

Preventing Harassment and Bullying in the Workplace

Delaware Valley Labor and Employment Law Conference

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WHAT WE WILL COVER

- Harassment – hostile work environment
- Workplace bullying
- Workplace violence
- Best practices to minimize litigation exposure and to protect your employees
- What to do when you receive a complaint
- Common mistakes to avoid

HOSTILE WORK ENVIRONMENT

- Unwelcome behavior that creates an abusive, intimidating, hostile or offensive work environment
 - Not just based on sex! Can be based on any statutory protection – the “protected classes”
 - Behavior is not limited to the confines of the work environment but extends to after hours and off the property

HOSTILE WORK ENVIRONMENT (CONT.)

- Must be severe or pervasive
- What is not a hostile work environment
 - Comments that are part of the ordinary trials and tribulations of the workplace

THE EMPLOYER'S AFFIRMATIVE DEFENSE

- If no Tangible Employment Action occurred, the employer can avoid liability by proving
 - It took reasonable care to prevent and correct promptly any harassing behavior
 - The complaining employee failed to take advantage of the preventive or corrective opportunities

RESPONDEAT SUPERIOR

- An employer is not liable for hostile work environment unless
 - It knew or should have known of the hostile environment
 - It failed to take “prompt, effective remedial action” after notice

HOSTILE WORK ENVIRONMENT CLAIMS ARE EXPENSIVE!

- Defense of cases can routinely be more than \$100,000
- Can be very disruptive to operations
- Recent verdicts and settlements

WORKPLACE BULLYING STATISTICS

- No longer confined to the schoolyard – growing epidemic
- Up to 75% of workers are affected by workplace bullying – whether as the target or as a witness (2016 University of Phoenix study)
- According to the Workplace Bullying Institute – bullying is up to 4x more common than either sexual harassment or racial discrimination

WORKPLACE BULLYING STATISTICS (CONT.)

- Recent verdicts and settlements
- Consequences
 - Decreased productivity
 - Lower morale
 - Absenteeism
 - Attrition
 - Negative health consequences

RECOGNIZING WORKPLACE BULLYING

- Unwanted, aggressive behavior that is designed to intimidate
- Intentional, often repeated mistreatment of an employee by one or more employees through verbal or non-verbal aggression
- Power imbalance – supervisor is more often the aggressor; subordinates are more often the targets - - but all combinations are possible

RECOGNIZING WORKPLACE BULLYING (CONT.)

- Roughly 1/3 of the workplace will experience bullying (source: Workplace Bullying Institute)
- Hallmarks: repetitive behavior, lasting over a period of time, escalation, intimidation

BEWARE – EXCESSIVE MONITORING AND MICROMANAGEMENT

- Helicopter bosses who hover
- Line between effective leadership and micromanaging can be thin
- Texts/emails at night or over the weekend
- Suggestions
 - Training
 - Get HR involved to open dialogue
 - Teach delegation

CYBERBULLYING

- Social media
- Text messages/photos
- Email
- Phone calls

WHY IS CYBERBULLYING DIFFERENT?

- Anonymous
- Can occur 24/7

WHEN DOES BULLYING VIOLATE THE LAW?

- Generally – there is no specific law that addresses bullying (private cause of action does not exist)
- However, when based on a protected classification, it can violate state and federal laws
 - Race, national origin, gender, religion, age, disability

WHEN DOES BULLYING VIOLATE THE LAW? (CONT.)

- Workplace bullying claims – to be valid – must be framed as either discrimination or hostile work environment
- Employer responsibility may be triggered when acts of bullying/harassment are brought to the employer's attention

REASONS TO PREVENT WORKPLACE BULLYING

- Minimize turnover
- Increase productivity
- Morale
- Fear of a lawsuit... not yet an incentive to prevent bullying, but push is on for legislation creating a private cause of action for workplace bullying

WORKPLACE VIOLENCE STATISTICS

- Approximately 2 million employees are victims of workplace violence each year (OSHA)
- 18% of violent crimes are committed at the workplace
- 800 workplace homicides occur each year

WORKPLACE VIOLENCE STATISTICS (CONT.)

