PRIMA'S 2017 RISK MANAGEMENT
WEBINAR SERIES

PROHIBITED SEXUAL HARASSMENT

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What is Sexual Harassment?

- Unwelcome sexual advances
- Requests for sexual favors.
- Other verbal or physical conduct of a sexual nature that affects an individuals' employment, unreasonably interferes with his/her work performance, or creates an intimidating, hostile or offensive work environment.

Forms of Sexual Harassment

- Quid Pro Quo
  - Tangible employment action against the victim.
  - Involves monetary loss or change in job.
    - E.g. Jane Doe receives smaller pay increase based on performance than other employees with similar performance because she refused to go out with her supervisor, Richard Roe.

Forms of Sexual Harassment (cont.)

- Hostile Work Environment
  - Speech or conduct that is severe and/or pervasive enough to create an abusive or hostile work environment.
    - E.g. Richard Roe is leering at and intentionally brushing against Jane Doe.
  - Explicit or suggestive items displayed in the workplace that interfere with job performance or that create a hostile work environment
    - E.g. Jackie Roe has a calendar of nude males on her cubicle wall visible to passersby.

Who can be involved in Sexual Harassment?

- Those who commit – employees at all levels, customers, members of the same sex.
- Those who are targeted – victims, bystanders and, in some cases, witnesses who are affected by the harassment.

Video Clip



Are Employers legally responsible for harassment by a supervisor?

- Employers are always legally responsible for harassment by a supervisor that culminates in a tangible employment action.
- The company cannot avoid legal liability on the basis that an employee did not complain about the harassment, or because it took other steps designed to discourage workplace harassment.
- The Supreme Court recognized that this result is appropriate because an employer acts through its supervisors, and a supervisor's undertaking of a tangible employment action is equivalent to an act of the employer.

Employer Liability

- **Harassment by a supervisor:**
  - If the harassment results in a tangible employment action, e.g. firing or demotion, the employer is liable.
  - If the harassment creates a hostile work environment, then the employer can also be liable, but it has a possible defense, if it can show that the employer exercised reasonable care to prevent and promptly correct any harassment and the employee unreasonably failed to take advantage of the preventive or corrective measures.
- **Harassment by a co-worker:**
  - The employer is liable if it knew or should have known about the harassment, unless it took immediate and appropriate corrective action.

Remedies Available to a Victim of Sexual Harassment

- Victims of sexual harassment can recover remedies including:
  - hiring; back pay; front pay; reinstatement; promotion; compensatory damages (emotional pain and suffering); punitive damages (damages to punish the employer); other actions that will make an individual "whole" (in the condition she or he would have been but for the harassment).
- Remedies also may include payment of:
  - attorneys' fees; expert witness fees; and court costs.

Laws Pertaining to Sexual Harassment

- Title VII of the Civil Rights Act of 1964 protects a job applicant, employee, or former employee from discrimination based on:
  - Race, Color, Religion, Sex (including pregnancy), National origin, Age (40 or older), and Disability
- Courts have found that sexual harassment is a form of sex discrimination.
- Title VII is Enforced by the Equal Employment Opportunity Commission (EEOC)
- Title VII also prohibits employers from retaliating against employees who oppose discriminatory employment practices, report incidents, file an EEOC charge, cooperate with an EEOC investigation, or participate in a lawsuit.

Who is covered by the law?

- Title VII covers all private employers, state and local governments, and educational institutions that employ 15 or more individuals.
- These laws also cover private and public employment agencies, labor organizations, and joint labor management committees controlling apprenticeship and training.

EEOC Procedure

- The EEOC enforces Title VII claims through investigation, and reconciliation.
- The initial complaint by the Employee will be considered and investigated.
- The EEOC will issue a “probable cause” or “reasonable cause” ruling which will provide the employee with a determination as to whether there is merit to the claim for discrimination.
- If the EEOC determines there is probable cause that discrimination occurred, or is occurring in the workplace, it will:
  - Attempt reconciliation and settlement between the employee and employer which can result in: (a) Money damages paid to the employee; and (b) Policy changes instituted by the employer.
  - Provide the employee with a “right to sue” letter allowing the employee to take legal action against the employer and seek damages on his or her own.
  - Initiate its own suit against the employer.

