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### New Legal Standard Increases Risk of Harassment Claims

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In two recent opinions, the U.S. Supreme Court established a new standard of liability for employers in sexual harassment cases. The new standard not only affects sexual harassment liability, but it may well foreshadow changes in other areas of employment discrimination law. These changes could have a major impact on all employers, large and small — including dental practices.

In the wake of these decisions, crafting a strong anti-harassment policy is a crucial risk management strategy for all dentists.

#### The Rulings

In *Faragher v. City of Boca Raton* and *Burlington Industries Inc. v. Ellerth*, the Court announced a two-part test governing employers' liability for sexual harassment. The Court held that when a supervisor has taken a "tangible employment action" against an employee (such as termination, demotion or a poor performance appraisal) that is related to a supervisor's sexually harassing conduct, the employer is liable for the supervisor's conduct *whether or not* the employer knew or should have known about the harassment, and *regardless* of whether the employee registered a complaint.

Employers have long been considered strictly liable for "quid pro quo" harassment, where the employee is punished in some way for failing to comply with the supervisor's wishes. The current ruling, however, appears to extend that standard of strict liability to other forms of harassment.

Even where the employee is not subjected to a damaging job action, the employer may *still* be liable for a supervisor's or co-employee's sexually harassing conduct (such as unsolicited requests for sex or a pattern of sexually charged comments) unless the employer can prove that

- the employer exercised "reasonable care" to prevent and promptly correct any harassing behavior
- the employee "unreasonably failed to take advantage of any preventive or corrective opportunities provided by the employer or to avoid harm otherwise"

This represents a significant departure from the view, widely accepted before these rulings, that an employer could be held liable for "hostile environment" harassment only if the employee could prove that the employer knew or should have known of the supervisor's conduct but took no action.

If an employee proves that he or she was sexually harassed by a supervisor, the employer can successfully defend itself *only* by proving that it took reasonable preventive measures, which the harassed employee failed to pursue. These internal measures might include

- establishing a comprehensive sexual harassment policy
- implementing an effective complaint procedure

- instituting educational programs for supervisors and employees

Although *Faragher* and *Ellerth* dealt with sexual harassment, the courts have not hesitated to apply this new standard to harassment claims based upon race, national origin and disability.

## What You Can Do

Dentists, like all other employers, have always been well-advised to address the problem of workplace harassment. Now, it is more important than ever before to adopt, communicate and enforce general anti-harassment policies. The rulings effectively require employers not only to promulgate these policies, but also to ensure that they are publicized and implemented.

Formulation and implementation of strong anti-harassment policies and educational programs are necessary both to prevent harassment and to strengthen a dentist's defense should a claim arise. Every practice must develop anti-harassment measures that reflect its own nature and needs. However, the following elements should be included in most such policies:

Prohibit *all* forms of harassment. Policies should be broadly defined to include not only sexual harassment, but also harassing and discriminatory behavior based on race, religion, ethnicity, age, disability, etc.

Implement a formal reporting process. For larger offices, the reporting mechanism should allow employees to complain not only to the dentist for whom they work, but, if possible, also to another supervisor, such as an office manager. This precludes employees' potential argument that they were too embarrassed or afraid to lodge a complaint to their direct supervisor.

Don't overpromise. The anti-harassment policy should guarantee that all complaints will be investigated and will be kept confidential to the extent possible. Do not, however, promise absolute confidentiality, and do not suspend an investigation when an employee asks you to "forget about it," as you are now officially "on notice" that harassment may be occurring.

Give the policy teeth. The policy should include strict sanctions when harassment is proved, up to and including discharge. This provision should apply to dentists as well as staff.

Prevent retaliation. The policy should stress that no retaliation or disciplinary action will be allowed against employees who make good-faith complaints under the policy. This is especially important in smaller offices, where employees' only recourse is to complain directly to the supervisor or dentist whose conduct is the subject of the complaint.

Fight electronic harassment. Make sure your policy prohibits harassment not only in person, but also via computerized communication tools such as the Internet, intranet systems and e-mail.

## Backing up Your Policy

Even the strongest anti-harassment policy will be a less than ideal defense if it is not communicated clearly and regularly to staff members. Dentists should periodically remind staffers of the practice's rules, and new employees should sign a form acknowledging their understanding of the policy and their willingness to follow it. You may also wish to have current employees sign such a form on an annual basis and whenever the policy is modified.

And, of course, no policy is worth the paper it is written on unless it is rigorously and consistently enforced. Lax enforcement tells employees that harassment is condoned or overlooked. This strips the policy of its deterrent effect and compromises the employer's defense if a claim is filed.

In small offices, there is no effective means of reporting or disciplining a dentist for harassment, and hence less protection against harassment claims. For dentists in these practices, the most effective line of

defense is to keep their conduct above reproach in terms of social relationships with employees and attitudes expressed in the office. Dentists should avoid making off-color and biased remarks, even if they are offered in a humorous spirit. Such comments may seem less comical when recounted in deposition or in front of a jury.

No policy can eliminate the risk of a sexual harassment claim. However, dentists can significantly lessen their exposure by adopting, communicating and enforcing effective anti-harassment policies. Sexual harassment claims often come down to clashing perceptions and sensitivities. Given the strict standards enunciated by the Supreme Court, every effort should be made to avoid any hint of harassing conduct.

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