

ANDERSON KILL EMPLOYMENT LAW INSIDER

ALERT

Sexual Harassment — What Employers Should Do After #MeToo

By Dona Kahn

For years, courts have provided guidance on the definitions of sexual harassment and sexually hostile work environment, and on the defenses available to employers.

Sexual harassment includes what is called quid pro quo harassment, which is conditioning a promotion, raise or other benefit on sexual favors, and harassment in general, which is unwelcome touching, pervasive inappropriate sexual comments and other unwelcome behaviors that are sexual in nature and which a reasonable woman or man (depending on the situation) would find offensive.

A sexually hostile work environment includes unwelcome sexual advances or behaviors directed either at the person complaining or at others. Courts have held that the behavior must be severe or pervasive and must limit or adversely impact the person's ability to perform their job. Objective standards apply and need to be sexual in nature and offensive. It is generally held that unlike the traditional "reasonable person" standard of tort law, the facts are analyzed from the perspective of a similar person under the same set of facts as the victim.

The courts have also made clear that if an employer has a procedure or practice for receiving and investigating complaints of sexual harassment or hostile environment, and the employer takes prompt and remedial action, such action may constitute all or part of a valid defense to the complaint. Further, if the matter is investigated by a neutral investigator (preferably outside the company or institution) and the recommendations of the investigator are followed, punitive damages — available to successful plaintiffs under the discrimination laws — will not be awarded since the actions will not be deemed a willful disregard of the law.

How has this framework changed since the #MeToo movement?

What has happened is a rush to judgment, the accused at times being terminated without what some would consider due process. We need new standards to decide how to distinguish between abusive behavior rising to the level of harassment or hostility, and merely boorish banter,

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which no reasonable person should find so offensive as to adversely impact one's job performance, or other behavior that, although ill-advised, is hardly illegal. Companies should seek to provide a better, more welcoming and neutral workplace environment so that both men and women feel comfortable in the workplace, but should not guarantee that everyone has the right not to be offended.

What can companies do?

At times, mediation between the accused and accuser is appropriate and leads to a resolution that leaves both feeling the issue has been addressed and remedied. As a certified New York State mediator, I have mediated such situations, with success. When mediation is not viable, the most effective response to a harassment allegation is to retain an outside specialist who will conduct extensive interviews of all concerned, draw conclusions and make recommendations. I have been doing such investigations for companies, universities and colleges, and non-profits and can be said to be neutral since I have found both that there is no merit to the claim but steps can be taken to address the issue, and that there is merit to the claim and disciplinary action is appropriate. Using your own human resources department is not prudent since both the accuser or juries will read in bias toward the employer. Once an investigation is completed, all parties should be informed of the remedial action taken and warned that retaliation will not be tolerated — and in fact may constitute a more severe infraction than the originating behavior.

Also recommended is holding regular workshops on sexual harassment that clearly delineate behavior the employer deems unacceptable. I have conducted such workshops and am surprised at how many employees are clueless as to what is clearly offensive behavior. The aim is to have a workforce in which the employees respect each other, work together to produce a work product to advance the employer's business, and believe that they are on the same playing field as others in advancing their careers.▲