Judicial Review of EEOC Conciliation

- In a unanimous decision, the U.S. Supreme Court held that courts have limited authority to second-guess the EEOC's conciliation efforts in enforcing Title VII – ending a circuit court split, and clarifying the "proper scope of review."
- Mach Mining, LLC v. E.E.O.C., 135 S. Ct. 1645 (2015)
  - Holding: A court may review whether the EEOC satisfied its statutory obligation to attempt conciliation before filing suit. But, because the EEOC has "abundant discretion" to determine the nature and scope of conciliation discussions in any particular case, saying that "Congress left to the EEOC such strategic decisions as whether to make a bare-minimum offer, to lay all its cards on the table, or to respond to each of an employer's counter-offers, however far afield," the scope of that review is narrow.

Evolving Issue - EEOC Protection for Transgender Employees

- The EEOC has taken the position that discrimination against an individual because that person is transgender constitutes discrimination based on sex.
- Macy v. Dep't of Justice, EEOC Appeal No. 0120120821, 2012 WL 1435995 (E.E.O.C.) (April 20, 2012).
  - Transgender woman was a police detective who applied for a position with the ATF as a crime lab technician.
  - Position was given to another applicant.
  - EEOC Appeal Board stated "gender is no different from religion" and applying Title VII protection to gender status does not create a new class of covered employees.

What is Transgender Discrimination?

- Refusal to hire an applicant based on transgender status.
- Firing an employee because of a gender transition.
- Intentional and/or persistent refusal to use the gender pronoun that corresponds with an employee's gender identity – of which the employer has notice.
- Denying a promotion to an employee due to sexual orientation/gender identity.
- Providing lower salary due to sexual orientation/gender identity.
- Offering disparate terms/conditions/privileges of employment such as:
  - Offering health insurance to a male employee's spouse that is a woman but refusing health insurance to a female employee's spouse that is also a woman.

Judicial Interpretation

- EEOC v. R.G. & G.R. Harris Funeral Homes, Inc.
  - Federal District Court in Michigan rejected a Title VII claim brought by the EEOC on behalf of transgender employee who sought to "dress as a woman" at work.
  - The Court found that body of sex-stereotyping case law that is enforced by the EEOC imposes a *substantial burden* on the funeral home's ability to conduct business in accordance with its sincerely held religious beliefs.
  - In this case, the religious belief was that “the Bible teaches that a person's sex is an immutable God-given gift and that people should not deny or attempt to change their sex.”
  - The EEOC failed to show that imposing that burden is the least restrictive means of protecting employees from gender stereotyping.
  - Instead, the EEOC should have proposed a gender neutral dress-code.

Bathrooms Facilities for Transgender Employees

- In early May, 2016, the EEOC provided additional guidance with respect to employers' bathroom facilities.
- Lusardi v. Dep't of the Army, EEOC Appeal No. 0120133395, 2015 WL 1607756 (Mar. 27, 2015).
  - Denial of an employee's access to a restroom that corresponds with gender identity amounts to sex discrimination.
  - An employer cannot condition the employee's right to access such restroom on proof of having undergone surgery or any other medical procedure.
  - An employer cannot avoid the requirement by restricting employee to a single-user restroom.
- EEOC authority supersedes contrary state laws (North Carolina).

Bathrooms, cont'd.

- North Carolina – HB 2
  - State law requiring persons to use public bathrooms that correspond with biologic sex.
  - The Obama Administration and a number of organizations including the ACLU have taken the position that transgender status is protected as "sex" under Title VII.
  - The law immediately sparked litigation and will be an ongoing issue as to the extent that gender identity will be protected under Title VII.