- Between January 2009 and July 2015 - - 133 mass shootings in the workplace

DEFINING WORKPLACE VIOLENCE

- Verbal and written threats (direct or indirect)
- Threatening body language
- Harassment, stalking, intimidation or other threatening disruptive behavior that occurs at the worksite, including physical assaults
- Threats may be delivered in person or not

THE IMPACT OF WORKPLACE VIOLENCE

- Costs can be staggering and hard to quantify
- Aside from immediate physical and psychological impact felt by victim and family, friends and co-workers
 - Loss of productivity
 - Morale
 - Increased security costs
 - Increased workers' compensation costs
 - Reputational harm
 - Potential legal liability

POTENTIAL LIABILITY FROM WORKPLACE VIOLENCE

- No federal law establishing a duty to prevent workplace violence against employees
- Occupational and Safety Health Act (administered by OSHA) - - GENERAL DUTY CLAUSE - - which applies to almost all employees requires an employer to provide employees a workplace

“free from recognized hazards that are causing or are likely to cause death or serious physical harm to employees” 29 U.S.C. section 654(a)(1)

POTENTIAL LIABILITY FROM WORKPLACE VIOLENCE (CONT.)

- Legal obligation to provide a safe workplace
 - Take steps to reduce or eliminate recognized hazards likely to cause death or serious bodily injury to employees
- OSHA citations

POTENTIAL LEGAL CLAIMS BY VICTIMS OF WORKPLACE VIOLENCE/BULLYING

- Workers' Compensation – exclusive remedy
- Exceptions
 - A clearly private dispute that manifests itself in the workplace - - negligence claim
 - There was a known or suspected danger and the employer's failure to prevent the violence was intentional

POTENTIAL LEGAL CLAIMS BY NON-EMPLOYEES

- Contractors, customers, or surviving family members
- Commonly filed tort claims
 - Negligent hire theory
 - Negligent retention theory
 - Negligent supervision theory
- Recovery includes the difficult to measure “pain and suffering” component

POTENTIAL LIABILITY TO VIOLENT EMPLOYEE

- Americans with Disabilities Act
 - Prohibits discrimination against an employee on the basis of an actual or perceived disability – including mental disabilities
 - EEOC Regulations state that the term “disability” does not include personality traits such as poor judgment or a quick temper if these are not symptoms of a mental or psychological disorder

POTENTIAL LIABILITY TO VIOLENT EMPLOYEE (CONT.)

- While no duty to tolerate violence, there may be a duty to grant an employee with a mental disability a leave of absence for treatment

DIRECT THREAT

- The ADA permits an employer to take action where an employee poses a “direct threat” to himself or others in the workplace
 - EEOC: An employee is a direct threat where the employee poses a substantial risk of significant harm that cannot be eliminated through a reasonable accommodation
 - EEOC: Requires a high probability of substantial harm
 - EEOC: Determination must be based on current medical knowledge or the best available objective evidence by evaluating duration of risk, nature and severity of potential harm, likelihood of potential harm, and imminence of potential harm

SIGNIFICANT UNDERREPORTING OF HARASSMENT, BULLYING, WORKPLACE VIOLENCE

- Only 25-50% of harassment, threats and physical altercations are reported
- Why the underreporting?
 - Fear of aggressor
 - Fear of retaliation
 - Embarrassment
 - “can deal with it myself” attitude
 - Fear of being blamed
 - Lack of confidence in anticipated response from employer

PREVENTING WORKPLACE HARASSMENT CLAIMS AND MINIMIZING LEGAL EXPOSURE

- Strong Anti-Harassment Policy
 - Statement prohibiting harassment
 - Definition (comprehensive) of harassment
 - Specific complaint procedure identifying who may receive reports of harassment
 - Statement forbidding retaliation

PREVENTING WORKPLACE HARASSMENT CLAIMS AND MINIMIZING LEGAL EXPOSURE (CONT.)

- Stress importance of prompt reporting
- Distribute to all employees
- Periodic training for supervisors
 - Define what is considered harassing behavior
 - Review the complaint procedure
 - Emphasize that retaliation for reporting harassment will not be tolerated

PREVENTING WORKPLACE BULLYING/VIOLENCE CLAIMS AND REDUCING LEGAL EXPOSURE

- Employers who are aware of the risks of workplace violence and take appropriate preventive measures can reduce their chances of such an incident occurring in their workplace and also reduce their exposure to liability in the unfortunate event such an incident occurs

PREVENTING WORKPLACE BULLYING/VIOLENCE CLAIMS AND REDUCING LEGAL EXPOSURE (CONT.)

