Session 109

Critical Legal Developments for Small Law Department Counsel

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PREPARING FOR BATTLE

LITIGATION STRATEGIES FOR SMALL LAW DEPARTMENTS

Most of us would agree that litigation is both undesirable and inevitable. Not even the most cautious companies are immune from lawsuits. Law departments must therefore "gear up for battle" by developing strategies for the efficient and effective handling of cases. Through trial and error, I have uncovered some practical and useful litigation strategies for small law departments. While these strategies will not guarantee victory, they should help to maximize your resources, focus your attack, and make the litigation battle a little less agonizing.

1. **Chose Your Warriors Well.** Perhaps the most important stage of any case is the attorney-selection stage (assuming you chose not handle the case in-house). Haphazard choices can lead to disastrous results. It is therefore important to have in place a panel of qualified outside attorneys from which to chose. The panel should be diverse not only in expertise, but also in billing rates (as there will be cases that simply do not warrant the use of big-fee law firms).

   We all want outside attorneys who are skilled, reliable, pleasant to work with, conscious of costs, and committed to the client's best interests. Such attorneys can be found, but not without some effort. A short conversation over the telephone, or a quick review of Martindale-Hubbel, will not reveal the true nature of an attorney or a law firm. It will usually be worth your time to do the following in selecting a panel of attorneys:

   - Meet with each candidate personally;
   - Ask around – find out what other attorneys (especially in-house attorneys) have to say about the candidate;
   - Visit the candidate's law firm in order to familiarize yourself with the firm's employees, facilities and resources;
   - Introduce the candidate to your own company and staff;
   - Inquire <u>in detail</u> about the candidate's experience;
   - Discuss the candidate's fees, as well as your own billing requirements;
   - Ask about the candidate's anticipated use of paralegals and associates; and
   - Make sure the candidate shares your vision of effective case management.

   Nothing helps to make litigation more palatable than a trusting, cohesive working relationship with outside counsel. Such relationships don't just happen; they must be diligently pursued and fostered.

2. **Should You Enter the Battle Alone?** In assessing a new case, a small law department must quickly decide whether to handle the case in-house, through outside counsel, or through a co-counsel arrangement. This decision will often depend on <u>time</u> --- can your law department afford the time to balance a new case with the rest of the workload? Other factors to consider before sending the case to outside counsel are the following:

   - Is there an in-house attorney with expertise in this particular area of the law?
   - Does your law department have adequate research tools to address the legal issues presented?

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- Do you have the necessary secretarial and/or paralegal resources to handle the copying, bate-stamping, word-processing, calendaring, document review and research that will be required?
- Can you afford to pay outside counsel?
- Can you afford not to pay outside counsel? (e.g., are the risks of staying in-house greater than the need to cut costs?)

In our small law department of two attorneys and one secretary, we generally hire outside attorneys to help with our lawsuits, but we almost always act as co-counsel on the cases. Depending upon the case, we handle anywhere from 10% to 90% of the workload. Through this "partnering" approach, we maintain considerable control over strategy, work product and attorney fees, while at the same time benefiting from the expertise, counsel and resources of an outside firm. This type of partnering relationship only works, however, if your outside attorney is willing to accept a reduced role and share control over strategy and work product.

3. **Learn the Terrain.** Far too often, cases languish for months without any discernable direction. Attorneys sometimes take cases through several rounds of discovery and motions before even identifying the key legal and factual issues. It is far more logical and cost-efficient to master the issues at the outset of the case (pre-discovery) so that you have a more focused understanding of what needs to be accomplished. Complete the following tasks as early as possible:

   - Gather and understand the facts available to you, including all relevant internal documents;
   - Learn the elements of each cause of action and affirmative defense;
   - Research similar cases;
   - Identify the key factual issues that must be further explored through discovery;
   - Identify the key legal issues to be researched and/or briefed; and
   - Identify appropriate methods of resolving the case before trial (e.g., motion to dismiss, motion for summary judgment, binding arbitration, mediation).

   As in-house counsel, your familiarity with the case should ideally rival that of your outside attorney. Otherwise, you will be disadvantaged in participating in key strategic decisions, and you may become overly dependent on the advice of outside counsel. Though it certainly takes time and money to master the case in its early stages, you will usually make up those losses by eliminating aimless discovery, unwanted surprises, and costly strategy adjustments.

