How to Avoid Employer Liability for Sexual Harassment

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"Hostile work environment" and "sexual harassment" are words that strike fear into the hearts of employers everywhere: the upheaval in the workplace; the nightmare of the legal battle ahead; and the thoughts of huge jury verdicts. As it turns out, the legal battles of the past have provided employers the tools to avoid liability for the actions of bad employees. This article attempts to arm employers with those tools.

I. Background

To establish a claim for hostile work environment/sexual harassment, an employee must prove five elements:

1. the complainant is a member of a protected class;
2. the complainant was subject to unwelcomed sexual harassment;
3. the harassment was based on the complainant's sex;
4. the harassment created a hostile work environment; and
5. employer liability.

See Williams v. General Motors, 187 F.3d 553, 561 (6th Cir. 1999).

This article focuses on the last element, employer liability. The tried and true advice to limit employer liability is to take every complaint of harassment seriously, investigate the complaint promptly and thoroughly, and respond/punish promptly and appropriately. But that attitude focuses on post-harassment conduct – when an employer often finds themselves already in trouble.

The purpose on Title VII is not only to compensate employees subject to harassment, but also to prevent workplace harassment. *See Faragher v. City of Boca Raton*, 524 U.S. 775, 805-06 (1998). In discussing that purpose, courts have written what amounts to a how-to guide to limit employer liability for sexual harassment. Employers can both prevent harassment and protect themselves from liability on the front end by following two simple guidelines: 1) implement and distribute/post clear policies for harassed

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employees to follow in case of harassment, including steps to be taken if the harasser is a supervisor; and 2) take steps to be aware of what is going on in the workplace – employee surveys, meeting with supervisors and employees, etc.

II. Co-Worker Harassment

The means to establish employer liability in hostile work environment/sexual harassment cases depends on whether the harasser is a co-worker or supervisor. In the case of co-worker harassment, liability is established by proving that the employer knew or should have known of the charged sexual harassment and failed to implement prompt and appropriate corrective action. *See Fleenor v. Hewitt Soap Co.*, 81 F.3d 48, 50 (6th Cir. 1996).

This statement of proof is comprised of two separate elements, both of which must be proved by a complainant: 1) that the employer knew or should have known of the charged sexual harassment; and 2) that the employer failed to implement prompt and appropriate corrective action. The second element only comes into play after harassment has occurred. The same goes for part of the first element; that the employer knew of the charged harassment. It goes without saying that it is important for employers to institute policies concerning prompt and corrective actions to be taken once the employer is aware of harassment. However, in a large number of hostile work environment/sexual harassment cases, employers are unaware of the harassment, and complainants hang their hats on the allegation that the employer "should have known." In these cases, a little preventative work on the front end could have saved employers significant amounts of money on the back end.

"Should have known" – easy enough to say and understand, but what can an employer do to show it had no way of knowing of an alleged incident of harassment? An employer could issue monthly or quarterly employee surveys asking questions about work environment. Or, an employer could schedule regular meetings with a sampling of supervisors and lower-level employees to verbally enquire about their work environment. Another tack could be for

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employers to hold regular seminars on workplace harassment that stress the importance of reporting by those being harassed and their peers. While there certainly is no fool-proof method of guarding against "should have known," this nonexclusive list of steps could go a long way in litigation toward convincing a court that the employer should not have known about any alleged discrimination. And, importantly, answering the "should have known" question in the negative has the effect of disproving that one element and thus, prevents any employer liability.

III. Supervisor Harassment

When an employee claims hostile work environment/sexual harassment and his/her supervisor is the harasser, the elements of proof for employer liability are significantly different than in co-worker harassment. In fact, no proof of employer liability is required. An employer is presumed to be liable to a victimized employee for an actionable hostile environment created by a supervisor. *See Faragher*, 524 U.S. at 807. In other words, the employee is relieved of proving employer liability; rather, it is assumed.

This more onerous standard implicitly established an affirmative duty of the employer to prevent sexual harassment by supervisors. *See Williams*, 187 F.3d at 561. The Supreme Court, however, in the same opinion where it relieved complainants of having to prove employer liability in supervisor harassment, gave clear instructions on how to overcome this presumption of liability. If heeded, these instructions can help employers ensure they will not be held liable for supervisor harassment. As such, in the same opinion where the Supreme Court made it easier for complainants to collect from the employer for actionable supervisor harassment, the Court also made it easier for employers to guard against liability.

The Court in *Faragher* held that an employer may raise an affirmative defense to liability in sexual harassment cases by proving two things: 1) that the employer exercised reasonable care to prevent and promptly correct harassing behavior; and 2) that the complainant unreasonably failed to take advantage of the preventative and/or corrective opportunities provided by the employer. *See Faragher*, 524 U.S. at 807. In explaining these two

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requirements, the Court stated that a showing that there was a promulgated anti-harassment policy with complaint procedure, and that the complainant failed to avail his/herself of such complaint procedure should suffice to avoid employer liability. *Id.*

Here again, the Court has given a how-to guide to avoid liability that every employer should follow. First, establish and promulgate an anti-harassment policy with complaint procedures (being sure to include procedures for supervisor harassment). Second, when a complaint is made pursuant to those procedures, follow the tried and true advice above: take the complaint seriously, investigate it promptly and thoroughly, and respond/punish promptly and adequately. If employers follow these two guidelines, they should have a defense to liability in supervisor harassment cases.

As a caveat to this affirmative defense, it is only available to employers when no tangible, adverse employment action has been taken against the complainant. *See Faragher*, 524 U.S. at 807. If such an action has been taken in a sexual harassment case, all bets are off, and the employer is presumed to be liable without access to the affirmative defense described above. The employer must win on one of the other elements to avoid liability. This caveat puts a special emphasis on the delegation of authority to reprimand employees. When possible, that authority should be delegated to someone other than an employee's direct supervisor, with only a recommendation for action from the direct supervisor.

IV. Conclusion

Every company's nightmare is a hostile work environment/sexual harassment claim that actually has merit. And, there is certainly no foolproof way to prevent harassment from occurring between co-workers and between workers and supervisors. But, there are ways to protect against employer liability in those cases. With a little planning, company officials can get the peace of mind of knowing that while they can only do so much to prevent harassment, they can do a lot to prevent being held liable for it.

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