

THE POWER OF OPEN REPORTING

Open reporting is the process through which an employee may anonymously report a complaint to a non-biased third party without fear of retaliation.

TO SEE THE VALUE OF OPEN REPORTING, LET'S LOOK AT A SCENARIO:

Let's assume Dan, Susan's supervisor, is sexually harassing her. Let's further assume that there is no question about the harassment and Dan knows that Susan does not welcome his conduct.

The policy for Susan's organization states, "An employee should first confront his or her harasser and make it clear that the conduct in question is unwelcome. If the conduct continues, contact your immediate supervisor."

This one has serious problems. In Susan's case, her only recourse is to go to Dan, her harasser. The natural thing for Susan to do is to avoid contact with her harasser as much as possible, which means that Susan's situation is likely to go unreported. But as recent court cases have indicated, an employer can be liable for the conduct of supervisors, regardless of whether the organization had knowledge of the supervisor's conduct.

THE SCENARIO CONTINUES:

Susan doesn't report the harassment. She finally gets fed up and quits her job. Susan then begins considering her options. She contacts an attorney — and now the employer is faced with a lawsuit over an issue it (the employer) didn't even know about.

WHAT WENT WRONG?

The employer in this scenario was off to a good start. It had a sexual harassment policy in place. A major weakness in the policy was a lack of "open reporting" procedures — procedures that allow an employee to step outside the traditional chain of command in order to report wrongdoing. Confronting one's harasser should never be a prerequisite for making a claim under a sexual harassment policy. By placing such a requirement on its employees, an employer runs the risk of not learning about problems until it is too late.

HOW CAN YOU PREVENT THE PROBLEM?

The easiest way to prevent the problem presented in this scenario is to modify the organization's sexual harassment policy to include additional reporting avenues — such as the supervisor's supervisor, or someone in the human resources department. An employer that wanted additional protection would also augment the reporting policy with an open reporting system, such as an employee hotline.

But how does open reporting prevent the problem? Decisions in a pair of Supreme Court cases help explain when an employer could be held liable for sexual harassment by a supervisor and what an employer can do to establish an affirmative defense.

In *Burlington Industries, Inc. v. Ellerth*, the Supreme Court explained how an employer could establish its affirmative defense:

"The defense comprises two necessary elements: (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 preventive or corrective opportunities provided by the employer or to avoid harm otherwise."

Decided on the same day, the Court in the case of *Faragher v. City of*

Boca Raton, explained the affirmative test with an example and further reasoning:

"An employer may, for example, have provided a proven, effective mechanism for reporting and resolving complaints of sexual harassment, available to the employee without undue risk or expense. If the plaintiff unreasonably failed to avail herself of the employer's preventive or remedial apparatus, she should not recover damages that could have been avoided if she had done so. If the victim could have avoided harm, no liability should be found against the employer who had taken reasonable care, and if damages could reasonably have been mitigated no award against a liable employer should reward a plaintiff for what her own efforts could have avoided."

Let's look at the scenario again assuming that the employer has an employee hotline in place.

IMPROVED SCENARIO #1:

Recall that Dan, Sue's supervisor, is sexually harassing her. There is no question about the harassment and Dan knows that Susan does not welcome his conduct. We'll assume that the reporting procedure under the sexual harassment policy has been properly revised and now includes a reference to the employee hotline as a means of reporting wrongdoing. Even though Susan knows all about the hotline — she sees posters hanging in the break room that mention the hotline, and she signed an acknowledgment form about the open reporting service — she does not call to report the harassment. Instead, as in the initial scenario, she quits her job because of the sexual harassment and then files a lawsuit against her former employer.

By offering the open reporting service, the employer has satisfied the tests under the *Burlington* and *Faragher* cases and can offer an affirmative defense to the claim — a defense that would have not been available had the employer not had an open reporting system in place. Not exactly a happy ending, but it's one that is much better for you, as an employer, than the one first presented.

Still, an even better result is possible.

IMPROVED SCENARIO #2:

We'll start with the same basic facts as the scenario just above. However, this time Susan picks up a telephone anywhere and dials a toll-free number for the employee hotline. She makes her report about Dan's harassment. Susan's report contains enough information for her employer to perform an investigation and discover the truth about Dan. Dan is disciplined appropriately and the harassment stops. Susan once again has a workplace she can enjoy. It is a happy ending for everyone (even for Dan, who cleans up his act).

BOTTOM LINE:

Employee hotlines have been around for some time, but recent Supreme Court cases have given them legal merit.

But look beyond the legal implications. A safe and effective means of reporting wrongdoing helps everyone. Employers have a chance to correct potential problems they may otherwise not know about, and employees have the comfort of knowing they can report wrongdoing without the fear of retaliation.

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FALL • 2006

The Twelve Issues of the Holiday Season

As the year draws to a close, it is a good idea to review some of the more common risk management issues employers have faced during the past year. These issues don't just present management challenges during the holidays, but also throughout the rest of the year.

Our wish for you is that all the risk management issues you face in the upcoming year are resolved quickly, smoothly, and to everyone's sense of fairness.