4. **Take Careful Aim Before Firing.** Once you have studied the facts and issues in a case, it is time to come up with a detailed litigation plan. This is best done through a face-to-face meeting between inside and outside counsel. The plan should address all of the following issues:

   - Is this a case you are willing to litigate, or are early settlement negotiations a priority?
   - If settlement is desirable, how and when will you pursue it?

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- Who will be attending court hearings, conferences, mediations and settlement conferences? (Outside counsel, in-house counsel, associates?)
- What discovery must be conducted? When and by whom?
- What additional research must be conducted? When and by whom?
- What motions must be drafted? When and by whom?
- Who will be trying the case? Second chair?
- How will all other litigation responsibilities be allocated among in-house and outside resources? (e.g., copying, word-processing, calendaring, document gathering, summarizing of depositions and documents.)
- For each item of work, how much time should it take, and how much money will it cost?

Because the course of a lawsuit is inherently unpredictable, there must be some flexibility in your litigation plan (including the budget). Nevertheless, the more carefully you plot out the course of your case, the more likely you are to achieve low-cost, positive results.

5. **Keep Battle Communications Open.** If you have retained outside counsel to help with your case, it is essential to communicate at least once a week, even if very little is happening in the case. A failure to communicate will often result in missed deadlines, unfulfilled tasks, and unwanted expenditures. Through your conferences with outside counsel, you may want to discuss the following:

   - The litigation plan;
   - New developments or issues;
   - New theories and ideas;
   - The status of work assignments; and
   - Upcoming deadlines.

   A key element of effective communication is honesty. If either you or your outside attorney disagrees with a strategy, or is unhappy with effort or work product, such feelings must be expressed. Because the in-house attorney is the client, it is generally easier for him or her to express displeasure. You should therefore encourage your outside attorney to be equally forthright, without fear of retaliation. You will not benefit from an attorney who is afraid to express his true opinions for fear of losing your business.

Conclusion

The above strategies, though not fool-proof, should create a solid foundation for the litigation battles that lie ahead. These strategies are based on fundamental principles of success – planning, organization, and communication. If followed, they can lead to a more productive and pleasant working relationship with outside counsel, a more efficient use of time and resources, and a greater likelihood of successful, cost-effective results.

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ACCA CONFERENCE – SAN DIEGO
SMALL LAW DEPARTMENT – "HOT TOPICS" – EMPLOYMENT LAW
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I. ADA/Reasonable Accommodation

A. Late last term, the Supreme Court decided five employment discrimination cases on issues of importance to employers.

1. A corrected impairment that does not "substantially limit a major life activity" is not protected by the ADA, e.g., myopia, pharmaceutically-controlled high blood pressure.

2. Social Security Disability Insurance (SSDI) benefits do NOT automatically bar an ADA claim.

3. In a punitive damages context, an employer may not be liable for managerial actions which are contrary to the employer's efforts to comply with Title VII, the ADA and the Federal Fair Housing Act.

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1. The Supreme Court on 6/22/99 took a restrictive view of the ADA definition of "disability" in three separate cases concerning the Americans with Disabilities Act of 1990 (ADA), all decided by a 7-2 majority. The Court ruled that people with physical impairments who can function normally, such as when they wear their glasses or take their medicine, generally cannot be considered disabled, and therefore do not come within the ADA's protection against employment discrimination. The Court concluded that a "disability" should not be measured in its untreated state, but rather in light of any corrective measures such as medication, glasses or other devices that enable a person to function normally. Under the ADA, "…a 'disability' exists only where an impairment 'substantially limits' a major life activity, not where it 'might,' 'could' or 'would' be substantially limiting if mitigating measures were not taken." Thus, "an employer is free to decide that some physical characteristics or medical conditions that do not rise to the level of an impairment – such as height, build or singing voice – are preferable to others, just as employers are free to decide that some limiting, but not substantially limiting, impairments – such as myopia for a pilot – make individuals less than ideally suited for a job." A person with a corrected impairment still has the impairment, but if the impairment is corrected, it does not "substantially limit" a major life activity and so is not protected by the ADA. See

   Sutton v. United Airlines, 119 S. Ct. 2139 (1999)
   Murphy v. United Parcel Service, 119 S. Ct. 2133 (1999)
   Albertson's v. Kirkingburg, 119 S. Ct. 2162 (1999)

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2. In Cleveland v. Policy Management Systems Corp., 119 S. Ct. 1597 (1999) on 5/24/99, the Supreme Court decided that application for and receipt of Social Security Disability Insurance (SSDI) benefits does not automatically bar a recipient from pursuing an ADA claim or even erect a strong presumption against the recipient's ADA success. However, to survive a summary judgment motion, an ADA plaintiff cannot ignore her SSDI contention that she was too disabled to work, but must explain why that contention is consistent with her ADA claim that she can perform the essential functions of her job, at least with reasonable accommodation.

