not a "supervisor."

Sometimes an employer can be held liable for the actions of a supervisor who does not have actual authority over the employee, if the employee reasonably believes that the harasser has such power. If the harasser has no direct authority, and there is no reasonable belief that such authority exists, then the employer's liability for harassment will be the same as for harassment by a co-worker.

Tangible Employment Action
Reference Number: CTAS-1065

Tangible employment actions are decisions that significantly change an employee's employment status. Examples include decisions involving hiring, firing, promoting, demoting, compensation, benefits and re-assignments. A tangible employment action:

- requires an official act of the enterprise
- usually is documented in company records
- may be subject to review by higher level supervisors
- often requires formal approval of the enterprise and use of its internal processes
- usually inflicts direct economic harm
- in most instances can only be caused by a supervisor or other person acting on behalf of the company

Any employment action is "tangible" if it results in a significant change in employment status. Conversely, an employment action is not "tangible" if it results only in an insignificant change. Unfulfilled threats are insufficient.

If a supervisor undertakes or recommends a tangible job action based on a subordinate's response to unwelcome sexual demands, the employer is strictly liable. The result is the same regardless of whether the employee rejects the supervisor's demands and is subjected to an adverse action, or whether the employee submits to the demands and receives a tangible job benefit.

If a challenged action is not "tangible," it still may be considered as part of a hostile environment claim.

The only way to avoid liability for unlawful harassment that results in a tangible employment action is to prevent it from happening. Supervisors must be educated on this point. Employers cannot afford to allow this type of discrimination to occur.

Defending Against Workplace Harassment Claims
Reference Number: CTAS-1066

In harassment cases that do not involve harassment by a supervisor that resulted in a tangible employment action, an employer has a defense if it can prove two things:

1. The employer exercised reasonable care to prevent and promptly correct any harassment; and
2. The employee unreasonably failed to take advantage of any preventive or corrective opportunities provided by the employer, or to avoid harm otherwise.

The first prong of the test requires the employer to show that it took reasonable care to prevent and promptly correct any harassment. Simply having a policy is not enough; the policy must be implemented. Not having a formal policy will not necessarily defeat the defense if the employer exercised sufficient care through other means, but not having a policy makes it very difficult for an employer to show that it exercised reasonable care. Therefore, it is best to have a policy in place.

Policy and Complaint Procedures
Reference Number: CTAS-1067

It is generally necessary for employers to establish, publicize, and enforce anti-harassment policies and complaint procedures. At a minimum, the policy should contain:

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

Non-Discrimination and Sexual Harassment Policies

Conducting Effective Investigations

Reference Number: CTAS-1068

In order to avoid liability, the employer must investigate allegations of unlawful harassment in a prompt, thorough and impartial manner. The first thing the employer should do is find out whether the alleged harasser denies the accusation. If not, there is no need for further fact-finding, and all that is left is to determine the appropriate corrective action. If the alleged harasser denies the allegations, then the employer should launch a fact-finding investigation immediately.

Steps in the Investigative Process:

