



# Employee Compliance Hotline White Paper

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The cost of sexual harassment claims is astounding and can be financially crippling to employers. The average jury verdict in harassment lawsuits exceeds \$1 million. In addition, there are costly “after shocks” such as damage to employee morale, an increase in employee turnover, a reduction in productivity, not to mention irreparable damage to a company’s reputation.

The number of sexual harassment complaints filed with the EEOC rose 200% from 1991 to 1998. During the same period of time, monetary awards skyrocketed 714% from \$7 to \$50 million. Employers of all sizes face incredible exposure to the risks of sexual harassment complaints. Between 1995 and 1998, companies with more than 250 employees had three times the number of complaints as small employers, but small employers had five times the number of complaints per employee.

- The chart below represents the number of harassment charge receipts filed with the EEOC. More comprehensive data on sexual harassment charges filed with both the EEOC and state and local Fair Employment Practices Agencies (FEPAs) combined can be found under [Sexual Harassment Charges at www.eeoc.com](http://www.eeoc.com).
- The data are compiled by the Office of Information, Research and Planning from EEOC's Charge Data System - national data base.

	Race		National Origin		Sex		Race, National Origin and Sex Combined		All Harassment Charges	
	Number of Receipts	% of Total Receipts	Number of Receipts	% of Total Receipts	Number of Receipts	% of Total Receipts	Number of Receipts	% of Total Receipts	Number of Receipts	% of Total Receipts
FY 1990 to FY 1999	47,175	6.0%	15,148	1.9%	37,725	4.8%	100,049	12.8%	109,472	14.0%
FY 2000	6,641	8.3%	2,352	2.9%	5,332	6.7%	14,325	17.9%	14,987	18.8%
FY 2001	6,710	8.3%	2,439	3.0%	5,204	6.4%	14,353	17.8%	14,914	18.4%
FY 2002	6,697	7.9%	2,728	3.2%	5,159	6.1%	14,584	17.3%	15,282	18.1%
FY 2003	6,180	7.6%	2,365	2.9%	4,906	6.0%	13,451	16.5%	14,273	17.6%

The EEOC has concluded, "Prevention is the best tool to eliminate sexual harassment in the workplace. Employers are encouraged to take steps necessary to prevent sexual harassment from occurring. They should clearly communicate to employees that sexual harassment will not be tolerated. They can do so by providing sexual harassment training to their employees and by establishing an effective complaint or grievance process and taking immediate and appropriate action when an employee complains".

Fully aware of this situation, Accord Management Systems has come to the conclusion that its clients would be better protected from litigation risks by acting in a proactive – rather than reactive – manner.

Implementing the **Employee Compliance Hotline** provides an affirmative defense action by providing employees with a third-party, objective, reporting vehicle available 24/7/365. Employers receive courtroom ready documentation in case of litigation and, more importantly, **peace of mind for employees and employers alike.**

Employers simply cannot afford to ignore the risk of harassment liability. It's really not a matter of *if* you are sued, but *when!* Factor in lowered employee morale, lower productivity, higher turnover and restoring a companies' reputation, now you're talking big bucks.

### **EMPLOYEE COMPLIANCE HOTLINE**

Accord Management Systems' Employee Compliance Hotline eliminates risks including your money, your business and your sanity! Our systems are easy-to-use, professional, low-cost and efficient. Employers can choose the system which works best for them – either an automated voice recognition or an operator assisted system.

The confidentiality\*\* of the process encourages employees to willingly coming forward to report possible harassment activities and provides instantaneous written notification to management. The combination of these valuable services affords employees and companies alike, peace of mind.

Utilizing Accord's Employee Compliance Hotline, employers are proactively providing employees with a third-party, objective sexual harassment reporting vehicle which aids in awareness, prevention and corrective processing. An immediate response is sent to the designated reporting personnel to immediately investigate and mitigate harassment activities. The hotline is available 24 hours a day and can strengthen the effect of companies' zero tolerance policy regarding harassment. Also, the 24/7/365 availability for employees to report possible harassment is an affirmative defense recognized by state and federal courts. It may be the only affirmative defense with conclusive evidence that companies may be able to present in case of sexual harassment litigation.

