

# EMPLOYER **Gardian**

EMPLOYMENT PRACTICES RISK REDUCTION STRATEGIES

This EmployerGardian newsletter is a risk management tool provided as a resource to insureds in CPA EmployerGard, the AICPA-endorsed employment practices liability insurance program.

SUMMER • 2001

## Employer Liability for Unlawful Harassment by Supervisors

The number of sexual and racial harassment charges filed with the EEOC and state fair employment practices agencies has nearly doubled since 1991. Recent U.S. Supreme Court cases emphasize the desirability of preventing harassment in the workplace. In recent decisions, the Court has identified incentives for employers to implement anti-harassment policies and procedures. This is good news because now for the first time there are concrete actions employers can take to avoid or lessen liability in harassment cases. However, the Court has also made it easier for employees to recover punitive damages in cases where employers *fail* to implement and enforce preventative anti-harassment policies and procedures. This article discusses the latest developments in sexual harassment law and provides guidance on how your firm can minimize and possibly avoid liability.

### VICARIOUS LIABILITY

In 1998 the U.S. Supreme Court handed down two landmark sexual harassment decisions that for the first time clarified when employers will be held vicariously liable for sexual harassment committed by their supervisors. (Vicarious liability is the imposition of liability on one person for the conduct of another, based solely on a relationship between the two persons.) In *Burlington Industries v. Ellerth* and *Faragher v. The City of Boca Raton*, the Court ruled that employers will be absolutely liable (absolute liability is responsibility without fault or negligence) for sexual harassment by supervisors where the plaintiff has suffered a “tangible employment action” such as being terminated, demoted, denied a promotion, or given an undesirable job reassignment. Because there is no legal defense available for employers in those cases, an employer can only limit, not avoid liability by implementing anti-harassment policies and procedures.

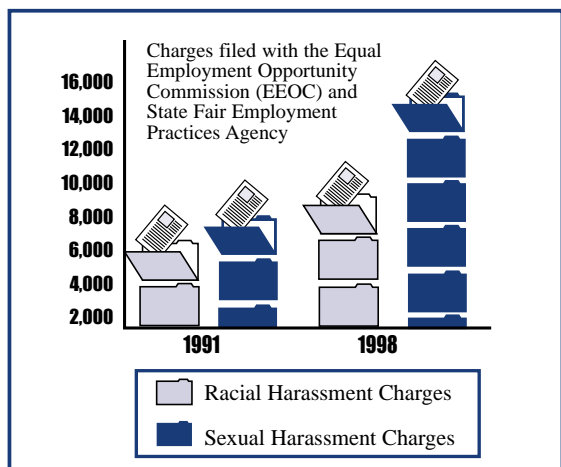
The Court also ruled that where there is no tangible employment action taken against the plaintiff, the employer would still be held liable unless it can establish a two-part defense. The first part of the defense requires that the employer must have exercised its “duty of reasonable care” to prevent and promptly correct harassment. According to guidelines provided by the Equal Employment Opportunity Commission (“EEOC”), whose mission is to enforce federal discrimination laws, this generally requires an employer to “establish, disseminate, and enforce an anti-harassment policy and complaint procedure and to take other reasonable steps to prevent and correct harassment.”

The second part requires the employer to show that the employee failed to avoid or minimize the harm by taking advantage of the preventive and corrective mechanisms the employer had established. An employer cannot be held liable if both parts of the defense are established. Therefore, an employer who has exercised its duty of reasonable care to prevent and correct unlawful harassment is not liable if the employee could have avoided all of the harm by using the anti-harassment policy and procedures instituted by the employer. If only some of the harm could have been avoided by using the procedures then the employer is liable, but an award of damages will be reduced accordingly.

Employers still have exposure to vicarious liability for the unlawful acts of their supervisors, but in order to encourage prevention the Supreme Court has provided a way to limit liability in some cases, and avoid liability entirely in others.

### PUNITIVE DAMAGE AWARDS

In June of 1999, the Supreme Court handed down another decision that is both good news and bad news for employers. The bad news is that the Court ruled that while an employer is potentially liable for its supervisors’ harassing conduct whether the employer was aware of it or not, the employer is always liable for a pervasive, hostile atmosphere of harassment. The good news is that the Court created an opportunity for employers to reduce the risk of punitive damage awards. In *Kolstad v. American Dental Association*, a sex discrimination case, the Court was asked to clarify under what circumstances an employer can be held liable for punitive damages for a manager’s discriminatory actions. The Court ruled that an employer would not be held vicariously liable for punitive damages (in other words, punished) for unlawful acts of its supervisors where the employer has made a sincere effort to comply with federal anti-discrimination law. In such a case, the employer could only be held liable for compensatory or actual damages. Again, the Court recognized that employers should be given credit for trying to prevent and correct employment discrimination.



