DISCRIMINATION AND HARASSMENT:
WHAT IS THE DIFFERENCE AND HOW TO AVOID THESE CLAIMS

By Hillary Arrow Booth

Given the increasingly litigious nature of our society, the question facing employers today is not whether they will be sued, but when. For staffing companies, it is important to recognize that a worker may be employed by more than one employer for purposes of asserting claims for harassment, discrimination, or wrongful termination, depending upon the control exercised over the worker’s compensation, hours and terms of employment. Joint employment is commonly found where a staffing agency screens and hires workers for either short-term projects or for long term employment. In such situations, both the staffing agency and the company where the employee is placed may be considered employers.

Many employers are unclear as to the distinction between harassment and discrimination. The California Supreme Court has defined harassment as “conduct outside the scope of necessary job performance, conduct presumably engaged in for personal gratification, because of meanness or bigotry, or for other personal motives.” There are varying types of harassment. For example, sexual harassment may be found where an employee’s subjection to sexual conduct is linked to the grant or denial of job benefits, such as getting or retaining a job, or receiving a favorable performance review or promotion. Employers can also be held liable for harassment where an intimidating, hostile, or offensive environment is created for certain individuals, based upon their race, gender, religion, or other protected attributes. This does not mean that one off-color joke, or one inappropriate comment will create liability; the conduct must be severe and pervasive such that the work atmosphere is affected.

In contrast, discrimination occurs where an employer bases employment decisions on a person’s race, religious creed, color, national origin, ancestry, physical disability, mental disability, medical condition, genetic information, marital status, sex, gender, gender identity, gender expression, age, or sexual orientation. The employment decision can be the refusal to hire the person, the exclusion of the person from training opportunities, or differential treatment in compensation or in the terms, conditions, or privileges of employment. In situations where there are legitimate reasons for an adverse employment decision and also evidence of discrimination, the employee must prove that the discrimination was a substantial factor in the decision.

The best way to avoid harassment and discrimination claims is to educate all employees, particularly management level employees, and maintain a consistent policy of respect towards all individuals in the workplace. All employers, even staffing agencies, should have a policy manual or employee handbook that sets forth the employer’s policy against harassment and discrimination. As an additional safeguard for staffing agencies, and in recognition of the joint employer responsibility, they should also ensure that the companies where the employees are placed have proper polices as well.

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Further, staffing agencies need to designate a person to receive complaints by employees for both incidents occurring at the staffing agency and at the company where the employee is placed. When a complaint is received, no matter how trivial it may seem, an investigation needs to take place including interviews of the key people involved. Where the complaint concerns treatment of the employee by the company where he is placed, the staffing agency has an opportunity to correct a problem, should one exist.

Another thing to examine and educate employees about is the use of company email. For better or worse, most people use email for both formal and informal communications. In many workplaces, employees use email to make lunch plans, talk about outside social events, and maintain conversations over the course of the day. Oftentimes informal comments and jokes are acceptable at the time they are made, but years later in front of a jury, a very different impression may be made. For example, an email between good friends stating, “Hey chica, how about lunch?” would not create any concern at the time. However, if the sender was a supervisor and the recipient’s employment was later terminated, this email could be used to help create an inference that the recipient’s race or national origin was a factor in how she was treated.

Finally, to avoid liability for discrimination, employers need to consistently and fairly apply neutral policies, and maintain good records. For example, an employee who is late for work needs to be counseled and put on notice that lateness will not be tolerated. Many employers, especially in smaller companies, want to maintain a relaxed atmosphere and may be hesitant to point out small infractions. However, review and discipline policies must be carried out, and the personnel files of the employees need to have documentation of any events, stated in a businesslike manner. If the policies are not uniformly carried out, the employer is vulnerable when discipline is imposed or an employee is discharged as that employee can claim that he or she was singled out because of a protected characteristic.

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