> Updates on Sexual Harassment Law for 2013

by Andrew (Drew) Kozlow

The Equal Employment Opportunity Commission received about 7,500 charges of workplace sexual harassment in 2012, a figure that has been fairly consistent over the past few years, but is substantially lower than the high of 15,889 in 1997.

However, the actual number of people who have experienced sexual harassment at work is likely much higher, according to Fatima Goss Graves, the vice president for education and employment at the National Women's Law Center.

Though a significant share of Americans are victims of sexual harassment in the workplace, experts say that many do not report it out of fear of retaliation or worries their co-workers will make them feel ashamed by the experience and other concerns.

Sexual harassment is prohibited regardless of the gender of the harasser and the victim, and whether both are the same sex. Any conduct of a retaliatory nature is strictly prohibited.

Sexual harassment includes many forms of offensive behavior. A partial list includes:

- Unwanted sexual advances;
- Offering employment benefits in exchange for sexual favors;
- Actual or threatened retaliation;
- Leering, making sexual gestures or displaying sexually suggestive objects, pictures, cartoons, or posters;
- Making or using derogatory comments, epithets, slurs, or jokes;
- Sexual comments including graphic comments about an individual's body, sexually degrading words used to describe an individual or suggestive or obscene letters, notes, or invitations; and
- Physical touching or assault, as well as impeding or blocking movements.

Under current law, there are two theories of sexual harassment in the workplace: 1) quid pro quo, the unwelcome or inappropriate promise of rewards in exchange for sexual favors; and 2) a hostile work environment, which occurs when the harassment is so severe or pervasive that it alters the conditions of employment and creates an abusive work environment.

Title VII of the 1964 Civil Rights Act makes it easier to hold a company accountable for workplace harassment if the harasser is considered a supervisor. If the harasser is simply a co-worker, the company can defend itself just by proving it was not negligent in dealing with any complaints. However, in a win for employers, the United States Supreme Court in Vance v. Ball State (June 24, 2013) adopted a narrow definition of who is a "supervisor," holding that it must be a person empowered to take tangible, adverse actions against the worker, like demoting or firing the worker or cutting pay.

However in California employers need to be aware that employees are more likely to sue an employer under the California Fair Employment and Housing Act (FEHA) rather than Title VII (federal law). FEHA defines a "supervisor" as someone having the ability to hire, fire, discipline "or the responsibility to direct" the employee. Thus the state law definition is broader and would include someone such as a shift leader who has day-to-day responsibility over the worker. It remains unclear what impact, if any, the Vance decision will have on cases brought under California law.

On Aug. 12, 2013, Gov. Jerry Brown signed into law state Senate Bill 292, which revises the definition of sexual harassment under the FEHA. The new definition makes it clear that employees who assert claims of sexual harassment need not show the harassment is motivated by sexual desire. The new law becomes effective Jan. 1, 2014.

Senate Bill 292 overturns the 2011 California Court of Appeal decision Kelley v. Conco Companies. In Kelley, the court held that, in order to prove unlawful sexual harassment because of sex, the plaintiff in a same-sex harassment hostile work environment case had to establish that the harasser was motivated by sexual desire.

2013 is also a training year in California under Gov. Code §12950. 1 (AB 1825 which became law on Jan.1, 2005), and requires employers with at least 50 employees to provide two hours of classroom, webinar, e-learning or other effective interactive training and education regarding sexual harassment prevention to supervisory employees. New supervisors must be trained within six months of being promoted to a supervisory position and every two years thereafter.

Persons qualified to deliver AB 1825-compliant training include:

- Attorneys;
- Professors or instructors; and
- Human resources professionals or harassment prevention consultants.

Employers must track the training provided to each employee. Employers can use individual tracking, training-year tracking or a combination of the two methods.

The DFEH can penalize employers who fail to comply with the training requirement. The law states that compliance with AB 1825 is not a defense to a sexual harassment claim and, conversely, that a supervisor's failure to receive training is not grounds for establishing liability for harassment under the FEHA.

If you have not done any training in the past two years, and are required to under California law, you must do it by Dec. 31, 2013. Even if your company has less than 50 employees, it remains good policy to provide the training to supervisors. ■

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