Harassment, & Discriminat Retaliation

BY JULIE A. PACE

The scene is a modern-day law firm in a major American city. A female attorney raises a concern to the managing partner about race or gender; her concern is in regard to another associate at the firm. The managing partner becomes hostile toward the attorney and cannot believe she would raise such a concern about his favorite male associate. The female attorney is then ostracized and terminated because she is seen as a troublemaker. In fact, the managing partner states, "It is unforgivable that you would raise race or gender issues at this law firm."

Is this a correct way to handle this situation? What type of liability is incurred by a law firm if a managing partner reacts in this way when a complaint is raised?

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Time to Audit Your Firm

Unfortunately, this scenario, and others detailed throughout this article, are true and have happened in Arizona in recent years. There are many other examples that cross the line in law firms, including:

- inappropriate touching
- firms not wanting to hire someone of color because of the apprehension—spoken and unspoken—of how to deal with the situation if the employment relationship does not work out
- discussions among partners about compensating at a higher level a male attorney who has a family than a female attorney who has no children

Law firms cannot always prevent such scenarios from occurring. However, they must develop effective training programs and appropriately respond to concerns raised by staff, paralegals, associates and even partners.

Firms must implement preventive and corrective practices without targeting the person raising the concerns. Today, this is the area in which many, if not most, law firms fail. Typically, firms instinctively rally to the defense of senior attorneys who have acted inappropriately. They view persons raising concerns as lacking in teamwork and camaraderie, as being out of step with firm culture, or as troublemakers. Reaction to complaints can range from less favorable assignments and professional development opportunities to exclusionary and cold treatment, and ostracizing and targeting the persons to try to get them to leave. This, of course, is deemed retaliation and is against the law.[1]

Audits of Practices and Procedures

Law firms need to audit their practices and procedures and take steps to protect the firm and ensure a positive working environment. Beyond the essential goal of fairness to all employees, there are a variety of reasons to implement an effective program.

Some benefits of a successful anti-harassment and anti-discrimination program include having a respectful workplace; retention of attorneys, paralegals and staff who would otherwise leave; compliance with the law; and avoidance of defending against costly charges of discrimination and lawsuits. Furthermore, more and more clients are demanding that firms have effective diversity programs, and anti-discrimination and anti-harassment programs are an essential element of such programs. Respect at work and retention of women and minorities is part of the 21st century workplace culture, and law firms need to embrace that culture to be successful.

Corporate America is way ahead of many of the law firms that advise corporations in the areas of diversity, anti-discrimination and anti-harassment. Many law firm partners still regard their culture as more of a "club" than a business.

For various reasons, many law firms have been reluctant to develop and implement effective diversity, anti-discrimination and anti-harassment programs. Even though many clients in corporate America long ago established such programs, law firms have felt they are above implementing such programs, and most have not done so or have done so only on paper.

These dilatory firms fail to encourage complaints, and they neglect or delay investigating or taking appropriate action

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against an offender. Firms fall short particularly if the offender has a book of business or is in a firm leadership position. A typical, instinctive response is to retaliate to drive the person raising a concern out of the office.

The Equal Opportunity Employment Commission ("EEOC") is becoming more active in pursuing law firms regarding harassment and discrimination issues.[2] Avoiding damages and costly litigation by the government is one more reason why a firm should audit its program.

For those charged with risk management at their respective law firms, an audit will help expose poor practices. It also will enable a firm to establish appropriate procedures when dealing with concerns about inappropriate conduct or comments based on race, color, national origin, ethnicity, religion, sex (including pregnancy and gender), age (40 and over), disability or any other protected category.[3] Many firms also prohibit inappropriate comments about sexual orientation as well as obesity or weight-related comments.

The goal is to have a respectful workplace where employees can focus on their jobs and not be distracted by hurtful or insensitive comments. The result is to minimize the time and costs of litigation. This article provides tips and identifies steps for law firms that want to implement an effective anti-harassment and anti-discrimination program.

Scenario 2: *A client is sitting in the firm's conference room with a male associate, and the client tells an inappropriate sexual joke during the meeting.*

What could the associate do?

Harassment and Discrimination

The basis for developing an effective program derives from statutes, regulations and case law.

