

Plan, Inform, Act: Practical Solutions for Sexual Harassment Policy for Iowa Small Businesses

Alexis Reller

Drake University and University of Minnesota

Subject Area: Business Law; Human Resource Management and Organizational Behavior

Article Type: Editorially Reviewed Student Research Report

**Acknowledgement: This article was developed from a Drake University Honors Senior Thesis. Faculty advisers for the project were Prof. Sally Frank, College of Law, and Dr. Steve Scullen, College of Business and Public Administration.*

INTRODUCTION

In the late 1980s, Lois Jensen worked as one of a few female in the Eveleth coal mines in Northern Minnesota.¹ Jensen accepted the heightened danger natural to the mines- what she had not expected was constant sexual harassment from her male peers and superiors.² While working in the mine, Jensen and other women experienced crude comments from male employees, pornographic graffiti and inappropriate touching; this behavior, coupled with a lack of response from the company, led to the women to file a claim of sexual harassment for a hostile work environment.³ Jensen was able to rally other injured parties to form a class of injured parties and filed a class action lawsuit against their former employer.⁴ Though the legal battle went on for years, the court eventually found Eveleth Mines liable for the victims' harassment and paid millions of dollars in compensatory and punitive damages.⁵

The *Jensen* court found the mining company liable for the sexual harassment actions committed by its managers and employees. Entity liability for discrimination is not limited to large corporations as even small companies are responsible for preventing and responding to sexual harassment. Under federal law, businesses with fifteen or more employees must abide by the anti-discriminatory rules set forth in the Civil Rights Act of 1964.⁶ However, Iowa's Unfair Employment Practices anti-discrimination provisions apply to any business regularly employing four or more employees.⁷ Small business owners must be aware of this significant expansion of the federal law within the state of Iowa.

For the small business founder, abiding by the Unfair Employment Practices Act (the "Act") may seem as simple as acting fairly during the hiring and firing of employees. However, Title VII of the Act protects all employees from discrimination throughout the term of their employment,

¹ CLARA BINGHAM & LAURA GANSLER, CLASS ACTION: THE LANDMARK CASE THAT CHANGED SEXUAL HARASSMENT LAW 12 (1996).

² BINGHAM, 78.

³ BINGHAM, 78.

⁴ BINGHAM, 97.

⁵ *Id.*

⁶ Civil Rights Act of 1964, codified at §§ 42 U.S.C. 2000e-17 (2008).

⁷ I.A.C. § 216.6.6a (2009) (exempting members of the employer's family for the purpose of this section).

including promotion consideration.⁸ Employers are responsible for their interactions with employees. Furthermore, employers are responsible for inter-employee interactions as well as employee interactions with outsiders (vendors, suppliers, patrons) of the firm. If employees are subjected to discrimination, the company will suffer losses to productivity as a result. What is more, recent court cases have reaffirmed corporate liability in claims of sexual harassment, thus employers must pay damages for the harm caused by sexual harassment to the plaintiffs. Even the smallest business owner must be vigilant to abide by the requirements of sexual discrimination law.

It is essential for employers to understand the breadth of sexual harassment law in order to avoid lawsuits and damage to reputation for misconduct. There are both statutory and common law origins to sexual harassment protection. Courts have determined a set of requirements to support a finding of at least one of three types of sexual harassment, including hostile environment, *quid pro quo* and third party harassment. Employers have many options for preventing sexual harassment including fostering corporate culture ideals as well as creating educational programs to inform employees. In the event that an incident arises, employers must be well prepared to investigate and if found, punish violators of the policy.

Following the analysis of statutory and common law sexual harassment regulations, this article will describe practical approaches to regulation compliance. By following a three step plan to Plan, Educate and Act, even a small business can prepare to prevent and respond to sexual harassment claims.

Plan: Understanding the Origins and Requirements of Sexual Harassment Law

Statutory Bases of Sexual Harassment

Title VII of the Civil Rights Act prohibits discrimination employment and provides the legal basis for sexual harassment lawsuits. Title VII states:

It shall be an unlawful employment practice for an employer . . . to fail or refuse to hire or to discharge any individual, or otherwise to discriminate against any individual with respect to his compensation, terms, conditions, or privileges of employment, because of such individual's race, color, religion, sex, or national origin.⁹

As stated in the text of the act, non-discriminatory practices must occur in the hiring of employees.¹⁰ Initially, claimants used the Act only for cases of discrimination in hiring, promoting and firing.¹¹ In the late 1970s, claimants employed the Act to prohibit workplace discrimination including sexual harassment.

⁸ "U.S. EQUAL EMP'T OPPORTUNITY COMM'N, N-915-050, POLICY GUIDANCE ON CURRENT ISSUES OF SEXUAL HARASSMENT (1990), available at <http://www.eeoc.gov/policy/docs/currentissues.html>.

⁹ Civil Rights Act of 1964, codified at §§ 42 U.S.C. 2000e-17 (2008).

¹⁰ Ibid.

¹¹ "Disability Discrimination." *The U.S. Equal Employment Opportunity Commission*. 11 Mar. 2009. <<http://www.eeoc.gov/types/ada.html>>.