## **WHAT IS SEXUAL HARASSMENT?**

### **Sexual Harassment Defined**

"Harass" means a knowing and willful course of conduct directed at a specific person which seriously alarms, annoys, torments, or terrorizes the person, and which serves no legitimate purpose. The course of conduct must be such as would cause a reasonable person to suffer substantial emotional distress, and must actually cause substantial emotional distress to the person. Section 646.9 (amended) of the Penal Code.

Sexual harassment falls into three main categories: Quid Pro Quo, Hostile Work Environment and Electronic Harassment.

#### **1. QUID PRO QUO**

Quid pro quo is a Latin phrase meaning, "what for what" or "something for something". In legal terms, it is the transaction of valued items or favors, in return for giving something of value. This type of sexual harassment occurs in which the harasser asks for a sexual favor in return for providing a tangible employment benefit, such as a raise, continued employment, or other preferential treatment. An employment benefit would include "a significant change in employment status, such as hiring, firing, failing to promote, reassignment with significantly different responsibilities, or a decision causing a significant change in benefits."

**Case Law Example:** *Faragher v. City of Boca Raton* . 524 U.S. 775 (1998).

In a landmark decision, Supreme Court of the United States in *Faragher v. City of Boca Raton* mandated employers must provide their employees sexual harassment training. This case involved an employer who had adopted a sexual

harassment policy but failed to effectively communicate it to the department in which Faragher and her supervisors worked.

The Court held that an employer is vicariously liable for actionable sexual harassment discrimination by a supervisor but may have an affirmative defense to such an action depending on the reasonableness of the employer's conduct as well as that of an employee. The Court stated further, "Recognition of employer liability when discriminatory misuses of supervisory authority alters the terms and conditions of a victim's employment is underscored by the fact that the employer has a greater opportunity to guard against misconduct by supervisors than by common workers; employers have greater opportunity and incentive to screen them, train them and monitor their performance." The district court found the employer liable and awarded the employee one dollar in nominal damages (as requested by Faragher).

When no tangible employment action is taken against an employee, a defending employer may raise an affirmative defense to liability or damages for sexual harassment, subject to proof by a preponderance of the evidence.

The defense is comprised of two necessary elements:

1. That the **employer exercised reasonable care** to prevent and correct promptly any sexual harassing behavior and
2. That the employee **unreasonably failed to take advantage of any preventative or corrective opportunities** provided by the employer or to avoid harm otherwise.

## 2. HOSTILE WORK ENVIRONMENT

The basis for a sexual harassment claim of a "hostile work environment" is created where the presence of demeaning or sexual photographs, jokes, threats, or overall atmosphere is so pervasive as to create an intimidating and offensive work environment. A hostile work environment can be created by supervisors (29% of complaints), coworkers (51% of complaints), subordinates (3% of complaints), or even third parties, such as clients, vendors, and customers (6% of complaints).

Case Law Example: Burlington Industries, Inc. v. Ellerth, 524 U.S. 742, at 744 (1998).

The Supreme Court of the United States in a landmark decision, Burlington Industries, Inc. v. Ellerth, involved Ellerth's claim of repeated offensive sexual remarks from her supervisor's boss, pats on the buttocks and continuous threats that he could make her work life "very hard or very easy". However, the supervisor's threats were unfulfilled threats, so it is a hostile work environment claim requiring a showing of severe or pervasive conduct. The Court held the supervisor's remarks as numerous threats to retaliate against Ellerth if she denied some sexual liberties. Cases based on carried-out threats are referred to often as "*quid pro quo*" cases, as distinct from unwanted attentions or sexual remarks sufficient to create a "hostile work environment." These two terms do not appear in Title VII, which forbids only "discrimination against any individual with respect to his ... terms [or] conditions ... of employment, because of ... sex." §2000e-2(a)(1).

## 3. ELECTRONIC HARASSMENT

In the past few years, the use of technology in the workplace has grown exponentially. Almost every employee has access to the Internet and most companies have a corporate email system. That access provides employees an opportunity to increase the liability exposure of employers. This is a common source of claims involving employee use of their employer's internet and email systems and is in effect, a "loaded gun"...(aimed at employers).

