



# Create a Productive Work Environment by Eliminating Harassment

*Without proper policies, employee stress could lead to legal ramifications*

by Kathryn M. Vanden Berk

**A**t a time when nonprofit agencies are coping with funding shortfalls and focused on survival, some may unwittingly be opening themselves to legal liabilities by failing to recognize how severely stressed their employees have become. In such conditions, it's all too easy for the workplace to turn into a "hostile" or even "abusive" environment for some staff.

## Defining 'Hostile Work Environment'

The test for what constitutes a "hostile work environment" has been developed by federal courts as they have wrestled with complaints arising over the past several decades through the Equal Employment Opportunity Commission (EEOC) process.<sup>1</sup> The test in place today is partly *subjective* (what did the employee experience?) and partly *objective* (would a reasonable person also feel that way?).

Both parts look at the severity, frequency, and offensiveness of the conduct, as well as what eventually happened to the employee. Harassing conduct must be so extreme that it amounts to a change in the terms and conditions of employment.<sup>2</sup> Simple teasing, offhand comments, and isolated incidents (unless extremely serious) will not amount to discriminatory changes in the terms and conditions of employment.<sup>3</sup>

Of primary importance to you as the employer is how your role in the matter either defuses or exacerbates the problem.

You cannot completely control the behavior of your employees; the only thing you can be responsible for is how you respond to their poor behavior. How you respond will determine whether or not you can be successfully sued for harassment.

For example, a federal court in Ohio upheld a \$50,000 punitive damage award in a sexual harassment case because the employer's investigation was "half-hearted at best, and at worst, a sham." The court said the company's failure to investigate conduct intended to embarrass and ultimately drive its employee to resign from her job, demonstrated reckless indifference to her rights as an employee.<sup>4</sup>

In contrast, a federal court in Arkansas held that a police department was not liable because it took all steps that could reasonably be expected. It promptly investigated an employee's report of sexual harassment within days of the incident, insulated her from further offensive conduct, and took appropriate corrective measures, which included demoting, transferring, and ultimately terminating the offending employee.<sup>5</sup>

## Crafting an Anti-Harassment Policy

The first step to creating a safe and productive work environment is to adopt a policy that covers the key issues. Your anti-harassment policy should:

1. Prohibit all forms of harassment in the workplace. Specifically address

sexual harassment, but also prohibit harassment for all protected classes: race, color, gender, national origin, religion, disability, pregnancy, age, and military status. Discrimination based upon genetic information also recently became prohibited federally.<sup>6</sup> If your state's equal opportunity laws go further than these, be sure to include those as well.<sup>7</sup>

2. Describe clearly what conduct is prohibited:
  - quid pro quo threats or promises (loss of job or promise of job, promotion, or other employment benefit) by a supervisor;
  - offensive touching;
  - verbal harassment (lewd comments, sexual jokes or references, offensive or inappropriate personal questions, or negative comments based on the person's protected class status);
  - offensive pictures displayed in the workplace; and
  - offensive or inappropriate written materials (letters, e-mail messages, website and blog postings, or graffiti).
3. Provide a complaint and resolution procedure that includes a "bypass" mechanism in the event that a supervisor is involved.
4. Clearly state that violations will result in discipline, up to and including termination.
5. Provide a "no retaliation" statement for those who file complaints or who

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assist in the investigation process (see sidebar).

- Require employees who feel they have been subjected to harassment to file a complaint rather than to allow harassing behavior to continue. Specify that an employee's failure to report known abusers may in itself be subject to discipline.

When you have written the policy, be sure to educate your staff so that they know about the policy and understand that the organization has a "zero tolerance" position regarding harassment.

### Investigating, Resolving Complaints

Having a well-written policy is not enough. When complaints reach the EEOC or federal courts, the worst possible scenario comes when the employer has a written policy but did not follow it. Every complaint, no matter how minor it may appear, should be investigated.

Here are the steps to a legally defensible investigation process:

- Remind the person being interviewed that your policies prohibit retaliation for his or her participating in the investigation, and that any retaliatory behavior should be reported immediately.
- Be and appear as nonjudgmental and objective as possible; you won't know the outcome of the investigation until it has concluded.
- Ask open-ended questions such as, "Tell me what happened when you met Sally in the coffee room last Thursday." This does not suggest an answer the way it would if you asked, "Sally met you in the coffee room, didn't she?"
- Get as much detail as possible, focusing on the specific facts of what happened when, where, and how often.
- Do not show surprise, suspicion, outrage, or dismay at any answer. This may cause interviewees to change their stories.
- Do not promise complete confidentiality or anonymity, or that punishment will be less severe if the employee admits inappropriate behavior.
- Immediately document the interview, including the questions asked; the answers provided; and the person's demeanor, gestures, ability to remember clearly, and overall credibility. Where

### Lack of Anti-Retaliation Policy Creates Vulnerability

Companies that successfully defend themselves from a harassment complaint may find that they ultimately lose the case when the complainant can prove that he or she was retaliated against for making the complaint.

An anti-retaliation policy should protect a complaining employee from retaliation that is "materially adverse" to their employment.

What does this mean? It means the employer takes an action that might dissuade a reasonable worker from making or supporting a similar charge of discrimination.

possible, obtain written statements signed by the witnesses.

Write up a summary of the facts as you determined them to be from your investigation, as well as your conclusion as to whether or not there was harassment. If yes, determine how you will respond. Will you impose discipline on the wrongdoer, changing work assignments to avoid further contact, or holding an agency-wide training on harassment?

Regardless of the conclusion, be sure to report back to the complainant so that he or she will know that you have followed up on the complaint.

Your adherence to these guidelines should establish a productive work environment where employees can feel confident that their well-being is important to the company. This kind of environment is self-sustaining over time; the expectation of employees to operate within a safe and supportive work climate reinforces your policy and lessens the need for intervention. ■

#### ENDNOTES

- The Equal Employment Opportunity Commission is the agency of U.S. government that is charged with implementing federal anti-discrimination laws. See *Faragher v. City of Boca Raton*, 524 U.S. 775, 788, 118 S. Ct. 2275, 141 L. Ed. 2d 662 (1998) and *Oncale v. Sundowner Offshore Services Inc.*, 523 U.S. 75, 81 82, 118 S. Ct. 998, 140 L. Ed. 2d 201 (1998) for discussion of what constitutes a "hostile work environment."
- Faragher*, supra.
- Clark County School District v. Breeden*, 532 U.S. 268, 270 71, 121 S. Ct. 1508, 149 L. Ed. 2d 509 (2001).
- Parker v. General Extrusions Inc.*, 2007 U.S. App. LEXIS 15176 (6th Cir. 2007).
- McCurdy v. Arkansas State Police*, 375 F.3d 762 (8th Cir. 2004), cert. denied, 543 U.S. 1121 (2005).
- The federal Genetic Information Nondiscrimination Act took affect Nov. 21, 2009.

- For example, almost half of states, as well as Washington, have laws that currently prohibit sexual orientation discrimination in both public and private jobs: California, Colorado, Connecticut, Hawaii, Illinois, Iowa, Maine, Maryland, Massachusetts, Minnesota, Nevada, New Hampshire, New Jersey, New Mexico, New York, Oregon, Rhode Island, Vermont, Washington, Washington, D.C., and Wisconsin.

#### DISCLAIMER

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