   Despite the appearance of conflict between the SSDI program (which provides benefits to a person with a disability so severe that she is unable to do her previous work or any other kind of substantial gainful work) and the ADA (which prohibits covered employers from discriminating against a disabled person who can perform the essential function of her job, including one who can do so only with reasonable accommodation), the two claims do not inherently conflict to the point where courts should apply a special negative presumption such as the one applied by the Fifth Circuit Court of Appeals in this case. There are many situations in which an SSDI claim and an ADA claim can comfortably exist side by side. For example, since the Social Security Administration (SSA) does not take into account the possibility of "reasonable accommodation" in determining SSDI eligibility, an ADA plaintiff's claim that she can perform her job with reasonable accommodation may well prove consistent with an SSDI claim that she could not perform her own job (or other jobs) without it. An individual might qualify for SSDI under SSA's administrative rules and yet, due to special individual circumstances, be capable of performing the essential functions of her job. Or her condition might have changed over time, so that a statement about her disability made at the time of her application for SSDI benefits does not reflect her capacities at the time of the relevant employment decision. Thus the Supreme Court will not apply a legal presumption permitting someone who has applied for, or received, SSDI benefits to bring an ADA suit only in some limited and highly unusual set of circumstances.

   Nonetheless, in some cases an earlier SSDI claim may turn out genuinely to conflict with an ADA claim. Summary judgment for a defendant is appropriate when a plaintiff fails to make a sufficient showing to establish the existence of an essential element on which she has the burden of proof at trial. An ADA plaintiff's sworn assertion in an application for disability benefits that she is unable to work appears to negate the essential functions of her job, and a court should require an explanation of this apparent inconsistency. To defeat summary judgment, that explanation must be sufficient to warrant a reasonable juror's concluding that, assuming the truth of, or the plaintiff's good faith belief in, the earlier statement, the plaintiff could nonetheless perform the essential functions of her job, with or without reasonable accommodation.

3. In Kolstad v. American Dental Association, 119 S. Ct. 2118 (1999), the Supreme Court also limited the risk of punitive damages that have been available to employees since the 1991 amendment to the 1964 Civil Rights Act (which

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amendment also applies to the ADA and the Federal Fair Housing Act). Since 1991, punitive damages of up to $300,000 have been available in cases of intentional discrimination in which an employer acted "with malice or with reckless indifference to the federally protected rights of an aggrieved individual."

The Kolstad court concluded that the 1991 amendment did not make "egregious" conduct a prerequisite to punitive damages, as the Court of Appeals for the District of Columbia had held earlier in the history of this sex discrimination case.

Next, the Court decided an issue only raised in a U.S. Chamber of Commerce "amicus" brief, going further than it had in two sexual harassment rulings issued in June 1998. Then, the Court held employers to a standard of "reasonable care" to prevent supervisors from harassing lower level employees, although if a supervisor took a "tangible employment action," such as conditioning a promotion on yielding to a sexual demand, the company had no defense and was liable.

Here, the Court made no such distinction among the range of discriminatory situations that can arise in a workplace and it concluded that "…in the punitive damages context, an employer may not be vicariously liable for the discriminatory employment decisions of managerial agents where these decisions are contrary to the employer's good faith efforts to comply with Title VII." The opinion did not define "good faith efforts" but it appears that a published company policy against discrimination which a company circulates periodically should rebut a punitive damage claim. In addition, a well-publicized complaint procedure and training for both employees and managers should help.

