

HR INSIGHTS

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Employer Liability for Harassment by Supervisors

Title VII of the Civil Rights Act (Title VII) prohibits harassment of an employee based on race, color, sex, religion or national origin. The Age Discrimination in Employment Act (ADEA) prohibits harassment of employees who are 40 or older on the basis of age. The Americans with Disabilities Act (ADA) prohibits harassment based on disability. The Genetic Information Nondiscrimination Act of 2008 (GINA) prohibits harassment based on genetic information. All of the anti-discrimination statutes enforced by the Equal Employment Opportunity Commission (EEOC) prohibit retaliation for complaining about discrimination or for participating in complaint proceedings.

The EEOC's Guidance on Employer Liability for Harassment by Supervisors provides practical guidance regarding the duty of employers to prevent and correct harassment and the duty of employees to avoid harassment by using their employers' complaint procedures.

1. When does harassment violate federal law?

Harassment violates federal law if it involves discriminatory treatment based on race, color, sex (with or without sexual conduct), religion, national origin, age, disability, genetic information or because the employee opposed job discrimination or participated in an investigation or complaint proceeding. Federal law does not prohibit simple teasing, offhand comments or isolated incidents that are not extremely serious. The conduct must be sufficiently frequent or severe to create a hostile work environment or result in a tangible employment action.

2. Does the guidance apply only to sexual harassment?

No, it applies to all types of unlawful harassment.


3. When is an employer legally responsible for harassment by a supervisor?

An employer is always responsible for harassment by a supervisor that culminated in a tangible employment action. If the harassment did not lead to a tangible

In this article, the Equal Employment Opportunity Commission offers guidance on laws and Supreme Court decisions regarding potential liability employers may have in the instance of harassment by supervisors.



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employment action, the employer may still be liable unless it proves that it exercised reasonable care to prevent and promptly correct any harassment and the employee unreasonably failed to complain to management or to otherwise avoid harm.

4. Who qualifies as a supervisor for purposes of employer liability?

An individual qualifies as an employee's supervisor if he or she has immediate or successively higher authority over the employee, if he or she has the authority to recommend tangible employment decisions affecting the employee or if he or she has the authority to direct the employee's daily work activities.

5. What is a tangible employment action?

A tangible employment action means a significant change in employment status. Examples include hiring, firing, promotion, demotion, undesirable reassignment, a significant change in benefits, compensation decisions and work assignment.

6. How might harassment culminate in a tangible employment action?

Harassment might occur if, for example, a supervisor fires or demotes a subordinate because she rejects his sexual demands, or promotes her because she submits to his sexual demands.

7. What should employers do to prevent and correct harassment?

Employers should establish, publicize and enforce a policy prohibiting harassment and setting out a procedure for making complaints. In most cases, the policy and procedure should be in writing.

8. What should an anti-harassment policy say?


An employer's anti-harassment policy should make clear that the employer will not tolerate harassment based on race, sex, religion, national origin, age, disability, genetic information or opposition to discrimination or participation in complaint proceedings. The policy should also state that the employer will not tolerate retaliation against anyone who complains of harassment or who participates in an investigation.


9. What are important elements of a complaint procedure?

The employer should encourage employees to report harassment to management before it becomes severe or pervasive. The employer should also designate more than one individual to take complaints, and should ensure that these individuals are in accessible locations. The employer should instruct all supervisors to report complaints of harassment to appropriate officials. The employer should assure employees that it will protect the confidentiality of harassment complaints to the greatest extent possible.

10. Is a complaint procedure adequate if employees are instructed to report harassment to their immediate supervisors?

No, because the supervisor may be the one committing harassment or may not be impartial. It is advisable for an employer to designate at least one official outside





an employee's chain of command to take complaints, to assure that the complaint will be handled impartially.

11. How should an employer investigate a harassment complaint?

An employer should conduct a prompt, thorough, and impartial investigation. The alleged harasser should not have any direct or indirect control over the investigation. The investigator should interview the employee(s) who complained, the alleged harasser, and others who could reasonably be expected to have relevant information.

Before completing the investigation, the employer should take steps to ensure that harassment does not continue. For example, the employer can make scheduling changes to avoid contact between the parties or place 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, because this could constitute unlawful retaliation.

12. How should an employer correct harassment?

If an employer determines that harassment occurred, it should take immediate measures to stop the harassment and ensure that it does not recur. Disciplinary measures should be proportional to the seriousness of the offense. For example, counseling and a warning may be all that is necessary for minor harassment, while serious harassment may result in suspension or discharge.

13. Are there other measures that employers should take to prevent and correct harassment?

An employer should correct harassment that is clearly unwelcome regardless of whether a complaint is filed. For example, if there is graffiti in the workplace containing racial or sexual epithets, management should not wait for a complaint before erasing it.


An employer should ensure that its supervisors and managers understand their responsibilities under the organization's anti-harassment policy and complaint procedures.

An employer should screen applicants to see if they have a history of engaging in harassment. If so, and the employer hires such a candidate, it must take steps to monitor actions taken by that individual.

An employer should keep records of harassment complaints and monitor them to reveal any patterns of harassment by the same individuals.

14. Does an employee who is harassed by his or her supervisor have any responsibilities?

Yes. The employee must take reasonable steps to avoid harm from the harassment. Usually, the employee will exercise this responsibility by using the employer's complaint procedure.



15. Is an employer legally responsible for its supervisor's harassment if the employee failed to use the employer's complaint procedure?

No, unless the harassment resulted in a tangible employment action or unless it was reasonable for the employee not to complain to management. An employee's failure to complain would be reasonable, for example, if he or she had a legitimate fear of retaliation. The employer must prove that the employee acted unreasonably.

16. If an employee complains to management about harassment, should he or she wait for management to complete the investigation before filing a charge with EEOC?

It may make sense to wait and see if management corrects the harassment before filing a charge. However, if management does not act promptly to investigate the complaint and undertake corrective action, then it may be appropriate to file a charge. The deadline for filing an EEOC charge is either 180 or 300 days after the last date of alleged harassment, depending on the state in which the allegation arises. This deadline is not extended for an employer's internal investigation of the complaint.

Further guidance on harassment can be found on the EEOC's website (www.eeoc.gov).

Source: Equal Employment Opportunity Commission, www.eeoc.gov