By **Elaine Herskowitz**

Ten Misconceptions About Sexual Harassment

Don't run afoul of the laws

Wherever you work, whether it's at a law firm, family office, accounting firm or some other type of company, you need to make sure you don't run afoul of the rules prohibiting sexual harassment in the workplace. Not only can violations result in penalties, but also the publicity of a lawsuit can harm your organization's reputation and negatively affect your business.

A recent poll from *The Wall Street Journal* and NBC found that nearly half of females said they personally experienced sexual harassment at work.[1] Clearly, a significant number of individuals continue to engage in sexually offensive workplace behavior despite employer policies prohibiting harassment, workplace training and increased awareness of the problem.

The persistence of sexual harassment may in part be due to confusion about what constitutes prohibited conduct and the extent of an employer's responsibility to address it. Consider the following 10 misconceptions:[2]

It's No Joke

Misconception 1: Jokes that could be considered offensive are fine in the workplace as long as they're welcome to others present.

Many assume that potentially offensive jokes are okay if others enjoy them. But, that's not the case. An employee who's offended by a joke may feel intimidated about expressing offense, particularly if the person who uttered the remark is in a supervisory position. Therefore, the lack of a clearly negative reaction doesn't necessarily mean the joke is welcome.

The exchange of jokes that are degrading to women cultivates sex-biased attitudes. Moreover, an employer that tolerates the remarks effectively endorses the underlying bias. Thus, a claim of sexual harassment will more likely succeed if there's evidence that managers were aware of but failed to stop such remarks.

Broader Standard Applied

Misconception 2: The definition of "harassment" in an employer's anti-harassment policy should mirror the legal definition of the term.

Employers need to step in before harassment rises to the level of a violation of federal law. Federal law prohibits unwelcome conduct based on sex, race, color, religion, national origin, age (40 or older) or disability when: 1) enduring the conduct becomes a condition of continued employment, or 2) the conduct is severe or pervasive enough to create a work environment that a reasonable person would consider intimidating, hostile or offensive. As the U.S. Equal Employment Opportunity Commission (EEOC) has explained, "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."[3] The EEOC's policy covering its own workforce therefore states, "The conduct covered by this Order is broader than the legal definition of unlawful conduct . . . It includes hostile or abusive conduct based on race, color, religion, sex (whether or not of a sexual nature), national origin, age, disability, sexual orientation, or retaliation, even if the conduct has not risen to the level of illegality."[4]

Workplace Romance

Misconception 3: A consensual sexual relationship

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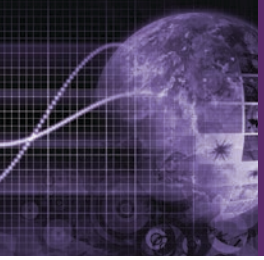


between a supervisor and subordinate can't give rise to a claim of unlawful sexual harassment.

In June 2017, the Society for Human Resource Management reported on a survey of 1,000 respondents regarding workplace romance. A quarter of the respondents said they had a workplace romance, and nearly 40 percent of those individuals were top-level employees.[5]

If you have a supervisory position, think twice before starting a relationship with one of your subordinates. Various legal claims can arise from consensual sexual relationships between supervisors and subordinates. For example, a subordinate may claim she consented to sexual behavior because of threats of adverse consequences for refusal; third parties may challenge preferential treatment by the supervisor toward the subordinate; and if a romantic relationship between a supervisor and subordinate sours, the subordinate may claim that subsequent adverse treatment by the supervisor constitutes retaliation.

> Courts have made clear that an employer is liable if it knew or "should have known" of unlawful harassment.

In light of the risks, a prudent employer should implement a policy requiring supervisors and managers to disclose the existence of a romantic or sexual relationship with an employee. If the employer learns of such a relationship, it should seek to determine whether the relationship truly is consensual in light of the power imbalance. If the subordinate indicates the relationship is coercive, management should swiftly investigate the matter. If the relationship truly is consensual, the employer should reallocate job duties to avoid any actual or perceived reward or disadvantage to the subordinate.

Responsibility for Non-Employees

Misconception 4: An employer isn't legally responsible for sexual harassment of its employee by a non-employee.

An employer is liable for harassment by non-employees if it knew or should have known of the harassment and failed to take prompt and appropriate corrective action. According to the EEOC, the appropriateness of the response depends on the extent of the organization's control over the non-employee's actions.[6] An employer might not be able to control the actions of a one-time visitor to the workplace, but it would have more control over the actions of independent contractors, vendors and regular customers.

