

A Massachusetts Employer's Guide to Sexual Harassment Allegations in the Wake of #MeToo

BY REGINA RYAN

In recent months, the careers of high-profile figures such as Harvey Weinstein, Matt Lauer, Kevin Spacey and Mario Batali have ended abruptly due to allegations of sexual harassment in the workplace. The explosion of allegations being reported and the rise of the #MeToo movement are a reminder to all employers that it is their responsibility to take appropriate measures to create a workplace that is free of harassment. In order to do so, employers must be aware of the conduct that constitutes unlawful harassment, the steps to take to prevent such behavior, and the liability an employer may incur for failure to do so.

Two Types of Sexual Harassment

In Massachusetts, Chapter 151B of the General Laws is the statute that makes sexual harassment in the workplace unlawful. There are two main categories of sexual harassment from which employers need to protect employees: “quid pro quo” harassment and “hostile work environment” harassment.

Harassment falling under quid pro quo (Latin meaning “something for something”) includes sexual advances and



requests for sexual favors to which the submission or rejection becomes the basis for employment decisions or a term or condition of employment.¹ Many of the recent complaints against celebrity figures reported in the media have included allegations of quid pro quo harassment. For example, numerous aspiring actresses have accused movie producer Harvey Weinstein of promising them stardom

contingent upon satisfying his sexual demands—and denying advancement in retaliation for rejecting his requests.

Hostile work environment discrimination includes sexual advances, requests for sexual favors, and other verbal or physical conduct of a sexual nature that interfere with an individual's work performance by creating an intimidating, hostile, humiliating or sexually offensive work environment. To create a hostile work environment, the behavior must be severe and pervasive, as the law does not prohibit

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¹ See *College-Town, Division of Interco, Inc. v. Massachusetts Commission Against Discrimination*, 400 Mass. 156, 163 (1987).

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all conduct of a sexual nature.² Accordingly, joking in the office is permissible, but not when it becomes hostile and intimidating. If an employee initiates conduct of a sexual nature or is a willing participant in a sexually charged environment, he or she may not be the victim of sexual harassment. But if an employee submits to harassing behavior only in order to cope in a hostile environment and to avoid being targeted further, or because participation is made an implicit condition of employment, he or she is not considered to have welcomed the conduct.³ Examples of a hostile work environment would include allegations that *Today* show host Matt Lauer touched women inappropriately and made them feel uncomfortable, and allegations that *CBS This Morning* host

of the conduct.⁴ An employer may also be liable if an employee who is not a supervisor or a manager, such as a co-worker, creates a hostile work environment.⁵ Even more concerning, an employer may also be liable for the sexual harassment of its employees by certain non-employees (such as customers, patients, clients, independent contractors or other acquaintances) if it knew or should have known of the harassment and failed to take action.⁶

What Should an Employer Do to Protect Employees?

1. Create a Sexual Harassment Policy

Now more than ever, Massachusetts employers must create a sexual harassment policy that will guide employees as

and sign the policy, which makes it clear to them that sexual harassment in the workplace is unlawful because it is considered a form of sex discrimination (see M.G.L. Ch. 151B, Sec. 3A). The Massachusetts Commission Against Discrimination has prepared a Model Sexual Harassment Policy, which can be found at www.mass.gov/service-details/about-sexual-harassment-in-the-workplace. By educating employees on what specific behaviors are acceptable and unacceptable in the workplace, employers will be taking the first step in creating a workplace that is free of harassment. By outlining in the policy the specific steps employees should take if they believe they are victims of unlawful harassment, and by identifying the person to whom the employee should report the behavior, a policy can encourage victims to come forward so that problems can be addressed and corrected.

It is recommended that the sexual harassment policy incorporate all of Massachusetts' additional protected classes, including race, color, religious creed, national origin, ancestry, sex, gender identity, age, criminal record (inquiries only), handicap (disability), mental illness, retaliation, sexual orientation, genetics, and active military—resulting in a complete anti-harassment policy.

2. Train Employees

Employers are strictly liable for the acts of supervisors and managers in Massachusetts,⁷ so it is critical that training be offered to employees. Additionally, detailed records must be maintained of which employees attended the trainings and when. While it is not a requirement, Chapter 151B encourages employers to conduct education and training programs on sexual harassment for all employees on a regular basis. Supervisors need to know their specific responsibilities, as well as the steps they should take to ensure immediate and appropriate corrective action in addressing harassment complaints. Most importantly, supervisors need to address any concerns witnessed by them or reported to them. Ignoring the unlawful behavior enables the wrongdoers to continue to harass other employees, which results in a less-productive work environment.

By implementing a strong sexual harassment policy, training employees, and investigating allegations of sexual harassment, employers are protecting themselves from exposure to liability.

