

Sexual harassment

Taking proactive steps to deter and defend costly litigation **Interviewed by Leslie Stevens-Huffman**

Sexual harassment cases have moved beyond the stereotype of the female subordinate versus her male superior. Today, your company can be sued by an employee, male or female, who happens to overhear vivid watercooler conversations between two co-workers.

"The courts have expanded the definition of sexual harassment, including behaviors that previously were not actionable under the sexual harassment laws," says B. Allison Borkenheim, attorney at law with Procopio, Cory, Hargreaves & Savitch LLP. "The cost of defending a case from the day a complaint is filed through trial can be significant, even if you defend the case successfully. If you don't prevail, in addition to your defense costs, you'll have to pay the victim's legal costs. Preventing the claim from happening in the first place is the most cost-effective solution."

Smart Business spoke with Borkenheim about what CEOs can do to prevent and defend sexual harassment claims.

What is sexual harassment?

Generally, sexual harassment refers to unwelcome advances, requests for sexual favors and other verbal or physical conduct that unreasonably affects an individual's employment. Over time, the definition has expanded to include conduct or behavior that occurs 'because of sex,' but is not 'sexual' in nature. Claims for sexual harassment can be brought for actions perpetrated by supervisors, co-workers and, under certain circumstances, third parties who interact with employees.

What is the employer's responsibility in preventing sexual harassment?

Employers are expected to prevent sexual harassment in the workplace, and they can be held liable if the employer (or supervisors) knew, or should have known, about the harassment and failed to take appropriate corrective action.

What constitutes an effective sexual harassment policy?

Here are the best practices for administering an effective sexual harassment policy:



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1. Have a *written* sexual harassment policy that includes a statement of nontolerance for the behavior, a plan for the employee to follow if he or she is harassed, and a process for investigating claims of harassment. This is required by law and is the first line of defense.

2. Include a nonretaliation policy as part of your plan.

3. Communicate the plan both verbally and in writing and have employees sign and retain a copy, acknowledging receipt of the policy and knowledge of the consequences.

4. Recommunicate the policy and have employees sign a new copy each year.

What actions should CEOs take to enforce the policy?

I often find that behind many cases is a victim whose feelings were hurt because no one stopped to listen or sympathize. Besides having a written sexual harassment policy, here are my other recommendations for CEOs:

1. Have good, solid human relations practices and open communications.

2. Appoint a policy enforcer, such as the HR manager who can walk the halls and personally observe and monitor employee behavior.

3. Address inappropriate behavior before someone complains.

4. Personally attend sexual harassment training and train all employees.

5. Implement a no-dating policy for supervisory staff or require that dating employees inform management about their relationship.

6. Don't be afraid to take corrective action if it's called for. Consider using third-party investigators in cases of alleged supervisor harassment to ensure objectivity.

7. Don't discriminate when investigating or assigning discipline; don't protect a highly valued employee at the expense of enforcing your policies.

8. Don't retaliate against the person who complained about the harassment. It is illegal and provides the employee with another cause of action to pursue.

9. Screen new hires carefully. Conduct reference checks and spend time with prospective employees asking behavioral interviewing questions so you know if they are not only a technical but also a cultural fit.

Where are sexual harassment claims filed and how does the jurisdiction affect the defense?

Claims can be filed in federal court under Title VII of the Civil Rights Act of 1964, which prohibits discrimination in employment. There are effective defenses to federal claims. Several consider an employer's policies to prevent sexual harassment. Liability may be determined by the reasonableness of the actions taken by the employee. For example, if the employer had a preventive policy and the employee unreasonably failed to take advantage of it, then the employee likely will not be able to recover damages.

Claims filed in California under the Fair Employment and Housing Act (FEHA) are more difficult to defend because an employee's failure to follow an employer's complaint procedure may not result in a complete defense to all liability. Also, California courts tend to be more generous with awards. On the positive side, in California an employee can only recover 'reasonable damages,' which excludes those damages the employee could have avoided with reasonable effort and without undue risk. <<

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