Legal Update Article

EEOC Enforcement Guidance on Workplace Harassment: Liability

By Stephanie L. Adler-Paindiris, Stephanie E. Satterfield & Joseph C. Toris

May 17, 2024

Meet the Authors

Stephanie L. Adler-Paindiris

(Pain-DEAR-is • She/Her)

Principal

(407) 246-8409

Stephanie.Adler-Paindiris@jacksonlewis.com

Stephanie E. Satterfield

(She/Her)

Principal

(864) 672-8048

Stephanie.Satterfield@jacksonlewis.com

The Equal Employment Opportunity Commission's (EEOC) first updated enforcement guidance on workplace harassment in 25 years is broken down into the three components of a harassment claim: (1) the covered bases and causation; (2) discrimination respecting a term, condition, or privilege of employment; and (3) liability. We discuss each component in separate articles. This article is on how the guidance addresses the liability component and the standards for imposing employer liability for harassment.

The guidance does not constitute legally binding precedent, but it does provide "legal analysis of standards for harassment and employer liability applicable to claims of harassment under the equal employment opportunity (EEO) statutes enforced by the Commission." The new guidance supersedes several earlier EEOC guidance documents on harassment.

Liability

The final component of harassment claims covered by the guidance is the issue of employer liability. Liability for the creation of a hostile work environment under federal EEO laws depends on whether the employer has implicitly or explicitly changed the terms or conditions of employment. For explicit changes (i.e., quid pro quo harassment), the employer has no defense to liability. For implicit changes to the terms or conditions of employment, employer liability is dependent on the relationship between the harasser and the target of the harassment:

- If the alleged harasser is a proxy or alter ego of the employer, the employer has no defense to liability for the harasser's conduct as the harasser's actions are considered the actions of the employer.

- For supervisory harassers who are not proxies for the employer, the employer will still be vicariously liable for the harassment if the harassment includes a "tangible employment action" against the victim (e.g., termination or demotion). If there is no tangible employment action, the employer may limit its liability for the harassing conduct based on the *Faragher-Ellerth* affirmative defense (demonstrating the employer acted reasonably both to prevent *and* promptly correct harassment; and the complaining employee unreasonably failed to use the employer's complaint procedure or to take other steps to avoid or minimize harm from the alleged harassment). The tangible employment action may occur at any time during the period of harassment. Unfulfilled threats to take a tangible employment action do not constitute a tangible employment action but can qualify as harassing conduct.

- For non-supervisory harassers, the employer is only liable for the alleged

Joseph C. Toris
KM Attorney
908-795-5220
Joseph.Toris@jacksonlewis.com

Related Services

Litigation

harassment if the employer was negligent by failing to take reasonable actions to prevent the harassment or to take reasonable corrective action once it knows or should know of the harassment.

The guidance notes, "Negligence provides a minimum standard for employer liability, regardless of the status of the harasser. Other theories of employer liability—automatic liability (for proxies and alter egos) and vicarious liability (for supervisors)—are additional bases for employer liability that supplement and do not replace the negligence standard." (Internal citations omitted.)

The guidance sets forth a number of actions an employer can take in order to establish it exercised reasonable care to prevent and correct harassment. There are no specific required actions; rather the employer must show that its efforts, taken as a whole, were reasonable.

According to the guidance, anti-harassment policies should generally include the following:

- Define prohibited conduct;
- Be widely disseminated;
- Be comprehensible to employees, including those the employer has reason to believe might have barriers to understanding the policy;
- Require supervisors to report harassment when they are aware of it;
- Offer multiple methods for reporting harassment, including avenues designed to allow the employees to bypass their harassers;
- Clearly identify points of contact for receiving reports of harassment, including their contact information; and
- Explain the employer's complaint process, including the process's anti-retaliation and confidentiality protections.

Effective training should generally:

- Explain the employer's anti-harassment policy and complaint process, including any alternative dispute resolution process, and confidentiality and anti-retaliation protections;
- Describe and provide examples of prohibited conduct under the policy;
- Provide information about protections provided to employees who experience, observe, become aware of, or report prohibited conduct;
- Provide supervisors and managers with information about how to prevent, identify, stop, report, and correct harassment along with clear instructions for addressing and reporting harassment they become aware of;

- Be tailored to the needs of the particular workplace and workforce and be provided on a regular basis in an easily understandable style and format.

The guidance states that even if an employer follows all of the above guidance, this will not be sufficient to establish reasonableness, as the employer must also implement these policies and procedures effectively.

If the employer can establish it had exercised reasonable care to prevent and correct the harassment, the second element of the *Faragher-Ellerth* defense requires the employer to establish the complainant "unreasonably failed to take advantage of any preventive or corrective opportunities provided by the employer or to avoid harm otherwise." According to the guidance, the second prong of the defense is not an "all or nothing" proposition. If the employer is able to show the employee unreasonably delayed complaining and had they done so they could have avoided some but not all of the harmful conduct, the employer may be able to reduce the damages related to the conduct that could have been avoided.

Many factors go into a determination of whether an employee took reasonable steps to avoid the harassing conduct. A delay in reporting by the employee is not necessarily fatal to the employee's claim if there is a reasonable explanation for the delay. For example, an employee may reasonably choose not to report minor incidents, hoping the conduct will end. The employee may also choose to speak directly to the harasser and ask them to stop before resorting to the internal complaint procedure. Further, the employee's failure to follow the employer's complaint process will not necessarily insulate the employer from liability if the efforts the employee did take were reasonably calculated to avoid the harassment. However, even if the employee uses the internal complaint procedure, the employer may still be able to use the *Faragher-Ellerth* affirmative defense if the employee unreasonably fails to cooperate with the company's investigation. Other potential reasonable explanations for an employee's delay or failure to use the company's complaint procedures include: employer-created obstacles to filing complaints; ineffective complaint mechanisms; and reasonable fear of retaliation.