1. Find out if the alleged harasser denies the allegations. If not, determine appropriate corrective action. If so,
2. Conduct fact-finding investigation.
3. If necessary, take measures to ensure that further harassment does not occur, such as making scheduling changes to avoid contact between the parties, transferring the alleged harasser, or placing the alleged harasser on non-disciplinary leave with pay pending the conclusion of the investigation.
4. Interview witnesses.
5. Examples of questions to ask the complainant:
   Who committed the alleged harassment?
   What exactly occurred?
   When did it occur, and is it still ongoing?
   Where did it occur?
   How often did it occur?
   How did it affect you?
   Has your job been affected in any way?
   How did you react?
   What responses did you make at the time, or afterwards?
   Was anyone present when the incident(s) occurred?
   Who might have relevant information?
   Did you tell anyone?
   Did anyone see you immediately after the incident(s)?
   Has the person harassed anyone else?
   Do you know if anyone has complained?
   Are there any notes, physical evidence or other documentation?
   How would you like to see the situation resolved?
   Do you know of any other relevant information?
6. Examples of questions to ask the alleged harasser:
   What is your response to the allegations?
   (If the harasser claims the allegations are false) Do you know why the complainant might lie?
   Who might have relevant information?
   Are there any notes, physical evidence or other documentation?
   Do you know of any other relevant information?
7. Examples of questions to ask third parties:
   What did you see or hear? When did it occur? Describe the behavior of the alleged harasser.
   What did the complainant tell you? When?
   Do you know of other relevant information?
   Are there other persons who have relevant information?
8. Determine Credibility - factors:
   Inherent Plausibility - Is it believable on its face? Does it make sense?
   Demeanor - Did the person seem to be telling the truth or lying?
   Motive to Falsify - Did the person have reason to lie?
   Corroboration - Is there witness testimony or physical evidence to support the testimony?
   Past Record - Is there a history of similar behavior in the past?
9. Make a determination as to whether harassment occurred. This could be done by the investigator or by management reviewing the investigator's report. If no determination can be made because the evidence is inconclusive, the employer should still take further preventative measures, such as training and monitoring.

Immediate and Appropriate Corrective Action

Reference Number: CTAS-1069

The employer must make clear that it will take immediate and appropriate corrective action, including discipline, whenever it finds that harassment has occurred in violation of the employer's policy. Remedial measures should be designed to:

1. Stop the harassment;
2. Correct the effects of the harassment on the employee; and
3. Ensure the harassment does not recur.

Disciplinary measures should be proportional to the seriousness of the offense. The measures taken do not have to be those that the employee requests, as long as they are effective. Remedial measures should not adversely affect the complainant, and should be designed to put the complainant in the position he or she would have been in had the misconduct not occurred. The employer should follow up to ensure that the remedial measures were effective.

Some examples of measures intended to stop the harassment and ensure that it does not recur include the following:

- Oral or written warning or reprimand
- Transfer or re-assignment
- Demotion
- Reduction in wages
- Suspension
- Discharge
- Training or counseling to ensure the harasser understands why the conduct violated the policy
- Monitoring the harasser to ensure the harassment stops

Some examples of measures intended to correct the effects of the harassment include the following:

- Restoration of leave taken because of the harassment
- Expungement of negative evaluations that arose from harassment
- Re-instatement
- Apology by harasser
- Monitoring to ensure the complainant is not subjected to retaliation because of complaint
- Correction of any other harm that may have occurred (e.g., compensation for losses)

Other Preventive and Corrective Measures

Reference Number: CTAS-1070

In addition to implementing a policy and complaint procedure, the employer must exercise *due care* to guard against supervisor misconduct. This includes screening, training and monitoring their performance. Due care requires employers to:

1. Instruct supervisors and managers to address or report all complaints of harassment regardless of whether they are designated to take complaints, and regardless of whether the complaint conforms to procedure (e.g., if employee files EEOC charge, management should launch internal investigation regardless of whether the employee filed a complaint under employer's policy).
2. Correct harassment regardless of whether an employee files an internal complaint, if the conduct is clearly unwelcome (e.g., if there is graffiti containing sexual or racial epithets, management should eliminate it and not wait for an internal complaint).
3. Conduct periodic training for supervisors and managers to ensure that they understand their responsibilities under the policy and complaint procedure.
4. Monitor supervisors' and managers' conduct to ensure that they carry out their responsibilities (e.g., include this in formal evaluations).
5. Take reasonable preventive measures, including screening applicants for supervisory jobs to see if they have a record of engaging in harassment.
6. Keep records of all complaints of harassment so that any patterns of harassment by the same individual may be noted.

