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ARTICLES & INSIGHTS

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EEOC Issues Updated Guidelines Regarding Investigation of Workplace Harassment

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For the past year, the Equal Employment Opportunity Commission (EEOC) has been investigating and evaluating the prevalence of workplace harassment around the country. Led by Commissioners Chai Feldblum and Victoria Lipnic, the EEOC recently released a report outlining its findings and recommendations for eliminating harassment in the workplace.

In 2015, the EEOC received approximately 90,000 charges, with nearly one-third involving a complaint of workplace harassment. Workplace harassment has been considered a form of discrimination under Title VII of the Civil Rights Act of 1964 since the U.S. Supreme Court decided *Meritor Savings Bank v. Vinson* in 1986. Harassment in the workplace can come in many forms, including inappropriate conduct based on sex, race, disability, age, ethnicity/national origin, color, and religion.

The EEOC noted that many incidents of workplace harassment go unreported by employees. Many individuals, particularly those who experience sex-based harassment, tend to “avoid the harasser, deny or downplay the gravity of the situation, or attempt to ignore, forget, or endure the behavior.” Although the most effective way of stopping harassment is to report it, formal action by employees, whether internally or externally, has consistently been the least common response – an estimated 75% of people who have experienced harassment never reported it. The agency found that many employees fear some form of retribution if they report the harassment. And, many employees believe their claims will not be taken seriously.

Beyond ensuring a safe environment for all of their employees, another incentive for employers to stop workplace harassment is the economic and reputational impact it can have on an organization. In 2015 alone, the EEOC recovered \$164.5 million from companies embroiled in harassment lawsuits as a result of resolution. The report notes, however, that such legal fees are “just the tip of the iceberg.” Harassment also leads to “decreased productivity, increased turnover, and reputational harm” that can negatively impact companies beyond the monetary costs associated with defending a harassment claim.

In its report, the EEOC identified 12 risk factors that may make a work environment more susceptible to harassment.

1. Homogenous workforces: When companies have a “historical lack of diversity,” minority employees “can feel isolated and . . . vulnerable to pressure from others.”
2. Workplaces where some workers do not conform to workplace norms: The EEOC characterizes these types of companies as those that may have “rough and tumble” cultures or are dominated by one sex. In such workplaces, crude humor or abusive remarks may “promote workplace norms that devalue certain types of individuals.”
3. Cultural and language differences in the workplace: New employees who have a different cultural background than the rest of a company may find themselves segregated from their coworkers. Also, employees who are from other backgrounds may not be aware of employment laws and may, therefore, be “more subject to exploitation.”
4. Coarsened social discourse outside the workplace: When employees get together outside of work and discuss current events or politics, such activities may increase the likelihood that harassment and discriminatory behavior seep into the work environment.
5. Workforces with many young workers: Younger employees may not fully understand workplace norms or employment laws against harassment. Such lack of awareness inside a company with younger employees could result in a young employee engaging in harassment behavior directly or ignoring inappropriate behavior coming from a colleague because they lack the confidence to speak up for themselves.
6. Workplaces with “high value” employees: When there is a smaller number of high-level management or particularly successful employees, employers may be more willing to let such employees engage in behavior employers would otherwise not tolerate. As a result, such employees may feel “immune” or above the law because of their status within the company.
7. Workplaces with significant power disparities: If a company has a large number of employees who are “subject to the direction of others,” supervisors may feel that they can exploit employees, and those employees may be reluctant to report such behavior.
8. Workplaces that rely on customer service or client satisfaction: If employees are compensated based on customer satisfaction, they may be less inclined to complain about harassing behavior coming from a customer. Workplace harassment does not always occur behind closed doors — even customers can harass workers and an employer who permits such harassment may be held liable.
9. Workplaces where work is monotonous or consists of low-intensity tasks: When employees are not actively engaged in their work, “harassing behavior may become a way to vent frustration or avoid boredom.”
10. Isolated workspaces: If workplaces are physically isolated, “harassers have easy access to their targets”, witnesses to such behavior may not exist, and employees have few options to seek immediate help.
11. Workplace cultures that tolerate or encourage alcohol consumption: If employees consume alcohol with their colleagues, this could impair judgment and reduce inhibitions, creating a prime environment for harassment to occur.
12. Decentralized workplaces: When corporate offices or headquarters are “far removed” from baseline-level employees, members of management may not feel as readily accountable for any harassment that occurs on their watch.

After reviewing and analyzing the results of its investigation, the EEOC made a variety of recommendations centered on the formation of an all-out campaign titled: "It's On Us." Similar to the campaign of the same name that aims to curb sexual assault on high school and college campuses, the EEOC hopes that its similar campaign will help draw attention to the dangers and prevalence of workplace harassment. The agency's campaign will focus on three key goals: "increasing bystander intervention, defining consent, and creating an environment to support survivors."

The EEOC noted that a change in workplace culture "starts at the top." The leadership of a company often defines what behavior is or is not acceptable, and this new report is a call-to-action for employers everywhere to reevaluate their harassment policies. The agency suggests implementing new policies and training that teach the dangers of harassment and highlight the reporting systems in place. The EEOC recommends frequent communication with employees about the policies and says that the policies should be readily accessible. The EEOC urges employers to discipline harassers promptly, utilizing methods and practices that are proportionate to the harassing behavior. Such punishments should be consistent so as not to appear to show favoritism.

If you have questions regarding the EEOC's harassment report or other employment law issues, please contact Connie Carrigan at ccarrigan@smithdebnamlaw.com.

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