Common Law Origins of Sexual Harassment Law

In 1976, *Williams v. Bell* was one of the first sexual harassment claims based on Title VII.¹² The Department of Justice hired Diane Williams in a non-discriminatory manner and her initial job performance received excellent reviews.¹³ But within six months, Williams' direct supervisor, Harvey Brinson, subjected Williams to repeated sexual advances.¹⁴ Once Williams rejected Brinson, her previously excellent performance reviews suffered significantly and she was subsequently terminated. In a pretrial EEOC hearing, the Complaints Examiner found that the plaintiff experienced discrimination based on sex "in the acts of her supervisor in intimidating, harassing, threatening and eventually terminating her."¹⁵ When the case went to trial, the court found that Title VII applied since a male supervisor took retaliatory actions because a female employee declined his sexual advances.¹⁶

Before *Williams*, using Title VII for a sexual harassment claim was novel. Discrimination, as defined in the Act, was in the context of hiring, promoting and firing. The *Williams* decision found that discrimination is possible, and actionable, throughout the term of employment.¹⁷ Courts have held that a company need not carry out a policy or pattern of discrimination or harassment; instead, an isolated person or incident might be the source of sexual harassment, subjecting the company to vicarious liability. The *Williams* court established the protection from sexual harassment in the workplace under Title VII. Victims could only seek compensatory damages until Congress amended the Act in 1991, which allows victims to collect punitive damages for pain and suffering from their employers.

The following cases further illustrate the evaluation criteria for sexual harassment in US Supreme Court decisions since 1986.

Meritor Savings Bank v. Vinson (1986):

The Court extended the anti-discrimination provisions of Title VII to an employee's right to a work in an environment that is free from insult and intimidation. The Court defined that harassment of a subordinate on the basis of sex is discrimination and prohibited by Title VII. The two most important tests for sexual harassment that came out of this case are whether or not the conduct is "unwelcome" and whether the action "reasonably interferes with an individual's work performance or creates a hostile work environment."¹⁸

Harris v. Forklift (1993):

The Court in *Harris* clarified the definition of hostile environment by using a "reasonable person" standard. This defined harassment as actions that a normal, reasonable person would find offensive. The Court noted that sexual harassment is not an isolated incident, but is inflicted over time. The Court also established two additional requirements for sexual harassment: creation of the hostile environment by the offender's actions and the victim's perception of these actions as abusive.¹⁹

¹² "United States Government." *University of North Carolina Greensboro*. 2 May 2009.

<<http://library.uncg.edu/depts/docs/us/harassment.asp>>.

¹³ *Williams v. Bell*, 587 F.2d 1240, 1242 (D.C. Cir.) (1976).

¹⁴ *Id.*

¹⁵ *Id.* at 1243 (quoting the 1975 administrative proceeding findings).

¹⁶ *Williams v. Bell*, 587 F.2d 1240, 1245 (D.C. Cir.) (1976).

¹⁷ *Id.* at 1243

¹⁸ *Meritor Sav. Bank v. Vinson*, 477 U.S. 57 (1986).

¹⁹ *Harris v. Forklift*, 510 U.S. 17, 22 (1993).

Oncale v. Sundowner Offshore (1998):

The court determined that sexual harassment is still possible if the offending superior and subordinate are of the same sex.²⁰

Burlington v. Ellerth (1998):

The court determined that, in the absence of “adverse, tangible job consequences,” an employer may not be subject to vicarious liability by meeting the following two necessary conditions: the employer “exercised reasonable care to prevent and correct promptly” any offending behavior and that the plaintiff employee failed to take advantage of the resources made available.²¹

Faragher v. City of Boca Raton (1998):

In an effort to better define a “hostile work environment”, the court established the following factors for consideration: 1) whether the conduct was verbal, physical, or both; 2) how frequently it was repeated; 3) whether the conduct was hostile or patently offensive; 4) whether the alleged harasser was a co-worker or supervisor; 5) whether others joined in perpetrating the harassment; 6) whether the harassment was directed at more than one individual.²²

Defining Sexual Harassment Requirements and Types

The Court’s Requirements for Sexual Harassment Cases

Certain qualities must be present for a court to find sexual harassment. An action is considered harassment only if the following criteria are satisfied: (a) it is unwelcome; (b) it is severe or pervasive; (c) there is a cause for action if the environment is hostile.²³ Court decisions as well as the EEOC use a similar evaluative structure for defining sexual harassment under Title VII.²⁴

Harassment Must be ‘Unwelcome’

In 1977, Paulette Barnes rejected her supervisor’s sexual advances and was subsequently terminated.²⁵ To determine whether the actions of the defendant were sexual harassment, the court described the following spectrum of responses to sexual conduct in the workplace: “invited, uninvited-but-welcome, offensive- but-tolerated, and flatly rejected.”²⁶ Ms. Barnes expressed that the sexual offers were ‘unwelcome’ and the court found her employer’s advances to be in violation of Title VII’s prohibition of sexual discrimination.²⁷

The Court later clarified the ‘unwelcome’ test in *Meritor Savings Bank, FSB v. Vinson*. In *Meritor*, the victim claimed that her former manager, Sidney Taylor, subjected her to sexual harassment following a previously consensual sexual relationship.²⁸ The Court found that previous consent in sexual relations was not a guarantee that all future interactions would be

²⁰ *Oncale v. Sundowner Offshore Servs.* 523 U.S. 75 (1998).