The guidance provides several factors to be considered in determining whether an employer failed to act reasonably to prevent the unlawful harassment from occurring, including the adequacy of the employer's anti-harassment policy, complaint procedures, and training; the nature and degree of authority the alleged harasser exercised over the complainant; the adequacy of the employer's efforts to monitor the workplace; and the adequacy of the employer's steps to minimize known or obvious risks of harassment. The guidance goes on to state that even if the employer acted reasonably to prevent unlawful harassment, it may still be liable for the harassment if it did not act reasonably to correct harassment about which it knew or should have known.

The obligation on the part of the employer to take reasonable corrective action arises once the employer has actual or constructive notice of potential harassment. This includes when the employer receives complaints from someone other than the target of the harassing conduct including friends, relatives, or coworkers. Even if the employer does not receive any complaints, it still has an obligation to correct harassment it becomes aware of, such as by personally witnessing the harassing

conduct. Additionally, while no "magic words" from a complainant are required to alert the employer to the existence of harassment, the complainant must identify the conduct in some way. As such, complaints that someone in the workplace was "rude" or "aggravating" may be insufficient, depending on the circumstances, to place the employer on notice. While an employer cannot be held liable for conduct that does not violate federal EEO laws, it may nonetheless have a duty to take corrective action if it is aware of conduct that could reasonably be expected to lead to unlawful conduct.

The guidance states that an investigation into potentially harassing conduct will be considered prompt if it is conducted reasonably soon after the employer learns of the alleged harassment, whether through a complaint or other means. The determination of what is "reasonably soon" will depend on the facts of a given situation, including the nature and severity of the alleged harassment and the reasons for any delay.

The adequacy of an investigation is determined by whether it is sufficiently thorough to "arrive at a reasonably fair estimate of truth." Not every situation needs to involve a full-blown investigation. However, the investigation that is undertaken, at a minimum, should be conducted by an impartial party and solicit information about the conduct from all parties involved. The investigator should be well-trained in conducting interviews and assessing witness credibility. The subject of the investigation should not have any direct or indirect control over the investigation, including not having supervisory authority over the investigator. The investigator should be well-trained in the skills required for interviewing witnesses and evaluating credibility. Once the investigation is complete, the employer should advise the complainant and the alleged harasser of the outcome and any corrective action to be taken, subject to applicable privacy laws.

The guidance states that in some cases, it may be necessary to take intermediate steps to address a harassing situation while an investigation is ongoing, if the allegations are sufficiently severe. The guidance provides examples of potential interim measures such as temporarily transferring the alleged harasser or placing them on leave pending the outcome of the investigation. The guidance notes that the employer has an obligation to take "every reasonable effort" to minimize any burden or negative consequences on the complainant both during and after the investigation. Any corrective action that leaves a complainant in a worse position than they enjoyed prior to their complaint could constitute unlawful retaliation.

Employers should retain records of all harassment complaints and investigations to help identify patterns of harassment. This information can be useful in improving efforts to prevent harassment, including training, and can also be used to assist with credibility assessments and disciplinary measures in the future.

The guidance provides that employers follow consistent processes to investigate harassment complaints and to determine what corrective action is appropriate. Employers are cautioned to avoid taking corrective action that takes into consideration the protected characteristics of the parties involved. For example, corrective action taken against a male employee accused of harassment based on the stereotype that men have a propensity to harass women would violate Title VII of

the Civil Rights Act.

If an employee reports harassment but asks the employer not to take any action or to keep the complaint confidential, it may be reasonable to honor this request if the conduct is "relatively mild." However, if the alleged harassment is severe or could affect other employees, it is not reasonable for the employer to take no action. The guidance provides that the employer can establish mechanisms such as an informational phone line or website that would allow employees to anonymously ask questions or share concerns about harassment. If the employer establishes such a mechanism, it may be required to take general corrective action, such as recirculating the company's anti-harassment policy, in response to inquiries to reduce the likelihood of future harassment.

For individuals working for a company through an employment agency, both the agency and the client are responsible for taking corrective action to address any alleged harassing conduct about which either has notice. The employment agency and its client do not have to take duplicative corrective action, but each has an obligation to respond to harassing conduct, either independently or cooperatively. The guidance provides examples of the type of corrective action an employment agency can take in response to knowledge of harassing conduct including: advising the client of the conduct; insisting the client investigate and take corrective action; working with the client to investigate the conduct and take corrective action; and offering the employee the opportunity to take another assignment at the same pay rate, if an assignment is available and the employee is willing to accept it.

The guidance states that, as with other forms of discrimination, harassment can be systemic, affecting multiple individuals to similar conduct. Allegations of systemic harassment focus on the overall work environment rather than the subjective experience of a single complainant. In these instances, the facts may establish the employer engaged in a "pattern or practice" of tolerating harassment in the workplace. An employer's efforts to prevent and correct systemic harassment must be sufficient to address the nature and scope of the overall harassment the employer knows or should know has been occurring. This includes taking reasonable steps to determine whether specific conduct is directed at a particular individual or is part of a systemic issue.

Related:

- EEOC Enforcement Guidance on Workplace Harassment: Covered Bases and Causation
- EEOC Enforcement Guidance on Workplace Harassment: Impact on a Term, Condition, or Privilege of Employment

Employers should review their harassment policies in light of the new guidance. Please contact a Jackson Lewis attorney with any questions.