On the first day of the Holiday Season, a key employee said to me: "I need FMLA for my sick family."

A key employee is defined under FMLA as a salaried employee in the highest paid 10 percent of all employees working for the employer within 75 miles of the business. Key employee income is determined on a year-to-year basis, including wages, premium pay, incentive pay, and non-discretionary and discretionary bonuses. Determination of key employee status is made at the time FMLA leave is requested. Key employees may be denied reinstatement following FMLA leave if restoration will cause substantial and grievous economic injury to the operations of the employer. Minor inconvenience does not constitute substantial and grievous economic injury. In some cases, the necessity of hiring a permanent replacement will.

It is important to remember to notify key employees that they have that status and what it means as soon as practicable after you learn of the key employee's need for FMLA leave.

On the second day of the Holiday Season, a tired employee said to me: "Overtime? You're kidding. Don't even ask me!"

Not just at the holidays, but also during the year, be aware of the overtime demands you are making on your employees. While some employees relish the extra income and have few other demands on their time outside of work, other employees view overtime requests as a burden, become resentful, and then tend to do sloppy work. Overtime burnout can occur especially if overtime becomes the rule, rather than the exception in your workplace. If this is your organization's situation, take a closer look. Perhaps it would make more economic sense to hire another employee, full or part-time. And, consider that a reshuffling of job duties could possibly reduce or eliminate the need for overtime.

On the third day of the Holiday Season, we fired an employee for downloading pornography.

Despite training, education, and decades of sex discrimination law enforcement and litigation, some employees still don't get it. Guard against hostile environment claims generated over your organization's computers by having a written computer policy and up-to-date screening methods for transmission/receipt of inappropriate material. And, enforce your policy consistently and fairly.

On the fourth day of the Holiday Season, at the holiday party, employees ignored our safety policy.

Liability prevention is a challenge at any organization event where the employees get to "let their hair down." To avoid safety issues ranging from tripping over a clearly marked stair to driving home intoxicated, do not serve alcohol at your social gatherings. Think about other ways to have fun while maintaining some reasonable control over the atmosphere. Some organizations accomplish this, for example, by holding their celebrations during the day at the office, rather than at night at another location.

On the fifth day of the Holiday Season, a new hire said to me: "I'm leaving for the military."

New hire or not, the federal military leave laws apply to every employee and employer, regardless of length of employment or size of organization. You may have to make an immediate, unplanned adjustment in your workforce now and again when the employee returns from service to reclaim his or her job.

On the sixth day of the Holiday Season, my employee said to me: "I'm announcing my pregnancy."

Federal laws prohibit discrimination on the basis of pregnancy. Some state laws provide for special leave rights for pregnancy-related issues. One of the biggest challenges in managing a pregnant employee is being overprotective — making assumptions about what the employee can and can't do and about what might not "be good for the baby." Although you may be motivated by care and concern when not considering Sally for that promotion because she is pregnant and it involves a lot more work, Sally could very well interpret your decision-making as an illegal discriminatory decision.

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On the eighth day of the Holiday Season, a manager asked of me: “When can I fire this absentee?”

Terminations should be planned, and all risk areas considered. Terminations should be fair and based on a factual basis. If absenteeism is a problem, check to see if it has been documented as such. Has the employee been counseled about it? Is this a sudden absence?

Some employers have a provision in the employee handbook that states, “If you do not call in or report to work for three consecutive days, we will consider that situation as your voluntary resignation.” You can avoid some potential problems if you have a policy like that by including a statement such as, “This policy is not intended to curtail any FMLA or other leave rights and responsibilities you may have.”

On the ninth day of the Holiday Season, an applicant said to me: “I can do the job with my disability.”

Sometimes interviewers forget that the ADA applies to job applicants, as well as employees. If an applicant asks for a reasonable accommodation to be able to fully participate in the interview process, such as testing, then you should provide it.

It is important for employees to understand how to request reasonable accommodations, too. Make sure you have a written policy that informs your employees and applicants how to request accommodations and describes the interactive discussion process they can expect in response to their request.

On the tenth day of the Holiday Season, my employee brought to me ... a claim filed with the EEOC.

Your biggest challenge in dealing with an ongoing EEOC claim is avoiding retaliation claims. The same laws that prohibit discrimination against protected classes — race, color, national origin, sex, religion, age, and disability — prohibit retaliation for

making a claim or for supporting another’s claim. When the complaining employee still works for you, it is a challenge not to feel resentful or revengeful. Be aware that any employment decision that the claimant believes is negative will be interpreted as retaliatory.

On the eleventh day of the Holiday Season, my employee said to me: “I don’t think I’m an exempt employee.”

The last thing you need is a Fair Labor Standards Act audit (or your state law equivalent). Be aware that the rules for determining who is exempt and who is not changed recently. Work with your local employment counsel to evaluate which job positions are indeed exempt. Mischaracterizing a non-exempt employee as exempt can lead to back overtime payments and fines.

On the twelfth day of the Holiday Season, an employee injured his knee and said: “I can’t stand up ... will you accommodate me?”