- Strong Zero Tolerance Policy towards aggressive or violent behavior
 - Clearly define workplace violence and bullying behaviors
 - Must cover all employees, clients, patients, visitors, contractors or anyone else who may come into contact with company personnel

PREVENTING WORKPLACE BULLYING/VIOLENCE CLAIMS AND REDUCING LEGAL EXPOSURE (CONT.)

- Zero Tolerance Policy (cont.)
 - Articulate that company resources may not be used to threaten, stalk or harass anyone at or outside the workplace
 - Require the immediate reporting of indirect or direct threats of violence and promise safety to those making the report without fear of retaliation

PREVENTING WORKPLACE BULLYING/VIOLENCE CLAIMS AND REDUCING LEGAL EXPOSURE (CONT.)

- Zero Tolerance Policy (cont.)
 - Specific reporting mechanism providing 2-3 specific management employees to whom threats can be reported
- Encourage reporting
- Prompt and thorough investigation of all reports and confidentiality (to the extent possible) for the employee making the report

PREVENTING WORKPLACE BULLYING/VIOLENCE CLAIMS AND REDUCING LEGAL EXPOSURE (CONT.)

- Disciplinary procedures allowing for immediate suspension of employees suspected of workplace violence pending the outcome of the investigation and discipline “up to and including discharge”
- Require employees to promptly inform employer of any protective or restraining order listing the workplace as a protected area
- Provide for support of victims with referral to company’s EAP

TRAINING ON BULLYING AND WORKPLACE VIOLENCE POLICIES

- All employees to be trained on policy's requirements and company's expectations; explain penalties for violating policy; non-retaliation assurances; cover basic emergency procedures in the event of an incident

TRAINING ON BULLYING AND WORKPLACE VIOLENCE POLICIES (CONT.)

- Educate supervisors and managers generally to be alert to various warning signs and behavioral characteristics that are warning signs
 - Employees who do not accept criticism and express anger and blame others for their own poor performance
 - Unexplained increase in absenteeism

TRAINING ON BULLYING AND WORKPLACE VIOLENCE POLICIES (CONT.)

- Warning signs (cont.)
 - Increased severe mood swings and noticeably unstable or emotional responses
 - Frequent loss of temper
 - Personality conflicts with co-workers
 - Experiencing a traumatic event

TRAINING ON BULLYING AND WORKPLACE VIOLENCE POLICIES (CONT.)

- Warning signs (cont.)
 - Increasing dialogue about problems at home (mental, family, financial struggles)
 - Increase in unsolicited comments about violence/firearms
 - Increased use of alcohol/drugs

OTHER WAYS TO PREVENT WORKPLACE BULLYING AND VIOLENCE

- Careful screening of applicants
 - Starts with employment application
 - Interviewing
 - References
 - Verify licenses/credentials
 - Consider pre-employment drug testing as a means of predicting future problems in workplace

OTHER WAYS TO PREVENT WORKPLACE BULLYING AND VIOLENCE (CONT.)

- Develop workplace violence safety plan/crisis management plan
 - Consider formation of threat assessment/response team
 - Front line manager
 - HR
 - Legal counsel
 - Security consultant
 - Mental health professional

OTHER WAYS TO PREVENT WORKPLACE BULLYING AND VIOLENCE (CONT.)

- Threat response/assessment team (cont.)
 - Team to assess threats of violence and determine what steps are necessary to prevent threat from being carried out
 - Immediate contact to security, police or both
 - Immediate removal of employee from workplace pending investigation

OTHER WAYS TO PREVENT WORKPLACE BULLYING AND VIOLENCE (CONT.)

- Teach conflict resolution skills/training to selected supervisors/managers
 - Call on to diffuse potentially volatile interactions

INVESTIGATION OF HARASSMENT CLAIMS

- Supervisors must immediately inform HR upon receiving a complaint of harassment
- Identify an investigator
 - Familiar with company's policies
 - Review personnel files
 - Review policies
 - Consider outside counsel

INVESTIGATION OF HARASSMENT CLAIMS (CONT.)

- Interview the complaining employee
- Interview the alleged harasser
- Interview witnesses
- Review and weigh the evidence
- Review documentary evidence (emails, texts, photos)

INVESTIGATION OF HARASSMENT CLAIMS (CONT.)