²¹ *Burlington Indus. v. Ellerth*, 524 U.S. 742 (1998).

²² *Faragher v. City of Boca Raton*, 524 U.S. 775 (1998).

²³ FRUG, MARY JOE ET. AL, WOMEN AND THE LAW 689, 691 (2008).

²⁴ “U.S. EQUAL EMP’T OPPORTUNITY COMM’N, N-915-050, POLICY GUIDANCE ON CURRENT ISSUES OF SEXUAL HARASSMENT (1990), available at <http://www.eeoc.gov/policy/docs/currentissues.html>.

²⁵ *Barnes v. Costle*, 561 F. 2d 983, 999 (1977).

²⁶ *Id.*, 984.

²⁷ *Id.*

²⁸ *Meritor Sav. Bank v. Vinson*, 477 U.S. 57, 62, 65 (1986).

'welcome' and found that Taylor's actions were sexual harassment.²⁹ The 'unwelcome' test is still a vital part of a court's harassment evaluation and EEOC policy.³⁰

Actions Must be Severe or Pervasive

In order for sexual harassment to violate Title VII, the courts determined the action must be beyond a certain level of tolerance. The *Meritor* Court determined that "for sexual harassment to be actionable, it must be sufficiently severe or pervasive" or the action must "create an abusive working environment" for the victim."³¹ This definition has become a standard test in the evaluation for claims of sexual harassment.

The Equal Employment Opportunity Commission (EEOC) describes that behavior in a hostile work environment in violation of Title VII as any activity that "unreasonably interfer[es] with an individual's work performance" or behavior that is "intimidating, hostile, or offensive."³² In an effort to establish concrete guidelines for employees and students university-wide, the University of Iowa's Operations identifies specific actions that may be evidence of sexual harassment³³:

- Unnecessary touching
- Sexual jokes or anecdotes
- Direct or implied threats
- Physical assault
- Repeated staring
- Display of graphic sexual material
- Sexually explicit gestures
- Direct sexual propositions
- Pressure for sexual activity
- Remarks of a sexual nature about clothing or body

The University emphasizes that any of these activities may be "made physically, orally, in writing, or through electronic media." While the University's list is not exhaustive, specific examples can provide managers and employees guidance to prevent and identify sexual harassment.

The Harassment is Sufficient to Create a Hostile Environment

When evaluating sexual harassment allegations, the court must determine if the conditions were sufficient to create a hostile work environment.³⁴ The *Meritor* court defined hostile environment as, "harassment that, while not affecting economic benefits, creates a hostile or offensive working environment" and that "[t]he EEOC Guidelines fully support the view that harassment leading to noneconomic injury can violate Title VII."³⁵ The Court used a reasonable person standard in *Harris* and clarified that Title VII prohibits conduct where "the environment would

²⁹"*Meritor Sav. Bank v. Vinson*," 477 U.S. 57 (1986), 57.

³⁰ U.S. EQUAL EMP'T OPPORTUNITY COMM'N, N-915-050, POLICY GUIDANCE ON CURRENT ISSUES OF SEXUAL HARASSMENT (1990), *available at* <http://www.eeoc.gov/policy/docs/currentissues.html>.

³¹ *Meritor Sav. Bank v. Vinson*, 477 U.S. 57, 67 (1986).

³² U.S. EQUAL EMP'T OPPORTUNITY COMM'N, 915.002, ENFORCEMENT GUIDANCE: VICARIOUS EMPLOYER LIABILITY FOR UNLAWFUL HARASSMENT BY SUPERVISORS (1999), *available at* <http://www.eeoc.gov/policy/docs/harassment.html>.

³³ UNIVERSITY OF IOWA BOARD OF REGENTS, OPERATIONS MANUAL, PART II: COMMUNITY POLICIES, CH. 4 SEXUAL HARASSMENT (2011), *available at* <http://www.uiowa.edu/~our/opmanual/ii/04.htm>.

³⁴ FRUG, 690.

³⁵ *Meritor Savings Bank, FSB v. Vinson*, 477 U.S. 57, 62, 65 (1986).

reasonably be perceived, and is perceived, as hostile or abusive.”³⁶ The *Meritor* Court concluded a hostile environment was present and found the employer to be liable for sexual harassment.³⁷ This decision expanded the definition of sexual harassment beyond *quid pro quo* relationships and therefore increased employer liability.

