

reasonable care generally requires an employer to establish, disseminate, and enforce an anti-harassment policy and complaint procedure and to take other reasonable steps to prevent and correct harassment. The steps described below are not mandatory requirements - - whether or not an employer can prove that it exercised reasonable care depends on the particular factual circumstances and, in some cases, the nature of the employer's workforce. Small employers may be able to effectively prevent and correct harassment through informal means, while larger employers may have to institute more formal mechanisms.⁵³

There are no "safe harbors" for employers based on the written content of policies and procedures. Even the best policy and complaint procedure will not alone satisfy the burden of proving reasonable care if, in the particular circumstances of a claim, the employer failed to implement its process effectively.⁵⁴ If, for example, the employer has an adequate policy and complaint procedure and properly responded to an employee's complaint of harassment, but management ignored previous complaints by other employees about the same harasser, then the employer has not exercised reasonable care in preventing the harassment.⁵⁵ Similarly, if the employer has an adequate policy and complaint procedure but an official failed to carry out his or her responsibility to conduct an effective investigation of a harassment complaint, the employer has not discharged its duty to exercise reasonable care. Alternatively, lack of a formal policy and complaint procedure will not defeat the defense if the employer exercised sufficient care through other means.

1. Policy and Complaint Procedure

It generally is necessary for employers to establish, publicize, and enforce anti-harassment policies and complaint procedures. As the Supreme Court stated, "Title VII is designed to encourage the creation of anti-harassment policies and effective grievance mechanisms." *Ellerth*, 118 S. Ct. at 2270. While the Court noted that this "is not necessary in every instance as a matter of law,"⁵⁶ failure to do so will make it difficult for an employer to prove that it exercised reasonable care to prevent and correct harassment.⁵⁷ (See section V(C)(3), below, for discussion of preventive and corrective measures by small businesses.)

An employer should provide every employee with a copy of the policy and complaint procedure, and redistribute it periodically. The policy and complaint procedure should be written in a way that will be understood by all employees in the employer's workforce. Other measures to ensure effective dissemination of the policy and complaint procedure include posting them in central locations and

incorporating them into employee handbooks. If feasible, the employer should provide training to all employees to ensure that they understand their rights and responsibilities.

An anti-harassment policy and complaint procedure should contain, at a minimum, the following elements:

- A clear explanation of prohibited conduct;
- Assurance that employees who make complaints of harassment or provide information related to such complaints will be protected against retaliation;
- A clearly described complaint process that provides accessible avenues of complaint;
- Assurance that the employer will protect the confidentiality of harassment complaints to the extent possible;
- A complaint process that provides a prompt, thorough, and impartial investigation; and
- Assurance that the employer will take immediate and appropriate corrective action when it determines that harassment has occurred.

The above elements are explained in the following subsections.

Prohibition Against Harassment

An employer's policy should make clear that it will not tolerate harassment based on sex (with or without sexual conduct), race, color, religion, national origin, age, disability, and protected activity (*i.e.*, opposition to prohibited discrimination or participation in the statutory complaint process). This prohibition should cover harassment by *anyone* in the workplace – supervisors, co-workers or non-employees.⁵⁸ Management should convey the seriousness of the prohibition. One way to do that is for the mandate to “come from the top,” *i.e.*, from upper management.

The policy should encourage employees to report harassment *before* it becomes severe or pervasive. While isolated incidents of harassment generally do not violate federal law, a pattern of such incidents may be unlawful. Therefore, to discharge its duty of preventive care, the employer must make clear to employees that it will stop harassment before it rises to the level of a violation of federal law.

Protection Against Retaliation

An employer should make clear that it will not tolerate adverse treatment of employees because they report harassment or provide information related to such complaints. An anti-harassment policy and complaint procedure will not be effective without such an assurance.⁵⁹

Management should undertake whatever measures are necessary to ensure that retaliation does not occur. For example, when management investigates a complaint of harassment, the official who interviews the parties and witnesses should remind these individuals about the prohibition against retaliation. Management also should scrutinize employment decisions affecting the complainant and witnesses during and after the investigation to ensure that such decisions are not based on retaliatory motives.