II. Policy Against Sexual Harassment, Staff Training and Investigation of Claims

A. Each company should

1. have a policy
2. update and redistribute it annually with cover memo from C.E.O.
3. distribute it to all new employees
4. train employees to recognize and avoid sexual and all discriminatory harassment
5. train managers to investigate claims

An anti-harassment policy and complaint procedure should contain, at a minimum, the following elements:

- A clear explanation of prohibited conduct;

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

The above elements are explained in the following subsections.

a. Prohibition Against Harassment

An employer's policy should make clear that it will not tolerate harassment based on sex (with or without sexual conduct), race, color, religion, national origin, age, disability, and protected activity (i.e., opposition to prohibited discrimination or participation in the statutory complaint process). This prohibition should cover harassment by *anyone* in the workplace – supervisors, co-workers, or non-employees. Management should convey the seriousness of the prohibition. The best way to do that is for the mandate to "come from the top," i.e., from upper management.

b. Protection Against Retaliation

An employer should make clear that it will not tolerate adverse treatment of employees because they report harassment or provide information related to such complaints. An anti-harassment policy and complaint procedure will not be effective without such an assurance.

Management should undertake whatever measures are necessary to ensure that retaliation does not occur. For example, when management investigates a complaint of harassment, the official who interviews the parties and witnesses should remind these individuals about the prohibition against retaliation. Management also should scrutinize employment decisions affecting the complainant and witnesses during and after the investigation to ensure that such decisions are not based on retaliatory motives.

c. Effective Complaint Process

An employer's harassment complaint procedure should be designed to encourage victims to come forward. To that end, it should clearly explain the process and ensure that there are no unreasonable obstacles to complaints. A complaint procedure should not be rigid, since that could defeat the goal of preventing and correcting harassment. When an employee complains to

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management about alleged harassment, the employer is obligated to investigate the allegation regardless of whether it conforms to a particular format or is made in writing.

The complaint procedure should provide accessible points of contact for the initial complaint. A complaint process is not effective if employees are always required to complain first to their supervisors about alleged harassment, since the supervisor may be a harasser. Moreover, reasonable care in preventing and correcting harassment requires an employer to instruct all supervisors to report complaints of harassment to appropriate officials.

It is advisable for an employer to designate at least one official outside an employee's chain of command to take complaints of harassment. For example, if the employer has an office of human resources, one or more officials in that office could be authorized to take complaints. Allowing an employee to bypass his or her chain of command provides additional assurance that the complaint will be handled in an impartial manner, since an employee who reports harassment by his or her supervisor may feel that officials within the chain of command will more readily believe the supervisor's version of events.

It also is important for an employer's anti-harassment policy and complaint procedure to contain information about the time frames for filing charges of unlawful harassment with the EEOC or state fair employment practice agencies and to explain that the deadline runs from the last date of unlawful harassment, not from the date that the complaint to the employer is resolved. While a prompt complaint process should make it feasible for an employee to delay deciding whether to file a charge until the complaint to the employer is resolved, he or she is not required to do so.

d. Confidentiality

An employer should make clear to employees that it will protect the confidentiality of harassment allegations to the extent possible. An employer cannot guarantee complete confidentiality, since it cannot conduct an effective investigation without revealing certain information to the alleged harasser and potential witnesses. However, information about the allegation of harassment should be shared only with those who need to know about it. Records relating to harassment complaints should be kept confidential on the same basis.

A conflict between an employee's desire for confidentiality and the employer's duty to investigate may arise if an employee informs a supervisor about alleged harassment, but asks him or her to keep the matter confidential and take no action. Inaction by the supervisor in such circumstances could lead to employer liability. While it may seem reasonable to let the employee determine whether to pursue a complaint, the employer must discharge its duty to prevent and correct harassment. One mechanism to help avoid such conflicts would be for

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the employer to set up an informational phone line which employees can use to discuss questions or concerns about harassment on an anonymous basis.

e. Effective Investigative Process

An employer should set up a mechanism for a prompt, thorough, and impartial investigation into alleged harassment. As soon as management learns about alleged harassment, it should determine whether a detailed fact-finding investigation is necessary. For example, if the alleged harasser does not deny the accusation, there would be no need to interview witnesses, and the employer could immediately determine appropriate corrective action.

If a fact-finding investigation is necessary, it should be launched immediately. The amount of time that it will take to complete the investigation will depend on the particular circumstances. If, for example, multiple individuals were allegedly harassed, then it will take longer to interview the parties and witnesses.

It may be necessary to undertake intermediate measures before completing the investigation to ensure that further harassment does not occur. Examples of such measures are making scheduling changes so as to avoid contact between the parties; transferring the alleged harasser; or placing the alleged harasser on non-disciplinary leave with pay pending the conclusion of the investigation. The complainant should not be involuntarily transferred or otherwise burdened, since such measures could constitute unlawful retaliation.

