



# Protecting Your Employees

## *The Broad Scope of Protection Against Sexual Harassment*

by Richard K. Mahrle

*You are just finishing up on a call from a client who is giving your staff rave reviews for their work and the reasonableness of the cost. What a great way to start your day. Just as you hang up, your receptionist sticks her head into your office and asks, “Do you have a minute?” The brightness of your day is about to change. Your receptionist tells you that a delivery service that comes to your office every day recently assigned a new person to your account. According to your receptionist, this new delivery person keeps asking her out for lunch or a drink, and she keeps telling him she is not interested. Sometimes, he asks her about her bra cup size or brags about his sexual exploits. Despite your receptionist’s attempts to make it clear that these interactions are inappropriate and make her uncomfortable, they have continued.*

*Note: Sexual harassment is not just male on female harassment. It can be just the opposite, or it can be same-sex harassment, or harassment based on sexual orientation or gender identity. However, the vast majority of sexual harassment situations are males harassing females, so the examples used in this article will follow the more common situations.*

Is this your problem? The delivery person is not your employee. Of course it is still your problem. Under Title VII of the Civil Rights Act of 1964, as the employer, you are required to provide your workers with a workplace that is free from all types of harassment or intimidation based on race, color, sex, religion and national origin. This obligation extends to preventing harassment by supervisors, co-workers, customers, and vendors. (29 CFR § 1604.11(e).) Your receptionist is not required to tolerate this boorish behavior. The delivery service needs to be contacted about reassigning the person on your account.

The next question is whether to tell the delivery service why you are requesting that its employee stop coming to your office. Under the circumstances here, you probably should. The delivery person's actions are egregious enough that you should tell the delivery service about the problem.

Maybe the day can now get back to normal. Not so fast. Next up at your door are the two female employees who had been onsite all week at the office of the client who had just called you to praise your services. "Do you have a minute to talk?"

According to your employees, one of the guys they worked with in the client's accounting department gave them a "creepy feeling." You probe further. Why? What did he do? Well, he didn't really say anything inappropriate, except that on the first day he said he was lucky to be working with two such beautiful ladies. But, he stared at them a lot. When he walked by, he would try to look down their blouses. There was no touching or anything like that. He just freaked them out with his attention.

Just like your need to protect your receptionist from harassment occurring in the office, you have an obligation not to expose your employees to harassment when they are working for you offsite. (*Little v. Windermere Relocation, Inc.* 301 F.3d 958 (9th Cir. 2001) (service manager raped by potential customer that her employer was pursuing); *EEOC v. Cromer*

*Food Services*, 414 Fed. Appx. 602 (4th Cir. 2011) (employer failed to protect employee who was harassed at client's location when filling vending machines.)) But is what your employees are complaining about really sexual harassment? From a legal standpoint, probably not. That doesn't mean that your employees' reactions are not genuine. If that is all that happened, maybe you just send male employees to that site in the future. On the other hand, if this is an important client, are you harming your female employees by taking them off the account?

What if there had been more serious harassing behavior? If so, a different approach is needed.

Truly egregious acts, such as cornering one of your workers and kissing or fondling her, require immediate action. That certainly should be reported to the client, and maybe even the police.

In between the two extremes described above, there is an entire range of potentially harassing activities. No two situations are likely to be the same. Talking things through with your legal counsel is advisable to create a plan of action. Regardless of the scenario, it is critically important to take any claims of harassment or intimidation seriously. "Boys will be boys" is not an appropriate response. Any harassment claim needs to be carefully investigated, either internally, or by bringing in a trained professional from the outside.

An additional factor to consider is whether you are exposing yourself to a possible defamation claim if you report suspected harassment activity to either the delivery service, or to your client. Maybe. But when balancing actions and reactions, your duty to your employees should come first. Although reporting has risks, if your report is accurate, truth is a defense to potential defamation claims. The key is not to embellish in the reporting. Just stick to what has been reported to you.

The more serious the unwelcomed behavior, the greater the need to report it to the employer of the bad actor. The employer presumably is unaware of the problem and needs to know.

Your report may help that employer prevent a serious problem, either now or in the future.

Reporting inappropriate behavior to a client might result in the loss of that client. On the other hand, it also might lead to a strengthening of the relationship with that client. However, regardless of the business outcome, your first duty is to your employees. ■

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