While past decisions provide some precedent and guidance, sexual harassment evaluation criteria is neither permanent nor fixed. In her opinion for a unanimous court, Justice O’Connor emphasized that there cannot be a “mathematically precise test” to determine the existence of sexual harassment.³⁸ Instead, the Court found that the totality of circumstances should be evaluated to determine if a hostile work environment is present:

[W]e can say that whether an environment is “hostile” or “abusive” can be determined only by looking at all the circumstances. These may include the frequency of the discriminatory conduct; its severity; whether it is physically threatening or humiliating, or a mere offensive utterance; and whether it unreasonably interferes with an employee’s work performance. The effect on the employee’s psychological well-being is, of course, relevant to determining whether the plaintiff actually found the environment abusive. But while psychological harm, like any other relevant factor, may be taken into account, no single factor is required.³⁹

This opinion was important in that it rejected the increased requirements of proof set forth by the lower court.⁴⁰ The *Harris* Court emphasized the importance of the bigger picture; since sexual harassment can take many forms and degrees, courts must consider all circumstances.

The Court’s Identification of Sexual Harassment Types

Hostile Environment

The case of *Lois Jenson v. Eveleth Taconite Co.* alleged that the type of sexual harassment present was a hostile work environment. The basis for this claim was the Title VII of the Civil Rights Act of 1964 and the Minnesota Human Rights Act of 1964.⁴¹ During the trial for *Jenson v. Eveleth*, the plaintiff class presented the following evidence of sexual harassment to argue a hostile environment existed:

“...evidence of pervasive offensive conduct. Sexually explicit graffiti and posters were found on the walls and in the lunchroom areas, tool rooms, lockers, desks and offices... Women reported incidents of unwelcome touching, including kissing, pinching, and grabbing. Women reported offensive language... as well as... comments that women did not belong in the mines, kept jobs from men, and belonged home with their children. The Court finds this sufficient evidence to demonstrate... plaintiffs’ claims for sexual harassment.”⁴²

After establishing that a hostile work environment was indeed present, the plaintiffs sought damages for the unjust treatment of female employees of Eveleth Mines. Additionally, the

³⁶ *Harris v. Forklift*, 510 U.S. 17, 22 (1993).

³⁷ *Meritor Savings Bank, FSB v. Vinson*, 477 U.S. 57, 62, 65 (1986).

³⁸ *Harris v. Forklift*, 510 U.S. 17, 22, 22–23 (1993).

³⁹ *Id.*

⁴⁰ *Id.*

⁴¹ *Jensen v. Eveleth Taconite Co.*, 824 F. Supp. 847, 856 (D. Minn. 1993).

⁴² BINGHAM, 238.

plaintiffs requested an injunction to require the company to create and uphold a policy on sexual harassment and responsible reporting procedures.⁴³

In the 1998 case of *Ellerth v. Burlington Industries, Inc.*, the Court found vicarious liability and emphasized the importance of sexual harassment training and prevention.⁴⁴ During Kimberly Ellerth's 15 month employment, her direct supervisor, Ted Slowik, subjected Ellerth to repeated sexual harassment.⁴⁵ Slowik was not a high ranking policy maker in the firm, but he controlled important decisions for Ellerth's division, including hiring and promotions.⁴⁶ Ellerth eventually quit, alleging that Slowik's harassment was effectively a termination.

The court found that Slowik had a history of "repeated boorish and offensive remarks and gestures... where Slowik's comments could be construed as threats to deny her tangible job benefits."⁴⁷ Though the court did not find that Ellerth had "suffered any tangible effects on compensation, terms, conditions or privileges of employment as a result," there was sufficient evidence to indicate that Slowik's behavior was unwelcome and interfered with Ellerth's work.⁴⁸ Though Ellerth failed to make a single report of the harassment during her time with the company, the Court held the company liable for Slowik's actions. The Court reasoned that ignorance is an insufficient defense where the employer has a duty of care or, alternatively, where they are subject to vicarious liability.⁴⁹ *Ellerth* demonstrates that employers must be aware of the actions of their employees and proactive about non-discriminatory practices.

Quid Pro Quo Harassment

The Latin phrase *quid pro quo* means "something for something"⁵⁰ and in the sexual harassment context, "sexual favors are understood to be provided either as a condition of obtaining an employment benefit. . . or to avoid a threatened adverse action."⁵¹ During her time at Eveleth Mines, Jensen was subjected to a *quid pro quo* situation when her supervisor threatened to fire her if she did not agree to date him.⁵² In *Bundy v. Jackson*, the court found that the victim's refusal of sexual favor requests were the cause of termination, the court found that *quid pro quo* sexual harassment was present.⁵³

Many cases involve at least one *quid pro quo* incident, usually where a superior threatens punishment (via demotion, termination or otherwise) if the subordinate fails to submit to the superior's sexual advances.⁵⁴ Absent recorded evidence, *quid pro quo* incidents may be difficult to prove only based on the victim's word.⁵⁵ *Quid pro quo* harassment is often an element of proving a hostile work environment exists and it is likely that the victim's attorneys will use these instances to add to a larger claim.⁵⁶

⁴³ *Jenson*, 824 F. Supp. at 889–89.

⁴⁴ *Ellerth v. Burlington*, 524 U.S. 742, 745–70 (1998).

⁴⁵ *Id.* at 747–48.

⁴⁶ *Id.*

⁴⁷ *Id.*

⁴⁸ *Id.* at 753.

