

Focus



Elements of a sexually hostile work environment

In order to prove a sexually hostile work environment, an employee must prove the following:

- He/she is a member of a protected group
- He/she was subjected to unwelcome sexual harassment
- The harassment was based on sex
- The harassment affected a term, condition or privilege of employment
- The employer knew, or should have known, of the harassment and failed to take prompt and remedial action

Source: **Duff Law Firm P.L.C**

Harassment: a touchy subject BY MARJORIE SMITH

Sexual harassment can be a touchy subject - literally. It can also affect a company's bottom line and flat-line an employee's morale.

And though most companies articulate their sexual harassment rules and regulations in employee manuals, workers still violate the code of ethics and harass coworkers. This harassment in turn creates a hostile work environment that directly affects productivity and the company's overall bottom line.

"When it gets to the point where it is a hostile work environment, people don't want to come to work," said Tom **Duff**, an attorney who practices harassment law at his firm, **Duff Law Firm PLC**.

Furthermore, **Duff** said that he has noticed that sexual harassment in the work place occurs in stages. At first, he said, everything is fine, and the worker thinks they can deal with the person who is harassing them. Then it keeps getting worse and eventually, it comes to the point where the employee dreads going to work.

"It causes stress, anxiety and depression," **Duff** said. "And when people have those conditions they aren't as productive. You aren't being productive whether it's at the computer or on an assembly line."

The next stage of sexual harassment is when the worker starts to use vacation days, sick days and paid time off to avoid coming to work. Using up these days to avoid a harasser or a hostile work environment results in less work getting done. Productivity weakens and other workers within the company start to feel the workload of the absent worker, **Duff** said.

"It's been my experience that if you have a coworker that is depressed or anxious, they're not easy to work

with," **Duff** said. "You as a coworker, who may not know what's going on, might not understand why they're not getting their work done. So instead you're getting their workload and you don't understand why they're not pulling their share."

This workload shift can throw off a whole department and create huge hiccups within the workflow process. For instance, a recent study found that sexual harassment is significantly associated with a team's functioning and performance in the workplace.

The study found that harassment, in the form of sexually explicit and insulting verbal and nonverbal behaviors, negatively affects team cohesion as well as team financial performance, claiming "harassment may have far-reaching implications for teams' performance through its influence on everyday team processes."

But beyond individual and team productivity losses, if the harassed employee quits, the company now accrues training expenses for a new worker. And even more, if the case goes to court, a whole slew of new expenses come into play, **Duff** said.

For instance, a harassed employee can get lost wages and benefits, monetary damages for emotional distress, punitive damages and attorney expenses paid in full if the case goes to court, **Duff** said. Attorney fees alone can exceed \$70,000 depending on how far the case goes and some cases can exceed \$500,000 in emotional distress damages depending on the severity and the people involved.

However, before a company starts shelling out money in a sexual harassment court case, or even a settlement, leaps and bounds must be made on behalf of the plaintiff. According to **Duff**, plaintiffs generally have a tough time making their case heard in court due to the complications and varying interpretations of the law.

"The law is very complicated, and over the last 10 years it's gotten more favorable to the employer and less favorable to the employee," **Duff** said.

Duff explained that if an employee notifies a supervisor of harassment and the company claims it investigated the situation but didn't discover anything, that's all that is necessary to avoid liability in a lawsuit.

"Once sexual harassment has been reported, all they have to do to avoid liability is investigate it; take some sort of action," **Duff** said. "It doesn't have to be perfect. If they investigate it and take any remedial action, they're off the hook. And larger employers and more sophisticated employers know that."

But the same sense of ease doesn't necessarily apply for the plaintiff who has to prove that substantial sexual harassment occurred in the face of tough courts.

"Some courts are particularly hostile to these cases," **Duff** said. "The elements of sexual harassment are very specific and the courts are very demanding. It has to be frequent, it has to happen all the time, pretty much every day, and you can't have any big time gaps. It's not sufficient enough if someone calls you a name."

Duff went on to explain that a lot of courts dissect sexual harassment cases and pick them apart so that the sum of the parts doesn't equate to a greater, solved whole.

"The courts tend to dissect these things too much," **Duff** said. "And it's an injustice and a wrong. It's bad for the economy, and there needs to be a mechanism for people to get lawyers to represent them; to make sure that there is an incentive for employers to comply with the law."

Duff, who is one of few lawyers who willingly, and actively, practice sexual harassment law, only takes approximately 12-15 cases annually and knows first-hand the battles that have to be fought in the courtroom.

"These cases are hard fought," **Duff** said. "Nobody likes to be accused as a sexual harasser. And when you do that to an employer, they tend to fight back pretty hard."