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Using Mediation to Address Sexual Harassment Claims in the Work Place

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Sexual Harassment in the Workplace

Sexual harassment continues to be a serious problem in the work place in terms of the number of claims being filed, the new types of claims filed, and the cost to the employer. The Equal Employment Opportunity Commission (EEOC) reported that in fiscal year 2003, it received 13,566 sexual harassment claims.² Employers tend to think that these claims are only filed by women but there are an increasing number of men who are also filing claims. For example, in fiscal year 2003, 14.7% of the sexual harassment claims filed with the EEOC were filed by men. In addition, employees are now allowed to bring claims against persons of the same sex.³ These claims can be very costly. The Federal Government reported in 1994 that it had paid \$267 million for sexual harassment adjudication for the previous two years, and in 1997 that amount had increased to \$327 million for the previous two years.⁴ The EEOC reported that in fiscal year 2003 it obtained \$50 million in settlement dollars for persons who filed complaints with the EEOC, and this figure does not include monetary awards obtained through litigation.⁵

The courts have recognized two different types of sexual harassment. The first is quid pro quo harassment which literally means "this for that."⁶ An example of this type harassment is a supervisor who requires that a subordinate exchange sexual favors in order to obtain a promotion. The other type of harassment is hostile environment harassment. The U.S. Supreme Court in describing this type of harassment stated that "as long as the environment would reasonably be perceived, and is perceived, as hostile or abusive ... it is sexual harassment."⁷ An example of hostile environment harassment is where an employee is subjected to repeated sexual comments or innuendo in the work place. This type of harassment may be committed by a supervisor or co-employee.

Federal and state laws that prohibit sexual harassment provide that it is the employer, not the supervisor or co-worker, who is potentially liable for the harassment.⁸ Consequently, it is the employer who benefits the most from stopping the harassment before a claim is filed by an employee with the EEOC against the employer. Typically the way an employer seeks to do this is by implementing a sexual harassment policy that describes prohibited activity, provides a way to report the offensive behavior, and states that violators will be disciplined up to and including discharge. These policies have been somewhat effective, but studies indicate that employees are reluctant to use the reporting procedure.⁹ This reluctance is sometimes due to the fact that the employee does not want the offender disciplined but just wants the offending behavior to stop.¹⁰ The complaining employee may also want to keep the matter private. To address these

concerns, some employers have found it beneficial to add a procedure to their sexual harassment policy called mediation.

What is Mediation?

Mediation is a process where a trained neutral assists the parties in resolving a dispute.¹¹ It is important to note that the mediation process we are referring to in this article is mediation between the complaining employee and the alleged harasser, not mediation between the complaining employee and the employer. We recognize that mediation would not be acceptable in all instances, and we shall address this concern later in the article. Many times, however, claims arise out of circumstances such as a broken relationship, a lewd comment, or a simple misunderstanding. In these types of instances, it might be appropriate to have a third party neutral (mediator) meet with the parties either separately or together and attempt to resolve the matter.

The steps in the mediation process are fairly uniform. While there may be small procedural differences, most mediation processes include the following components: the mediators are considered neutral; the mediation is voluntary on the part of the participants; and the process is considered confidential. The mediator's role is to assist the participants in expressing their concerns, help the parties listen to one another, and facilitate brainstorming to come up with solutions that are acceptable to all involved.

Specific steps include contacting the parties and setting up a meeting in a neutral setting, explaining the procedure to the parties and getting their commitment to begin, allowing each party to describe his or her concerns, clarifying the issues involved, revisiting the issues to get all of the concerns out on the table, brainstorming for solutions, clarifying solutions that are acceptable to all parties, and reaching a final agreement.

When is Mediation Appropriate?

If an employer decides to use mediation for sexual harassment disputes, it should have specific parameters regarding what will and will not be mediated. While most employers are willing to refer sexual harassment cases to mediation services if the participants are willing, the mediators are typically careful to determine whether there are extenuating circumstances that would suggest that mediation is inappropriate. In cases where there was actual physical harm, sexual assault, or a power differential too great to allow for fairness (i.e., extreme difference in rank or status), employers are much less likely to view mediation as an appropriate venue for resolution of the problem. In addition, if the employer has already determined that a harasser must be discharged, mediation may not be deemed appropriate. Mediation may, however, assist the employer in addressing many

of the problems that attend sexual harassment complaints. For instance, employers have found that mediation is a good way to educate the perpetrator about unacceptable behavior in the work place. It also allows victims an avenue in which to vent feelings that have arisen as a result of disparaging treatment. Sexual harassment claims are often difficult to resolve because the employer is faced with a “he said/she said” situation and no other form of proof. With mediation, the emphasis is not on who has a better case. Consequently, parties may focus on resolving their differences and developing a set of work rules with the mediator that allow them to continue to work together and move beyond the dispute.

Where Do Employers Find Mediators?

Professional mediators may be obtained through agencies such as the American Arbitration Association and the Alternative Dispute Resolution section of the Michigan Bar Association. Often there is a dispute resolution center in larger communities. They provide mediation services, typically free of charge, and can also provide mediation training. If there is a large number of employees in a company, employers may want to consider having in-house mediation available since it is both convenient and cost effective. Human Resources personnel can be trained in mediation and be made available as mediators. Sensitivity to race and gender issues should be considered in selecting personnel to become mediators.

Conclusion

Mediation can be a valuable tool for employers to include in their sexual harassment policies. It may be used by employees who would normally not use the typical complaint process. Although mediation is not appropriate for all sexual harassment complaints, it can be a beneficial process for both the accuser and the accused if utilized properly.

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² EEOC web site: <http://www.eeoc.gov/stats/harass.html> (last visited November 9, 2004).

³ *Oncala v. Sundowner Offshore Services, Inc.*, 523 U.S. 75 (1998).

⁴ Mauricio Velasquez, “Sexual Harassment today: An Update – Looking Back and Looking Forward” at <http://www.diversitydtg.com/articles/sex-harass-today.html> (last visited November 9, 2004).

⁵ EEOC web site: <http://www.eeoc.gov/stats/harass.html> (last visited November 9, 2004).

⁶ *Burlington Industries v. Ellerth*, 118 S. Ct. 2257 (1998).

⁷ *Harris v. Forklift Systems, Inc.* 510 U.S. 17 (1993).

⁸ *Jager v. Nationwide Truck Brokers, Inc.* 252 Mich. App 464 (2002); *Wathen v. General Electric Co.* 115 F 3d 400 (CA6, 1997).

⁹ United States Merit System Protection Board, Sexual Harassment in the Federal Workplace: Trends, Progress, Continuing Challenges (1994); Sharyn A. Lenhard & Diane K Shrier, *Potential Costs and Benefits of Sexual Harassment Litigation*, 26 *Psychiatric Annals* 132 (1996).

¹⁰ Louise F. Fitzgerald, *Why Didn't She Just Report Him? The Psychological and Legal Implications of Women's Responses to Sexual Harassment*, 51 *J. Soc. Issues* 117 (1995).

¹¹ Mediation should not be confused with arbitration. Arbitration is also conducted by a neutral, but the arbitrator hears the facts in a trial-like setting and renders a written decision. Mediation focuses on the parties finding a resolution to their dispute. Although a written agreement may result from mediation it is an agreement designed by the parties not the mediator.