The History of Sexual Harassment Lawsuits: The Top Ten Mistakes Defendants Make

By Phil Horowitz

"Those who cannot remember the past are condemned to repeat it."

– George Santayana

For twenty years now, I've watched the same patterns repeat themselves in sexual harassment cases. There is inappropriate behavior, usually by one person, or behavior that is plausibly perceived as inappropriate. The behavior is sexual, has sexual overtones, or is directed at people of one gender.

The employee who is affected by the inappropriate behavior may at first try to ignore it, get along with it, or play along with it. At some point, the employee moves to repulse the inappropriate behavior, by saying something, by turning or walking away abruptly, by complaining, or by quitting.[1]

Actions have consequences, and so do these. The employee's actions to repulse the inappropriate behavior are usually met by an equal but opposite reaction. The employee repulses, and in response the person behaving inappropriately behaves even more inappropriately or retaliates.

Eventually, human resources, a higher-up, or the employer's lawyers come into the picture, either before or after a lawsuit is filed. Trying to represent the employer zealously, they defend the employer's actions vigorously.

When all is said and done, almost invariably, the employee affected by the inappropriate conduct is no longer working for the employer. Perhaps hundreds of thousands of attorney fees later, the case is settled or tried and appealed.

It does not have to be this way. All too often, mistakes made by employers and their lawyers cause inappropriate behavior issues to escalate into major sexual harassment problems. Here are ten of the most common mistakes made by employers and their lawyers.

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[1] Whatever you may think about the holding of the California Supreme Court in *State Department of Health Services v. Superior Court (McGinnis)*, 31 Cal. 4th 1026 (2003), you should study its discussion of the common patterns of victim responses to sexual harassment at pages 1044-1045 and 1048-1049. The majority opinion's description is uncannily accurate.

Mistake #1: Dilly Dally or Bury Your Head in the Sand

Once you hear of behavior that could conceivably be characterized as sexual harassment, you have a problem that is not likely to go away. This is true whether you hear of the behavior from the affected employee or from someone else. This is true whether the behavior is described as "sexual harassment," or as simply bothersome.

All too often, employers delay investigating or acting for weeks, or even months. Meanwhile, the situation and the emotions fester, and the problem grows. Don't bury your head in the sand or dilly-dally. When you hear of a problem, get busy right away.

Mistake #2: Blame the Victim (or Claimed Victim)

It is easy for an employer (or their lawyer) to say something that offends an employee who may have been affected by sexual harassment. When this happens, it is like pouring gasoline on a fire.

Many of the questions employers typically ask inflame employees who have suffered from inappropriate behavior. Here are some examples:

- "Are you sure you didn't do anything to provoke this?"
- "Are you complaining because of the poor performance evaluation you just received?"
- "Are you sure you really want to make this complaint, given how tough it is for people who complain about sexual harassment?"

Many of the statements employers typically make to employees also have inflammatory results, whether or not the statements are true. Here are some examples:

- "We have to investigate to see if you are telling the truth."
- "We find many complaints of sexual harassment are unjustified."
- "This doesn't sound severe enough to be sexual harassment."
- "This wouldn't have gotten so bad if you had complained earlier."

Before you say something to the employee, put yourself in the employee's shoes. If you had been

sexually harassed, how would you feel if someone said to you what you are about to say to the employee? Don't say anything that could be interpreted as "blaming the victim." This is true even if you are not sure the employee is a victim.

Even further, be nice to the employee. It is the right thing to do. It costs nothing. It will make it less likely that the employee will want to sue. It will also make the employee more reasonable in settlement negotiations if the employee does sue.

The first contact with the employee often sets the tone of all which follows. Here's one example of how to set a positive tone: "If anything like that happened, I want to be the first to apologize on behalf of the company. We will work hard to right any wrong."

Mistake #3: Move the Employee Instead of the Alleged Harasser

One of the most common things employers do when they learn of possible sexual harassment is to separate the employee and the alleged harasser. A good rule of thumb in many cases is to "separate, then investigate."

