

# Preventing, investigating and defending harassment in the workplace

**STEPHEN P. POSTALAKIS**  
Blaugrund, Herbert & Martin Incorporated  
[spp@bhmlaw.com](mailto:spp@bhmlaw.com)

Ohio Association of County Boards of MR/DD  
2008 Spring Conference  
May 23, 2008

## Introduction

- ◆ While probably not occurring that often, sexual, racial, or other types of harassment can be devastating to an employer
  - Have to be concerned with not only the victim and harasser, but other employees, public, and family members of those involved
  - We will discuss how to effectively prevent and manage this issue if it should arise

## Legal Background

- ◆ Sexual Harassment:
  - Supreme Court has stated the following standard for imposing liability upon an employer for a supervisor's sexual harassment:
    - ◆ If the harassment results in a "tangible employment action," the employer will be held strictly liable
    - ◆ "Tangible employment action:"
      - "A significant change in employment status, such as hiring, firing, failing to promote, reassignment with significantly different responsibilities, or a decision causing a significant change in benefits."
      - Employment action must be materially adverse for an employer to be strictly liable for sexual harassment

3

## Legal Background

- ◆ If the harassment did not result in a "tangible employment action," the employer can escape liability, in the form of an affirmative defense:
  - The employer exercised reasonable care to prevent and promptly correct any sexual harassment; and
  - The employee unreasonably failed to take advantage of any preventive or corrective opportunities provided by the employer or to avoid harm otherwise
    - ◆ No affirmative defense is available when supervisor's harassment culminates in a tangible employment action, such as discharge, demotion, or undesirable reassignment

4

## Prevention

- ◆ Adopt a policy that prohibits harassment by any employee, especially supervisors
  - Supervisors can be individually liable under Ohio law
  - Supervisory sexual harassment makes you strictly liable, but harassment by co-worker does not
    - ◆ Employer will be liable only where the plaintiff can demonstrate that employer knew or should have known of the harassment and failed to take appropriate remedial action

5

## Prevention

- ◆ Policy:
  - Policy can cover more than just sexual harassment
  - Mere adoption is not enough: Disseminate, publicize, and make employees sign for receipt and understanding of the policy

6

## Prevention

### ◆ Policy:

- Follow the KISS method regarding reporting
  - ◆ Make the process easy for employee
    - 800 number, email, open-door
- Provide alternatives:
  - ◆ Include a number of options for reporting, because victim will see it futile to report harassment to the supervisor doing the harassing

7

## Prevention

### ◆ Policy:

- Advise employees that “off-the-clock” activity is covered and prohibited as well.
- It is one thing to ask somebody out on a date; it is quite another to step over the line
  - ◆ Being away from work won’t insulate the board, especially if supervisor is involved or a supervisor or the board knows what is going on.

8

## Prevention

### ◆ Training

- Train all employees on sexual harassment and other harassment
  - ◆ Do it annually and for every new employee
  - ◆ Make it commonplace so that employees recognize it and feel comfortable with reporting it

9

## Prevention

### ◆ Training

- Make employees understand that the board is a professional work environment
- Jokes are not acceptable, even if everybody engages and no one is offended
- If cannot say it, do it, or show it to your mother/grandmother, then leave it at home, for friends and not co-workers and subordinates

10

## Prevention/Investigation

### ◆ Take all complaints seriously

- Investigate thoroughly: failure to do so can doom case
  - ◆ "The most significant immediate measure an employer can take in response to a sexual harassment complaint is to launch a prompt investigation to determine whether the complaint is justified." By doing so, "the employer puts all employees on notice that it takes such allegations seriously and will not tolerate harassment in the workplace."
- Collette v. Stein-Mart, Inc., 126 Fed. Appx. 678, 686 (6th Cir. Mich. 2005)

11

## Investigation

### ◆ Steps to take:

- Relay complaint to HR or responsible staff/division within the board
- Reassign, transfer, suspend alleged harasser
- If cannot do that, warn harasser that should have no contact with victim and make that happen
  - ◆ No retaliation!

12

## Investigation

- ◆ Steps to take:
  - Interview all persons involved (victim and accused) and all relevant co-workers
  - Seek input from the victim and provide options to him/her
  - Maintain confidentiality during investigation

13

## Evaluation

- ◆ Once investigation is complete, do the following:
  - Analyze the results of the investigation, including credibility of witnesses, corroboration of allegations, history of behavior and prior complaints

14

## Evaluation

### ◆ Analysis:

- Was the action/behavior based upon sex or something else?
- Any tangible employment action to redress?
- Did victim avail him/herself of policy and procedures?
  - ◆ Victim does not get to decide that it would be futile

15

## Evaluation

### ◆ Take appropriate action, with both victim and accuser

- Notify both of results
- Discipline as appropriate
- Make counseling available to victim, if desired, and do what is necessary to correct any problems

16

## Defending

### ◆ Questions:

- Sexual harassment: did employee avail him/herself of employer's remedial process and reporting procedure?
  - ◆ Did employee ever complain?
- Was employee subject to "tangible employment action?"
- Was harasser a supervisor or co-worker?

17

## Defending

### ◆ Was behavior severe and pervasive enough to alter work environment?

- Look to "all the circumstances," including "the frequency of the discriminatory conduct; its severity; whether it is physically threatening or humiliating, or a mere offensive utterance; and whether it unreasonably interferes with an employee's work performance"

18

## Defending

- ◆ Adoption, dissemination, and training on policy will go a long way to defense of a harassment lawsuit
- ◆ Appropriate investigation and response are necessary to successfully defend

19

## Questions ???

Thanks for attending!

20