**Example:** In 1995, key evidence retrieved from a large oil company's computer system was an email stating, "25 reasons why beer is better than women". This led to a \$2.2 million settlement.

More than 24% of workers surveyed said they "sometimes/often" receive sexually explicit or otherwise improper e-mails.

- One in five men and one in eight women admitted using their work computers and email to view sexually explicit materials.
- In 2000, a study stated that one in three companies terminated employees for misuse and/or via the internet and email systems.

- Dow Chemical fired more than 75 employees for forwarding harassing and inappropriate jokes to co-workers by email.
- The New York Times fired 22 staff members for sending and/or forwarding dirty jokes.

## LIABILITY FOR SEXUAL HARASSMENT

The two landmark cases previously cited decided by the United States Supreme Court in 1998 changed the rules of employer liability for sexual harassment and clarified the defenses available to such claims. *Faragher v. City of Boca Raton*, 524 U.S. 775 (1998), and *Burlington Industries, Inc. v. Ellerth*, 524 U.S. 742 (1998), established that an employer would be strictly liable for any harassment by a supervisor that resulted in a tangible employment action. Strict liability means that the employer has no defense against the claim.

The Court further discussed the two different standards imposed on employers for liability of employees. If the alleged harasser is a co-worker, the employer is only liable if it knew or should have known of the harassment and failed to take immediate and appropriate corrective action.

By implication, the employer is strictly liable for harassment by a supervisor. However, if the harassment by a supervisor did not culminate in a tangible employment action, the employer can defend itself by showing that:

1. It exercised reasonable care to prevent and correct promptly any sexually harassing behavior, and
2. That the plaintiff employee unreasonably failed to take advantage of any preventive or corrective opportunities provided by the employer or to avoid harm otherwise.

And while proof that an employee failed to fulfill the “obligation of reasonable care to avoid harm” is not limited to showing any unreasonable failure to use any complaint procedure provided by the employer, a demonstration of such failure will normally suffice to satisfy the employer’s burden under the second element of the defense. No affirmative defense is available, however, when the supervisor’s harassment culminates in a tangible employment action.

In the case of harassment by a co-employee or a third party (such as a client or contractor), the employer is only liable if the employee can show that the employer knew or should have known about the harassment and failed to take prompt remedial action. For purposes of this rule, knowledge by a supervisor is considered to be knowledge by the employer.

Companies should avail themselves of affirmative defense mechanisms by proactively implementing effective and reliable sexual harassment prevention and correction mechanisms.

## PREVENTING HARASSMENT

**All employers in the United States, regardless of size must adopt and distribute to all employees a written policy expressing absolute disapproval of sexual harassment and retaliation for making such claims.**

Such publication of employer disapproval of sexual harassment may foster an awareness of sexual harassment issues, and deter sexual harassment in the work place. This written policy can serve as some evidence of the employer’s good faith attempt to prohibit sexual harassment in the work place.

The critical elements of effective harassment prevention are:

1. A clearly written anti-harassment policy with procedures clearly outlined on how and to whom to report harassment.

For instance, California states that employers must act to ensure a workplace free from sexual harassment by distributing to each employee an information sheet on sexual harassment. An employer may either distribute the brochure prepared by the state (DFEH-185) or develop an equivalent document. An equivalent document contains the following elements:

- a. A statement on the illegality of sexual harassment;
- b. The definition of sexual harassment under state and federal law;
- c. A description of sexual harassment, using examples;

- d. The employer's internal complaint process;
  - e. Legal remedies and complaint processes available through state and federal law;
  - f. Directions on how to contact the state and federal agencies that are responsible for enforcing sexual harassment laws; and
  - g. Protections provided by state and federal law against retaliation for bringing a harassment claim or being a witness in a harassment investigation.
2. Training on harassment prevention and correction for all employees and managers. Please note, each state has various statutes and all have federal regulations. For state-by-state information, visit [www.accordsyst.com](http://www.accordsyst.com).



For example, on September 30, 2004, California passed a new law, AB 1825, which states:

- a. Employers with 50 or more employees must provide two hours of training and education to all supervisory employees every two years within one year of January 1, 2005, unless the employer has provided sexual harassment training and education to employees after January 1, 2003. Thereafter, the employer must provide sexual harassment training and education to each supervisory employee once every two years, after January 1, 2006.

