

DONAHUE, TUCKER & CIANDELLA

ATTORNEYS AT LAW

225 Water Street

Exeter, New Hampshire 03833

Telephone: (603) 778-0686

Fax: (603) 772-4454

Web Site: www.DTCLawyers.com

PREVENTION: SEXUAL HARASSMENT

By: **DOUGLAS M. MANSFIELD, ESQ.**

Dmansfield@dtclawyers.com

Implementing a non-harassment policy for your Business is an important preventative measure in protecting yourself and the Business from future possible harassment claims.

Prevention is the only sure-fire way to ensure no liability, since any tangible, “adverse employment action” (i.e. termination, reduction in pay, demotion) flowing from harassment results in automatic liability for an employer. In short, you should ensure that your Business exercises “reasonable care” promptly to prevent and correct any sexually harassing behavior. If an employer does so and an employee unreasonably fails to take advantage of those preventative or corrective opportunities, an employer will not be liable for the harassment if there has been no tangible, adverse employment action.

Should a claim be made against your Business, your ability to demonstrate efforts at prevention (i.e. non-harassment policy, training) and response (i.e. appropriately handling a complaint) are crucial to your defense.

The following is a preventative plan designed to prevent sexual harassment claims, document those efforts, maximize the likelihood of an effective response to a complaint and ensure the ability of your Business to assert all affirmative defenses permitted by law.

First, implement a proper, written non-harassment policy. If you already have one in place, make sure legal counsel has reviewed the policy. Certain key elements must be included in the policy in order to take advantage of it in a defense. These include a non-retaliation provision, examples of potential harassing conduct, the name of a person to make complaints to, (including an alternate, should the first person be the subject of the complaint).

Ensure that your supervisors are aware of their responsibilities under the non-harassment policy and understand that compliance with the policy is part of their job responsibilities.

Identify and document whom you consider a supervisor. The U.S. Supreme Court has held that an employer is liable when a “supervisor” harasses an employee over whom the supervisor has immediate or successively higher authority. Include and document as a qualification for every supervisory position a “commitment to equal opportunity.”

Ensure that all employees are given a copy of the non-harassment policy. New hires should be given a copy at the time of hire. Re-distribute the policy on an annual basis. When distributing the harassment policy, you should obtain a signed receipt from the employee acknowledging receipt, documenting its distribution. An updated receipt should be obtained each time it is distributed and should be kept in the employee’s personnel file. Provide and document appropriate training to supervisors and non-supervisory employees on sexual harassment prevention. The type of training will be different for supervisors than for non-supervisors. Non-supervisory training will include an overview of the policy, examples of harassing behavior and appropriate ways to handle the behavior. Such training will play a role in showing you have taken reasonable steps to prevent sexually harassing behavior.

Training of supervisors plays an important role in your preventative strategy. In 1998, the U.S. Supreme Court issued two decisions establishing standards for determining employer liability for sexual harassment committed by supervisors. Both cases authorized the imposition of automatic employer liability where a supervisor engages in sexual misconduct and directly misuses his or her authority to discharge, demote or otherwise impose a tangible “adverse employment action.” However, where a supervisor’s sexually harassing misconduct does not cause such tangible job related harm to the employee, the employer can avoid liability or reduce damages if the employer proves, as an affirmative defense, “(a) that the employer exercised reasonable care to prevent and correct promptly any sexually harassing behavior, and (b) that the plaintiff employee unreasonably failed to take advantage of any preventative or corrective opportunities provided by the employer or to avoid harm otherwise.”

Providing training promotes your ability to take advantage of this defense as well as increases the likelihood that the supervisor will not engage in the unlawful conduct in the first place. All supervisors should be required to attend such training and all training of employees should be documented.

Following the above outline can help prevent claims and reduce the risk that you and your partners may be found liable for harassment in the workplace.