One way to separate the employee from the alleged harasser is with time off for one or the other. The employee may want some time off. If so, consider offering the employee a week off with pay, especially if the employee seems very upset. Of course, do not suspend the employee without pay, as this would likely be perceived as retaliation.

If there is substantial evidence of harassment, suspending the person accused of harassment is another option. Alternatively, the person accused of harassment may be willing to use a week's vacation.

A second way to separate the employee and the accused harasser is to transfer someone, at least temporarily. If someone is moved, move the alleged harasser. There are exceptions to this general rule, but they are few. Any employer action which is not welcome by the employee may well trigger a complaint of retaliation.

Mistake #4: Don't Take Action or Don't Follow Through

Employers often investigate possible sexual harassment, but do nothing about it (or not enough), or don't follow through. There are many reasons.

Sometimes employers refuse to admit anything happened, no matter what. More often, employers do nothing because they have their beliefs about what happened but are not 100% certain. This is a mistake. Once an employer's investigation shows it is likely an employee was sexually harassed, the employer should spring into action.

Other times employers do nothing, or not enough, because the harasser does a good job or contributes to profits or is liked as a friend by those in power. This approach almost always costs the employer in the long run.

Even when employers do take effective remedial action, such as a written warning, suspension, or even termination, they often forget to follow through. Check back with the employee from time to time to make sure everything is all right and that there is no further alleged harassment and no retaliation.

Mistake #5: Write Up, Discipline or Harass the Employee

Rapidly declining performance ratings, written warnings, and verbal criticism of the employee all too often follow a sexual harassment complaint like night follows day. Don't let this happen.

This is not a "Get Out of Jail Free" card for employees who complain about sexual harassment. There are certainly exceptions to this rule. However, before you declare an exception, remember how often plaintiffs lose discrimination and harassment claims at trial, but win their retaliation claims.

Mistake #6: Ignore the Possibility of Early Settlement

It is well known that at least 95 percent of civil cases, including sexual harassment cases, settle before trial. Despite this fact, few defense lawyers fully explore the possibility of early settlement.

There are many reasons why lawyers think it is too early to talk settlement. They think they don't know enough facts, forgetting that they can find out facts as part of settlement discussions. They are afraid that being the first to say the "s" word is a sign of weakness, even though it can be a sign of strength.

Mistake #7: Do Intrusive Discovery about the Employee's Personal Life

A typical defense mistake is to conduct unwarranted and intrusive discovery about the employee's personal life. Subjects can include the employee's past history of romantic relationships, marital problems, medical history and personality quirks.

Sometimes limited discovery into sensitive areas is necessary, but think twice before you do so. Little else during litigation inflames the employee as much, and can make the likely eventual settlement that much more expensive.

Mistake #8: Plan on Getting Rid of the Case by Summary Judgment

Hope springs eternal. Defense lawyers sometimes plan to win sexual harassment cases on summary

judgment. Usually this is unrealistic.

There are a few situations where sexual harassment cases may be disposed of on summary judgment. Every now and again, a plaintiff's allegations are not sufficiently severe to constitute sexual harassment. Occasionally, the employer can prove, without contradiction, that it never knew of the harassment by a coworker or third party. Much more often, there are disputed facts precluding summary judgment.

Mistake #9: Take a Sexual Harassment Case with Vivid Facts to Trial

Trial lawyers are known for their bravado. Faced with a plaintiff's case with vivid facts, the defense lawyers are known to insist that they are not afraid to take the case to trial. There is nothing wrong with saying this, but sometimes the lawyers begin to believe it. Verdicts in strong sexual harassment cases can run high. Sometimes discretion is the greater part of valor.

Mistake #10: Don't Bother Training to Try to Avoid New Problems

California Government Code §12940(k) requires employers to take all reasonable steps to prevent sexual harassment. This typically includes training sessions for employees and giving employees written information.

It is all too easy to focus on whether a particular employee was sexually harassed and forget to also take steps to reduce the risk that other employees will complain of sexual harassment. While you are working to solve one problem, you have a wonderful opportunity to help prevent other problems. Don't waste it.

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