Effective Complaint Process

An employer's harassment complaint procedure should be designed to encourage victims to come forward. To that end, it should clearly explain the process and ensure that there are no unreasonable obstacles to complaints. A complaint procedure should not be rigid, since that could defeat the goal of preventing and correcting harassment. When an employee complains to management about alleged harassment, the employer is obligated to investigate the allegation regardless of whether it conforms to a particular format or is made in writing.

The complaint procedure should provide accessible points of contact for the initial complaint.⁶⁰ A complaint process is not effective if employees are always required to complain first to their supervisors about alleged harassment, since the supervisor may be a harasser.⁶¹ Moreover, reasonable care in preventing and correcting harassment requires an employer to instruct all supervisors to report complaints of harassment to appropriate officials.⁶²

It is advisable for an employer to designate at least one official outside an employee's chain of command to take complaints of harassment. For example, if the employer has an office of human resources, one or more officials in that office could be authorized to take complaints. Allowing an employee to bypass his or her chain of command provides additional assurance that the complaint will be handled in an impartial manner, since an employee who reports harassment by his

or her supervisor may feel that officials within the chain of command will more readily believe the supervisor's version of events.

It also is important for an employer's anti-harassment policy and complaint procedure to contain information about the time frames for filing charges of unlawful harassment with the EEOC or state fair employment practice agencies and to explain that the deadline runs from the last date of unlawful harassment, not from the date that the complaint to the employer is resolved.⁶³ While a prompt complaint process should make it feasible for an employee to delay deciding whether to file a charge until the complaint to the employer is resolved, he or she is not required to do so.⁶⁴

Confidentiality

An employer should make clear to employees that it will protect the confidentiality of harassment allegations to the extent possible. An employer cannot guarantee complete confidentiality, since it cannot conduct an effective investigation without revealing certain information to the alleged harasser and potential witnesses. However, information about the allegation of harassment should be shared only with those who need to know about it. Records relating to harassment complaints should be kept confidential on the same basis.⁶⁵

A conflict between an employee's desire for confidentiality and the employer's duty to investigate may arise if an employee informs a supervisor about alleged harassment, but asks him or her to keep the matter confidential and take no action. Inaction by the supervisor in such circumstances could lead to employer liability. While it may seem reasonable to let the employee determine whether to pursue a complaint, the employer must discharge its duty to prevent and correct harassment.⁶⁶ One mechanism to help avoid such conflicts would be for the employer to set up an informational phone line which employees can use to discuss questions or concerns about harassment on an anonymous basis.⁶⁷

Effective Investigative Process

An employer should set up a mechanism for a prompt, thorough, and impartial investigation into alleged harassment. As soon as management learns about alleged harassment, it should determine whether a detailed fact-finding investigation is necessary. For example, if the alleged harasser does not deny the accusation, there

would be no need to interview witnesses, and the employer could immediately determine appropriate corrective action.

If a fact-finding investigation is necessary, it should be launched immediately. The amount of time that it will take to complete the investigation will depend on the particular circumstances.⁶⁸ If, for example, multiple individuals were allegedly harassed, then it will take longer to interview the parties and witnesses.

It may be necessary to undertake intermediate measures before completing the investigation to ensure that further harassment does not occur. Examples of such measures are making scheduling changes so as to avoid contact between the parties; transferring the alleged harasser; or placing the alleged harasser on non-disciplinary leave with pay pending the conclusion of the investigation. The complainant should not be involuntarily transferred or otherwise burdened, since such measures could constitute unlawful retaliation.

The employer should ensure that the individual who conducts the investigation will objectively gather and consider the relevant facts. The alleged harasser should not have supervisory authority over the individual who conducts the investigation and should not have any direct or indirect control over the investigation. Whoever conducts the investigation should be well-trained in the skills that are required for interviewing witnesses and evaluating credibility.

