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LABOR AND EMPLOYMENT ALERT

SEXUAL HARASSMENT AND RETALIATION IN THE WORKPLACE: WHAT NONPROFITS NEED TO KNOW

When it comes to the law of sexual harassment and retaliation, nonprofit organizations stand on equal footing with for-profit businesses – no exceptions exist for organizations that operate in the nonprofit realm. This requires nonprofit employers and employees to understand how the law of sexual harassment and retaliation affects their daily responsibilities in the workplace. Like many areas of the law, sexual harassment and retaliation can be complex, but understanding the practical and common-sense notions that drive this field of law can help avoid problems in any employment setting.

SEXUAL HARASSMENT DEFINED

Sexual harassment in employment is prohibited under federal and state law, as well as under local law in certain jurisdictions such as the District of Columbia. Under federal law, Title VII of the Civil Rights Act of 1964 forbids employment discrimination based on sex, as well as on other characteristics such as race, religion, color and national origin. The District of Columbia Human Rights Act prohibits employment discrimination based on a broader category of characteristics: "race, color, religion, national origin, sex, age, marital status, personal appearance, sexual orientation, gender identity or expression, family responsibilities, genetic information, disability, matriculation or political affiliation." As a result, harassment in the employment context can take a number of forms. For the purposes of this article, we have focused on one of the most common forms, sexual harassment.

So, what is "sexual harassment"? Sexual harassment includes verbal or physical conduct that denigrates or shows *hostility or aversion* toward an individual based on sex. This definition has a few parts to it. First, sexual harassment can come in different varieties: verbal or physical conduct. Most people think of harassment as involving physical conduct, like touching, groping or fondling. More often, however, sexual harassment involves verbal conduct, such as comments that directly or indirectly refer to an individual's sex or comments of a sexual nature. Of course, the two types of harassment can be (and often are) combined. For example, if a supervisor brushes up against an employee regularly and calls her names like "baby," "honey" and "sweetie," that is both verbal and physical conduct.

Second, harassment is premised on *discrimination*. It involves treating people in a certain manner *because* of their sex, and generally differently than those of the opposite sex.

Third, harassing conduct can include verbal or physical conduct that (a) has the *purpose or effect* of creating an intimidating, hostile, or offensive working environment, (b) has the *purpose or effect* of unreasonably interfering with an individual's work performance or (c) otherwise adversely affects an individual's employment opportunities.

The terms "purpose" and "effect" are important because they provide a standard to determine whether certain conduct may constitute sexual harassment. "Purpose" requires an employer to consider the issue from a reasonable-person standard. The employer should ask, "Would the average person be offended by the conduct?" "Effect" requires the employer also to consider the issue from the employee's perspective. Here, the employer should ask, "Was *she* offended by the conduct?"

This standard is central to determining what constitutes sexual harassment. In certain situations, a person can violate one part of the standard and not the other. The objective, reasonable-person element allows the courts to screen out claims brought by extraordinarily oversensitive people. From an employer's perspective, the objective aspect also allows the employer to assess the seriousness of a particular incident and determine how to respond appropriately. And, although it does not arise very often, the requirement that a person be subjectively offended roots out those claims where the alleged victim was not offended at all but is merely manufacturing a claim. For example, this occurs in cases where the employee who is complaining of sexual harassment based on a "hostile work environment" (explained further below) herself frequently makes sexual jokes and comments.

QUID PRO QUO SEXUAL HARASSMENT

Historically, courts have recognized two categories of sexual harassment. The first category, referred to as "quid pro quo" – Latin for "this for that" – involves sexual advances or conduct linked to an employment decision. Generally, quid pro quo sexual harassment exists when (a) an employee's submission to or rejection of sexual advances or conduct of a sexual nature is used as the basis for employment decisions with respect to the employee or (b) the employee's submission to such conduct is made a term or condition of employment. In the sexual harassment context, it most commonly refers to a supervisor insisting upon sex in return for promotions, other job benefits or continued employment.

