Employer Liability for Harassment by Supervisors: An Overview of the 1999 EEOC Guidelines

Although the Supreme Court held that employers are sometimes liable for the sexual harassment of employees by supervisors in the 1986 Meritor Savings Bank v. Vinson decision, the Justices did not identify the specific circumstances under which employers are accountable for the actions of their supervisors. As a result, organizations have often been confused about the extent of their potential liability and the means to effectively deal with the issue of sexual harassment. Effective policies and procedures that protect employees from harassment and the organization from liability have become increasingly important, as the number of Title VII sexual harassment complaints filed with the Equal Employment Opportunity Commission (EEOC) has increased about 50 percent since 1992. However, without clear guidance from the courts or the EEOC, it has been difficult for employers to understand the precise nature of their obligation to prevent sexual harassment under Title VII.

Finally, in the 1998 Faragher v. City of Boca Raton and Burlington Industries v. Ellerth cases, the Supreme Court addressed employers' responsibility for the harassment of individuals by supervisors and ruled that employers are generally liable for harassment by supervisors if the harassment results in any tangible employment action. If a tangible employment action is not involved, the Supreme Court ruled that employers may be able to avoid liability by an affirmative defense that: (1) they exercised reasonable care to prevent and correct harassment, and (2) the employee unreasonably failed to take advantage of any opportunities provided to him/her to either submit a complaint or avoid harassment.

Obviously, the Court's 1998 decisions have tremendous implications for U.S. employers. However, as is often the case, the court decisions left some questions unanswered. For example, although the Court indicated that employers are liable for harassment that results in tangible employment actions, it did not provide a definitive list of what constitutes a "tangible" action. Some obvious

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tangible actions would include unfavorable decisions regarding promotion, pay, or termination. But do all changes in the workplace environment affecting an employee, no matter how trivial, constitute tangible employment actions? The answer to this question requires an interpretation of the language used in the Court's decisions. Similarly, the Court stated that, in the absence of tangible employment actions, employers might be able to avoid liability by demonstrating that they had taken reasonable steps to prevent and correct harassment and that an employee had unreasonably failed to inform the employer of the alleged supervisory harassment. But what are the “reasonable” steps to prevent harassment and what is an “unreasonable” failure to inform the employer of alleged harassment?

In 1999, the EEOC responded to employers’ need for information by issuing guidelines based on the 1998 Court decisions. The policy guidelines attempt to clarify the issue of employer liability and specify the steps necessary to correct and prevent harassment in the workplace. Although the Supreme Court cases dealt specifically with sexual harassment, the EEOC has emphasized that their policy guidelines are also relevant to harassment based on race, religion, national origin, age, or disability. The purpose of this paper is to review the EEOC guidelines and summarize the obligations of employers under the guidelines. Unless otherwise indicated, the following discussion is based on the text of the EEOC policy guidelines related to vicarious employer liability for unlawful harassment by supervisors. The interpretation of the EEOC guidelines is that of the authors alone and should be regarded as general information about employers’ responsibility, and not specific legal advice.

Key Definitions

This section reviews the key components of the 1999 EEOC guidelines regarding employers’ liability for the harassment of employees by supervisors. First, we look at the EEOC’s definition of “supervisor.” Then, we examine the nature of “tangible” employment actions.

The Definition of Supervisor

The Supreme Court ruling regarding employer liability states that employers are liable for unlawful harassment by “supervisors with immediate (or successively higher) authority over the employee.” It is therefore necessary to define what constitutes a supervisory role. First, it is important to realize that the individual does not have to be the employee’s immediate supervisor to be defined as the employee’s supervisor under the EEOC guidelines. Instead, it appears that any individual in the chain of command above the employee could be defined as a supervisor of the employee. However, to be considered an employee’s supervisor, one of three more specific conditions must be met. First, an individual would be defined as a supervisor if he/she has input about or makes decisions about the terms or conditions of employment that directly affect the employee. Under this part of the definition, a supervisor does not have to have the final authority over tangible employment actions, but must at least be able to influence the decisions affecting the employee through recommendations. The second condition under which an individual would be considered an employee’s supervisor is if the individual can directly influence the day-to-day work schedule and assignments of the employee, even if the individual does not have the authority to make or recommend changes in the terms or conditions of employment. Finally, if the chain of command in an organization is vague or confusing, an employer may be liable for the actions of an individual that an employee believes has supervisory authority over him or her, even if no such relationship actually exists.