Questions to Ask Parties and Witnesses

When detailed fact-finding is necessary, the investigator should interview the complainant, the alleged harasser, and third parties who could reasonably be expected to have relevant information. Information relating to the personal lives of the parties outside the workplace would be relevant only in unusual circumstances. When interviewing the parties and witnesses, the investigator should refrain from offering his or her opinion.

The following are examples of questions that may be appropriate to ask the parties and potential witnesses. Any actual investigation must be tailored to the particular facts.

Questions to Ask the Complainant:

- Who, what, when, where, and how: *Who* committed the alleged harassment? *What* exactly occurred or was said? *When* did it occur and is it still ongoing?

Where did it occur? How often did it occur? How did it affect you?

- How did you react? What response did you make when the incident(s) occurred or afterwards?
- How did the harassment affect you? Has your job been affected in any way?
- Are there any persons who have relevant information? Was anyone present when the alleged harassment occurred? Did you tell anyone about it? Did anyone see you immediately after episodes of alleged harassment?
- Did the person who harassed you harass anyone else? Do you know whether anyone complained about harassment by that person?
- Are there any notes, physical evidence, or other documentation regarding the incident(s)?
- How would you like to see the situation resolved?
- Do you know of any other relevant information?

Questions to Ask the Alleged Harasser:

- What is your response to the allegations?
- If the harasser claims that the allegations are false, ask why the complainant might lie.
- Are there any persons who have relevant information?
- Are there any notes, physical evidence, or other documentation regarding the incident(s)?
- Do you know of any other relevant information?

Questions to Ask Third Parties:

- What did you see or hear? When did this occur? Describe the alleged harasser's behavior toward the complainant and toward others in the workplace.
- What did the complainant tell you? When did s/he tell you this?
- Do you know of any other relevant information?
- Are there other persons who have relevant information?

Credibility Determinations

If there are conflicting versions of relevant events, the employer will have to weigh each party's credibility. Credibility assessments can be critical in determining whether the alleged harassment in fact occurred. Factors to consider include:

- **Inherent plausibility:** Is the testimony believable on its face? Does it make sense?
- **Demeanor:** Did the person seem to be telling the truth or lying?
- **Motive to falsify:** Did the person have a reason to lie?
- **Corroboration:** Is there **witness testimony** (such as testimony by eye-witnesses, people who saw the person soon after the alleged incidents, or people who discussed the incidents with him or her at around the time that they occurred) or **physical evidence** (such as written documentation) that corroborates the party's testimony?
- **Past record:** Did the alleged harasser have a history of similar behavior in the past?

None of the above factors are determinative as to credibility. For example, the fact that there are no eye-witnesses to the alleged harassment by no means necessarily defeats the complainant's credibility, since harassment often occurs behind closed doors. Furthermore, the fact that the alleged harasser engaged in similar behavior in the past does not necessarily mean that he or she did so again.

Reaching a Determination

Once all of the evidence is in, interviews are finalized, and credibility issues are resolved, management should make a determination as to whether harassment occurred. That determination could be made by the investigator, or by a management official who reviews the investigator's report. The parties should be informed of the determination.

In some circumstances, it may be difficult for management to reach a determination because of direct contradictions between the parties and a lack of documentary or eye-witness corroboration. In such cases, a credibility assessment may form the basis for a determination, based on factors such as those set forth above.

If no determination can be made because the evidence is inconclusive, the employer should still undertake further preventive measures, such as training and monitoring.

Assurance of Immediate and Appropriate Corrective Action

An employer should make clear that it will undertake immediate and appropriate corrective action, including discipline, whenever it determines that harassment has occurred in violation of the employer's policy. Management should inform both parties about these measures.⁶⁹

Remedial measures should be designed to stop the harassment, correct its effects on the employee, and ensure that the harassment does not recur. These remedial measures need not be those that the employee requests or prefers, as long as they are effective.