Title VII of the Civil Rights Act and the Age Discrimination in Employment Act make it an unlawful employment practice for an employer with 15 employees or more to discriminate against any individual with respect to compensation, terms or conditions of employment, because of an individual's race, color, religion, sex, age or national origin.[4] In Arizona, every employer with at least one employee, such as a sole practitioner and part-time secretary, is covered by the prohibition against sexual harassment.[5]

EEOC regulations refer to unwelcome conduct in which the submission to such conduct is made either explicitly or implicitly a term or condition of employment, or submission to or rejection of such conduct is used as the basis for employment decisions affecting the person, or such conduct unreasonably interferes with an individual's work performance or creates an intimidating, hostile or offensive work environment.[6]

There are many cases that define and interpret various parts of the law. Employers have strict liability for offensive conduct based on a protected classification when the conduct is accompanied by an adverse job action. Even if there is not tangible job action against the employee, the U.S. Supreme Court, in *Faragher v. City of Boca Raton,*[7] has held that employers are liable for a hostile work environment unless the employer can establish an affirmative defense consisting of two elements: (1) that the employer exercised reasonable care to prevent and correct promptly any harassing behavior; and (2) that the employee unreasonably failed to take advantage of any preventive or corrective opportunities provided by the employer to avoid harm.

Scenario 3: *Some associates who are working late at night at the office start making comments about their own sex lives and describe their sexual experiences.*

Is this acceptable conduct at the law firm? What if it is an all-male group of associates who claim they are not offended by the conversation? Does it make a difference if a partner overhears or participates in the conversation?

A Written Policy

The foundation to obtain the affirmative defenses outlined by the Supreme Court is to implement an effective written policy against harassment and discrimination. The days of focusing polices solely on sexual harassment are long past. Firms should update and broaden the scope of dated polices that refer only to sexual harassment and fail to address other protected classifications, such as national origin or religion.

Policies should be broader and expressly state that inappropriate conduct or comments based on sex or discrimination are prohibited. The policy should provide specific examples of prohibited conduct. People do not know what it means when a firm uses the words "Don't discriminate or sexually harass anyone." They still think that means they should refrain from grabbing an employee's breasts and buttocks as they stroll the hallways. That conduct from decades past is fortunately rare in law firms today.

The policy should spell out specific prohibited conduct and address touching, nonverbal behavior, jokes, conversations or questions about someone's personal life, cartoons, diagrams, use of the Internet, gag gifts, nicknames, off-duty conduct, and more. For example, touching should be limited to high-fives and firm handshakes. Stay away from patting people on the shoulder or neck rubs. Hugs should be used rarely and only in limited circumstances (e.g., the death of a loved one).

The written policy should identify to whom complaints can be made, and there needs to be multiple avenues for complaints. Employees need to feel empowered to communicate the fact that inappropriate conduct is unwelcome. Employees can tell the offending person, or they can report it to Human Resources or another designated person at the firm. The policy should state that an investigation will occur, appropriate corrective action will be taken, and that retaliation is prohibited against the person making a complaint or others who are interviewed as part of an investigation.

Scenario 4: *An attorney sends a joke via e-mail to other attorneys on the firm's computer system. The attorney believes the joke has a good punch line but the joke also happens to be derogatory based on religion.*

How should attorneys receiving the joke react both to protect themselves and ensure that the firm's anti-harassment and anti-discrimination policy is effectively implemented? If the attorney sending the joke is considered powerful within the firm's management structure, should the recipient ignore the inappropriate joke? How could an attorney react if a client sends the inappropriate email?

Training Is Crucial

A policy is not effective without training. Law firms should ensure that all new hires and current employees are trained regarding the firm's anti-harassment and anti-discrimination policy. Training includes partners, associates, paralegals, staff, supervisors and firm administrators. Management committees should attend training and regularly evaluate the effectiveness of a firm's overall anti-harassment and anti-discrimination program. A good strategy is to have training certificates or individual signed attendance sheets in the personnel files of all employees and attorneys who have attended a training session. Many companies complete annual training; law firms would be wise to follow suit.

Training should include role-playing and teaching people how to respond to uncomfortable and awkward situations. Teach the words to use in response to an inappropriate joke. All of the scenarios identified in this article could be handled well if the individuals were trained and the firms have effectively implemented the firm's policy. When a culture of respect exists, it becomes much easier to deal with these types of situations, and the responses to each of the scenarios become predictable.