Based on the EEOC guidelines regarding the supervisory role, employers should be aware that the interpretation of what constitutes a supervisory role is rather broad and may include individuals that the employer does not formally designate as occupying a supervisory position. Second, employers should ensure that their employees understand the chain of command, especially as to the individual(s) that have direct authority over them. Finally, employers should attempt to ensure that unauthorized individuals do not undertake the direction and control of other employees, as this may make them de facto supervisors as far as anti-harassment law is concerned.
The Definition of Tangible Employment Action
The 1998 Supreme Court decisions indicated that tangible employment actions were those that resulted in a "significant" change in the terms or conditions of employment. The EEOC guidelines include an interpretation of the Court decisions that provides employers with a more precise description of tangible employment actions. Of course, the definition is key, since employers are now always liable for the harassment of employees by supervisors when there is a tangible employment action involved. In order for employers to have an affirmative defense in the case of harassment by a supervisor, the harassment must not result in a tangible employment action.

According to the EEOC guidelines, there are several factors to consider when trying to determine if harassment has resulted in a tangible employment action. First, only a supervisor of the employee (as defined above) acting with the authority of the company can initiate a tangible employment action. Second, an employee must usually suffer economic harm in order for an employment action to be considered tangible. Finally, an action is more likely to be considered tangible if it is an official act documented by the company and subject to the review of upper-level managers. Specific examples of tangible employment actions would include selection and termination decisions, promotion and demotion decisions, compensation and benefits decisions, and decisions resulting in significant changes in work assignments or responsibilities.

Based on this interpretation of tangible employment actions, employers should understand that any employment decision that has a significant effect on an employee's terms or conditions of employment is considered tangible. Under these circumstances, for example, employers would have no defense if a supervisor's employment action was associated with an employee's rejection of unwelcome sexual demands or other harassment. Employers would be liable for the supervisory action regardless of any steps they might have taken to try to prevent harassment in the workplace.

Only if the supervisory harassment does not result in a tangible employment action can employers attempt to escape liability. The next section reviews the defenses available to employers when harassment occurs but does not result in a tangible employment action.

Employer Defenses When Harassment Does Not Result in Tangible Employment Actions
Essentially, employers must demonstrate two things to avoid liability for the harassment of an employee by a supervisor when there is no tangible employment consequence. First, employers must demonstrate that they took reasonable care to prevent harassment. Second, employers must demonstrate that the employee involved acted unreasonably by failing to utilize available internal remedies. Below, we examine these two requirements in more detail.

Reasonable Care to Prevent Harassment
Reasonable care as defined by the EEOC guidelines basically involves (1) establishing an anti-harassment policy with an effective complaint process, (2) establishing an effective investigation and disciplinary process, and (3) adequately communicating the existence and content of the anti-harassment policies and procedures to employees. The following sections review each of these requirements.

Anti-harassment policy and complaint procedure. Acceptable anti-harassment policies should include a specific definition of harassment and indicate in clear language that harassment based on sex, race, religion, national origin, age, or disability is prohibited. The policy should apply to harassment by supervisors, but also to harassment by employees, vendors, and customers. It should be designed so as to encourage employees to report incidences of harassment, and employees should be guaranteed that they will be protected from adverse consequences if they utilize the complaint procedure. It should also specify specific reporting channels, at least one of which is outside the chain of command, so that employees will not always be required to report first to their immediate supervisor. The process should be flexible in order to accom-
modate all employees and all types of harassment cases. It is important for employers to make the complaint process as easy and painless as possible in order to encourage victims of harassment to come forward.87

Based on these guidelines, employers should be aware that just having an anti-harassment policy is not sufficient. It must contain the elements prescribed by EEOC in order for employers to demonstrate that they have exercised reasonable care to prevent harassment. Employers should review existing anti-harassment policies to make sure that they contain all the necessary elements required by the EEOC guidelines.

Effective investigative and disciplinary process. A key part of the anti-harassment policy is a mechanism to ensure that all reports are investigated quickly and as confidentially as possible. For employers to demonstrate reasonable care, effective investigative procedures must be in place and utilized in all cases of alleged harassment. Employers should make sure that employees understand before submitting complaints that any report of alleged harassment must be investigated. The investigation process should begin as quickly as possible after a complaint is received. If necessary, steps should be taken to minimize contact between parties for the duration of the investigation. The investigation should include only the relevant facts surrounding the alleged harassment. The individual responsible for the investigation should be impartial and objective and not have any direct control over the employee. Finally, the investigative process should protect the privacy of all parties involved to the extent possible, although it is unlikely that an investigation can be conducted with complete confidentiality. However, the process should be conducted so that information is only shared with those who are essential to a full and complete investigation.9

