

Reproduced with permission from Daily Labor Report, 04 DLR I-1, 01/06/2017. Copyright © 2017 by The Bureau of National Affairs, Inc. (800-372-1033) <http://www.bna.com>

Preventing Harassment in the Workplace: An Updated Analysis of the EEOC's Call for a "Reboot"

Sexual Harassment

With the imminent arrival of a new Trump Administration, employers are wise to evaluate what changes may be coming. Employers should not lose sight, however, that workplace harassment is likely to remain a substantial problem. In this *Bloomberg Law Insights* article, Todd A. Leeson, a partner with Gentry Locke, discusses a few takeaways from the report of the EEOC Select Task Force on the Study of Harassment in the Workplace. While harassment claims encompass unwelcome conduct based on any protected class, Leeson's primary focus in this article is on sexual harassment.

TODD A. LEESON

Did you know that of the 90,000 charges filed with the Equal Employment Opportunity Commission in fiscal year 2015, almost 1/3 included an allegation of unlawful "harassment" in the workplace? Moreover, according to the EEOC's latest research, at least 70 percent of persons who experience "harassment" at work never report it to anyone either internally (e.g., Human Resources or a supervisor) or externally (e.g., EEOC charge). As you probably know, in January 2015 the EEOC announced that it would establish a Select Task Force of diverse and experienced persons to investigate the prevalence of workplace harassment, and to offer analysis and solutions.

The Task Force held meetings and received testimony from dozens of experts. In June 2016, the co-chairs of the Task Force published an 88-page report (the "Report") with the stated goal of "reducing the level of harassment in our workplaces to the lowest level possible." (The full report can be accessed from

the EEOC's website. https://www.eeoc.gov/eeoc/task_force/harassment/report_summary.cfm.) They urged a "reboot" of our collective efforts towards this goal. Although lengthy, the Report is a useful document that is well-organized, and contains helpful insights and advice for employers.

With the imminent arrival of a new Trump Administration, employers are wise to evaluate what changes may be coming. Employers should not lose sight, however, that workplace harassment is likely to remain a substantial problem. We have now had 6 months to absorb the Task Force Report. This article will discuss a few takeaways for employers. While harassment claims encompass unwelcome conduct based on any protected class, my primary focus will be on sexual harassment.

How are we defining the term "harassment?"

When I lead employment law training for my corporate clients, I often tell the story of a time in which I had the audacity to ask my teenage daughter about her day at school. She responded that I needed to stop "**harassing**" her. While we know that my question would not constitute unlawful "harassment" under Title VII, we must be mindful that the term "harassment" is regularly used to describe a wide variety of conduct that is not unlawful. Synonyms of "harass" are words such as "pester" or "annoy."

Because the Task Force's focus was on prevention, it also did not confine its analysis to the legal definition of workplace "harassment." Instead, it defined the term "harassment" as conduct that was "unwelcome or of-

Todd Leeson is a partner with the Gentry Locke law firm in Roanoke, Virginia. He has over 27 years of experience representing businesses in employment and labor law matters and litigation. Todd is rated "AV/Preeminent" by Martindale-Hubbell, and is repeatedly named one of the Best Lawyers in America® in Labor & Employment Law.

ensive,” based on gender (or a protected class), and which was detrimental to an employee’s work performance, professional advancement, and/or mental health.

Indeed, the Report found that when persons are surveyed as to whether they have experienced “sexual harassment” at work, the responses differ widely depending on the definitions offered. For example, when the term is defined to include whether women have experienced “sexist or crude/offensive behavior” at work, almost 60 percent of women have experienced such conduct.

I offer two takeaways. First, most companies would likely view any sexist or crude conduct towards a woman as a violation of their EEO or anti-harassment policy. If so, however, employers must be aware that they are deciding that certain conduct is not acceptable even though the conduct may not be unlawful.

Second, given the different definitions and uses of the term “harassment,” company management should be careful as to their communications in response to a complaint under the company’s policy. Managers should be trained to refrain from calling it a “harassment” complaint or from concluding that an employee engaged in “harassment.” The better course is to focus on the alleged facts. If the company determines that improper or offensive conduct occurred, it should be documented as a violation of company policy (and the company should take proportional corrective action, as well as steps to ensure that no retaliation occurs).

Is there a compelling business case for harassment prevention?

Minimizing potential legal liability and related costs are significant factors impacting a company’s decision to emphasize its commitment to being an equal employment opportunity (EEO) employer. If your company has been a defendant in a harassment or discrimination case, you are well aware of the time, energy and costs expended even if you ultimately “win” the case. The Task Force opined, however, that these direct costs are “just the tip of the iceberg.” Their research persuasively demonstrated that unchecked harassment leads to a host of “indirect costs” that can “tower over the direct costs.” The Report analyzes costs such as personal harm to the victim, decreased productivity, increased turnover, and reputational harm. These additional “costs” also have a significant adverse impact on a company’s bottom line.

