

## **PREVENTING SEXUAL HARASSMENT IN THE WORKPLACE**

### ***THE MUNICIPAL EMPLOYER'S OBLIGATIONS***

Sexual harassment in the workplace is illegal under federal and state law. As an employer, a municipality is legally obligated to protect its employees from sexual harassment by town officials, supervisors, co-employees and others. A failure to adopt appropriate policies and procedures, conduct prompt and thorough investigations and remedy the harassment will result in a significant risk of liability exposure for the municipality. Indeed, the damage awards in these types of cases can be quite high given that successful litigants are entitled to recovery of attorneys' fees and costs of suit in addition to other nominal and compensatory damages.

The following tips (although not exhaustive) are designed to help municipalities comply with federal and state mandates and minimize the risk of exposure.

#### **1. Does Your Municipality Have a Written Anti-Harassment Policy and Poster?**

Under state law, *all* municipalities *must* have a written anti-harassment policy that is distributed to each employee. 21 V.S.A. §495h. (Federal law - Title VII of the Civil Rights Act of 1964 – has similar requirements for municipalities that employ 15 or more individuals.)

At a minimum, the policy must contain: (a) a statement that sexual harassment is illegal; (b) a statement that retaliation for bringing or supporting a sexual harassment claim is illegal; (c) a description and examples of sexual harassment; (d) a statement of the range of consequences for employees who engage in sexual harassment; (e) an explanation as to how to file complaints within the municipality (including the names and addresses of the persons to whom complaints should be made); and (f) an explanation as to how to file external complaints with the federal Equal Employment Opportunity Commission (EEOC) and the Vermont Attorney General's office. Moreover, VLCT recommends that each employee sign a form acknowledging receipt and understanding of the policy.

It is also recommended that the municipality designate at least two or three management-level people to whom complaints of sexual harassment may be brought. The law is clear that there must be a complaint by-pass process in place so that an employee is not forced to complain to the supervisor who is actually engaging in the harassment or who is otherwise sanctioning the unlawful behavior. If possible, one of individuals to whom complaints may be brought should be a woman, and all of the management-level individuals should be accessible to all employees and trained in processing and investigating sexual harassment claims.

Municipal employers are also required to post in a prominent and accessible location a poster that contains, at a minimum, the elements of the employer's sexual harassment policy. 21 V.S.A. §495h.

A model Anti-Harassment Policy and Poster is available from the Vermont Department of Labor and Industry web site's Wage and Hour section, [www.state.vt.us/labind/wagehr.htm](http://www.state.vt.us/labind/wagehr.htm) (see the Posters/Brochures list at the bottom of the page) or by calling the Department at 802/828-2288.

#### **2. Does Your Municipality Conduct Anti-Harassment Training?**

Under Vermont law, training for supervisors and employees is "encouraged." 21 V.S.A. §495h. Therefore, all municipalities should have an annual training program for employees and supervisors that addresses policies and procedures regarding sexual harassment. Training for supervisors should also include the methods they should use to ensure immediate and appropriate corrective action in addressing sexual harassment complaints.

VLCT PACIF has been conducting anti-harassment regional training seminars for supervisors and employees of PACIF members. For additional information, please contact Brian Fitzpatrick at 800/649-7915.

#### **3. Are Sexual Harassment Complaints Being Handled Promptly and Effectively?**

A major lesson from the case law in this area is that the employer should never ignore a sexual harassment complaint or delay an investigation. At the end of the day, judges and juries will look to whether the employer promptly handled the complaint and took steps to ensure immediate cessation of the harassment. When addressing a sexual harassment complaint, employers should, at a minimum, do the following:

**(i) Conduct a Complete and Thorough Interview of the Complainant** You must obtain a complete recitation of what occurred – including all dates, times, locations, witnesses, documents, conversations, actions taken, to whom reports of the harassment were made, etc.

**(ii) The Employer Cannot Promise Confidentiality to the Complainant** There may be instances where the complainant wants the employer to keep the matter confidential or does not want an investigation at all. The bottom line is that the employer has an obligation to investigate if the reported behavior falls within the definition of sexual harassment, and the employer cannot make a guarantee of confidentiality. The best the employer can do is advise the complainant that the information will be shared only with people who have a business need to know and only to the extent necessary to interview the relevant witnesses.

**(iii) Document the Information Provided** After completing the initial interview of the complainant, the details of the interview should be immediately written up and then signed by the complaining witness. This will avoid any discrepancies that may arise later.

**(iv) Determine Whether a Further Investigation is Necessary/Consult Counsel** If the allegations made by the complaining witness fall within the definition of sexual harassment, the employer must take the necessary steps to investigate the incident (unless there is already sufficient independent evidence to allow the employer to conclude that the harassment has occurred). If an investigation is warranted, the employer should advise the complaining witness as to the length of time the investigation will take and that the witness will be advised of the outcome by a date certain. If there is a concern about the complainant's well being, the employer should give consideration to providing paid leave to the complainant (if he or she desires such leave) or to the accused. It is also strongly recommended that the employer consult with counsel for guidance in conducting the investigation and taking further action, if necessary.

**(v) Conduct Thorough and Well-documented Interviews of all Relevant Witnesses** The employer should give careful consideration to the order of witness interviews. In addition, each witness should be thoroughly interviewed in the same manner and with the same detail as the complaining party. All interviews should be well documented and signed by the witnesses.

**(vi) Stop the Workplace Rumor Mill** The integrity of the investigation will be seriously threatened if the relevant witnesses are allowed to discuss the matter outside the confines of the interview. It is critical that all employees be aware that if they discuss any aspect of a sexual harassment investigation with anyone other than the investigator (or their own attorney) they will be subject to discipline up to and including discharge. This policy should be communicated to all employees in writing as part of the employer's personnel policies.

**(vii) Findings and Recommendations** Once the investigator has gathered the information and reduced it to writing, the evidence should be analyzed to determine whether it is more likely than not that the harassment occurred. Factors to be considered include witness credibility, quality of supporting evidence on both sides, prior complaints against the accused and the personnel records of those involved. Once a decision is made, the investigator's findings and conclusions should be reduced to writing.

**(viii) Does the Punishment Fit the Crime?** If the employer determines that it is more likely than not that the harassment occurred, then the employer's obligation is to take measures to ensure immediate cessation of the harassment. The factors that are relevant to this determination are very case specific and will depend on the severity of the conduct, prior instances, the terms of relevant personnel policies and collective bargaining agreements, etc. The message here is that the employer must ensure immediate cessation of the harassment. If the measures taken don't stop the offending behavior, then more drastic measures must be taken.

**(ix) Follow Up is Key** Once discipline is imposed in accordance with the municipality's applicable rules and procedures, then there must be continued follow up with the complainant to ensure that the harassing behavior has stopped. Although the employer cannot share with the complainant the nature of the discipline that was imposed on the accused, the employer should advise the complainant that appropriate action was taken and that the complainant should immediately report any future harassing behavior.

**(x) Keep Investigation Documents in a Separate, Confidential File** The documents generated during a sexual harassment investigation should be kept in a separate, confidential file and access should be allowed only to authorized individuals with a business need to know the information.

For additional information, please feel free to contact the VLCT Municipal Law Center.

- Sue Ritter, VLCT Staff Attorney

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