HARASSMENT IN THE WORKPLACE: WHAT EMPLOYERS, EMPLOYEES, AND INTERNS NEED TO KNOW

May 01, 2018 | By George C. Hlavac, Esq., and Edward J. Easterly, Esq.

What constitutes harassment? How are employers required to respond? What should employees do if they believe they are being subjected to harassment? Are unpaid interns even protected?

In order to fully appreciate the rights and issues relating to harassment, the foregoing questions need to be answered and understood.

WHAT IS HARASSMENT?

It is important to understand what is unlawful harassment. The common misconception is that anything that makes a workplace unpleasant constitutes a claim for an illegal hostile work environment. For example, an employee may claim that he or she has been subject to harassment because co-workers are mean or the boss likes other employees more, or, even worse, that the boss is mean to everyone. While these issues may make for a bad work environment, it does not necessarily make up a cause of action for harassment.

In order for there to be cause of action for unlawful harassment, one of two specific types of “harassment” must be present: quid pro quo or a hostile work environment. Quid pro quo harassment literally means “this for that” and applies when a supervisor, or individual in power, seeks out some type of “favor” in return for a job benefit or to avoid a job detriment. An example of this type of harassment is when the individual in power requires a job interview to be completed on a date or in a hotel room.
Quid pro quo harassment requires a tangible, adverse employment action that results from an individual refusing to submit to a harasser's demands. Under a quid pro quo harassment theory, the employer is strictly liable for the harassing behavior because the supervisor with the ability to carry out the tangible adverse employment action is considered to have been acting as an agent of the employer, which has provided the supervisor with authority to make employment decisions.

The second, more common type of harassment is a hostile work environment. The hostile work environment is commonly confused with the “bad place to work” scenario. In order for an individual to be subject to an actionable hostile work environment, there must be unwelcome conduct that is based upon an individual's protected classification, the conduct must be subjectively and objectively offensive, and it must be severe or pervasive.

The main difference between having to endure a mean boss and having a valid harassment claim is that the unwelcome conduct is based upon an individual's protected classification. If the conduct is not based on a person's protected classification, then he or she does not have a claim for harassment. While the most recognizable form of a hostile work environment is sexual harassment—harassment based upon gender or sex—harassment is not limited to this classification. Employees can be subjected to harassment based upon not only their gender, but on their race, religion, national origin, age, disability, genetic information, gender identity, or sexual orientation.

It must also be noted that claims of harassment can be based upon conduct that occurs outside the workplace if it has consequences within the workplace. Accordingly, comments or actions made in a bar or during an after-work event have the same effect as if they were said or done during normal working hours and within the workplace. More significantly in this day and age, comments or posts on social media sites are taken as if they are said in the workplace. As such, not only are employers required to take action if a complaint is made about such posts, but employees can suffer from adverse consequences based on the statements they make virtually.

Additionally, the conduct does not have to be directed at anyone in particular. If someone is making “jokes” or statements about race, religion, or gender, and it is merely overheard by
someone or viewed on social media, that may be sufficient to form the basis for a claim of harassment. Moreover, harassment is not limited to complaints about co-workers or supervisors, but can be made with regard to third parties. In this regard, employees who are subject to harassment by vendors, visitors, guests, the delivery person, or any other third party who enters a workplace can bring a claim to or against their employer.

As noted, the conduct must also be subjectively and objectively offensive and severe or pervasive. In order for something to be subjectively offensive, the person being subjected to the harassment must find it to be offensive. The intent of the person making the comment or engaging in the behavior does not matter. Intent is irrelevant; whether someone was “just joking” does not matter. If the person who was subjected to the action is offended, that satisfies this part of the test for harassment.

For an action to be objectively offensive, the conduct must be offensive to a “reasonable person.” Accordingly, not everything that happens in a workplace will be sufficiently “offensive” to constitute harassment. For example, if one employee compliments another employee's shirt on one occasion, that will not be sufficient to offend a reasonable person and, therefore, could not form the basis of a claim of harassment.

Finally, the conduct must be severe or pervasive. As previously stated, the U.S. Supreme Court has held, repeatedly, that the law does not create a “general civility code” for the workplace. As such, simple teasing, offhand comments, or isolated incidents that are not serious do not generally violate federal law.