What is the culture of your workplace?

Prevention efforts will fail unless there is proactive leadership and commitment by a company’s top executives. To this end, what is the level of discourse in your facility? Are all employees treated with civility and respect? Is profanity or crude conduct condoned? Is management held accountable for their own conduct as well as the conduct of those persons they supervise? The Task Force evaluated these questions.

It should be a given that companies will hold their employees accountable to comply with their stated EEO policies and commitment. To be successful in minimizing improper harassment, a company must also ensure that its culture is not one that serves as a breeding ground for unacceptable conduct. I like this quote from the Report:

If leadership values a workplace free of harassment, then it will ensure that harassing behavior against employees is prohibited as a matter of policy; that swift, effective, and proportionate responses are taken when harassment occurs; and that everyone in the workplace feels safe in reporting harassing behavior. (Report, p. 32).

In sum, executive leadership must send a clear message with its actions that offensive conduct in the workplace is not acceptable.

What year was your harassment policy last reviewed, and by whom?

I am a management-side employment lawyer based in Roanoke, Virginia. My clients include large, international corporations, as well as smaller companies with relatively lean HR departments. Regardless of the size of a company, I still regularly see harassment policies that are not compliant and/or are not well written. For some companies, their HR professionals are often overburdened with other legitimate priorities. Thus, they typically dust off their employee handbooks every few years, and then update them quickly so they can check this task off their “to do” list. Conversely, larger corporations often task corporate HR and/or in-house counsel to develop corporatewide policies. In my experience, these policies are sometimes too long and too legalistic.

Employees today are often prolific users of social media and emerging technologies to communicate about anything and everything, including information about their work lives. Unfortunately, employees sometimes cross the line in their postings on social media. The Task Force recommends that employers emphasize in their harassment (and social media) policies that the company’s EEO policies are equally applicable to an employee’s social media use.

The Report reminds us of the value of a well-written harassment policy, and also provides a checklist of items that should be included in a policy. The reality is that all employers would benefit from a fresh evaluation of their policies and processes.

For decades, employment lawyers have urged companies to have robust discrimination and harassment policies, with complaint protocols that are easy to follow. When is the last time your company updated its EEO, discrimination, harassment and retaliation policy and complaint procedure? Was the policy approved by counsel with sufficient employment law experience? If you are reading this article, I hope you will take the cue and invest the time and resources to ensure that your policy and process is coherent.

What steps are you taking to educate or train your managers and your employees as to the company’s commitment to prevent and/or address harassment?

Perhaps the most surprising finding of the Task Force is that corporate harassment training over the last 30 years has been largely ineffective. In other words, the training has not worked as a tool to prevent or reduce harassment at work. There are a number of reasons for this finding. Nevertheless, the Report still emphasizes that “training is an essential component of an anti-harassment effort.”

Employers should dedicate sufficient resources to train middle-management and first-line supervisors on how to respond effectively to harassment that they observe, that is

reported to them, or of which they have knowledge or information—even before such harassment reaches a legally-actionable level. (Report, p. 53)

The Task Force also has much to say about the type of training provided.

For example, the Report stressed that training should not simply focus on “legal compliance” and should not be a “canned, ‘one size fits all’ ” approach. Similarly, the Report urged employers to engage live trainers who are “dynamic, engaging and have full command of the subject matter.”

As discussed above, such training must also be part of a larger commitment that includes a focus on company culture, leadership, and accountability. On this point, the Report cited research that “incivility is often an antecedent to workplace harassment.” Thus, the Task Force also recommends that employers expand their training to establish expectations of “civility and respect” in the workplace. (As an aside, the EEOC recognizes that its position is at odds with the current makeup of the National Labor Relations Board, which has found that policies requiring civility or respect vio-

late Section 7 of the National Labor Relations Act. The report recommended that the EEOC confer with the NLRB to clarify and harmonize the tension.)

Finally, it is important to ensure that your employees will have ready access to your policies and complaint process. As you know, there is a new generation of workers who consume information electronically (or not at all). Accordingly, companies should strongly consider making their policies available online and/or accessible from a mobile device.

Conclusion

I recently attended The Virginia Bar Association’s annual employment law seminar, where current EEOC Commissioner Victoria Lipnic was a featured speaker. Ms. Lipnic is also one of the co-authors of the Task Force Report. She spoke passionately at the seminar on the significance of this workplace issue. I, too, am persuaded that companies would be well served if they participate in the “reboot” of their harassment prevention efforts. I highly recommend that employers devote the necessary time and resources to reassess their commitment and strategies to minimize harassment.