⁴⁹ *Id.* at 763–66.

⁵⁰ "Quid pro quo." *Merriam Webster Dictionary*. (Webster Mass Market, 2004).

⁵¹ FRUG, 689–90.

⁵² BINGHAM, 57.

⁵³ *Bundy v. Jackson*, 641 F.2d 934, 942–53 (D.C. Cir. 1981).

⁵⁴ See e.g., *Williams v. Bell*, 587 F.2d 1240 (D.C. Cir. 1976).

⁵⁵ Interview with Sally Frank, Professor of Law, Drake Univ. Law Sch. (Apr. 1, 2009).

⁵⁶ *Id.*

Third Party Sexual Harassment

Employers also have a duty to protect employees from sexual harassment by third parties, including non-employee vendors, agents and customers of the business.⁵⁷ A court found an employer liable in *Lockard v. Pizza Hut, Inc.* when restaurant patrons verbally harassed and physically assaulted a waitress, Rena Lockard.⁵⁸ Lockard's supervisor, Micky Jack, rejected Lockard's requests to be relieved from serving the offensive clients.⁵⁹ The situation traumatized Lockard, a victim of a childhood sexual assault, and she spent the next two years receiving psychological treatment for "post traumatic shock disorder and major depression."⁶⁰ Jack's failure to respond to Lockard's report of harassment cost nearly \$250,000 in damages and damage to his company's reputation.

The California Court of Appeals also used this theory, reasoning that "an employer is liable. . . for harassment by a client or customer if the employer had actual or constructive knowledge of the harassment and failed to take all reasonable steps to prevent further harassment." Corporate awareness and emphasis on employee protection from third parties is rising nationwide and it is important to maintain an active policy about these issues. Employers must emphasize accurate investigation and prompt action following harassment reports.

Sexual harassment requirements have roots in both statutory and common law. The 1964 Civil Rights Act provides remedies for employment discrimination and courts have extended the protections of the Act to include sexual harassment claims. In addition to understanding the structure and history of employer liability, it is important for employers to understand sexual harassment its many forms: hostile environment, *quid pro quo* and non-employee harassment. Because of the potential financial risk of legal liability, employers must utilize prevention of and proper responses to sexual harassment reports. Companies can avoid liability and protect business reputation through active policy, awareness, investigation and reasonable penalties as discussed below.

⁵⁷ See Frank Cronin, *Sexual Harassment by Non-employees: the Employer's Expanding Duty to Protect its Workers*, ORANGE CTY. BUS. J. (June 2004).

⁵⁸ *Lockard v. Pizza Hut, Inc.*, 162 F.3d 1062 (10th Cir. 1998).

⁵⁹ *Id.* at 1074–75.

⁶⁰ *Id.*

Act: Preventing and Dealing with Sexual Harassment in Iowa Small Businesses

In the state of Iowa, an individual may form a business entity as a partnership, corporation, association, security, or non-profit. In creating an organization, there are many laws that are essential for founders to consider, including accurate tax accounting, minimum wage requirements,⁶¹ and safety regulations to protect employees and company investments.⁶²

Whereas business owners will not neglect these essential and apparent requirements, smaller business organizations lacking the personnel, knowledge or funding may invest less resources in developing sexual harassment policies.

The transition from law to employment practice is not necessarily an easy one. For those unfamiliar with court decisions, the requirements of anti-discrimination law may not be straightforward. While the liability and repercussions of employers for noncompliant employees is great, this regulation could be lost in the formation of the business. In this section of sexual harassment analysis, this article plans to demystify federal and state anti-discrimination laws applicable to Iowa businesses and demonstrate practical approaches to complying with these regulations. By describing the law and its components in an understandable manner, demonstrating the importance of employer liability and outlining a three-step process practical for smaller organizations, sexual harassment compliance will be more manageable for the small business owner.

Jurisdiction and Employer Duty

Title VII of the Civil Rights Act of 1964 does not mention sexual harassment and for small business owners the effect on their business may be unclear. Additionally, many of the requirements of sexual harassment law developed through case law and a small Iowa employer may feel distant from the actions of our country's highest court. The sexual harassment restrictions and liability apply to Iowa businesses under the following laws:

- **Title VII of the Civil Rights Act of 1964:** in accordance with the, discrimination on the basis of race, color, religion, sex, and national origin are prohibited. This regulation applies to state and local government agencies and private employers with 15 or more employees.⁶³
- **Iowa Code § 216.6:** Employers exempt from [the Title VII] regulation include "any employer who regularly employs less than four individuals. For purposes of this subsection, individuals who are members of the employer's family shall not be counted as employees."⁶⁴

Courts have interpreted the Act to protect workers from the hostile environment that sexual harassment creates. Legislative history supports that employees have a right to perform their jobs without sexualized threats from their superiors, peers or third party visitors of the business.

Under statute and court decisions, businesses have a duty of care to protect their employees. This regulation does not mean that businesses are responsible for ensuring that sexual harassment never occurs; though an employer may be diligent to discrimination issues, it is unreasonable to expect the business owner to remain in absolute control of their employees or

⁶¹ Iowa Code 91D.1. "State Minimum Wage Laws." *The Employer's Legal Handbook*. Nolo: 2002.

