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Newsletter

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#MeToo Movement! What are the Takeaways?

By Matthew Heins, Law Enforcement Action Forum Coordinator

In the past year or so the #MeToo movement has brought to the forefront the issue of sexual harassment and hostile work environment in the workplace. While this has always been an important matter, today it's front and center with the courage of victims coming forward to tell their stories. Incidents of this nature can have a profound effect on the workplace. They can create a negative environment that can ruin working relationships, careers, create opposing "groups" of employees, and lower productivity. Costly and time-consuming administrative actions and expensive litigation are often the result. As professionals, it's our responsibility to ensure we are providing a welcoming and safe work environment, free of harassment or hostile behavior. Through strict and detailed policies, strong leadership, and effective response procedures, we can strive to significantly reduce or eliminate sexual harassment in the workplace.

A Quick Review of Applicable Legislation

Sexual harassment and/or hostile work environment claims are commonly brought forth under Title VII of the federal Civil Rights Act of 1964 or Michigan's Elliott-Larsen Civil Rights Act. The Elliott-Larsen Civil Rights Act closely follows Title VII Civil Rights Act, yet there are some differences.

In the general provisions of the act, sexual harassment is defined as "unwelcome sexual advances, requests for sexual favors, and other verbal or physical conduct or communication of a sexual nature." Simply stated, plaintiffs must first show that the complained-of conduct was directed at them because of their gender. Second, plaintiffs must satisfy specific requirements to establish either a quid pro quo or a hostile work environment sexual harassment claim.

When making a claim of quid pro quo sexual harassment, plaintiffs must show that (1) they were subject to any of the types of sexual conduct or communication described in the statute, and (2) their employer or the employer's agent used their submission to or rejection of the conduct as a factor in a decision affecting their employment.

A hostile work environment sexual harassment claim is defined as "conduct or communication that has the purpose or effect of substantially interfering with an individual's employment." In general, a hostile work environment is created when conduct crosses the line of normal everyday interactions between males and females into the area of a patterned or continuous behavior that can be clearly perceived in a negative manner by the victim or another reasonable person.

"Unwelcome" means that the employee did not solicit or invite the conduct and the employee regarded the conduct as undesirable or offensive.

All the provisions under Title VII are enforced by the Equal Employment Opportunity Commission (EEOC). If an individual has a complaint, it must be filed with the EEOC for investigation. Complaints typically must be brought within 6 months of the offense.

So, What Are We Talking About?

LEAF Legal Advisor, Audrey Forbush, Plunkett Cooney PC, said it is well-recognized that sexual harassment is a form of sexual discrimination under Michigan's Elliott-Larsen Civil Rights Act, and sexual harassment is actionable when the "conduct or communication has the purpose or effect of substantially interfering with an individual's employment … or creating an intimidating, hostile or offensive environment."

Not all cases of sexual harassment are actionable. In *Rabideu v Osceola Refining Co.,* the court noted that, in order to prove a claim of hostile work environment premised on sexual harassment, the plaintiff must establish that she would not have been the object of harassment "but for sex." The court went on to say this means that "instances of sexual conduct that prove equally offensive to male and female workers would not support a Title VII sexual harassment charge, because both men and women are accorded like treatment." Therefore, conduct which is the result of ignorance or belligerence is not the same as conduct which is "because of sex" and accordingly, is not actionable. Offensive comments cannot be used to establish hostile work environment unless they were aimed at employees because of their status as females. In *Harris v Forklift Systems,* the court concluded that the "mere utterance of an epithet which engenders offensive feelings in an employee … does not sufficiently affect the conditions of employment to implicate Title VII."

In Black v Zaring Homes, Inc., the court held that the occurrence of five instances of demeaning and sexual comments over three months was not "severe or pervasive enough to create an objectively hostile work environment." "Although the verbal comments were offensive and inappropriate, and the record suggests that the defendant's employees did not always conduct themselves in a professional manner Title VII was not designed to purge the workplace of vulgarity."

