Haas Consulting Services, LLC

An Update on Sexual Harassment

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(Note: A recent development in the area of sexual harassment is the new definition of "supervisor" as it relates to this issue. It has also become more important than ever that employers maintain sexual and racial harassment policies that provide employees with procedures for reporting claims, and that employers adequately respond to any claims that are reported.)

What is a "supervisor"? Last year, the Second Circuit Court of Appeals answered that question in a case involving a sexually and racially hostile work environment claim by Yasharay Mack, a former elevator mechanic helper, against her employer, Otis Elevator. Mack claimed she was being harassed, discriminated against and was retaliated against by her mechanic-in-charge, James Connolly. He was not able to fire, demote, transfer or discipline Mack but was responsible for overseeing her work and ensuring the quality of the work project. Connolly was the highest-ranked employee on-site and his supervisor was seldom there.

A Brief Review of the Legal Background

Courts have historically categorized sexual harassment in two types – hostile work environment and quid pro quo. A hostile work environment is created when an employee becomes subjected to gender-based ridicule, hostility and insult in the workplace that is severe and pervasive. Quid pro quo exists where a supervisor requests that an employee engage in sexual activity with the threat of a penalty if he or she does not comply or with the enticement of a reward if he or she does comply. While these concepts are helpful in understanding sexual harassment, they have become of limited use in determining the instances when an employer may be held vicariously liable in court for the actions of their supervisors.

Rather than focusing on the type of harassment, during the last six years courts have instead turned to a simple inquiry as to whether any tangible employment action has been taken. If tangible action has been taken, liability will generally attach to the employer. As a result, an employer is apt to be held liable in instances of quid pro quo sexual harassment at the workplace. In cases where a supervisor has engaged in sexual harassment and no tangible employment action has been taken, an employer may be liable if it cannot prove that reasonable care was exercised to prevent and promptly correct the sexual harassment (usually by means of an effective, well communicated and enforced policy), and the employee unreasonably failed to take advantage of preventive or corrective mechanisms provided by the employer, or failed to otherwise avoid the harm.

Thus, whether an employee is a "supervisor" is often pivotal in cases where an employee who suffered no employment action claims his or her "supervisor" engaged in sexual harassment. In Mack v. Otis Elevator, the Second Circuit held that Connolly was a "supervisor" because Otis Elevator gave him authority that augmented his ability to create a hostile work environment. In so holding, the court reversed the decision of the lower court that Connolly was not a Supervisor

because Connolly had no power to hire, fire, demote, promote, transfer or discipline Mack. As a consequence of the broader test imposed by the Second Circuit for defining a "supervisor," Connecticut employers have more exposure to liability for the actions of working supervisors at remote or isolated work sites. It would be prudent for employers to ensure that any employee who has authority over another at the workplace is treated as a "supervisor" for purposes of providing sexual harassment training.

The importance for an employer to have a clear, concise policy on sexual harassment cannot be overstated. It is an opportunity to provide employees with clear direction on what to do when confronted with an issue of sexual harassment, and delivers a strong message that it is prohibited in the workplace. Some well-written policies on sexual harassment prevention include these specific areas:

- Zero tolerance.
- Definition of sexual harassment (hostile work environment and quid pro quo).
- Sexual harassment is illegal (restatement of the law).
- Examples of prohibited conduct.
- Duties and responsibilities of each individual to report sexual harassment when it occurs.
- Statement that retaliation is prohibited.
- Complaint procedure.
- Alternative complaint procedures available to complainant.
- Investigation procedure.
- Potential corrective or disciplinary action (including termination).
- Confidentiality of the process.

Confidentiality is of the utmost importance when investigating an allegation of sexual harassment. Conducting an investigation that is confidential adds to the credibility of the process and helps maintain the dignity of those involved. A sexual harassment prevention policy provides a clear guideline to employees and should be displayed in areas where employees gather.

Maintaining a harassment-free workplace environment is not only the responsibility of each employer, but also the responsibility of each employee. It is always a good idea for employers to periodically review their policies and how they communicate this responsibility to employees.

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