- Document steps
- Preserve evidence
- Prepare written report
- Communicate outcome

RESOLVING THE HARASSMENT COMPLAINT

- When harassment has occurred, you must take prompt and appropriate remedial action considering the following factors
- Severity of conduct
- Pervasiveness
- Harasser's employment record
- Type of discipline imposed for prior incidents of similar harassing behavior

RESOLVING THE HARASSMENT COMPLAINT (CONT.)

- Is it a case of first impression? Setting the bar
- Remedial action

TYPES OF REMEDIAL ACTION – RELY ON YOUR HANDBOOK/POLICY

- Verbal reprimand
- Written reprimand
- Transfer, reassignment, demotion of harasser
- Suspension
- Termination
- For progressive steps of discipline – does behavior warrant skipping a step?
 - If so, document the reason

WHEN A CONCLUSION CANNOT BE REACHED

- Assure complainant that the complaint was taken seriously and carefully investigated
- Review anti-harassment policy (or re-issue) with both the complainant and the alleged harasser
 - Document
- Specifically advise the complainant and harasser that retaliation is prohibited

WHEN CONCLUSION IS THAT NO HARASSMENT OCCURRED

- Review the harassment policy with the complainant and the alleged harasser
- Inform alleged harasser that you will not tolerate retaliation
- Disciplining the complainant?
 - Tread carefully - - don't want to chill right to report
 - Is there a history of unfounded accusations
 - Is there a policy against making false statements/reports

INVESTIGATION OF WORKPLACE VIOLENCE –RESPONDING TO A DIRECT THREAT

- If employee reports a direct threat and imminent harm is likely - - employer should respond immediately by contacting security, police or both
- Remove employee from workplace pending investigation

INVESTIGATION OF WORKPLACE VIOLENCE – RESPONDING TO OTHER THREATS WHERE IMMINENT HARM IS UNLIKELY

- When report does not disclose a direct threat or an immediate danger to safety of others - - begin investigation promptly with goal of obtaining as much detail as possible from complainant, witnesses, or anyone familiar with the accused

INVESTIGATION OF WORKPLACE VIOLENCE – RESPONDING TO OTHER THREATS WHERE IMMINENT HARM IS UNLIKELY (CONT.)

- Factors to consider
 - The specific threat or misconduct; context of threat
 - Complainant’s response and accused’s subsequent conduct
 - Time span of situation
 - Motivations for the complaint
 - Other employees harassed or threatened by the accused?

INVESTIGATION OF WORKPLACE VIOLENCE – RESPONDING TO OTHER THREATS WHERE IMMINENT HARM IS UNLIKELY (CONT.)

- Factors to consider (cont.)
 - Any history of improper or violent conduct to complainant (or to others)?
 - Any witnesses?
 - Any steps complainant may have taken toward protection (restraining order)?

OTHER INVESTIGATION STEPS

- Protect confidentiality of co-worker interviews as much as possible
- Consider having security immediately available, or if necessary, present during interview with accused employee
- Document all complaints, conversations and actions with detail. Be accurate and include your rationale for all conclusions.

OTHER INVESTIGATION STEPS (CONT.)

- Written report documenting findings
- When investigation suggests a real threat, consider
 - Terminating employee
 - Referral to company retained mental health professional for evaluation
 - Counseling through EAP
 - Contact law enforcement to report risk of violence?

OTHER INVESTIGATION STEPS (CONT.)

- Follow-up with complainant and inform him/her of conclusions and any follow-up measures taken

TERMINATION PROCEDURE

- Soon-to-be discharged employee should not be antagonized
- Discharge to be conducted at end of day
- Access to physical building cut off “immediately”
- Brief chance to “vent” before escorted back to desk to retrieve personal items with appropriate security/supervision
- Consider immediate escort from building with return of personal items arranged later

COMMON MISTAKES TO AVOID

- Ignoring harassing, threatening or other inappropriate behavior and hoping that it will go away
- “Trap” of complaint against well-respected manager or supervisor
- Unclear, inadequate written policy that fails to comprehensively address harassment, bullying, workplace violence

COMMON MISTAKES TO AVOID (CONT.)

- Failing to train employees
- Failing to promptly investigate and “close the loop”
- Retaliation!
- Inadequate documentation of employee complaints, the investigation, or corrective action taken

COMMON MISTAKES TO AVOID (CONT.)

- Failing to be careful in checking background of applicants
- Insufficient steps to remedy confirmed instances of harassment, workplace bullying, workplace violence
 - Creates toxic culture

QUESTIONS?



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THANK YOU

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