To determine whether the type of conduct in question amounts to a sexually hostile work environment, courts in Michigan have established the following standard:

> "Whether a hostile work environment existed shall be determined by whether a reasonable person, in the totality of circumstances, would have perceived the conduct at-issue as substantially interfering with the plaintiff's employment or having the purpose or effect of creating an intimidating, hostile, or offensive employment environment." *Elezovic v Bennett.*

Factors relevant to the inquiry include: the frequency of the discriminatory conduct; the conduct's severity; whether the conduct was physically threatening or humiliating, or merely an offensive utterance; and whether the conduct unreasonably interfered with the employee's work performance. *Kalich v ST&T Mobility.*

Forbush said when considering the environment within your organization you need to consider many factors regarding questionable conduct:

- Is the conduct focused on a specific sex?
- Is the behavior sufficiently severe and pervasive?
- Does it create an atmosphere that a reasonable person would consider to be intimidating, hostile, or offensive?

For example, when a female employee is forced to walk around to the back of the building to enter her office because she wants to avoid passing by the front desk as the male employee stationed there harasses her on a daily basis with comments about her body and her clothes, and peppers her with questions about her intimate, personal interactions with her boyfriend, that conduct would be considered severe and pervasive and a reasonable person would likely agree that it was interfering with her work.

In a male-dominated profession, we often hear that the female did not want to complain – they wanted to get along, or they feared retaliation if they "rocked the boat." Administrators should not take silence as permission or evidence that the conduct is welcome. Pay attention!

What Might Sexual Harassment Look Like

While we can assume all of us know what constitutes sexual harassment, we thought it best to provide some examples to better demonstrate what we are truly talking about. The following list covers a broad spectrum of behavior, but is not all inclusive:

- Continued or repeated sexual jokes, teasing, epithets, flirtation, advances, or propositions
- Derogatory or demeaning comments about gender, whether sexual or not
- Harassment consistently targeted at only one sex, even if the content of the verbal abuse is not sexual
- Graphic verbal commentary about an individual's body, clothing, sexual process, or sexual deficiencies
- Leering, whistling, touching, pinching, brushing the body, assault, coerced sexual acts or suggestive, insulting, or obscene comments or gestures
- Name calling, relating stories, gossip, comments, or jokes that may be derogatory toward a particular sex
- Offensive, repeated requests for dates, even if made after work
- Continued advances of a sexual nature which are rejected, even after the parties break off a consensual relationship
- Written, verbal, pictorial or nonverbal communications of a sexual nature which do not contribute to or advance the work or service being conducted.

Prohibiting Retaliation

The Elliot-Larsen Act clearly states a person shall not retaliate or discriminate against a person because the person has opposed a violation of this act, or because the person has made a charge, filed a complaint, testified, assisted, or participated in an investigation, proceeding, or hearing under this act. Simply put, management cannot fire, demote, harass or otherwise "retaliate" against an individual for filing a complaint, participating in a proceeding/investigation or opposing acts of discrimination.

To establish a prima facie case of retaliation a plaintiff must establish that: "(1) they engaged in a protected activity; (2) their "exercise of such protected activity was known by the defendant; (3) thereafter, the defendant took an action that was 'materially adverse' to the plaintiff; and (4) a causal connection existed between the protected activity and the materially adverse action." *Laster v. City of Kalamazoo.* Actions that would be considered "materially adverse" can range from denial of promotion, refusal to hire, denial of job benefits, suspension or discharge. Others might include work-related threats, warnings, reprimands, transfers, negative or lowered evaluation, transfers to less prestigious or desirable work, or other types of adverse treatment that might deter a reasonable person from engaging in protected activity.

Although difficult, supervisors need to make certain they do not take these types of complaints personally. The best approach is to take a step back and conduct a self-analysis to ensure you are not exacerbating the problem. A negative change of behavior toward an employee very well could be perceived as retaliatory in nature. To prevent this, supervisors should take the following actions:

- Avoid publicly discussing the allegation
- Be mindful not to isolate the employee
- Avoid reactive behavior such as denying the employee information, equipment, or benefits provided to others performing the same job
- Do not interfere with any administrative proceedings
- Provide clear and accurate information to investigators
- Do not threaten the employee, witnesses or anyone else involved in the complaint

What Does This All Mean?

The law enforcement profession can be a very demanding, high pressure, stressful environment. Officers handle a range of situations, from simple mundane tasks to some of the most highly pressured, terrifying situations imaginable. Coping mechanisms are often used to deal with the stress. Some can be very healthy, such as physical exercise, while some, such as being sarcastic to coworkers or expressing a very dark sense of humor, are not.

