Lowering the Bar: Redefining Sexual Harassment

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As if running a business is not difficult enough, recent Supreme Court decisions have changed the definition of sexual harassment. In the past, sexual harassment involved three, fairly broad, areas:

1. Quid pro quo (this for that) in which a supervisor or manager offered an employment benefit of some sort in exchange for sexual favors;
2. Inappropriate behavior such as unwanted sexual advances, including language, touching, groping, etc.;
3. Hostile work environment in which the workplace is permeated with sexual innuendo, disparate treatment and gender-based bias.

One recent case that changed the definition of sexual harassment is *Oncale vs. Sundowner Offshore Services*. In this case, involving workers on an off-shore oil rig, a male employee was subjected to a constant barrage of sexual taunts because he was slightly built and didn't fit the stereotype of a "manly" man. The defendants argued that, because there was no sexual desire and it was a same-sex situation, there was no harassment. It was simply a case of "horseplay;" typical "locker-room" behavior or "teasing." The judge wasn't buying that argument and ruled that, indeed, sexual harassment had occurred.

A second case involves a female employee of PriceWaterhouse. When denied promotion, she asked why and was told to walk, talk and dress more femininely. It does not appear that she was ever subjected to a "quid pro quo" situation or that the person who denied her promotion had any, personal sexual designs upon her.

These two cases have expanded the definition of a "hostile workplace." As *Findlaw* (a useful website) has interpreted the decisions: "It can be unlawful for an employer to foster an environment that punishes men and/or women for failing to conform to their assigned gender roles."

The kind of work behavior we used to call "teasing" or "horseplay" is no longer acceptable – in fact, it never should have been. But now, obviously, it will not be a defense in court to claim that such "teasing" is "normal" in most companies. The number of cases (like the two I have cited) continues to increase and more are being decided before a judge and/or jury. By the way, the average cost of defending yourself in a sexual harassment case that goes to trial is over $200,000 – and that's if you win!

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Let's just think about that. What else could you do with $200,000? Sending ten supervisors to a seminar on sexual harassment would cost about $1,500 if no overnight travel is involved. Meeting with groups of employees for up to an hour might cost another couple of thousand dollars depending upon your company size and number of locations. Passive employee training, such as providing a pamphlet about harassment, runs about $5.00 per employee. Ensuring that your employee handbook adequately covers this topic may cost another two thousand dollars, depending upon how often you consult with your attorney(s). You could spend $5,000 and save yourself $195,000. Seems like a bargain to me.

What should you do? First, make sure your handbook includes a strong policy against harassment of any kind. Point out that sexual harassment, in particular, is against the law.

Next, make sure all employees understand the definition of harassment. It's not just about sexual desire any more. Everyone needs to know that teasing, horseplay, etc., remains unacceptable in the workplace. There are good films and training booklets available to help get your point across. Such materials should be supported with group meetings and discussions.

While everyone should receive training, it is absolutely crucial for supervisors and managers. Training for this group should be much more extensive. They must understand what constitutes illegal harassment, how to investigate complaints and how to deal with situations that may arise in their area of control. Train them to identify possible problem situations and to know what pro-active measures to take *before* a complaint is lodged.

Demonstrating that you have conducted appropriate training remains one of your best defenses if you get hit with a lawsuit.

There are other, practical reasons to keep your workplace free of harassment. When your employees are spending work time behaving badly, they aren't doing their jobs. The victim of taunts and teasing certainly cannot perform his or her job duties efficiently. If you still want to consider it "horseplay," do so at your own risk and keep in mind the cost of such behavior.

Times have changed. Employee expectations of how they should be treated in the workplace have changed as well. To some, this lowering of the harassment standards may seem like "bunk." Bottom line, it means we must, as employers and business owners, ensure that everyone in the workplace is treated with respect. Is there anything really wrong with that?

As always, thanks for taking time to read this article. If you have input or questions about this topic or any personnel matter, feel free to contact me at the HR Helpline at 800-683-3440 or e-mail lesley@taxfavoredbenefits.com. ■