

EMPLOYMENT LAW UPDATE

Kerstein, Coren & Lichtenstein, LLP

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FOCUS ON SEXUAL HARASSMENT

“Sexual Harassment is Against the Law.”

In the modern workplace, employees cannot avoid noticing the conspicuous posters and company policies on sexual harassment. Indeed, Massachusetts requires companies to publish a harassment policy and to distribute it to new hires and to all employees annually.

Easy to Define, Hard to Prevent

Sexual harassment is a form of unlawful gender discrimination. It includes unwelcome sexual acts or overtures, where acceptance or rejection impacts employment (*quid pro quo harassment*). Sexual harassment also includes other unwelcome conduct that creates an intimidating or sexually offensive workplace (*hostile environment*). In a brief article, it is only possible to offer a general definition. For further guidance as to Massachusetts legal standards, readers should consult an attorney or the Massachusetts Commission Against Discrimination (MCAD), which publishes a model policy: <http://www.mass.gov/mcad/harassment.html>

Though harassment is easy to define, it is difficult to prevent. Employees work long hours in close quarters, and companies cannot prevent all instances of offensive (or misunderstood) touching, jokes, gestures, looks, Internet use, flirting, and other provocative conduct. Moreover, the reality is that some employees become sexually involved, and some liaisons end badly. Employees who suffer an adverse employment action (warning, termination, etc.) may question if discrimination or harassment was a factor. For most companies, harassment and discrimination claims are inevitable. The first line of defense is publishing strong anti-harassment and anti-discrimination policies and training supervisors and employees. The second line of defense is investigating harassment claims properly, and taking prompt and effective remedial measures. A recent decision of the Massachusetts Appeals Court, Trinh v. Gentle Communications et al (March, 2008) illustrates how prompt remedial action can limit a company's liability. See “Recent Legal Developments,” on page 2.

Get on the Train!

Sexual Harassment Prevention Training Is “Recommended”

Certain states now mandate sexual harassment prevention training (including California, Maine, and Connecticut). Most other states strongly encourage training. Massachusetts recommends training for employees and new supervisors within one year of hire or appointment. MCAD has developed specific training standards, and the MCAD offers certification programs for trainers. In both federal and state lawsuits alleging sexual harassment, mandatory training programs can be effective evidence of a company's commitment to oppose sexual harassment and discrimination.

Companies that resist training programs typically fear that training will encourage complaints or lawsuits. This fear may be misplaced. Dr. Caren M. Goldberg, a management professor at American University, conducted a recent study of over 200 professional workers. Half of the group received sexual harassment training, while the other half received none. In completing surveys about harassment scenarios, the trained group was no more likely to seek legal counsel than the untrained group. Psychology of Women Quarterly (March '07). Effective training programs may even deter frivolous claims by advising employees of sexual harassment standards and the reporting policies of your company.

Employment Law Update is presented by **Attorney Paul W. Morenberg**, who is certified by the MCAD as a trainer in harassment and discrimination prevention. The opinions in this report do not necessarily reflect the views of Kerstein, Coren & Lichtenstein, LLP. This document should not be construed as legal advice. This report may constitute legal advertising. © 2008, Paul W. Morenberg.

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“(S)he’s Claiming Sexual Harassment... Now What?”

Perhaps the greatest challenge that any HR professional can face is the sexual harassment investigation. Some HR managers treat sexual harassment claims with disbelief or annoyance. Unfortunately, a “hostile tone” or skeptical remark can undermine an investigation, which must be impartial and respectful. Companies should take great care to avoid discrediting or punishing employees who complain of harassment. State and federal laws prohibit “retaliation” against complainants and witnesses. Employees can win substantial damages for retaliation even if they fail to prove sexual harassment or discrimination.

Seven Tips for an Effective Investigation

1. Ensure that an objective, disinterested manager or HR professional leads the investigation.
2. Contact your attorney for early guidance regarding investigation methods and legal issues.
3. Conduct detailed and respectful interviews of the complainant, the accused, and all witnesses.
4. Ask the complainant for copies of all supportive documents, notes, journals, e-mails, etc.
5. Never promise “confidentiality,” but always be discrete in disclosing sensitive allegations.
6. Take prompt remedial action during and after an investigation to minimize potential harassment (e.g. if possible, reassign the complainant or accused employee to help defuse the conflict.)
7. Even when an investigation is inconclusive, consider reasonable warnings, notices or further training to remind employees of your sexual harassment policy and reporting procedures.

Recent Legal Developments

On March 10, 2008, the Massachusetts Appeals Court issued an important ruling on sexual harassment damages. Trinh v. Gentle Communications, et al., 71 Mass.App.Ct. 368 (2008). An administrative employee (Trinh) accused the manager of a Brookline dental office (Dr. Tencer) of sexual harassment. Her complaint included allegations that Tencer asked to see her breasts, made her uncomfortable with his glances, and brushed against her. Trinh was transferred to the Cambridge office of the company to minimize contact with Tencer without loss of salary or status. As Trinh was feeling “stressed out,” she cancelled an initial meeting with managers investigating her claims. Meanwhile, these managers interviewed several other employees, including Tencer. Trinh objected that the investigation was biased as it questioned her behavior, and she wrote a letter of resignation. The managers again attempted to interview Trinh, but she abruptly ended the interview. As no employees corroborated Trinh’s allegations, and as Trinh did not cooperate, the investigation was closed. After trial, the jury awarded \$20,000 in compensatory damages against Tencer and the company, another \$20,000 for lost

income, \$65,000 in punitive damages against Tencer, and \$1,000,000 in punitive damages against the company. The judge vacated the award of lost income since Trinh resigned, and vacated the \$1,000,000 award because there was no evidence the company knew of harassment, failed to take remedial action, or engaged in retaliation. The Appeals Court affirmed, finding that Trinh resigned voluntarily, “thereby short-circuiting the investigation.” The Trinh ruling demonstrates the great wisdom of taking prompt remedial action to limit alleged harassment and conducting swift and fair investigations.

On February 7, 2007, the U.S. Court of Appeals for the First Circuit overturned the dismissal of an unusually sparse sexual harassment complaint. The Court ruled that a secretary could pursue a sexual harassment claim that her manager frequently stared at her breasts. The plaintiff alleged no offensive comments, sexual advances, or improper touching. Billings v. Town of Grafton. The ruling is notable for allowing a hostile work environment claim to rest primarily on plaintiff’s subjective allegation of feeling objectified.

If you have any questions about sexual harassment law or other employment law issues, please contact your own KCL attorney. To reach Attorney Morenberg, please call (781) 997-1567 or submit an e-mail: pmorenberg@kcl-law.com.