Harassment by Non-Employees
Reference Number: CTAS-2470

Third parties that visit county offices to transact business may also be guilty of workplace harassment, and if this occurs the employer is responsible for taking appropriate action to stop it. The fact that the harasser is not an employee of the county does not relieve the county of liability. When an employer knows or should have known about the existence of a hostile work environment and fails to address it, both the employer and individual managers may be liable.

If less drastic efforts to stop the harassment have failed, the county does have a statutory remedy to seek injunctive relief in court. Under T.C.A. § 50-1-506, the county may, through its attorney, seek an injunction against a person who commits harassment against an employee. The injunction may be sought in any court of competent jurisdiction having the power to grant injunctions. As used in this statute, "harassment" means two or more instances of contact serving no legitimate purpose directed at an employee, in connection with that person's status as an employee, that a reasonable person would consider alarming, threatening, intimidating, abusive, or emotionally distressing and that does or reasonably could interfere with the performance of the employee's duties. "Instance of contact" means a direct communication or physical touching. T.C.A. § 50-1-502.

Small Workplaces
Reference Number: CTAS-1071

For small workforces, the employer may not need to implement the type of formal policy and complaint procedure that a large employer would need. Oral communication of the policy and procedure at staff meetings can be enough, if the mechanism is an effective one. If a complaint is made, the employer must be prompt, thorough, and impartial in its investigation, and swift and appropriate with corrective action.

EEOC Get the Facts Series: Small Business Information

Employee's Duty to Exercise Reasonable Care
Reference Number: CTAS-1072

The second part of the employer's defense requires the employer to show that the aggrieved employee "unreasonably failed to take advantage of any preventative or corrective opportunities provided by the employer or to avoid harm otherwise." *Faragher*, 118 S.Ct. at 2293, *Ellerth*, 118 S.Ct. at 2270. If the aggrieved employee could have avoided all of the harm, the employer will not be liable; if only some of the harm could have been avoided, the damages will be reduced accordingly.

Unreasonable failure to complain. This determination depends on the circumstances and information available to the employee *at that time*. Employees should not be expected to complain immediately after the first or second incident of relatively minor harassment. The employee may tell the harasser directly that he or she wants the harassment to stop, then wait to see if this is effective. If the harassment persists, though, further delay may be found unreasonable.

Other reasons for an employee's failure to complain may include:

1. The employee had reason to fear retaliation - The employee's fear of retaliation must be reasonable. To assure employees that such a fear is unwarranted, the employer must clearly communicate and enforce a policy that no employee will be retaliated against for complaining of harassment.
2. There were obstacles to making complaints - Unnecessary obstacles to complaints might include: undue expense to the employee, inaccessible points of contact for making a complaint, or unnecessarily intimidating or burdensome requirements. An employee's failure to participate in alternate dispute resolution (ADR) does not constitute unreasonable failure to avoid harm; while an employee may be expected to cooperate in the employer's investigation, the employee is not expected to give up legal rights, either procedural or substantive, as an element of exercise of reasonable care, nor can an employee be required to resolve the matter with the harasser.
3. The complaint mechanism was not effective - The employer cannot rely on an employee's failure to complain if the employee's failure is based on a reasonable belief that the process was ineffective (e.g., where the policy requires the employee to report the incident to the harassing supervisor, or where the employee is aware of other instances where co-workers' complaints failed

to stop harassment.) One way an employer can help this perception is to release information about corrective and disciplinary actions taken to stop harassment.

Other efforts by employee to avoid harm. The employer cannot use the defense even if the employee unreasonably failed to use the complaint process, if the employee made other efforts to avoid harm. A prompt complaint to the EEOC or Tennessee Human Rights Commission (THRC) while the harassment is ongoing could qualify as such an effort, as could a union grievance. Also, a temporary staffing agency employee could complain of harassment to the staffing firm or to the client, reasonably expecting either to correct the problem. The timing of the complaint is important - if the employee could have avoided damages by complaining sooner, then the damages may be reduced accordingly.