⁶² Occupational Safety and Health Act. 29 U.S.C., 651 to 678: 1970.

⁶³ 42 U.S.C. § 2000e(b)(Title VII). As cited in: "Title VII of the Civil Rights Act of 1964 Fact Sheet." *Equal Employment Opportunity Commission's Office of Legal Counsel*. 6 Jul. 2000. <<http://www.eeoc.gov/policy/docs/fmlaada.html>>.

⁶⁴ I.A.C. § 216.6.6a (2009).

patrons at all times. Amendment SF525 to Iowa Code § 216.6, describes the reasonable duty of care as:

An employer shall take all steps necessary to prevent sexual harassment from occurring, including, but not limited to, affirmatively raising the subject, expressing strong disapproval, developing appropriate sanctions, informing employees of their rights to raise the issue of sexual harassment within the employment setting and under this section, and developing methods to sensitize all employees to the issue of sexual harassment.⁶⁵

Just as the government asks employers to take necessary precautions to prevent on-the-job accidents and safety breaches, employers must protect their employees from sexual harassment. If a claim of sexual harassment against the business arises, the best defense will be proof of education, policy and proactive response.

Employer Liability

Companies of all sizes must be vigilant to sexual harassment requirements since employers who fail to protect their employees can be liable for compensatory damages to remedy the loss of wages, promotion or lost time. Furthermore, the 1991 Title VII Congressional amendment expanded potential employer liability to include punitive damages if victims can show evidence of pain and suffering.⁶⁶ In addition to direct liability, companies may be subject to vicarious liability for sexual harassment of lower level employees and third parties.

Courts have determined that employers ignorant of sexual harassment will not be free from liability if they should have been aware or if they failed to implement prevention and reporting methods. In the 1976 case of *Flowers v. Crouch-Walker Corporation*, the court did not consider whether “the employer otherwise had ‘notice’ of the action”⁶⁷ Employers must be aware of employee actions to limit liability in discrimination claims. If the business is small enough, the owner may have this awareness. If not, companies must train managers and supervisors to be vigilant to employee interactions.

Additional Policy Considerations

Employers actually benefit by maintaining an environment free from sexual harassment and other discrimination. Employees that work in a healthy and positive environment will have a higher morale and will likely be more productive.⁶⁸ Companies that establish and uphold anti-discrimination policies will give employees confidence: both in understanding what is expected of them and by feeling protected.

PLAN, INFORM, ACT

It is in the best interest of all businesses to avoid the costly attorney fees and damages associated with settlements or court trials. Ideally, employers will create and follow a comprehensive harassment action plan to avoid or at least limit liability. A formal and confidential reporting procedure gives victims and witnesses an opportunity to alert the employer; this will also encourage internal investigation and opportunity for resolution at

⁶⁵ *Id.*

⁶⁶ “U.S. EQUAL EMP’T OPPORTUNITY COMM’N, N-915-050, POLICY GUIDANCE ON CURRENT ISSUES OF SEXUAL HARASSMENT (1990), available at <http://www.eeoc.gov/policy/docs/currentissues.html>.

⁶⁷ *Flowers v. Crouch-Walker*, 477 U.S. 57 (1986), 75

⁶⁸ FRED STEINGOLD, *Illegal Discrimination*, THE EMPLOYER’S LEGAL HANDBOOK 8/10 (2008).

minimum cost to the company. Employers that create a formal investigation procedure will be ready to address any claim that might arise, rather than having to address an issue on the fly.

Employers should implement a three-phase comprehensive policy for preventing and reprimanding sexual harassment: Plan, Inform, Act. By establishing measures early on, employers will be better suited to protect their employees and defend themselves when claims arise. The first step, Plan, involves establishing cultural norms for employee interactions and identifying sources of potential harassment. Additionally, the company should develop its formal sexual harassment policy and establish formal reporting procedures for claims. The second phase, Inform, focuses on education. Sexual harassment policy awareness should not end with the pre-employment orientation; periodic trainings should continue throughout the course of employment. It is also essential for companies to keep employees informed on individual job performance. The final phase, Act, will be in place in the event that an employee makes a sexual harassment claim. Speedy reaction time, thorough investigation and documentation are important when responding to a sexual harassment claim.

PLAN: What is the ideal environment for both employee morale and company liability?

Culture

One of the most effective ways to avoid liability for sexual harassment is to prevent harassment. Just as employers can establish community cultures by encouraging collaboration and providing communal working space, so too can employers influence the likelihood of discrimination. Google has honed their corporate culture of constant innovation through unconventional thinking by giving workers "...generous, quirky perks keep employees happy and thinking..."⁶⁹ Management and company leaders have the opportunity to instill normative beliefs about discrimination's unwelcome place in the office.

