

## Law 101: Anti-harassment training for managers, supervisors

The employer/employee relationship is unique in the law: Employees don't just work for their employer, they are the employer's alter ego, speaking and acting "on behalf of" the employer. Employees are "agents" of their employers and can bind the employer for debts and wrongful acts.

This is true even if the employer did not do wrong or did not directly cause injuries. Liability hinges entirely on whether the employee was acting within the scope of employment when he or she engaged in the bad act.

Anything done while the employee is doing the employer's work generally will be considered within the scope of his or her employment—even if the employee is acting irregularly or disregarding the employer's instructions about how to perform a given task.

But when an employee acts for "personal motives" unrelated to the employer's business or advancing the employer's objectives, the employer will avoid liability. In those situations, the employee's acts will be deemed "outside the scope" of employment.

### Training backs up policy

Employers can reduce the risk of liability for an employee's actions by properly training employees in all aspects of their jobs. Employees with supervisory or managerial responsibilities create an omnipresent vicarious liability threat for countless decisions—from interviewing and hiring, to requests for leave and accommodations, to terminations and workplace harassment.

Developing, implementing and enforcing a comprehensive anti-harassment policy is vital to create a safe and comfortable work environment and minimize the potential damage from harassment lawsuits.

But having an anti-harassment policy is not enough; the policy must be implemented, promulgated and consistently enforced. Training employees and managers on harassment law and the employer's harassment policy is an important part of an employer's

defense against a harassment claim—whether the alleged harassment was by a supervisor or a co-worker.

An employer may avoid liability in those cases where no adverse job action results from the harassment (such as firing or demotion) if the employer can show that:

- It exercised "reasonable care" to prevent and to correct the harassment.
- The employee who claims he or she was harassed unreasonably failed to take advantage of the employer's complaint-reporting procedure.

### Defensive training

Training employees, managers and supervisors plays an integral part in establishing this defense. Unless an employer trains those in charge of investigating harassment complaints, the employer may not be able to show it took the appropriate level of care to prevent harassment.

In *Hill v. The Children's Village*, the Southern District of New York

refused to dismiss an employee's sexual-harassment claim because the court found that supervisors failed to follow their own sexual-harassment policy. The employer may not have trained them well enough to recognize sexual harassment when it was reported to them. This cast doubts about the employer's efforts to prevent harassment.

Similarly, in *Hollis v. City of Buffalo*, the Western District of New York rejected the employer's defense because it didn't take adequate steps to prevent sexual harassment. In that case, the employer hadn't conducted any sexual-harassment training.

Training also plays a role in establishing that the employer acted to correct or stop the harassment, as *Richardson v. New York State Dept. of Corrections* shows. Only after receiving and investigating an employee's complaints of sexual harassment did the employer's EEO officer recommend conducting harassment training. The employer argued it had acted reasonably to stop the reported harassment. The court disagreed, and pointed to the employer's failure to conduct harassment training—which its EEO officer felt was "necessary"—as evidence of the employer's failure to take reasonable steps to stop the harassment. In other words, the horse already had left the barn.

### Training on how to use the policy

Training is the key to showing that an employee unreasonably failed to take advantage of the employer's complaint procedure, which is the second piece of the employer's defense. An employer can't claim that an employee failed to utilize a complaint procedure he or she didn't know existed.

Train all employees on the complaint-reporting procedure. Training should include a discussion of the concept of "harassment"—that it involves more than just sexual remarks. It should familiarize employees with the appropriate people to whom reports should be made, the complaint and investigation process itself and possible outcomes.

### Good harassment training helps employers in court

Two New York cases show the value of training employees. In both *Wahlstrom v. Metro-North Commuter R.R.* and *Donovan v. Big V Supermarkets*, courts found the employers had provided a "reasonable avenue of complaint," thus avoiding liability for a co-worker's sexual harassment of the plaintiffs.

In *Wahlstrom*, the employer provided anti-harassment training to all management-level employees, and all new employees hired into the plaintiff's job title. The court pointed to this training as evidence the employer provided a reasonable avenue of complaint.

Training also was crucial in *Donovan*. There, the employer trained all the managers, assistant managers and unionized heads of stores in its sexual-harassment policy. The court concluded it was undisputable that the employer provided a reasonable avenue of complaint and cited the employer's training program as evidence of that conclusion.