The central component of quid pro quo cases is a link between an employment decision – such as work assignments, salary, position transfers or promotions – and the harasser's sexual advances or requests for favors. In the everyday office setting, this type of conduct usually involves a supervisor or manager. Lower-level employees, by definition, usually do not have the power to fire someone or promote someone, so there is no ability to link the employment action with the sexual advances. Examples include a supervisor asking a lower-level employee out on a date. If the employee refuses and the supervisor decides not to give her a promotion, or to fire or demote her because of that refusal, the supervisor has violated the law.

RETALIATION AND "ADVERSE EMPLOYMENT ACTION"

Not only must an employer work to ensure that employees do not engage in sexual harassment, it must also protect from retaliation employees who report possible sexual harassment. Specifically, under Title VII, an employer is prohibited from taking an "adverse employment action" against an employee because he or she has opposed a discriminatory employment practice, or because he or she has made a charge, testified, assisted or participated in any manner in opposing an allegedly discriminatory practice. This applies to *either* quid pro quo or hostile work environment sexual harassment claims, which are discussed further below.

Certain employer actions – such as denial of a promotion, demotion, suspension or discharge – obviously make up an "adverse" employment action. However, an adverse employment action can also include less-obvious acts that do not necessarily relate directly to employment. In June 2006 the U.S. Supreme Court determined that an employer can retaliate against an employee by taking actions not directly related to his or her employment or by causing the employee harm *outside* of the workplace. *See Burlington Northern & Santa Fe Ry. Co. v. White*, 126 S. Ct. 2405, 2412 (2006). In *Burlington Northern*, the Supreme Court provided an example of an employer that filed false criminal charges against a former employee who complained about discrimination. In another example, the Court discussed a case in which the FBI refused to investigate death threats that a federal prisoner made against an FBI agent who complained about discrimination. Such actions are not directly related to the workplace, but have an equal or even more severe retaliatory effect on employees.

These examples are not meant to suggest that an employer must go as far as filing baseless criminal charges against an employee in order to retaliate in violation of the law. In the *Burlington Northern* case, the Supreme Court stated that an adverse employment action (whether it directly affects employment or causes harm outside of the workplace) is one that would "*dissuade[] a reasonable worker from making or supporting a charge of discrimination"* (emphasis added). As with other aspects of sexual harassment law, employers should consider the objective standard here. Adverse employment actions may include, for example, a change in job duties that falls within the same job description, as was the situation in *Burlington Northern*. In that case, the Supreme Court found that the reassignment of a female factory worker from forklift duty to more arduous and "dirtier" track laborer tasks provided sufficient evidence of retaliation, even though her job description did not change.

Thus, an employer's decision to reassign an employee to handle less-desirable duties within the organization – while not officially demoting the employee or changing that employee's title – can nevertheless be an adverse employment action if it would make a reasonable employee think twice about reporting sexual harassment. Given this evolving framework, employers should take even more caution than before when reacting to a sexual harassment incident.

Further, an individual who alleges retaliation need not be the same person who was subject to the alleged discrimination. So, for example, a male employee may claim retaliation because he reported sexual harassment of a female employee that he witnessed. Employees are protected from retaliation for reporting allegations of discrimination to a court or to an administrative agency such as the Equal Employment Opportunity Commission (EEOC). In addition, any employee who submits evidence on behalf of, or otherwise supports, an individual's complaint is protected from retaliation. As a result, employers must avoid retaliating against the primary party who complains of sexual harassment *and* any other employees who participate in the investigative process.

HOSTILE WORK ENVIRONMENT SEXUAL HARASSMENT

An employer can also violate the law by allowing harassment to create a hostile work environment. Generally, a hostile work environment claim exists when the conduct (a) is clearly unwelcome, (b) is severe or pervasive and (c) alters the conditions of the victim's employment and/or creates an abusive working environment. Hostile work environment claims are by far the most common type of sexual harassment cases filed.

Like quid pro quo sexual harassment, hostile work environment claims involve sexual advances, requests for favors, and/or verbal or physical conduct of a sexual nature. Employers should recognize that a hostile work environment may exist *without* any relation to a particular employment decision. Notably, an employee can be subject to a hostile work

environment even if the employee experienced no negative effect to the terms of employment, such as a demotion. Nonetheless, these types of claims often overlap with quid pro quo claims.