The employer should ensure that the individual who conducts the investigation will objectively gather and consider the relevant facts. The alleged harasser should not have supervisory authority over the individual who conducts the investigation and should not have any direct or indirect control over the investigation. Whoever conducts the investigation should be well-trained in the skills that are required for interviewing witnesses and evaluating credibility.

i. Questions to Ask Parties and Witnesses

When detailed fact-finding is necessary, the investigator should interview the complainant, the alleged harasser, and third parties who could reasonably be expected to have relevant information. Information relating to the personal lives of the parties outside the workplace would be relevant only in unusual circumstances. When interviewing the parties and witnesses, the investigator should refrain from offering his or her opinion.

The following are examples of questions that may be appropriate to ask the parties and potential witnesses. Any actual investigation must be tailored to the particular facts.

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Questions to Ask the Complainant:

- Who, what, when, where, and how: *Who* committed the alleged harassment? *What* exactly occurred or was said? *When* did it occur and is it still ongoing? *Where* did it occur? *How often* did it occur? *How* did it affect you?
- How did you react? What response did you make when the incident(s) occurred or afterwards?
- How did the harassment affect you? Has your job been affected in any way?
- Are there any persons who have relevant information? Was anyone present when the alleged harassment occurred? Did you tell anyone about it? Did anyone see you immediately after episodes of alleged harassment?
- Did the person who harassed you harass anyone else? Do you know whether anyone else complained about harassment by the person?
- Are there any notes, physical evidence, or other documentation regarding the incident(s)?
- How would you like to see the situation resolved?
- Do you know of any other relevant information?

Questions to Ask the Alleged Harasser:

- What is your response to the allegations?
- If the harasser claims that the allegations are false, ask why the complainant might lie.
- Are there any persons who have relevant information?
- Are there any notes, physical evidence, or other documentation regarding the incident(s)?
- Do you know of any other relevant information?

Questions to Ask Third Parties:

- What did you see or hear? When did this occur? Describe the alleged harasser's behavior toward the complainant and toward others in the workplace.
- What did the complainant tell you? When did s/he tell you this?
- Do you know of any other relevant information?
- Are there other persons who have relevant information?

ii. Credibility Determination

If there are conflicting versions of relevant events, the employer will have to weigh each party's credibility. Credibility assessments can be critical in determining whether the alleged harassment in fact occurred. Factors to consider include:

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- **Inherent plausibility:** Is the testimony believable on its face? Does it make sense?
- **Demeanor:** Did the person seem to be telling the truth or lying?
- **Motive to falsify:** Did the person have a reason to lie?
- **Corroboration:** Is there **witness testimony** (such as testimony by eye-witnesses, people who saw the person soon after the alleged incidents, or people who discussed the incidents with him or her at around the time that they occurred) or **physical evidence** (such as written documentation) that corroborates the party's testimony?
- **Past record:** Did the alleged harasser have a history of similar behavior in the past?

None of the above factors are determinative as to credibility. For example, the fact that there are no eyewitnesses to the alleged harassment by no means necessarily defeats the complainant's credibility, since harassment often occurs behind closed doors. Furthermore, the fact that the alleged harasser engaged in similar behavior in the past does not necessarily mean that he or she did so again.

iii. Reaching a Determination

Once all of the evidence is in, interviews are finalized, and credibility issues are resolved, management should make a determination as to whether harassment occurred. That determination could be made by the investigator, or by a management official who reviews the investigator's report. The parties should be informed of the determination.

In some circumstances, it may be difficult for management to reach a determination because of direct contradictions between the parties and a lack of documentary or eyewitness corroboration. In such cases, a credibility assessment may be the basis for a determination, based on factors such as those set forth above.

If no determination can be made because the evidence is inconclusive, the employer should still undertake further preventive measures, such as training and monitoring.

f. Assurance of Immediate and Appropriate Corrective Action

An employer should make clear that it will undertake immediate and appropriate corrective action, including discipline, whenever it determines that harassment has occurred in violation of the employer's policy. Management should inform both parties about these measures.

Remedial measures should be designed to stop the harassment, correct its effects on the employee, and ensure that the harassment does not recur. These

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remedial measures need not be those that the employee requests or prefers, as long as they are effective.

In determining disciplinary measures, management should keep in mind that the employer could be found liable if the harassment does not stop. At the same time, management may have concerns that overly punitive measures may subject the employer to claims such as wrongful discharge, and may simply be inappropriate.