In determining disciplinary measures, management should keep in mind that the employer could be found liable if the harassment does not stop. At the same time, management may have concerns that overly punitive measures may subject the employer to claims such as wrongful discharge, and may simply be inappropriate.

To balance the competing concerns, disciplinary measures should be proportional to the seriousness of the offense.⁷⁰ If the harassment was minor, such as a small number of "off-color" remarks by an individual with no prior history of similar misconduct, then counseling and an oral warning might be all that is necessary. On the other hand, if the harassment was severe or persistent, then suspension or discharge may be appropriate.⁷¹

Remedial measures should not adversely affect the complainant. Thus, for example, if it is necessary to separate the parties, then the harasser should be transferred (unless the complainant prefers otherwise).⁷² Remedial responses that penalize the complainant could constitute unlawful retaliation and are not effective in correcting the harassment.⁷³

Remedial measures also should correct the effects of the harassment. Such measures should be designed to put the employee in the position s/he would have been in had the misconduct not occurred.

Examples of Measures to Stop the Harassment and Ensure that it Does Not Recur:

- oral⁷⁴ or written warning or reprimand;
- transfer or reassignment;
- demotion;
- reduction of wages;
- suspension;
- discharge;
- training or counseling of harasser to ensure that s/he understands why his or her conduct violated the employer's anti-harassment policy; and
- monitoring of harasser to ensure that harassment stops.

Examples of Measures to Correct the Effects of the Harassment:

- restoration of leave taken because of the harassment;
- expungement of negative evaluation(s) in employee's personnel file that arose from the harassment;
- reinstatement;
- apology by the harasser;
- monitoring treatment of employee to ensure that s/he is not subjected to retaliation by the harasser or others in the work place because of the complaint; and
- correction of any other harm caused by the harassment (e.g., compensation for losses).

2. Other Preventive and Corrective Measures

An employer's responsibility to exercise reasonable care to prevent and correct harassment is not limited to implementing an anti-harassment policy and complaint procedure. As the Supreme Court stated, "the employer has a greater opportunity to guard against misconduct by supervisors than by common workers; employers have greater opportunity and incentive to screen them, train them, and monitor their performance." *Faragher*, 118 S. Ct. at 2291.

An employer's duty to exercise due care includes instructing all of its supervisors and managers to address or report to appropriate officials complaints of harassment regardless of whether they are officially designated to take complaints⁷⁵ and regardless of whether a complaint was framed in a way that conforms to the organization's particular complaint procedures.⁷⁶ For example, if an employee files an EEOC charge alleging unlawful harassment, the employer should launch an internal investigation even if the employee did not complain to management through its internal complaint process.

Furthermore, due care requires management to correct harassment regardless of whether an employee files an internal complaint, if the conduct is clearly unwelcome. For example, if there are areas in the workplace with graffiti containing racial or sexual epithets, management should eliminate the graffiti and not wait for an internal complaint.⁷⁷

An employer should ensure that its supervisors and managers understand their responsibilities under the organization's anti-harassment policy and complaint procedure. Periodic training of those individuals can help achieve that result. Such training should explain the types of conduct that violate the employer's anti-harassment policy; the seriousness of the policy; the responsibilities of supervisors and managers when they learn of alleged harassment; and the prohibition against retaliation.

An employer should keep track of its supervisors' and managers' conduct to make sure that they carry out their responsibilities under the organization's anti-harassment program.⁷⁸ For example, an employer could include such compliance in formal evaluations.

Reasonable preventive measures include screening applicants for supervisory jobs to see if any have a record of engaging in harassment. If so, it may be necessary for the employer to reject a candidate on that basis or to take additional steps to prevent harassment by that individual.

Finally, it is advisable for an employer to keep records of all complaints of harassment. Without such records, the employer could be unaware of a pattern of harassment by the same individual. Such a pattern would be relevant to credibility assessments and disciplinary measures.⁷⁹

3. Small Businesses