Law firms also should focus their training efforts on prohibiting inappropriate comments and conduct and addressing and eliminating subtle forms of gender and racial bias. Training should address touching and nonverbal behaviors. In the 1980s and 1990s, much of the inappropriate conduct involved a man engaging in sexual conduct or comment toward a woman. Today, inappropriate conduct may arise among groups of men only, women only, men toward women, or vice versa.

Scenario 5: *Partners at a partners-only meeting are evaluating a female associate regarding performance. Several partners are expressing positive support for the associate's work, whereas other partners have mixed reviews about the associate's work. The bullying managing partner concludes loudly that the female associate is "white trash" and advocates terminating her employment. The associate happens to be a single parent with a biracial child.*

What concerns should a partner be thinking about, and how could the partner react? Does this type of comment indicate gender bias and lack of respect for women lawyers at the firm?

Take Corrective Action

Law firms must investigate every complaint or concern raised, and this is often where firms fall short.

Investigations can be as simple as talking to a person who told an inappropriate joke, verbally counseling the person not to engage in the conduct again, handing the person the firm's written anti-harassment and anti-discrimination policy and directing him or her to read and comply with it. That would be followed up by a written summary of the facts, confirmation in the notes that corrective action was taken, and follow-up notes as needed to demonstrate that the firm took action. The firm should designate a person to determine the appropriate corrective action after receiving the investigator's verbal or written report. Sometimes the investigator is also asked to provide general recommendations as to how to resolve the matter.

The investigator is also potentially a witness in any future litigation matter. Keep in mind that firms generally waive the attorney–client privileges for the investigator's work product, and firms do so to obtain the use of the *Faragher* affirmative defense. In doing so, firms must remember that conversations between managers and the investigator are potentially discoverable and should act accordingly. A conservative approach is to presume the investigator is not covered by any attorney–client privileges when serving in the role of an investigator. Someone else may want to review and provide materials to the investigator. Firms should make sure they have identified people who can conduct investigations and make investigations a routine part of law firm operations.

The corrective action chosen must be designed to ensure the conduct does not occur again. Corrective action can include but is not limited to verbal counseling, written counseling, individualized training, financial consequence, suspension, demotion or termination.

Scenario 6: *A male partner in a leadership position is jealous of a female partner's success in developing clients. He states, "She sells lipstick and clients hire me because of my substance and credentials."*

Does this comment undermine women at the firm? How could the firm's management committee react to such conduct?

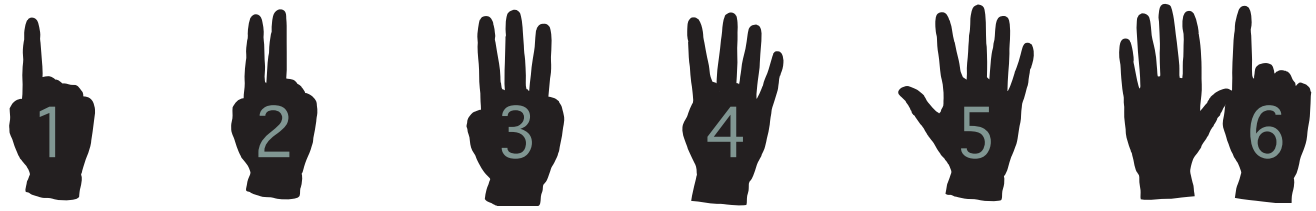
Avoid Retaliation at All Costs

Retaliation is the area in which most law firms fail when addressing these issues. Investigations should be as confidential as possible, and firms should take steps to ensure there is no retaliation, which may mean not identifying or sharing details regarding a pending matter with partners or even the entire executive committee at a firm.

A frequent tactic used by law firms is to publicize the complaint among people at the law firm in an attempt to rally people against the person who raised the complaint. This strategy is also used to taint the investigation that will occur.

A law firm should direct people not to retaliate or ostracize someone merely because they raise a concern or complaint. Instead, the approach should be to thank the person for raising the concern and let the person know that the firm will look into the matter and take appropriate action.

The Scenarios: Taking Action



Opening Scenario

Corrective action is definitely needed in this scenario.