After the investigative process is finished, the employer must reach a conclusion regarding the harassment incident and inform both parties of the decision. The final step of the policy and complaint procedure is immediate and appropriate action. If the investigation reveals that harassment has indeed occurred, then appropriate disciplinary action must be taken. The disciplinary actions that may result from harassment should be known and understood by all employees. Disciplinary actions should be proportional to the offense. Examples of disciplinary actions for minor offenses or to ensure that harassment does not occur are oral or written warnings, transfer or reassignment, suspension, or training. In the event of a major or repeated offense termination of employment may be the best action.10

Based on the EEOC guidelines, it is essential that employers have an effective investigative and disciplinary process if they are to establish that they exercised reasonable care to prevent harassment. Employers should review existing policies and procedures to ensure that they are consistent with the guidelines, and to the extent they are not, the policies and procedures should be revised.

Adequate communication of policy. Even if employers have anti-harassment policies and procedures that are consistent with the EEOC guidelines, the policy must be adequately communicated to every employee. Every employee should be provided with a written copy of the policy and procedure on a periodic basis, perhaps annually. The policy should also be posted in prominent locations. Training of supervisors and employees is also an important step in ensuring adequate communication. If employers do not ensure that all employees are aware of the anti-harassment policy, it will be difficult for them to establish that they have exercised reasonable care to prevent harassment.11

Employee’s Unreasonable Failure to Utilize Internal Remedies

To escape liability for incidences of harassment not involving tangible employment actions, employers must also demonstrate that an employee “unreasonably failed to take advantage of any preventive or corrective opportunities provided by the employer or to avoid harm otherwise.”12 There are several issues involved in satisfying the burden of proof regarding failure to complain. First, if an
employee does not utilize an internal complaint process because he or she feared retaliation, the employer must prove that the employee's fear is unreasonable. If employers have established an anti-harassment policy with safeguards against retaliation and clearly communicated this policy to all employees, they may be able to demonstrate that the fear of retaliation is unreasonable. Second, employers must ensure that there are no barriers to utilizing the reporting process. The most common example of a barrier would be requiring employees to first report complaints of harassment to their immediate supervisor. Finally, employers must demonstrate that there are no reasons for employees to perceive that internal remedies are ineffective. Therefore, employers should take steps to increase employees' confidence in the legitimacy of the investigative and disciplinary process, which might include communicating in general terms the results of previous disciplinary actions that resulted from substantiated cases of harassment.  

Based on the EEOC guidelines, employers should be aware that it is somewhat difficult to demonstrate that an employee's failure to utilize internal policies was unreasonable. In order to have any chance at doing so, employers must ensure that employees have no reason to fear retaliation, that there are no significant barriers to reporting alleged harassment, and that the investigative and disciplinary process is perceived as effective. Employers must remember that only if they have an appropriate anti-harassment policy and can demonstrate that an employee's failure to utilize it was unreasonable may they be able to escape liability for the actions of their supervisors.

**Conclusion**

The Supreme Court decisions and the EEOC guidelines have to some extent clarified the responsibilities of employers regarding harassment in the workplace. On the positive side, employers should now have a more thorough understanding of their obligations to prevent harassment, as well as when they are liable for harassment of employees by supervisors. On the negative side, however, the Court decisions and EEOC guidelines make it impossible for employers to avoid liability for the harassment of employees by their supervisors if tangible employment actions are involved. In addition, the guidelines clearly place the burden of proof on employers wishing to avoid liability in harassment cases where tangible employment actions are not involved. In order to prove that they have exercised reasonable care to prevent harassment, employers must not only create anti-harassment policies, but must also ensure that they contain all the necessary elements specified by the EEOC guidelines. They must also demonstrate that their policies have been adequately communicated to all employees. Even this will not be sufficient to avoid liability unless employers can also demonstrate that the affected employee did not avoid the harm that occurred because he or she unreasonably failed to utilize the available internal policies and procedures. The dual standards for avoiding liability appear to make it very difficult for employers to escape liability for the actions of their supervisors in cases of harassment based on sex, race, religion, national origin, age, or disability.  

**Endnotes**

1. 477 U.S. 57.  
4. EEOC Enforcement Guidance on Vicarious Employer Liability for Unlawful Harassment by Supervisors (June 18, 1999) at www.eeoc.gov/docs/harassment.html, p. 3 [CCH EEOC COMPLIANCE MANUAL, ¶3116].  
5. Ibid, p. 4.  
8. Ibid, pp. 7-8.  
10. Ibid, p. 10.  
12. Ibid, p. 11.  