### **Written Anti-Harassment Policy**

**It is imperative to communicate to all employees the employer has a ZERO tolerance toward sexual harassment, and that the company has done everything possible to prevent sexual harassment in the workplace.**

An effective, written anti-harassment policy is the foundation of harassment prevention. It sends a clear zero-tolerance message to management and non-management workforce and any "interested" outside parties that your organization prohibits harassment. It also instructs victims on reporting procedures and guarantees that corrective action will be taken to remedy violations of corporate policies, if and when it occurs. According to the EEOC, "It generally is necessary for employers to establish, publicize, and enforce anti-harassment policies and complaint procedures. . . . Failure to do so will make it difficult for an employer to prove that it exercised reasonable care to prevent and correct harassment." EEOC, Enforcement Guidance 915.002 (6/18/99).

The EEOC, Enforcement Guidance 915.002 (6/18/99) summarizes the requirements of a sufficient, anti-harassment policy in order to establish an affirmative defense, a written policy must, among other things:

- 1.) A clear explanation of prohibited conduct;
- 2.) Assurance that employees who make complaints or provide information related to such complaints will be protected against retaliation;
- 3.) A clearly described complaint process that provides accessible avenues of complaint;
- 4.) Assurance that the employer will protect the confidentiality of harassment complaints to the extent possible;
- 5.) A complaint process that provides prompt, thorough, and impartial investigation; and
- 6.) Assurance that the employer will take immediate and appropriate corrective action when it determines that harassment has occurred.

### **Anti-harassment Training**

Why provide anti-harassment training to your employees?

Reinforce your commitment to preventing and addressing all types of harassment. Trained employees better understand company expectations are more likely to report inappropriate behaviors, how to make a complaint and feel more comfortable that their complaints will be acted upon promptly with no adverse employment action.

In case after case, courts have repeatedly treated anti-harassment training as a significant and determining factor with regard to whether an organization took measures to prevent harassment (*Wathen v. Gen. Elec. Co.*, 115 F.3d 400 (6th Cir. 1997)). A summary judgment was granted for the employer that conducted training on sexual harassment policies. Anti-harassment training is essential for all employees, and it should be effective, accurate and interesting. Employers should train executives, managers, non-managers, new hires, document attendance and class content, while continuously seeking ways to improve harassment training.

### **Harassment Complaint Reporting Mechanisms**

As discussed above, the reporting procedures communicated in your written policies and training classes must be appropriate and reliable. If you designate managers to receive complaints, they must understand what constitutes a complaint, their role in complaint intake, and their responsibilities in complaint investigations. You will be left without a credible defense if a victim of harassment testifies that he/she reported his/her concerns to his/her manager, who did not respond promptly, or with impartiality on the complaint. Having multiple options as to whom to report harassing behavior is also necessary. What if the employee's supervisor is the harasser?

Courts have consistently found that an employer took appropriate corrective measures where these three prerequisites were met. See, e.g., *Savino v. C.P. Hall Co.*, 199 F.3d 925 (7th Cir. 1999):

1. The employer promptly conducted an investigation of the complaint; and
2. Reprimanded the person who was determined to have committed the offense; and
3. Relocated the employee who was determined to have committed the offense.

### **Harassment Complaint Investigations**

The law requires an investigation into harassment complaints, and your investigation will establish a defense against a potential harassment lawsuit. Additionally, the harassment complaint investigation is crucial to correction because it:

1. Determines whether harassment has occurred;
2. Provides the basis for an appropriate corrective action decision; and
3. Sends a message to your employees that your organization takes complaints of harassment seriously and addresses complaints quickly, aggressively and fairly.

Prompt investigation of harassment complaints creates an environment where employees will willingly come forward and seek resolution without litigation.

Courts have held that an investigator who is your attorney could become a witness at trial if the investigation is used as an affirmative defense (*Harding v. Dana Transport, Inc.*, 914 F.Supp.1084 (D.N.J. 1996)). It is recommended that the attorney who is representing the organization in any litigation that may arise from a complaint filed should not be the one conducting the investigation. Also keep in mind that, the more removed from an organization (impartial) an investigator is, the better. An in-house investigator's findings may be seen as viewed as skewed in favor of the organization, particularly if the complaint involves the corporation's management or human resources personnel. Remember, 29% of hostile work environment complaints are filed as a result of supervisor harassment.

