

# HANDLING HARASSMENT ISSUES IN THE WORKPLACE

## I. Recent Case Law Update

Gomez-Perez v. Potter, 128 S.Ct. 1931 (May 27, 2008). Retaliation and harassment claims of United States Postal Service employee based on alleged age discrimination are actionable under federal-sector provision of the Age Discrimination in Employment Act.

Cross West, Inc. v. Humphries, 128 S.Ct. 1951 (May 27, 2008). Under Section 1981 (42 U.S.C. Section 1981), terminated employee, whether white or black, has cause of action for employment-related retaliation, including claim that he has suffered retaliation from having tried to help another employee suffering direct racial discrimination.

Baker v. Via Christi Regional Medical Center, 267 Fed.Appx 755 (10th Cir. February 27, 2008). Plaintiff, a male, failed to establish prima facie case of sexual harassment based on two alleged incidents - a female co-worker grabbing his buttocks, and witnessing a staff member's inappropriate touching of a dying man.

Denetclaw v. Thoutt Brothers Concrete Contractors, 2008 WL 2503649 (10th Cir. June 24, 2008). Summary judgment in favor of employer affirmed on claim of hostile work environment based on alleged racial harassment. Plaintiff, a Native American, alleges that he was asked to do "rain dances" on hot days, was subject to comments about "Injuns," received derogatory remarks about the length of his hair, and was grabbed in crotch area or buttocks by a co-employee. "The incidents alleged by Mr. Denetclaw, taken as a whole, were neither sufficiently serious nor sufficiently pervasive to establish a hostile work environment."

Tademy v. Union Pacific Railroad Co., 520 F.3d 1149 (10th Cir. April 1, 2008). African-American employee stated a claim for racial harassment/hostile work environment based on following incidents - suspension of a life-size hangman's noose from an industrial wall clock, racist graffiti, and racial slurs. Employer argued that each such incident was the work of different employees. "Indeed, the rule Union Pacific champions would have troubling implications. Under Union Pacific's theory, an employer could escape liability for a racially hostile work environment by employing a legion of bigots, each of whom committed but a single act of racism. Such a workplace would hardly operate to 'achieve equality of employment opportunities'... Furthermore, requiring proof of repeat perpetrators would also provide employers with a reason to avoid conducting thorough investigations aimed at rooting out the culpable party."

## II. Practical Tips Regarding Avoiding Harassment Claims and Litigation

Successful harassment claims require: (1) a workplace permeated with discriminatory intimidation, ridicule, and insult that is sufficient severe or pervasive to alter conditions of victims's employment and create an abusive working environment; and (2) Plaintiff was targeted for harassment because of his race, national origin, or sex. See, e.g., Velasquez v. Tyson Fresh Meats, Inc., 2007 WL 2994068 (D.Kan. October 12, 2007). The first element focuses on frequency of conduct, its severity, whether it is physically threatening or humiliating or rather a mere offensive utterance, and whether it interferes with employee's work performance. Court analyzes the work environment both subjectively and objectively, looking at all circumstances from perspective of a reasonable person in the plaintiff's position. McCowan v. All Star Maintenance, Inc., 273 F.3d 917, 923 (10th Cir. 2001). The second element focuses on the intent or purpose behind the conduct.

Based on the foregoing definitions of actionable harassment in the workplace, Employers, at a minimum, should:

1. Have a written policy forbidding harassment, racially or sexually charged comments, physically threatening or humiliating comments, workplace pornography, and racial slurs. Such policy should be distributed to employees upon hire and on a regular basis thereafter (yearly or every two years, preferably).
2. Have a written grievance policy to investigate complaints of hostile work environment. Such investigations should be confidential, conducted by persons not directly in the chain of command of the aggrieved employee or alleged perpetrator, allow for alleged perpetrator to give his/her version of events, and provide for discipline up to and including termination for confirmed perpetrators.
3. Establish confidential process of informal complaints about hostile work environment. Follow up, if necessary, with employee meetings addressing specific issues that may be subject of informal complaints.
4. Create a zero tolerance environment for racially or sexually themed comments, practical jokes, and e-mails.
5. Establish and distribute a specific internet usage policy relating to pornography and other sensitive non-work related subjects.
6. Limit workplace or work-related functions where alcohol is served, including out-of-office client entertainment.

7. Stress that work is for work time, and not a place to discuss personal problems, dating and social life.
8. Establish policy that supervisors do not date employees whom they supervise. Consider adoption of policies relating to co-employee dating relationships.
9. Hire and retain a diverse work force. Even bigots are loathe to express their racism or sexism in a work environment that is racially, ethnically, and sexually diverse.
10. Regardless of whether Employer adopts a non-discriminatory policy relating to sexual orientation, make clear that gay jokes and slurs are not tolerated.
11. Create, to all degrees possible, a professional work environment that puts a premium on civility, team work, and resolving disputes amicably. Often, harassment complaints arise out of displays of temper. This is why use of e-mail for discussion of inter-office personnel matters should be discouraged. E-mail is composed and sent in moments of anger without adequate reflection.
12. Take seriously complaints of hostile work environment and document (and retain) investigation and outcomes.

### III. Harassment In The Context Of Domestic Restraining Orders

Employers are often faced with challenge of assisting employees in enforcement of restraining orders against spouses, boyfriends/girlfriends, relatives, neighbors, and assorted stalkers.

1. Divorce: K.S.A. 60-1607(a)(2) - restrain the parties from molesting or interfering in the privacy or rights of each other; RSMo. 452.315.2(2) - enjoining a party from harassing, abusing, molesting, or disturbing the peace of the other party or of any child.
2. Protection from Abuse: K.S.A. 60-3101, et seq. Applies to domestic violence - to persons who are or have been in a dating relationship, persons who reside together or who have formally resided together, or persons, who have had a child together. "Intimate partners or household members. RSMo. 455.005 et. seq. Covers incidents of assault, battery, coercion, harassment, following another about in a public place. Perpetrators are spouses, former spouses, adults related by blood or marriage, adults who are presently residing together or have resided together in the past, an adult who is or has

been in a continuing social relationship of a romantic or intimate nature with the victim, adults who have a child in common, or a stalker.

3. Protection from Stalking. K.S.A. 60-31a02, et seq. No limitation on relationship between victim and perpetrator. Two or more separate acts evidencing a continuity of purpose which would cause a reasonable person to suffer substantial distress. "Harassment" defined as "a knowing and intentional course of conduct directed at a specific person that seriously alarms, annoys, torments or terrorizes the person, and that serves no legitimate person. "Stalking," in turn, defined as "intentional harassment that places the other person in reasonable fear for that person's safety.
4. Employer's duties. Typically, restraining orders apply to home, work, or wherever the victim may be located or found. (i) Enforce restraining orders as between clients/patients/customers and employees. (ii) Enforce restraining orders as between employees and perpetrators in order to protect other employees from workplace violence. (iii) Give employees reasonable but not unlimited assistance - for example, time for court appearances, workplace security, telephone screening/blocking.

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