An on-the-job injury needs prompt medical attention and treatment. After treatment and rehabilitation, the employee may have a full release back to work or one with restrictions. If the employee has a lingering condition that meets the ADA definitions of “disability,” then he or she may be entitled to a reasonable accommodation. This could be true even if, for workers’ compensation purposes, the employee was not determined to have any “disability.” The definition of “disability” for ADA purposes differs from the workers’ compensation application of the term.

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WORKING THE HOLIDAYS AND MAKING HOLIDAYS WORK

There are a number of religious and cultural holidays on the calendar each year — especially during the winter months. Dealing with the different holidays can be challenging to an organization and to its management team. People want time off to celebrate, but the work must be done. So, how can an organization bring appropriate balance and respect to this sensitive issue?

This time of year, businesses can take a lesson from their counterparts in the not-for-profit world to deal proactively with the issues that arise during the holiday season.

Managers must know the basics about the holidays that affect their employees. There are several major holiday celebrations during the winter months. Among those that may have an impact on the workplace are:

CHRISTMAS

This is the Christian holiday celebrating the birth of Christ. The holiday is celebrated on December 25 and many employees request time off before and after this holiday to be with family. Employees who celebrate Christmas also find their schedules filled with school activities, holiday programs, holiday parties, shopping, and gift giving.

HANUKKAH: FESTIVAL OF LIGHTS

This Jewish holiday is eight days and nights of celebration of religious freedom. After regaining possession of their Temple from foreign rulers, the Jews rekindled the menorah to rededicate the Temple. Legend says there was only enough oil to burn the menorah for one night, and securing more oil would take eight days. Miraculously, the menorah burned for eight days and nights. A lighting of and blessings over the menorah candles takes place in the early evening. It is customary for family members to join together to share prayers, songs, food, stories, gifts, and games at the time of the lighting of the candles.[i]

RAMADAN

Ramadan is the ninth month of the Muslim calendar. During that month, Muslims fast during daylight hours, eat small meals, and visit with friends and family during the evening hours. Ramadan is a time of contemplation and worship when Muslims focus on strengthening family and community ties.[ii]

KWANZAA

This is a relatively new holiday. Kwanzaa has grown dramatically since its creation in 1966. It is celebrated as an African American and Pan-African holiday. The seven-day holiday is marked by public and private celebrations during the evenings. The celebrations reinforce and reaffirm values that strengthen families, communities, and the African culture, and what it means to be a human in the fullest sense.[iii]

CHINESE NEW YEAR

This celebration, which may be important to Asian employees, begins with the new moon on the first day of the Chinese New Year and ends on the full moon 15 days later.[iv] In 2007, this celebration will begin on February 18. On the 15th day, a large community celebration includes parades and fireworks that usher in the New Year. “This is a time to congratulate each other and themselves on having passed through another year, and a time to finish out the old and to welcome the New Year.”[v]

Among other holidays that can affect the workweek during the year are Rosh Hashanah, Yom Kippur, Passover, Good Friday,

Easter, Cinco de Mayo, and Thanksgiving, as well as federal holidays such as Martin Luther King, Jr. Day, Memorial Day, Independence Day, Labor Day, Presidents’ Day, Columbus Day, and Veterans Day. While many holidays and celebrations do not necessitate that employees alter their work schedules, some employees may request schedule changes or days off.

The not-for-profit world has found ways to utilize these differences to support each other during holiday celebrations. Other businesses can use some of the same tools to support the workplace. For example:

- In one community, the Christian-based Meals on Wheels program is completely operated by members of the Jewish community during Christmas and Easter.
- In another, Christian shelter employees traded shifts with their Muslim colleagues during the month of Ramadan so that Muslims had evenings free for prayer and celebration.
- Single adults working in a free clinic in one community offered to revise their schedules and cover for colleagues and co-workers who are parents, guardians, and grandparents so that they could attend school programs and other family-centered holiday celebrations.

These types of cooperative efforts can translate easily and quickly to other businesses.

Being sensitive to the cultural and religious heritage of employees can assist managers and supervisors to work together to maintain a vibrant and effective workforce at all times. Begin by simply educating employees about the basics of these varied cultural and religious holidays. Let employees know that by working together, each one will have the opportunity to participate in important family and community celebrations and still meet the needs of the organization. Invite those who are willing to work together to create a more sensitive workplace to form an employee group to assist managers and supervisors in developing guidelines for staff scheduling during busy holiday seasons.

Sensitivity, cooperation, education, and creativity can make the sometimes chaotic holiday season a more productive, thoughtful, and satisfying experience for all concerned.

- [i] Jewish Outreach Institute. www.joi.org/celebrate/hanuk/history.shtml
- [ii] Ramadan, www.holidays.net/ramadan
- [iii] The Official Kwanzaa Web Site. www.officialkwanzaawebsite.org
- [iv] Chinese New Year, www.educ.uvic.ca/faculty/mroth/438/CHINA/chinese_new_year.html
- [v] Chinese Culture Center of San Francisco. www.c-c-c.org

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