Attorney Fred Steingold writes that, an employer's "attitude toward sexual harassment- and the steps you take to prevent it- can help assure that you won't become the object of a formal complaint. . . ." ⁷⁰ The proactive employer will not have the mindset of avoiding discrimination claims. Instead, they will think of avoiding sexual harassment and other discrimination claims by creating an equal atmosphere. An employer sends a powerful message by reprimanding an employee for telling sexualized jokes and reinforces a culture free from sexual harassment. Especially in a small business setting, employers must show that discrimination and harassment in all forms is not tolerated.

There is an important issue to address in terms of employee interaction norms. Small business leaders must decide how they want to deal with intra-company relationships. Are employees allowed to date one another? What happens if one partner in the relationship is in a subordinate role? The employer must decide what is best for their company as planning ahead will ease employee uncertainty and direct corporate culture.

⁶⁹ Sara Kehaulani, *Building a 'Googley' Workforce: Corporate Culture Breeds Innovation*, THE WASHINGTON POST. (Oct. 21, 2006), available at <http://www.washingtonpost.com/wp-dyn/content/article>.

⁷⁰ STEINGOLD, 8/10.

Identify Sources of Harassment

An important preface to preventing sexual harassment claims is determining where discrimination might originate. Sexual harassment can be from peer-to-peer, superior to subordinate, or inflicted from outside parties visiting the business. While harassment from all sources can contribute to a hostile environment, some of the most frequently litigated cases involve superior to subordinate harassment. One of the tests a court will use to analyze a claim is whether the victim's response to the harassment affected "tangible job benefits."⁷¹ Superior to subordinate harassment poses the most risk to a company because it is more likely that one party will have control over "tangible job benefits" if there is a difference in rank. To avoid liability, a small business owner must adequately train management and establishing formal hiring, termination and promotion procedures.

Harassment claims can arise against any third party that interacts with or patronizes the business. It is most important for employers to be aware of any offensive conduct by third parties. The company might consider providing their sexual harassment policy to vendors engaged in an ongoing business relationship. It is essential that businesses use care to protect their employees from harassment by customers and visitors to the establishment, especially when a business maintains an active liquor license and may more frequently have imposing clientele.

Develop a Sexual Harassment Policy

The most important component to the Plan stage is to create a formal sexual harassment policy. Steingold advises that employers, "start by adopting a formal policy stating clearly that sexual harassment won't be tolerated..." by any employee.⁷² All staff members should be aware of the policy and have access to a copy posted publicly or within an employee manual.⁷³

It is important for employers to emphasize not only restricted behaviors, but also identify company reporting and investigation for claims. Companies should encourage employees to report harassment before it rises to the level of severe or pervasive. The employer should show that it seeks to stop harassment immediately. Employers are encouraged to create a policy that is as thorough or open-ended as might fit their business.

INFORM: How can our company be prepared if a claim ever arises?

Education

The EEOC emphasizes the importance of education and training as early as the new employee orientation in an effort to harassment from occurring.⁷⁴ By establishing the company's intolerance for employee misconduct from the start, the employer can establish corporate culture practices of equal and professional interactions established in the previous Plan phase.⁷⁵ Employers should provide written copies of sexual harassment and discrimination policies; the

⁷¹ *Ellerth v. Burlington*. 123 F.3d 490, 490.

⁷² STEINGOLD, 8/11.

⁷³ ROBERT J. SMITH, *Managing Individual and Complex Employment Discrimination Litigation*, in EMPLOYMENT DISCRIMINATION LAWSUITS 32 (2008).

⁷⁴ "U.S. EQUAL EMP'T OPPORTUNITY COMM'N, N-915-050, POLICY GUIDANCE ON CURRENT ISSUES OF SEXUAL HARASSMENT (1990), available at <http://www.eeoc.gov/policy/docs/currentissues.html>.

⁷⁵ "U.S. EQUAL EMP'T OPPORTUNITY COMM'N, N-915-050, POLICY GUIDANCE ON CURRENT ISSUES OF SEXUAL HARASSMENT (1990), available at <http://www.eeoc.gov/policy/docs/currentissues.html>.

information, coupled with the employees' signature acknowledging that the policies were available to them, helps ensure that everyone is informed.

Companies can emphasize the importance of a safe and fair environment for employees by encouraging awareness and supporting a corporate culture of respect. Formal training procedures are a valuable investment for companies. Even a short course annually will remind employees of the importance of non-discriminatory action and reporting procedures.

Create Reporting Procedures

Businesses also need to exert care to ensure that they create an environment where harassment reporting is acceptable and safe.⁷⁶ Employers should “not tolerate adverse treatment” to employees that report or provide information about a sexual harassment claim.⁷⁷ If employees feel unsafe or uncomfortable in reporting issues, harassment will likely continue to occur. Since sexual advances, lewd comments and inappropriate physical contact can be embarrassing for many individuals, it is in the firm's best interest to designate individuals of both sexes to whom employees can report incidents. It is in the firm's best interest to be informed and active in all alleged matters.