Retaliatory conduct can cause increased liability. It may also damage the firm's morale, productivity and overall anti-harassment and anti-discrimination program because people will not want to report inappropriate conduct if they have observed that those who raise complaints are targeted or fired.

If a law firm handles a complaint in the manner described in this scenario, it should seek legal counseling for the liability that is caused by such statement and actions, and the firm should bring in someone to work on firm culture. It should create steps to implement the firm's anti-harassment and anti-discrimination policy effectively. The firm may want to move someone else into the managing partner's role to minimize liability. The firm should conduct overall training to everyone in the firm to let them know it is appropriate to raise concerns or complaints to the firm and that the firm will investigate the matter and take appropriate corrective action.

Scenario 2

The attorney can let the client know gently that those types of comments can lead to liability, so he always tries to avoid these types of comments in the workplace today. Or the attorney can joke that those types of comments mean that I should set you up to meet with our firm's employment lawyer so she can help you avoid liability and preserve your company's profits. Sometimes a lighthearted approach can work to address the issue and communicate the law and expectations at work. If the client is extremely prejudiced, the attorney should let the firm's managing partner or senior partner who primarily works with this client address the matter.

Scenario 3

An attorney hearing such comments can say, "Hey guys, this conversation is crossing the line, let's change topics. What about those Suns?" This helps communicate that the conduct is unwelcome. It is still not appropriate to make these comments at work even if all of the participants claim not to be offended. Such comments still violate the firm's anti-harassment and anti-discrimination policy. If a partner overhears such comments, the partner must take appropriate corrective action and may need to report such comments to Human Resources, if applicable.

Scenario 4

If an attorney receives an inappropriate e-mail via the firm's computer system, the attorney should write back that he or she does not want to receive this type of e-mail in the future and remind the sender that these types of communications violate the firm's policy. The e-mail may need to be forwarded to Human Resources to address the matter. Merely deleting such e-mails today may not be sufficient to comply with and implement a firm's anti-harassment and anti-discrimination policy.

Scenario 5

Investigation and corrective action should be taken. The firm should evaluate its culture and determine if overall training should be implemented to ensure the law firm is developing a respectful work environment. Biases should be tested and addressed. It may take a year or two to develop the type of culture the firm should have if it is starting from this type of scenario.

Scenario 6

If a male partner is engaging in comments or conduct to undermine female or minority lawyers, the firm should address the matter and provide consequences to the offending partner, as well as individualized training. It is not enough for a law firm to ignore a partner engaging in these types of behaviors.

endnotes

1. 42 U.S.C. §. 2000(e)-2(a)(1); *Burlington Northern & Santa Fe Railway Co. v. White*, 126 S. Ct. 2405 (2006) (holding that the employer's action must not be retaliatory or harmful to the point it could dissuade a reasonable worker from making or supporting a charge of discrimination).
2. *Weeks v. Baker & McKenzie*, 74 Cal. Rptr. 2d 510 (Cal. Ct. App. 1998) (awarding $50,000 in compensatory damages and $3.5 million in punitive damages based on sexual harassment allegations; court of appeals upheld determination and award finding that the law firm consciously disregarded the rights and safety of the plaintiff); *EEOC v. Sidley Austin LLP*, 437 F.3d 695 (7th Cir. 2006) (permitting the EEOC to seek recovery of money damages under the ADEA on behalf of 32 partners after the firm demoted them from equity partners to "of counsel" or "senior counsel"); *EEOC v. Husch & Eppenberger, LLC*, 97 Fair Emp. Prac. Cas. (BNA) 764 (E.D. Mo. June 27, 2006) (entering consent decree between EEOC and law firm based on allegations that law firm employee was subjected to sexual harassment and retaliation and requiring payment of $65,000.00 to employee).
3. 42 U.S.C. § 2000(e)-2(a)(1); 29 U.S.C. § 623; A.R.S. § 41-1463.
4. 42 U.S.C. §. 2000(e)-2(a)(1).
5. A.R.S. § 41-1461-(4)(a).
6. 29 C.F.R. § 1604.11(a) (1989).
7. 524 U.S. 775 (1998). *See also Burlington Indus., Inc.v. Ellerth*, 524 U.S. 742 (1998).