

EDUCATION AND TRAINING: A CRITICAL PART OF WORKPLACE HARASSMENT PREVENTION

Unlawful harassment continues to be a significant problem in many workplaces. Every employer should evaluate whether it has taken all appropriate steps to protect its employees - and its business - from the harm caused by harassment. An employer should not simply rely on the fact that it has a harassment policy and complaint process; it should include education and training in its harassment prevention plan.

Harassment education and training has many purposes: (1) to meet an employer's legal obligation to maintain a safe and harassment-free workplace; (2) to put an employer in the best legal position to defend a potential harassment claim; (3) to educate all employees concerning what harassment is (and what it is not); (4) to explain to all employees the consequences they will face if they engage in improper conduct; (5) to publicize an employer's complaint process and to encourage employees to use the process when they have been subjected to inappropriate behavior; (6) to train managers and supervisors how to identify and respond to inappropriate behavior; and (7) to teach managers and supervisors their roles in the employer's complaint process.

MASSACHUSETTS STRONGLY ENCOURAGES HARASSMENT EDUCATION AND TRAINING

Massachusetts requires employers with six or more employees to have a sexual harassment policy and to distribute it to all employees at the time of hire and then annually. Although Massachusetts has yet to join the growing number of states (including, in New England, Connecticut and Maine) that require employers to conduct workplace harassment training, the Commonwealth strongly "encourages" training. Massachusetts General Laws Chapter 151B ("Chapter 151B"), the principal state anti-discrimination law, states that employers "are encouraged to conduct an education and training program for new employees within one year of commencement of employment."

Moreover, employers are "encouraged" to conduct "additional training" for new supervisory and managerial employees. Chapter 151B states that employees should be educated concerning the specific elements of the employer's sexual harassment policy, and that supervisory and managerial employees should also be trained concerning their specific responsibilities and "the methods such employees should take to ensure immediate and appropriate corrective action in addressing sexual harassment complaints."

The Massachusetts Commission Against Discrimination ("MCAD") has issued guidelines on sexual harassment that reinforce Chapter

151B's encouragement of education and training, and that even suggest that the MCAD views training as no longer optional. The guidelines state that "an employer's commitment to providing anti-harassment training to its workforce may be a factor in determining liability or the appropriate remedy." To drive home the point, the MCAD notes two cases with different outcomes, one in which an employer provided education and training (and the claim was dismissed) and one in which an employer did not (and the MCAD awarded substantial damages).

OTHER LEGAL CONSIDERATIONS UNDERSCORE THE IMPORTANCE OF CONDUCTING EDUCATION AND TRAINING

Many claims alleging harassment are pursued under federal law (as opposed to or in addition to Massachusetts law), most often under Title VII of the Civil Rights Act of 1964 ("Title VII"). In many situations, Title VII permits an employer to avoid liability for a supervisor's harassment if the employer can show: (1) that it exercised reasonable care to prevent and correct promptly any sexually harassing behavior, and (2) that the alleged victim failed to take advantage of any preventive or corrective opportunities provided by the employer or to avoid harm otherwise.

How does an employer show that it exercised reasonable care in preventing harassment? Is simply having a harassment policy enough? Increasingly, federal courts say that an employer must go further and take steps to educate its employees concerning its policy, including training its supervisors and managers about their responsibilities. Thus, employers who want to preserve their defenses in Title VII sexual harassment cases cannot rely on their harassment policies alone.

Under Massachusetts law, employers are "strictly liable" for the conduct of their supervisors and, unlike under federal law, are not able to escape liability solely by virtue of having taken steps to prevent harassment (*i.e.*, having a policy and conducting education and training). Nonetheless, as noted above, the MCAD has stated clearly that education and training (or the absence of such preventive measures) may be a factor in determining liability or the appropriate remedy/penalty to impose on the employer. In other words, the MCAD and courts are significantly more likely to find liability and assess substantial damages where employers have not conducted education and training.

Thus, having a policy is not enough. Government agencies, judges and juries now expect more of employers when it comes maintaining a safe and harassment-free workplace. Harassment education and training is expected. A prompt investigation of a complaint is expected. Where harassment has occurred, effective remedial action is expected. Protection from retaliation for complaining about harassment is expected. Whether or not they are all legal requirements, when an employer fails to live up to

these expectations and an employee is harmed, the employer usually gets punished.