We have all seen, heard, and may have participated in offensive office banter, including off-color jokes, offensive language, and downright sexist comments. Because this line of work lends itself to a very tight cohesive group, if an employee is offended by a behavior or comment, it is unlikely they will come forward to complain. This environment simply does not lend itself to one voicing displeasure on the topic.

As leaders, you have an obligation to your employees, and your employer, to set the standard that unprofessional behavior will not be tolerated, whether in public or "behind closed doors." An employer is responsible for acts of sexual harassment in the workplace where the employer, supervisors, or its employees know or should have known of the conduct. This also applies to the acts of non-employees with respect to sexual harassment of employees in the workplace.

Middle managers, commonly a sergeant or lieutenant in most organizations, are in the position to most likely witness inappropriate conduct. They not only have an ethical but a legal obligation to address conduct of this nature immediately upon becoming aware of it. Gone are the days of sloughing it off and taking the position, "it was only a joke" or "they didn't mean anything by it," or "suck it up and take it like a man." Today's supervisors and leaders must take decisive action as soon as they become aware of a situation. They must be clear in their intent, adhere to policy, educate staff, set clear expectations, and hold people accountable. Failure to do so will expose the organization to liability and the accompanying public humiliation.

Recommended Actions:

Set the tone at the top. The leader and senior management for the organization should make it clear that inappropriate behavior will not be tolerated, and swift action will be taken when it is revealed. All complaints or perceived inappropriate behavior will be investigated and appropriate action taken. This message should be delivered often to all employees.

Implement a sexual harassment policy. The policy, at a minimum, should include the following:

- A policy statement that stresses a zero-tolerance approach
- A definition of sexual harassment, including examples
- A statement that employees have a duty to report such behavior
- A statement that retaliation is prohibited
- Detailed complaint process to include multiple avenues inside and outside the organization where victims can file a complaint
- Training.

Ensure all staff are trained to the policy and that it is readily accessible by staff.

Provide regular training and pertinent information on sexual harassment to all employees. Training should occur for all newly hired employees and be reviewed yearly for all employees.

Set clear expectations for conduct of supervisors. It's essential they understand the need to model appropriate standards of professional conduct. Ensure supervisors can identify incidents of sexual harassment and have the knowledge on what immediate action steps need to be taken.

Investigations should be timely, unbiased and complete. It's important that all complaints be investigated and appropriate action taken if allegations are sustained.

Create a positive culture, ensuring all offensive, sexually explicit or pornographic calendars, literature, posters or other offensive material are removed and prohibited. Conversations, comments, behaviors, and conduct should also be monitored to ensure a professional work environment.

Are you an MML Insurance Program Member? Are you a Law Enforcement Executive?

If so, visit the MML's online Law Enforcement Risk Control Manual to access model policies and procedures developed by the LEAF Committee.

Go to http://www.mml-leaf.org/ or to http://www.mml.org (under the "Insurance" tab/LEAF). Click on the green "Member Login" box. At the Login screen, enter your username and password.

If you don't have a username/password, click "Sign Up!" next to the prompt "Don't have an account?" and complete the online form to establish your username/password and to request access.

LEAF continues to develop policies and resource documents designed to help Law Enforcement Executives manage their risk exposure. Do not hesitate to contact the Michigan Municipal League's, Loss Control Services at 800-482-2726, for your risk reduction needs and suggestions.

While compliance to the loss prevention techniques suggested herein may reduce the likelihood of a claim, it will not eliminate all exposure to such claims. Further, as always, our readers are encouraged to consult with their attorneys for specific legal advice.

LAW ENFORCEMENT ACTION FORUM (LEAF) is a group of Michigan law enforcement executives convened for the purpose of assisting loss control with the development of law enforcement model policy and procedure language for the Manual of Law Enforcement Risk Reduction. Members of the LEAF Committee include chiefs, sheriffs, and public safety directors from agencies of all sizes from around the State.

The LEAF Committee meets several times yearly to exchange information and ideas relating to law enforcement issues and, specifically, to address risk reduction efforts that affect losses from employee accidents and incidents resulting from officers' participation in high-risk police activities.

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1675 Green Road, Ann Arbor, MI 48105 ph - 800-653-2483
Contact information: Matthew Heins, matthew.heins@meadowbrook.com ph - 800-482-2726 ext. 8040