Isolated instances of harassment may be regarded as having created a hostile work environment when they are sufficiently severe. For example, a single incident of using racial or religious epithets or groping and touching may be sufficiently severe to constitute harassment. Other harassing conduct that is less severe, but frequently occurring, may satisfy the pervasive requirement to form the basis of a harassment claim. For example, frequent sexual comments made from one co-worker to another, racial or religious comments, or inappropriate pictures being left in a work area on an intermittent basis may satisfy the pervasive requirement and constitute harassment.

Regardless, whether the behavior is sufficiently severe or pervasive is determined by examining all of the circumstances: As stated by the U.S. Supreme Court, this includes looking at the frequency of the discriminatory conduct; its severity; whether it is physically threatening or humiliating, or merely an offensive utterance; and whether it unreasonably interferes with an employee’s work performance.

THE EMPLOYER RESPONSE
What is an employer required to do to prevent and respond to claims of harassment? It is important to know what an employer is required to respond to as it is not limited only to actual complaints made by employees: In fact, employers are required to take action with regard to any claims of harassment they know or had reason to know were occurring. As such, if a supervisor witnesses harassment and does nothing to stop it, that is sufficient to form the basis for a harassment claim. An employer may also be held liable for a hostile work environment created by an anonymous harasser if the employer is aware of the harassment and fails to take steps to address it.

The Equal Employment Opportunity Commission (EEOC) has stated that an employer must take reasonable steps to prevent harassment from occurring in the workplace. Accordingly, the EEOC has stated that all employers need to develop an effective harassment policy. A harassment policy must have certain provisions in order to be effective; these include a statement of what is protected, examples of harassment, a multi-tiered complaint mechanism (meaning the complaint procedure should not start and end with a person’s supervisor), a provision addressing confidentiality issues, anti-retaliation language, and language that addresses disciplinary issues.

The multi-tiered complaint mechanism is the most significant part of any harassment policy. Many employers have policies that indicate that, if harassment occurs, the employee must go to his or her supervisor to complain. If the complaint mechanism, however, is limited solely to an individual’s supervisor, what is that person to do if the supervisor is the one engaging in the harassing behavior? If that is not addressed in a policy, the policy will not be deemed effective, and the employer may as well have no policy at all.

The EEOC has also stated that employers must provide training to their employees on a regular basis. The training should be interactive, in-person, conducted by someone with knowledge in the field, and different for supervisors and non-supervisors. The different supervisor training is predicated upon the heightened level of responsibility for supervisors compared to non-supervisors. Supervisors need to be trained on how to handle complaints, how to document issues, and what to do if they are in the presence of harassment. Training must also address proper and appropriate measures that employers should take in response to claims of harassment to remedy and eliminate any such issues.

What is a proper response is also a question of fact for an employer. First, the employer should separate the complainant and the alleged harasser to immediately stop any additional complaints. The employer must then conduct a thorough and timely investigation into any claims of harassment to determine the merits of the claims. This involves speaking to and getting signed statements from the complainant, the alleged harasser, and any witnesses.

Once the investigation is complete, the employer must take prompt and appropriate action to
alleviate and remedy any harassment that has been found to have occurred. The appropriate action will be based on the investigation, any prior similar incidents and how these were handled, the human resources records of the employees at issue (such as disciplinary actions or prior investigations and complaints), and any other pertinent factors related to the claims. Any action must be proportional to the complaints and should not negatively impact the complainant. For example, the complainant should not be the individual transferred to remedy a complaint unless he or she has asked to be moved.

Employers must be mindful that prompt and appropriate action is the key to remedying any claims of harassment. If an employing organization does not take such action, it is viewed as condoning such conduct and making a bad situation significantly worse.

**WHAT SHOULD EMPLOYEES DO?**

If an employee feels that he or she is being subjected to harassment, the employee should take certain steps to remedy any such issues. However, the employee is not required to confront the alleged harasser and inform the harasser that the actions are inappropriate. The law does not impose a requirement on a person to get into a confrontation to remedy issues at work.

Employees should, however, report claims of harassment to their employer using the employer-provided complaint mechanism. Failure to make such a complaint not only prevents the employer from potentially fixing the situation, but may also prohibit the employee from bringing a valid claim against the employer.

