

NOT ALL HARASSMENT IS BLACK AND WHITE

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Most of you have had experience with run-of-the-mill harassment complaints such as an employee complaining that her co-worker tells sexually offensive jokes or uses racially offensive language. In fact, most of you have policies prohibiting this type of behavior and when these situations arise you conduct an investigation and take prompt action to stop the improper conduct. This month's questions and answers, however, address issues that do not involve cut and dry harassment based on protective characteristics (sex, race, national origin, religion, etc.), and you should be prepared to address these issues if they arise in your workforce.

Q: One of our employees has been losing effectiveness in her position (her skills aren't keeping up with customer needs). A few days ago, she passed by a coworker's computer and noticed an instant message complaining about her performance. She was devastated and told her supervisor that she felt harassed and could no longer work with the other two employees. She admitted that she no longer has the technical skills to perform her duties, but I'm afraid that if we move her to a lower position, it could look like retaliation for her harassment complaint. Are we facing liability?

A: As you know, federal law prohibits an employer from retaliating against an employee who complains of discrimination or harassment based on a protective characteristic (sex, race, national origin, religion, etc.). The question here is whether an employer can be held liable for transferring or demoting an employee who felt she was being harassed by other employees complaining about her poor performance.

The short answer to that question is "no" because the employee is not claiming that she was harassed because of a protected characteristic. Nevertheless, you should investigate the employee's complaint and counsel the other employees not to gossip or critique the performance of co-workers unless they are bringing it to the attention of a supervisor. After investigating the complaint, you should inform the employee of the results of the investigation and the steps taken to address her complaints and also

inform her that she is being moved to a lower position because, as she admits, she does not have the technical skills to perform her current duties. This should appease the employee because you took her complaint seriously, addressed it, and changed her position only because of her admitted inability to perform her current position.

Q: We have an employee who is having a relationship with a woman who cleans our offices (she isn't one of our employees). The fact that our employee is married is upsetting those in the office who know about the affair. Coworkers also are complaining about public displays of affection. The office manager is upset from a moral standpoint and wants to discipline the employee, but he really isn't breaking any rules. How should we handle the situation?

A: This question will undoubtedly remind Seinfeld fans of the famous "red dot" episode where George was fired for having sex with the cleaning lady on his desk. When confronted by his boss about the situation, George responds, "Is that wrong?" Despite the comedic nature of the episode, inter-office or employee-vendor relationships can cause serious problems as shown by this reader's question.

The biggest concern raised in this scenario is the fact that co-workers are complaining about public displays of affection. This can be construed as a complaint of a sexually hostile environment and you should conduct an investigation to determine the extent of the public displays and their effect on the co-workers. If you determine that the employee and cleaning lady are engaging in public displays of affection and that co-employees find this offensive, then you should discipline the offending employee and instruct him not to engage in similar conduct in the future. If the behavior persists, then you should consider further discipline, including termination. It is also possible to prevent this type of behavior by implementing a policy that prohibits romantic relationships between employees and vendors and/or customers. Many employers implement such policies to prevent these types of situations. Maybe, George's boss had a similar policy and that's why he fired George immediately just before Christmas.

Q: We had a rather volatile sales manager who received several written warnings for aggressive, intimidating behavior toward our controller. We also required him to take anger management classes. The manager ended up quitting over a month ago, but the controller just found out that the company owner has rehired him because we need his sales skills. The controller is understandably uncomfortable with having the manager back in the company. Do we face liability issues if we bring the manager back?

A: Yes, there are certainly liability issues if you re-hire this manager. Specifically, you may open yourself up to claims of negligent hiring, negligent retention, and negligent supervision if this manager loses his temper and assaults a co-employee or customer after he is rehired. You have no doubt been put on notice of this manager's aggressive behavior and unless you take steps to ensure the safety of co-employees and those he comes in contact with through his employment, you will probably have a very difficult time defending a claim of negligent hiring, supervision, and/or retention.

Q: **We have two employees who have had a long-standing feud. Every time they are in the same facility, Employee A says Employee B is harassing her (for example, Employee A will say, "I said 'hi' to her, and she didn't say 'hi' back"). In most of the complaints, it's one's word against the other's. Since most of the complaints are so petty, I want to call them into a meeting together and discipline them both. The problem is that Employee A's most recent complaint was filed as a "harassment" complaint, and I'm afraid she could turn any imposed discipline into retaliation. Since the conduct she complains about doesn't meet the legal definition of "harassment," are we safe to discipline?**

A: This situation is similar to the first question because both employees "complaints" of harassment are not based on a protected characteristic. I think you got this one partially right. You should certainly investigate each employee's complaints and determine whether any are serious enough to warrant action. If the complaints are as petty as "he didn't say hi to me," then you should counsel each employee and explain that you are not the teacher at recess and that if the petty complaints continue from either employee, that employee will be subject to further discipline up to and including termination. The law doesn't require you to babysit your employees and you shouldn't waste your time doing so.