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## STEPS YOUR FIRM CAN TAKE TO MINIMIZE LIABILITY

There is no foolproof plan that will allow your firm to avoid harassment lawsuits altogether. However, the EEOC has provided guidance on what should be included in an anti-harassment program in order to minimize your risk of losing a lawsuit. To satisfy the Court's requirement that you undertake reasonable care to prevent and promptly correct harassment, you should establish, publicize, and enforce anti-harassment policies and complaint procedures. According to the EEOC, your firm's anti-harassment policy should, at a minimum, include the following elements:

- A clear explanation of prohibited conduct;
- Assurance that employees who make complaints of harassment or provide information related to such complaints will be protected against retaliation;
- A clearly described complaint process that provides accessible avenues of complaint;
- Assurance that the employer will protect the confidentiality of harassment complaints to the extent possible;
- A complaint process that provides a prompt, thorough, and impartial investigation; and
- Assurance that the employer will take immediate and appropriate corrective action when it determines that harassment has occurred.

Keep in mind that the Court's rulings regarding vicarious liability apply not only to sexual harassment, but also to harassment by supervisors based on race, color, religion, national origin, protected activity, age, or disability. Thus, you should establish anti-harassment policies and complaint procedures covering all forms of unlawful harassment.

The EEOC also suggests that an employer's duty to exercise due care also includes the following:

- Instruct all supervisors and managers to address or report to appropriate officials complaints of harassment regardless of whether they are officially designated to take complaints and regardless of whether the complaint conforms to the firm's particular complaint procedures.
- Correct harassment regardless of whether an employee files an internal complaint.

### Don't Forget . . .

that as a CPA EmployerGard policyholder, your firm is entitled to up to 30 minutes of legal advice per month without charge. Do you have any employment law or practice management questions? Why not call today? 800-569-3679. Please have your policy number handy.

- Periodically train your supervisors and managers so that they understand their responsibilities under the firm's anti-harassment and complaint procedure.
- Keep track of your supervisors' and managers' conduct to make sure that they carry out their responsibilities under your firm's anti-harassment policy and complaint procedure.
- Screen applicants for supervisory jobs to see if any have a record of engaging in harassment.
- Keep all records of complaints of harassment and determine whether there is a pattern of harassment by the same individual.

**Note that the above suggestions are not exhaustive, and some may not necessarily apply due to the size of your firm.**

### WHAT DOES ALL OF THIS MEAN?

The Supreme Court's rulings in the Ellerth and Faragher create an incentive for employers to implement and enforce strong policies prohibiting harassment, and an incentive for employees to alert management about harassment before it becomes severe. The Court's ruling in Kolstad also creates an incentive for employers to implement strong anti-discrimination policies because it provides a way for employers to avoid vicarious liability for punitive damages.

Now that the Court has clarified how employers can comply with federal discrimination laws, failure to do so makes it easier for employees to prevail in court. The bottom line is that there are concrete ways that your firm can comply with federal anti-discrimination laws, prevent harassment in the workplace, and minimize or avoid liability in discrimination cases. Harassment claims are brought against CPA firms both large and small. The time is ripe for your firm to consult with an attorney who specializes in employment law and design a strong anti-harassment program for your firm. If your firm already has an anti-harassment policy and complaint procedure in place, it is also wise to update it periodically to ensure that it still complies with both federal and state discrimination laws.

Q&A

### *Is my firm liable for discrimination claims brought by temporary workers?*

If the temporary workers are under your firm's direction and control, it could open your firm up to potential liability under state and federal employment laws. According to guidelines issued by the federal Equal Employment Opportunity Commission (EEOC), under certain circumstances, both the staffing firm and your CPA firm can be considered employers of the temporary workers. As an employer of temporary workers, your firm can be held liable for claims of harassment and discrimination brought by these workers.

Where both the staffing firm and the CPA firm have the right to control the worker, they are considered "joint employers." A CPA firm generally qualifies as an employer of its temporary workers where the firm supplies the work space, equipment, and supplies, and has the right to control the details of the work to be performed, to make or change assignments, and to terminate the relationship.

Types of claims that may be brought by temporary workers include harassment, discriminatory assignments, and discriminatory termination on the basis of race, color, religion, sex, national origin, age, and disability, failure to provide reasonable accommodations to persons covered under the Americans with Disabilities Act, and retaliation. For example, a staffing firm assigned a worker to a CPA firm. After a few visits, the CPA firm asked the staffing firm to assign someone else, stating that it was not satisfied with the worker's accounting skills. However, the worker believes that the true reason for the client's action was racial bias. The temporary worker made a discriminatory termination claim against the firm.

Discrimination and harassment claims brought by temporary and leased workers are covered under the AICPA-endorsed CPA EmployerGard policy.

Always consult with a qualified labor and employment law attorney before signing a temporary staffing agreement. An attorney can assist you by making sure that the contract language is most favorable to your firm and that your firm is not assuming more liability than it should.