

SEXUAL HARASSMENT ISSUES



Who among us has not been bombarded by the allegations of sexual harassment in Hollywood, the U.S. Olympics and on Capitol Hill? However, the most prevalent venue for sexual harassment has been the workplace. Thousands of sexual harassment suits have been filed in federal and state courts across the country over the last ten years, (mostly by women against men, but with a significant minority going the other way). If the plaintiff prevails, the financial consequences can be catastrophic, with office morale perhaps beyond repair and public image tarnished. Even if the company wins, the protracted litigation is still expensive, incredibly distracting and disruptive to productivity.

If one of your employees alleges that a male or female co-worker or manager has said or done something to her/him that she/he finds sexually offensive, what can the company do to minimize the chances that this encounter mushrooms into litigation?

First and foremost, you cannot simply put your head in the sand and hope the problem just goes away. It won't. It never does. The key is to be proactive and undertake a thorough investigation of the allegations to determine whether they are true or false. Only then do you have the information at hand to make an informed decision. If the allegations are true, or even partially true, a company can then take corrective action whether it is counseling, disciplining or terminating the perpetrator. If, after a thorough investigation, the allegations prove false, or truly incapable of verification one way or the other, the company may be justified in taking no action at that time, being assured that if the complaining employee sued anyway, it can fall back on the defense that its' failure to take corrective action was based on the best evidence available to it.

So, an investigation is essential. But by whom? This is the all-important question. Human Resources? Perhaps. But there are a number of reasons why that might not be the best route. (1) If the target of the complaint is a higher-up executive, the HR manager may be swayed (or intimidated) to rule in the executive's favor. This is perfectly understandable; (2) Good investigations may take a long time to conduct and complete. The HR department may not have time or resources to be up to the task. This is especially the case in a smaller company; and (3) With all due respect to the men and women who handle human resources' problems, they may not be sufficiently knowledgeable in the complexities of sexual harassment law to know what questions to ask the complaining party or the accused. Nor may they be aware of what witnesses to contact, or what documentation might be relevant.

Another avenue of recourse for the Board of Directors/Trustees might be the company's law firm, which undoubtedly employs the services of attorneys well-versed in employment law. However, problems are created if the attorney speaks to witnesses, and takes notes or sworn statements from each, as the attorney may later be called as a witness at the trial to authenticate the accuracy of what an employee told the attorney, especially if an employee has changed his or

her story from what was first shared with the attorney. Under the law, an attorney cannot serve as a witness for a client in the same litigation in which he or she also represents the client. The company may be forced into retaining a new law firm, if a lawsuit is filed.

The best course of action would be for the Board of Directors/ Trustees to hire an independent attorney fully knowledgeable in sexual harassment law, for the sole purpose of conducting an altogether neutral, arms-length in-depth investigation. There are three major advantages to this approach: (1) If the alleged perpetrator is relatively high in the company, perhaps even at the Vice President or CEO level, an independent attorney who has no ties to the law firm representing the company, will be far more comfortable in following the evidence wherever it may lead; (2) Since the investigation is both thorough and objective, the investigating attorney's report and his or her testimony at trial as a witness will be accorded more credence by the judge and jury; and (3) If litigation is initiated, the company's attorney can put on a competent and vigorous defense of his or her client without the fear of having to serve as a disqualifying witness.

Finally, the retention of an independent attorney to investigate the sexual harassment allegations will not result in extra legal expense to the company, since the fee that is paid to the investigating attorney is money that would have otherwise been paid to the company's own law firm. Donald B. Hordes, Esq. is an employment law attorney with our firm, who has been practicing in this area of law for 40 years. Don frequently lectures on various aspects of employment law including sexual harassment and would be happy to give a presentation regarding prevention of workplace harassment and violence to your company or organization. He has also been retained by employers to conduct independent investigations into allegations of sexual harassment. Contact Don at dhordes@ritter-randolph.com.