Outside the Workplace

Misconception 5: An employer isn't legally responsible for sexual harassment of its employee outside the workplace.

Don't be complacent about what goes on outside the office. The federal law prohibiting sexual harassment, Title VII of the Civil Rights Act of 1964, covers workplace conduct. Courts have applied the law to behavior that occurs in a work-related context outside the employer's premises. For example, an employer can be held responsible for harassment that occurs during work travel or at an employer-sponsored event.

Conduct occurs within the work environment if it's conveyed with work email, regardless of whether the individual who initiated the communication did so while located on the employer's premises. Moreover, an employee's posting on social media of derogatory remarks linked to a co-worker's gender or other EEO characteristic may contribute to a hostile work environment.

Harassment by a supervisor outside the workplace is more likely to contribute to a hostile work environment than similar conduct by co-workers due to a supervisor's ability to affect a subordinate's employment status. Thus, a court evaluating a claim of workplace sexual harassment by a supervisor might consider evidence of the supervisor's unwelcome sexual advances to the employee that occurred outside a work-related context.

Conduct Directed at Others

Misconception 6: An employee can't establish a legal claim of harassment based on conduct directed only at others.

Once an employee engages in harassing conduct against one individual in the workplace, the door is opened to claims by others, even if the conduct wasn't directed at them. Unwelcome and offensive workplace conduct violates the law if it's sufficiently severe or pervasive to create a hostile work environment and is linked to the claimant's sex, race or other EEO protected characteristic. Harassing conduct can affect an employee's work environment even if the behavior is directed at someone else. The individual may even be able to challenge workplace conduct that occurred outside her presence as long as she became aware of it during her employment.

Shush, Don't Tell Anyone

Misconception 7: If an employee informs a supervisor about sexual harassment but asks that the matter be kept confidential with no further action, the supervisor should honor that request.

Inaction by a supervisor in these circumstances could lead to employer liability. A supervisor is an agent of the employer. Therefore, an employer can't claim lack of knowledge if a supervisor knew of the harassment. While it may seem reasonable to let the employee determine whether to pursue a complaint, the employer must exercise reasonable care to prevent and correct harassment whenever it gains knowledge of it.

An employer can't guarantee complete confidentiality of harassment allegations, because an effective investigation generally requires disclosure of relevant information to the alleged harasser and potential witnesses. However, information about the allegation 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.

Retaliation

Misconception 8: Harassment is the most common complaint filed with the EEOC.

Workplace harassment remains a persistent source of employee complaints, representing nearly one third of all charges filed with the EEOC. However, the most common allegation by far is retaliation—approximately 45 percent of charges include that claim. Moreover, nearly three-quarters of sexual harassment charges filed with the EEOC include an allegation of retaliation.[7]

An employment policy prohibiting harassment is ineffective without protection against retaliation. The employer therefore should make clear that it will protect complainants and those who provide related information against any adverse repercussions for participating in the complaint process. Managers also should be alert for any possibility of retaliation and undertake corrective action if it occurs.

Investigation

Misconception 9: An employer needn't conduct its own investigation of an employee's harassment allegation if the employee has filed a formal charge with the EEOC and that agency is investigating the matter.

Employers are obligated to exercise reasonable care to prevent and correct harassment. That duty includes launching a prompt and thorough investigation whenever an employer has reason to know of alleged harassment, regardless of whether an employee has filed a formal charge regarding the matter.

The individual who conducts the investigation should be impartial, experienced and familiar with EEO obligations. The investigator should seek information from all involved parties and potential witnesses. If there are conflicting versions of relevant events, it may be necessary to make credibility assessments. On completion of the investigation, the employer should inform the parties of its determination. Corrective action should extend to behavior that may not be legally actionable but that, if not stopped, may lead to a violation of federal or state law.

When the alleged harassment is particularly severe, it may be necessary for the employer to take intermediate steps to separate the parties while it determines whether a complaint is valid. For example, the employer should consider scheduling changes to avoid contact between the parties; temporarily transferring the alleged harasser; or placing the alleged harasser on non-disciplinary leave with pay pending the conclusion of the investigation.

Ignoring the Signs

Misconception 10: An employer can rest assured there's no problem in its workforce of sexual harassment if no employees have made complaints.