Harassment claims typically involve conduct by individual employees who act contrary to the employer's workplace rules and without the employer's knowledge. To punish the employer for the bad conduct of its employee, agencies, judges and juries often look for the employer's failure to do what it should (or could) have done to prevent the conduct in the first place. Often, the employer's only "failure" is in not providing education and training.

PREVENTING HARASSMENT THROUGH EDUCATION AND TRAINING ACHIEVES MORE THAN JUST CONTROLLING LEGAL LIABILITY

Workplace harassment harms employee morale and poisons the work environment. Rather than just being limited to the victim, the effects of harassment often spread through the workplace as word of the allegations and investigation makes its way around. Private "closed door meetings" and uncertainty about how management will respond frequently create tense work environments. Other employees may feel forced to take sides between the alleged harasser and alleged victim. Employers walk a tightrope, not wanting to act too harshly nor appear in any way tolerant of improper behavior.

Harassment causes disruption and lost productivity. Victims typically experience a decline in job performance and increased absenteeism, and may go on extended sick leaves. Alleged harassers are often suspended or reassigned while allegations are investigated, sometimes delaying the completion of important work. Employees who are identified as witnesses are pulled away from their jobs for interviews and may become upset or distracted by their involvement in the investigation.

Further, harassment often leads to employee turnover. The alleged harasser may be terminated. The complaining employee may resign, either because the employee is dissatisfied with the employer's investigation or corrective action, or because the employee feels the harassment has made the workplace inhospitable regardless of what is done in response. In addition to the risk of legal claims, the employer must bear the cost of replacing one or more of its employees. Thus, preventing harassment through education and training does more for a business than just control its legal liability.

WHAT TYPES OF EDUCATION AND TRAINING MAKE SENSE?

Harassment training for managers and supervisors is usually done separately from training for non-supervisory staff. The training

should cover the law of harassment and its implications for how managers and supervisors handle their responsibilities and interactions with other employees. Managers and supervisors often learn for the first time that they can be subject to personal liability -- a fact that generally causes them to take the training and their responsibilities more seriously. The training should cover in detail the employer's harassment policy and complaint procedure and equip managers and supervisors with skills and techniques necessary to handle various types of harassment situations, and to know when to contact senior management and human resources.

Non-supervisory training is usually geared toward giving employees an understanding of the employer's harassment policy and what does and does not constitute sexual harassment. The training should attempt to make employees more aware of the diversity of views on what is appropriate workplace behavior. What may be acceptable to some workers may be offensive to others. In the absence of training, many employees are simply unaware of the range of sensitivity among their co-workers.

Training also can teach employees forms of self-help and other informal means of resolving situations. The employer's complaint process should be fully explained, and employees should understand that it is always available to them. All too often an employee goes directly to the MCAD with a complaint of harassment because the employee was unaware of the employer's complaint process or did not believe the employer would take the complaint seriously.

MAINTAIN RECORDS OF ALL EDUCATION AND TRAINING

Employers should maintain records of all education and training, including attendance sheets signed by the attending employees. Employers can and should make attendance mandatory. In defending a claim of harassment, these records can be critical in proving that the complaining employee knew of the employer's harassment policy and complaint process but nonetheless failed to utilize it (which may cast doubt on the validity of the employee's claims). These records can also demonstrate that an alleged harasser knew full well that harassment in the workplace was unacceptable and would not be tolerated by the employer (which may support the alleged harasser's discipline and/or limit the employer's legal exposure to the alleged victim). Although it is impossible to eliminate all forms of improper behavior in the workplace, it is important for employers to take all reasonable and appropriate steps to protect its employees and business from the harmful effects of harassment.

The MORSE, BARNES-BROWN & PENDLETON EMPLOYMENT & LABOR PRACTICE GROUP provides sophisticated legal services and practical advice to employers of all sizes, ranging from technology start-ups to Fortune 500 companies.

Robert M. Shea – rms@mbbp.com ♦ Mark H. Burak – mhb@mbbp.com

Donald W. Parker – dwp@mbbp.com ♦ Sandra E. Kahn – sek@mbbp.com ♦ Scott J. Connolly – sjc@mbbp.com

BUSINESS | SECURITIES | M&A | TECHNOLOGY + IP | TAX | EMPLOYMENT + IMMIGRATION

Reservoir Place ♦ 1601 Trapelo Road ♦ Waltham, MA 02451 ♦ (p)781-622-5930 ♦ (f)781-622-5933 ♦ www.mbbp.com