Special consideration might be necessary for those working in small business environments where the number of superiors is limited. In addition to identifying multiple persons who can receive complaints, businesses might provide alternative resources. Some institutions, including Carnegie Mellon University, have telephone operators that employees seeking to report harassment can contact.⁷⁸ The Equal Rights Advocates maintain a national 24 hour hotline for victims of sexual harassment.⁷⁹ Though employers may hesitate to involve an outside party prior to investigating the initial claim, protecting privacy in this way may encourage employees to report harassment before it becomes severe or pervasive. In this way, management has an opportunity to act promptly to remove the offender and remedy the victim. Policies of peer accountability and confidential reporting methods provide management with an opportunity to keep informed.

ACT: Act quickly to restore dignity and instill confidence.

Investigate

When prevention does not suffice, an employer must respond quickly and professionally to reports of sexual harassment. The company should follow its formal policy for investigating and reprimanding the offending party. Ideally, either Human Resource representatives or designated managerial staff will conduct a thorough investigation, including interviewing the victim, the offender(s) and any party that may have been witness to the alleged harassment.⁸⁰ Some important investigation recommendations include:

⁷⁶ Equal Rights Advocates, Employer Responsibility to Employees: Sexual Harassment at Work, <<http://www.equalrights.org>>.

⁷⁷ SHELDON LONDON, *Sexual Harassment in the Workplace*, in HOW TO COMPLY WITH FEDERAL EMPLOYEE LAWS 97 (2000).

⁷⁸ Policy Against Sexual Harassment: Informal Reporting Procedures.” *Carnegie-Melon University*. <<http://www.cmu.edu/policies/documents/sexharass.html>>.

⁷⁹ “Advice and Counseling.” *Equal Rights Advocates*. <http://www.equalrights.org/personal/need_advice.asp>.

⁸⁰ “Small Business Checklist for Sexual Harassment Investigation.” *Find Law: Small Business*. <<http://smallbusiness.findlaw.com>>.

- **Be Prompt:** An investigation should begin within 48 hours of the filing of the complaint. Management should document any reasons for delay.
- **Be Thorough:** Prepare a set of questions in advance and stay focused on the necessary details. Do not encourage gossip.
- **Be Neutral:** Without taking sides or developing a bias, collect as much evidence and witness accounts as possible.
- **Be Accurate:** Record all information in writing and verify with interviewees that the information is correct.⁸¹

A thorough and speedy investigation will not only show an employer's commitment to due care, it will also comfort the alleged victim.⁸²

An employer should take photos of any physical evidence of harassment (notes, graffiti, explicit photos) for the record. Additionally, an employer can build a stronger case to protect their employee by interviewing any coworkers that may have overheard the verbal comments. This proactive investigation will evidence the employer's responsibility to ensure a safe working environment and help limit liability. It will also help prove that discipline or termination of the offender was justified and properly executed.

Third Party: Quick Decision Making

Though it is not possible to prevent all incidents, it is important that employers act quickly in the event that one of their employees is harassed. In an article in *Human Resources within the Law*, author Gillian Flynn notes that the best way for employers to limit liability in third party harassment claims is to be in tune with the comfort levels and reactions of their employees.⁸³ Simply conferring with employees throughout a shift can help supervisors stay informed on the current situation. In this way, the supervisor will develop trust with their employees and will be available for any reports of harassment by non-employees.

If an employer trains employees to report issues immediately, management is able to take action promptly. Management can maintain that a safe working environment by keeping a watchful eye on the safety of their employees and dealing with unruly patrons. When an employee feels protected, they may be less likely to file suit against the company if sexual harassment issues arise.

Reaffirm and Respond

Where the employer ignores or mishandles claims, the wronged employee will likely reach to outside sources for assistance, including filing a lawsuit. When a complaint arises, the company should acknowledge the employee as a potential victim to help reaffirm dignity and instill confidence in the company's ability to resolve the claim. It is important for management to follow the guidelines set forth in the company's sexual harassment policy in reprimanding the offender. Some measures for ending harassment and preventing a repeat offense are as follows:

⁸¹ See LONDON, 100.

⁸² "Sexual Harassment Manual for Managers and Supervisors." *US Equal Employment Opportunity Commission*. <http://www.eeoc.gov/types/sexual_harassment.html>.

⁸³ Gillian Flynn, *Third Party Sexual Harassment: Commonplace and Laden with Liability*, in *HUMAN RESOURCES WITHIN THE LAW* (2000).

- Verbal or written warning
- Suspension or discharge
- Reduction of wages or benefits
- Transfer, reassignment or demotion⁸⁴

CONCLUSION

Beginning with Title VII of the Civil Rights Act of 1964 and moving through US case law, sexual harassment protection for employees has grown over time. When employers failed to provide sufficient remedies, injured parties brought their claims to the court system. The courts have supported an employee's right to work in an environment that is free from insults, threats and harassment. Courts have expanded the responsibilities of employers through a duty of due care and businesses that neglect this duty may be subject to liability.

Title VII and the courts may seem far removed from the Iowa small business. Yet as proscribed in Iowa Code § 216.6, nearly all businesses must comply with anti-discrimination regulations. By employing a comprehensive policy such as the three phase plan described herein, even the small businesses of Iowa can better Plan to address sexual harassment policy; Educate employees to prevent and report incidents; and Act to respond efficiently and professionally when sexual harassment claims arise.

⁸⁴ LONDON, 98.