Risk Mitigation Measures

- Establish clear, realistic and concise policies that work for your workplace and community
- Educate and train your employees on policies, protocols and workplace expectations
- Document negative behavior and provide positive reinforcement of your public entity's core values and the law
- Leave politics out of the decision making
- Don't let an issue fester – quickly and confidentially address the elephant in the room

Recent Notable Cases

- Gretchen Carlson v. Roger Ailes
  - Defendant, CEO of Fox News, is alleged to have unlawfully retaliated against Plaintiff by terminating her employment because she refused his sexual advances and complained about it.
  - Fox News settled the lawsuit for $20 million on behalf of Defendant.
  - Defendant resigned in the aftermath.

Notable Cases, cont'd.

- Jane Doe v. Al Jazeera - (No. 1:16-cv-06416)
  - Luai Bashir, Al Jazeera's VP of Project Management Office, allegedly made unwanted sexual advances toward Plaintiff. Plaintiff filed a complaint with HR. A few weeks later, Plaintiff was let go.
  - Seeking $250k in damages for lost earnings and emotional injuries for violations of Title VII.

Retaliation Claims

- Involve an adverse action that someone within your organization takes against another because they complained about harassment or discrimination.
- Are adverse actions that may include demotion, discipline, termination, salary reduction, negative evaluation, changes in job assignments or hostile behaviors toward the individual who complains.

Retaliation Claims (Cont.)

- Some retaliation claims are now actionable under 42 U.S.C. § 1983.
- The retaliation claim must be based on some adverse action taken by the Employer as a result of the Employee's complaint of discrimination, in order for same to be actionable under § 1983.
- Vega v. Hempstead Union Free Sch. Dist., 801 F.3d 72 (2d Cir. 2015)
  - The Second Circuit held that a state employee may bring a retaliation claim under § 1983 against a supervisor who, acting under color of law, retaliates against him for opposing discrimination in the terms of his employment.

Risk Strategies to Prevent Retaliation

- Establish a policy prohibiting retaliation that is tailored to your work environment. Make the policy simple and straightforward and give concrete steps an employee may take to file a complaint and what your management staff needs to do when that complaint is filed.
- Keep the lines of communication open with the complaining employee and work with the employee to investigate the complaint while protecting your organization.
- Ensure confidentiality of the investigative process. Be firm about your expectations of confidentiality regarding that investigative process.
- Educate your organization on what retaliation is and what your organization's policy covers.
- Document the complaint on an ongoing basis and obtain as much information as possible.

Constructive Discharge Claims

- In order to establish a hostile-environment constructive discharge claim, a plaintiff "must show working conditions so intolerable that a reasonable person would have felt compelled to resign." Pennsylvania State Police v. Suders, 524, U.S. 129, 147 (2004).
- Notice of Resignation Triggers Statute of Limitations. Green v. Brennan, Docket No. 14-613 (U.S. 2016)
  - The 45 day limitations period for contacting an EEOC counselor begins running only after an employee resigns.
  - The Court also clarified that a constructive discharge claim accrues when the employee gives notice of his resignation.

Cat's Paw Theory

- Staub v. Proctor Hosp., 562 U.S. 411, 416 (2011)
  - The term "cat's paw" derives from a fable conceived by Aesop, put into verse by La Fontaine in 1679, and injected into United States employment discrimination law by Posner in 1990. . . . In the fable, a monkey induces a cat by flattery to extract roasting chestnuts from the fire. After the cat has done so, burning its paws in the process, the monkey makes off with the chestnuts and leaves the cat with nothing. A coda to the fable (relevant only marginally, if at all, to employment law) observes that the cat is similar to princes who, flattered by the king, perform services on the king's behalf and receive no reward.

Cat's Paw Theory, Cont'd.

- Under the Cat's Paw theory, the Supreme Court held that an employer may remain liable for the discriminatory animus or intent of a biased supervisor, even if the biased supervisor was not the decision maker, if the employee shows that the employer's decision was influenced by the biased supervisor. Staub, 562 U.S. 411.
- Vasquez v. Empress Ambulance Service, Inc., 2016 WL 4501673 (2d Cir. Aug. 29, 2016)
  - Court held that Cat's Paw theory also applies in cases where an employer "negligently allows itself to be used as conduit for even a low-level employee's discriminatory or retaliatory prejudice."

QUESTIONS?

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