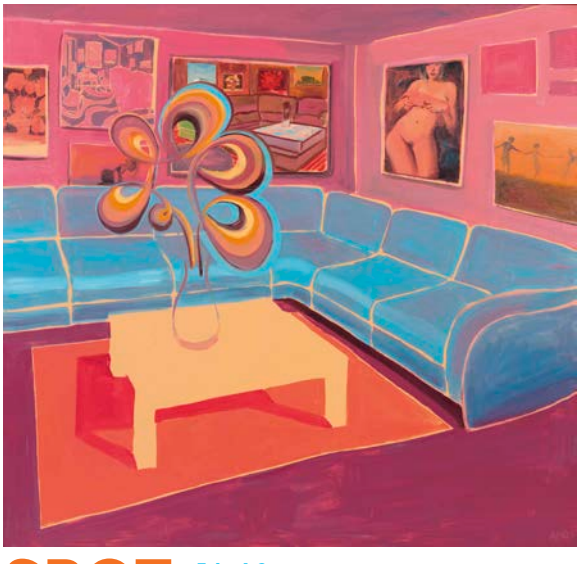
A survey conducted by *Redbook* found that the most popular method of dealing with sexual harassment is

ignoring it and hoping it will stop.[8] The EEOC similarly has found that common employee responses are to avoid the harasser; deny or downplay the gravity of the situation; or attempt to ignore, forget or endure the behavior. The least common response is to report the harassment internally or file a formal legal complaint. According to the EEOC, employees fail to report the behavior because they fear disbelief of or inaction on their claim, blame for causing the offending actions, social retaliation and professional retaliation.[9]

Courts have made clear that an employer is liable if it knew or "should have known" of unlawful harassment. For example, if the harassment is pervasive, management should have known of it. Therefore, management should initiate an investigation whenever it gains awareness of potentially harassing conduct, regardless of whether an employee has made a complaint.

The employer also should regularly distribute its anti-discrimination policy. That policy should clearly explain prohibited conduct; clearly describe the complaint process; assure protection against retaliation for making complaints; protect the confidentiality of complaints to the extent possible; provide for prompt, thorough and impartial investigations of complaints; and ensure immediate and appropriate corrective action when the employer determines that harassment has occurred.

There are many good reasons to prevent and stop harassment beyond risks of liability. Harassment can cause the target of the behavior to suffer psychological, physical, occupational and economic harm. Moreover, the costs include decreased productivity, increased turnover and harm to the employer's reputation. The organization's leadership therefore should meaningfully hold responsible those who engage in harassment and foster an organizational culture that doesn't tolerate such misconduct.



SPOT LIGHT

Take A Seat

Interieur no. 92 by Anton Henning sold for EUR 27,500 at Christie's Post-War and Contemporary Art sale in Amsterdam on Dec. 12-13, 2017. Henning is known for his signature take on the longstanding traditions of still life and nudes, in what can be deemed an unorthodox style. His interior works, such as the one above, are some of his best known paintings.

Endnotes

1. Rob Wile, "A New Poll Shows How Common Sexual Harassment is in the Workplace," *Money Magazine* (Oct. 30, 2017), *http://time.com/money/5002066/sexual-harassment-work-men-women-survey/.*
2. While this article focuses on sexual harassment, the same principles apply to all forms of harassment prohibited by federal law, that is, harassment based on sex (including pregnancy), race, color, religion, national origin, age of 40 or older and disability.
3. "Enforcement Guidance on Vicarious Employer Liability for Unlawful Harassment by Supervisors" (June 18, 1999), *www.eeoc.gov/policy/docs/harassment.html.*
4. Equal Employment Opportunity Commission (EEOC) Order, "Prevention and Elimination of Harassing Conduct in the Workplace" (Aug. 9, 2006), *www.eeoc.gov/eeoc/internal/harassment_order.cfm.*
5. Alison E. Curwen, "Workplace Romance: Who-Dates-Who Might Surprise You," SHRM Online (June 29, 2017), *www.shrm.org/resourcesandtools/hr-topics/employee-relations/pages/workplace-inappropriate-relationships.aspx.*
6. 29 C.F.R. Section 1604.11 (e).
7. "Not Just the Rich and Famous," Center for American Progress (Nov. 20, 2017), *www.americanprogress.org/issues/women/news/2017/11/20/443139/not-just-rich-famous/.*
8. Ashley Mateo and Kaitlin Menza, "The Results of a 1976 Survey of Women about Sexual Harassment at Work Remain Virtually Unchanged in 2017," *Redbook* (March 27, 2017), *www.redbookmag.com/life/money-career/a49220/sexual-harassment-in-the–workplace/.*
9. EEOC, "Select Task Force on the Study of Harassment in the Workplace," Report of Co-Chairs Chai R. Feldblum and Victoria A. Lipnic (June 2016), *www.eeoc.gov/eeoc/task_force/harassment/report.cfm.*