### **Corrective Action**

The main goal of corrective action should be to send an important message to the victim as well as all employees that the company stands behind its zero-tolerance policy in words (written policy) and actions. Additionally, this disciplinary action dramatically lessens and/or prevents future instances of harassment both at the individual and the organizational levels. Individually, corrective action taken regarding the harasser should immediately halt any current, inappropriate behavior and to provide a basis for the harasser to show better judgment in the future. Organizationally, corrective action keeps your anti-harassment policy respected and limits likely violations. If employees see the action (as described in the policy) as fair and vital, employee morale is less likely to decline. An anti-harassment policy that is not consistently and effectively enforced might as well not even exist – and in fact, may not in the eyes of the courts. Your corrective action choice will play an integral role in the defense of any lawsuit; therefore, another primary goal should be that corrective action strengthens your affirmative defense.

Based on the facts revealed in an investigation, corrective action options may include reinforcement of your anti-harassment policy, training, suspension, demotion, transfer, reprimand, or termination. The factual basis of the complaint will constitute what appropriate corrective actions are sufficient to allow you to take advantage of the Faragher and Ellerth defense.

Sometimes, a written formal reprimand will be sufficient, but in others even a suspension or termination will not be enough. Compare *Curry v. District of Columbia*, 195 F.3d 654 (D.C. Cir. 1999) stating, "Although the District took no formal disciplinary action, the clear, prompt admonitions were appropriate and, at least for this conduct, effective." and *Adler v. Wal-Mart Stores, Inc.*, 144 F.3d 664 (10th Cir. 1998) where verbal and written warnings and paid suspensions were sufficient. Seeking outside counsel for legal advice regarding the appropriate corrective action to take in a particular case is recommended.

#### Employee Compliance Survey (Available April 15, 2005)

Accord's Employee Compliance Survey provides a benchmark to validate or determine how well your supervisory staff and employees are "in the know" about what sexual harassment is, how to prevent it, how to report it and how employer documentation in the event of sexual harassment litigation provides protection. Further, the Employee Compliance Survey provides a customized survey tool to fit the unique culture and needs of your organization. This tool will also assess the anti-harassment and discrimination compliance environment of companies' management and employees. It is with this information that the employer can improve their message and behaviors. Based on employees' responses, you may increase training, identify a possible issue *BEFORE* it results in serious harm to an employee or litigation, provide additional written policies and procedures or provide one-on-one training or conduct an investigation. These solutions can limit liability and empower employees to report possible harassment before a lawsuit is filed allowing proactive prevention and correction strategy for all types of harassment.

**Disclaimer.** Sexual harassment, discrimination and other related content within this website is not intended to provide any legal advice whatsoever. Its purpose is to educate and inform individuals about some of the issues that comprise unlawful discrimination and/or harassment including sexual harassment. For a more information on unlawful harassment go to the internet at [www.EEOC.com](http://www.EEOC.com) or [www.Accordsyst.com](http://www.Accordsyst.com).

#### **System Features**

- Hotline specialists ensure calls are handled according to client instructions.
- Reports are quickly accessible for follow-up using a previously assigned unique report number
- Detailed caller information is archived for long-term retention as required
- Electronic call information is not duplicated in any other location
- Hotline is operated under terms of strict confidentiality
- Annual security audit performed on all systems
- All identifiers are omitted from call reports when anonymity is requested by the caller
- Hotline can be customized to meet your unique needs
- Call reports routed to single or multiple parties as required
- Monthly tracking and benchmarking reports
- Graphic trending reports for briefing audit and compliance committees, and senior management
- Monthly e-newsletter with hotline tips and updates
- TDD/TTY for hearing-impaired callers
- Disaster recovery plan with redundant capabilities
- Considerable excess capacity to cover call "spikes"
- Customizable posters and wallet cards to promote use of the hotline to employees
- Clients receive a start-up package to help catalog and track hotline call report information and develop policies and procedures to handle hotline call information
- A shared hotline can be ready to receive calls within one business day -- a dedicated hotline within five business days