If the employer is not made aware of the harassment either through observation or reporting by the harassed employee or someone else, the employer may demonstrate that the harassed employee unreasonably failed to take advantage of preventative or corrective opportunities provided by the employer to avoid the harm. This will occur if the complainant did not report the harassment to anyone at the company, did not report the harassment to an individual identified in the employer’s reporting procedure, or failed to provide sufficient information to an employer or cooperate with an investigation to allow the employer to address any complaints.

If an employee believes he or she is subject to harassment, the employee is also permitted to file an administrative claim with either the EEOC or the state anti-discrimination agency (each state has different laws pertaining to such claims). Such claims are time sensitive and must be brought within the timeframe set forth in the regulations. For example, claims for discrimination or harassment in Pennsylvania must be brought to the EEOC within 300 days from the last act and to the state administrative department—the Pennsylvania Human Relations Commission—within 180 days from the last act. If an employee does not comply with the timing requirements, he or she may be barred from bringing a lawsuit against the employer.
It should be noted that employees who bring internal or external complaints of harassment are protected from retaliation. This means that employees cannot be subjected to an adverse employment action—anything that would dissuade a reasonable person from bringing a complaint of harassment or discrimination—for engaging in a protected activity, which, in this case, is making the complaint or participating in an investigation. This is a strong protection for employees and is the most frequently brought complaint against employers.

Ultimately, while employees are not required to confront their harasser, they should take steps to assist the employer in preventing, remedying, and prohibiting any further acts of harassment in the workplace. If the employee does not, not only may such acts continue, but also the employee may be barred from any potential recovery.

THE INTERN CONUNDRUM

While both federal and state statutes provide protections for individuals to be free from harassment in the workplace, such statues generally only protect the employees of the company. What happens then if the individual subjected to harassment is an unpaid intern and not an “employee”? If there is no specific state statute that provides protections for unpaid interns (and only a few states have such statutes), the key inquiry will be whether the law will be interpreted to treat unpaid interns as if they are employees for purposes of protecting them from harassment.

The key inquiry in determining if someone is an employee for purposes of protections is whether or not the intern was provided with compensation. Compensation in such cases is not limited to monetary consideration. Some courts have found that non-financial benefits that create or relate to career opportunities may suffice. For example, free training and educational opportunities, such as a corporate leadership course, may establish an employer/employee relationship in which the individual can demonstrate an economic dependence upon the training and not a mere pleasure from the “compensation.”

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Further, at least one court has found that where a volunteer was provided with a “clear pathway to employment” deriving from her position as a volunteer, she could establish the plausibility of an employment relationship under federal anti-discrimination laws. Accordingly, if an unpaid intern can establish that he or she was provided with some form of remuneration for services, a court may find that the intern is afforded protections under federal and state anti-discrimination laws.

Some states, including New York and Maryland, have passed laws to address the harassment of unpaid interns. Unfortunately, not all states have followed suit at this juncture, nor has the federal government passed any such universal protections. There are, however, bills pending that address certain internships, such as federal government interns and interns for lobbyists.

Tellingly, colleges and universities may also have the same requirements to investigate and take action if the institution is deemed a joint-employer of the intern. As such, if the educational institution is intimately involved in the internship and controls the intern—e.g., by scheduling, supervising, or monitoring the intern—it could be treated the same as the employer for purposes of a claim of harassment. Therefore, if an educational institution becomes aware of or receives a complaint that an intern is being harassed, it must look into the claims to determine what, if any, action should be taken to remedy such a situation.

While it is debatable based on facts and differing laws whether unpaid interns are protected by the anti-discrimination laws, employers and educational institutions alike may be subject to liability for claims of harassment. As a result, it is recommended that employers and educational institutions treat interns the same as regular employees and investigate all claims of discrimination promptly and effectively.

Whether an individual is an employee or a paid or unpaid intern, it is recommended that employers take all claims of harassment or discrimination seriously and conduct a thorough investigation.

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Easterly is slated to present at the NACE 2018 Conference & Expo in New Orleans (http://www.naceweb.org/conferenceexpo/default.htm), where he will discuss legal issues related to harassment, internships, and preemployment testing.