The "severe and pervasive" standard is important for employers to consider in terms of what they may legally tolerate in the workplace. Relatively innocuous events alone will not meet the "severity" requirement. For example, employers need not take significant issue with a single incident of a male employee commenting about a female employee's style of dress. (Of course, employees who engage in such behavior should be told that it is unacceptable.) The "pervasive" aspect of this standard requires the conduct to be widespread. Comments uttered just once, even if relatively egregious, generally will not meet the pervasive standard, nor will isolated incidents. In contrast, a single incident alone can amount to quid pro quo harassment.

In deciding what is lawful and what is unlawful, courts look at all of the circumstances involved. Courts try to understand the particular employment atmosphere and attempt to put themselves in the shoes of the plaintiff in the work environment. Often, a court will consider issues such as the frequency of the conduct and whether the conduct was physically threatening, humiliating or merely offensive. Further, the court will ask whether the conduct interfered with the person's ability to work and function in the given environment. Therefore, context plays a critical role in determining hostile work environment claims. Single "compliments" alone will not constitute sexual harassment. Nor will a single request for a date. However, the cumulative effect of that sort of conduct, when paired with other unwelcome behavior over time, may result in a valid sexual harassment claim.

Examples of verbal conduct that could establish a claim for hostile work environment include sexual jokes, discussions about sex, remarks about an employee's appearance or anatomy, or persistent requests for a date. In terms of physical conduct, examples include repeated touching, pinching, hugging and brushing; serious sexual contact (such as fondling or groping); or excessive staring or leering. Employers should stress to their employees that such behavior will not be tolerated. In particular, if this sort of behavior occurs outside of an isolated context, employers must react *before* it becomes a pervasive pattern.

Again, employers must note that the anti-retaliation provisions of Title VII discussed above apply in the hostile work environment context as well. Finally, employers should recognize that they may be found liable even if they instruct supervisors in their workplace not to engage in certain types of behavior. Thus, reacting appropriately to incidents that occur is only part of an employer's responsibility. On top of that, employers also need to monitor employees and have formal sexual harassment compliance programs in place.

ENCOURAGING INDIVIDUALS IN YOUR OFFICE TO PREVENT SEXUAL HARASSMENT

There are a number of ways in which employers and employees can avoid situations that may lead to sexual harassment claims. For one, employers should stress that all personnel are to keep their hands to themselves. This does not mean that people in your office can't shake hands. However, context and personal judgment should make it fairly obvious what sort of physical contact is acceptable in an office environment. Sexual humor should be avoided. Again, people should use their judgment here. Encourage people to know their audience. What may be funny to one person is not necessarily funny to someone else.

As for deciding whether something could be considered sexual harassment, there are a few helpful rules of thumb. Encourage individuals in your office to ask themselves questions such as –

- "How would I feel if I was in the other person's shoes?"
- "Would I say this in front of my spouse?"
- "Would I want someone to do this or say this to my children?"
- "Would I want to read about what I'm saying or doing in the local paper?"

If an employee offends another person in your office, he or she should be urged to apologize and agree to avoid acting in that manner again. This sounds like a simple solution, and, to a large degree, it is. An apology and assurances from the individual that the behavior will not continue could prevent a formal sexual harassment complaint or lawsuit in the future. Similarly, if someone acts in an offensive way, the offended party should be encouraged to voice his or her concerns. More importantly, encourage the offended party to report the situation to someone else in the office. This not only helps to diffuse situations before they escalate, but also fosters a non-retaliatory culture within the workplace.

Finally, employers and employees must use common sense. This is something that all of us possess, but don't always use. Encouraging those in your nonprofit workplace to rely on their common sense will go a long way in preventing sexual harassment incidents.

CONTACT INFORMATION

Akin Gump Strauss Hauer & Feld LLP is proud to work closely with the D.C. Bar CED Project. If your organization has legal needs, please contact:

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