Charlie Rose made lewd phone calls, groped women and walked around naked in their presence.

The media exposure of these allegations makes it clear that sexual harassment can be experienced in any and all work environments, and employers need to take appropriate steps to eliminate this unlawful behavior in the workplace.

When Is the Employer Liable?

Massachusetts employers are strictly liable for quid pro quo sexual harassment. Employers are also strictly liable for hostile work environments created by managers and persons with supervisory authority, regardless of whether the employer knows

to what is acceptable behavior in the workplace. Massachusetts law already requires employers with six or more employees to adopt a written policy against sexual harassment. The employer's policy must include notice to employees that sexual harassment in the workplace is unlawful and that it is unlawful to retaliate against an employee for filing a complaint of sexual harassment. It should also identify the full name of the person to whom complaints should be made, along with his or her work address and telephone number.

Additionally, the sexual harassment policy must be distributed annually to all employees. Employees should review

² *Id.* at 162.

³ See *Ramsdell v. W. Mass. Bus Lines, Inc.*, 415 Mass 673, 677-8 (1993).

⁵ *Id.*

⁶ *Modern Continental/Obayashi v. Massachusetts Commission Against Discrimination*, 445 Mass. 96, 105 (2005).

⁷ *College-Town*, 400 Mass. 156, 166-7.

3. Investigate All Harassment Complaints

Employers are strongly encouraged to investigate any and all claims of sexual harassment. This includes written, verbal, anonymous, formal or informal complaints. Any employee who receives a complaint of sexual harassment or is made aware of any sexually harassing behavior should immediately report it to the human resources department. Although the statute of limitations for filing a charge of discrimination at the Massachusetts Commission Against Discrimination is 300 days from the last discriminatory act, even claims outside the 300-day timeframe should be investigated (see M.G.L. Ch. 151B, Sec. 5).

When an investigation concludes that there has been a violation of the sexual harassment policy, corrective action must be taken. Discipline of the responsible party can range from a verbal warning up to and including termination, depending on the circumstances. Beyond discipline, the employer may also order the employee to attend training. With regard to the complainant, the employer may need to correct the effects of the discrimination and should follow up with the complainant periodically.

Impact of Proactive Measures by the Employer

By implementing a strong sexual harassment policy, training employees, and investigating allegations of sexual harassment, employers are protecting themselves from exposure to liability. These steps are critical for the employer. In the event the employer is sued, the organization may be able to demonstrate that it exercised reasonable care to prevent and promptly correct any sexual harassment. Further, if it can show that the employee unreasonably failed to take advantage of any preventive or corrective opportunities provided by the employer or to avoid harm otherwise, the employer may use this as an affirmative defense. For example, if an employer has a policy

prohibiting harassment, and an employee unreasonably fails to report harassment under the policy, the employer may cite this as an affirmative defense to liability.⁸

Damages

Beyond Chapter 151B, a victim of sexual harassment in Massachusetts may seek recourse under federal law pursuant to Title VII of the Civil Rights Act of 1964 (42 U.S.C. 2000e, et seq.). If an employer is found liable for sexual harassment in the workplace and the case is filed in state or federal court, an employee may be awarded damages for lost wages and benefits, emotional distress, attorney's fees and statutory interest. Injunctive relief may also be available to the employee. If the unlawful acts are found to be malicious, punitive damages may also be awarded.⁹ If the case remains at the Massachusetts Commission Against Discrimination, punitive damages cannot be assessed, but a fine may be assessed against the employer.¹⁰

Now Is the Time to Act

Due to all of the national attention this subject is generating, employees are becoming more aware of what is acceptable and unacceptable in the workplace. More importantly, they are witnessing firsthand the serious consequences one suffers for engaging in behavior that constitutes sexual harassment.

Given the current climate, now is the time for employers to take action—to be proactive and train employees on what constitutes sexual harassment and to outline the steps to take if sexual harassment is experienced. Employers must also investigate any and all allegations of sexual harassment and take corrective action when necessary. By taking these necessary steps, employers will pave the way for a harassment-free workplace. 🌟

⁸ See *Faragher v. City of Boca Raton*, 524 U.S. 775, 780 (1998); *Burlington Industries, Inc. v. Ellerth*, 524 U.S. 742, 765 (1998).

⁹ M.G.L. Ch. 151B, Sec. 9; *Gyulakian v. Lexus of Watertown, Inc.*, 475 Mass. 290, 298-9 (2016).

¹⁰ M.G.L. Ch. 151B, Sec. 5; *Stonehill College v. Massachusetts Commission Against Discrimination*, 441 Mass. 549, 563 n.18 (2004).