

Sexual Harassment Liability Extends to Subs

by Quenda Behler Story

Okay, here's the situation: You've hired a female carpenter, and while your guys are cool, she's having trouble with the suppliers and the subs. Could you be in trouble if you don't do something about that?

Well, you might. I'm not going to talk about the crazy quilt of rules in all 50 states. I'll just concentrate on the federal laws. Even though you may not be directly covered by the federal laws, odds are your state laws look very similar.

Basic Rules

The sexual harassment rules that we're talking about in this column evolved out of antidiscrimination laws established as a result of the Civil Rights Act of 1964. Those rules are based on the idea that sexual harassment discriminates against people by discouraging them from working for particular companies. The victims of this type of discrimination are typically women, though men have been found to be victims, too.

The most blatant forms of sexual harassment involve actual sexual contact. The contact might include sexual bumping, groping, or repeated unwanted attention (which can sometimes amount to stalking, a criminal offense). Some behaviors fall into the category of a quid pro quo, where a supervisor offers perks such as raises and promotions in exchange for sexual favors. The flip side is when a supervisor threatens to fire or give undesirable job assignments to an employee who refuses a sexual advance.

Other forms of sexual harassment involve behaviors that people may not think of as sexual. For example, telling crude stories, making offensive jokes, or posting lewd cartoons on the job site can fall into the category of sexual

harassment. A particularly famous case involved male employees repeatedly hiding frozen bull testicles in a woman's desk. Such behaviors create a "hostile" work environment, defined as one that is so intimidating and offensive that it's difficult for the victim to work in it.

Who Is Responsible

As an employer, you can be held responsible for a hostile work environment that you did not create. Legally, it makes little difference whether the hostile environment was created by you, one of your employees, or someone on the job who is not your employee. Federal cases have made it clear that an employer can be held liable for the preventable acts of a third person (customer, supplier, or sub, for example) when the victim must interact with that person as part of the job.

Liability for the actions of a person who doesn't work for you is based on the idea that employers have a duty to supervise and control what happens on their job sites and to protect their employees by responding to harassment that the employers knew or should have known about. Employers must have some level of control over the situation in order to be liable, which automatically precludes liability for first-time or for unknown activity. Employers cannot be guilty of negligence without knowledge and an opportunity to intervene.

How to Protect Yourself

Your employee handbook should include a sexual harassment policy. It should explain what sexual harassment is (many books and websites provide this information) and state that you will not tolerate it. The policy

should also establish a complaint procedure, which tells the offended employee how to make a complaint and who to make it to.

Legal precedent has made it clear that if the employer has a complaint procedure and the offended employee doesn't complain, the employer is not guilty of allowing a hostile work environment to occur. The U.S. Supreme Court has found that employees who fail to use a company's internal complaint procedure cannot hold the company liable later on.

However, and this is very important, the complaint procedure in your handbook must be real. The court won't hold you liable for things you honestly didn't know about. But it might hold you liable if it determines that you looked the other way or went out of your way not to know what was going on.

If you get a complaint, investigate it. This does not mean you should automatically fire someone who is accused of inappropriate behavior. You can create a whole different set of problems by firing someone for something he didn't do. Start by finding out what's actually happening. If something offensive is going on, take steps to stop it. At a minimum, warn the offending party that the behavior will not be tolerated. Keep an eye on the situation so you'll know if it continues. Whatever you do, do not retaliate against the complainer.

Third-Party Offenders

It doesn't matter whether the offending person is a customer, a supplier, or a sub. Explain to that person that you won't tolerate such behavior toward your employees and that if it continues, you will take steps to stop it. That might include going to the offending person's

supervisor or buying from a different lumberyard or supplier. If the offender is a customer, you must state emphatically that you do not allow sexual harassment on your job sites and that that rule applies to *everyone*. If the behavior continues, consider moving the victim to a different site or scheduling the job so the victim is never alone with the customer.


If the offending party is a sub, you can treat that sub as being in breach of contract. Of course, that only works if your subcontractor agreement states that the sub agrees to follow your policies as stated in your employee manual (and if your manual contains a sexual

harassment policy). If that isn't included in your agreement, you could be held liable for helping to create a hostile working environment because you didn't see to it that your sexual harassment policy applied to your subs. You should include that stipulation in all your contracts with your subs — not just to prevent sexual harassment — but also to give you leverage on issues like job safety, job cleanup, and customer relations.

If a Complaint Occurs

If a complaint occurs, document everything. I mean everything: the complaint, your investigation, what

steps you took, and what you said to everyone including the person who complained. Be sure to date every entry. It may be annoying to have to write all that stuff down, but it could save your behind down the road.

Remember that antidiscrimination laws are not just about hiring people, they are also about making it possible for people to do the work they were hired for. 

Quenda Behler Story has practiced and taught law for over 25 years and is the author of The Contractor's Plain-English Legal Guide (<http://www.craftsman-books.com>).