To balance the competing concerns, disciplinary measures should be proportional to the seriousness of the offense. If the harassment was minor, such as a small number of "off-color" remarks by an individual with no prior history of similar misconduct, then counseling and an oral warning might be all that is necessary. On the other hand, if the harassment was severe or persistent, then suspension or discharge may be appropriate.

Remedial measures should not adversely affect the complainant. Thus, for example, if it is necessary to separate the parties, then the harasser should be transferred (unless the complainant prefers otherwise). Remedial responses that penalize the complainant could constitute unlawful retaliation and are not effective in correcting the harassment.

Remedial measures also should correct the effects of the harassment. Such measures should be designed to put the employee in the position s/he would have been in had the misconduct not occurred.

Examples of Measures to Stop the Harassment and Ensure that it Does Not Recur:

- oral or written warning or reprimand;
- transfer or reassignment;
- demotion;
- reduction of wages;
- suspension;
- discharge;
- training or counseling of harasser to ensure that s/he understands why his or her conduct violated the employer's anti-harassment policy; and
- monitoring of harasser to ensure that harassment stops.

Examples of Measures to Correct the Effects of the Harassment:

- restoration of leave taken because of the harassment;
- expungement of negative evaluation(s) in employee's personnel file that arose from the harassment;
- reinstatement;
- apology by the harasser;

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- monitoring treatment of employee to ensure that s/he is not subjected to retaliation by the harasser or others in the workplace because of the complaint; and
- correction of any other harm caused by the harassment (e.g., compensation for losses).

Other Preventive and Corrective Measures

An employer's responsibility to exercise reasonable care to prevent and correct harassment is not limited to implementing an anti-harassment policy and complaint procedure. As the Supreme Court stated, "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." Faragher v. City of Boca Raton, 118 S. Ct. 2275, 2291 (1998).

An employer's duty to exercise due care includes instructing all of its supervisors and managers to address or report to appropriate officials complaints of harassment regardless of whether they are officially designated to take complaints and regardless of whether a complaint was framed in a way that conforms to the organization's particular complaint procedures. For example, if an employee files an EEOC charge alleging unlawful harassment, the employer should launch an internal investigation even if the employee did not complain to management through its internal complaint process.

Furthermore, due care requires management to correct harassment regardless of whether an employee files an internal complaint, if the conduct is clearly unwelcome. For example, if there are areas in the workplace with graffiti containing racial or sexual epithets, management should eliminate the graffiti and not wait for an internal complaint.

An employer should ensure that its supervisors and managers understand their responsibilities under the organization's anti-harassment policy and complaint procedure. Periodic training of those individuals can help achieve that result. Such training should explain the types of conduct that violate the employer's anti-harassment policy; the seriousness of the policy; the responsibilities of supervisors and managers when they learn of alleged harassment, and the prohibition against retaliation.

An employer should keep track of its supervisors' and managers' conduct to make sure that they carry out their responsibilities under the organization's anti-harassment program. For example, an employer could include such compliance in formal evaluations.

Reasonable preventive measures include screening applicants for supervisory jobs to see if any have a record of engaging in harassment. If so, it may be

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necessary for the employer to reject a candidate on that basis or to take additional steps to prevent harassment by that individual.

Finally, it is advisable for an employer to keep records of all complaints of harassment. Without such records, the employer could be unaware of a pattern of harassment by the same individual. Such a pattern would be relevant to credibility assessments and disciplinary measures.

g. Small Businesses

It may not be necessary for an employer of a small workforce to implement the type of formal complaint process described above. If it puts into place an effective, informal mechanism to prevent and correct harassment, a small employer could still satisfy the first prong of the affirmative defense to a claim of harassment. As the Court recognized in *Faragher*, an employer of a small workforce might informally exercise sufficient care to prevent harassment.

For example, such an employer's failure to disseminate a written policy against legally-prohibited harassment would not undermine the affirmative defense if the employer had effectively communicated the prohibition and an effective complaint procedure to all employees at staff meetings. An owner of a small business who regularly meets with all of his or her employees might tell them at monthly staff meetings that he or she will not tolerate harassment and that anyone who experiences harassment should bring it "straight to the top."

If a complaint is made, the small business, like any other business, must conduct a prompt, thorough, and impartial investigation and undertake swift and appropriate corrective action where appropriate. The questions set forth above, can help guide the inquiry and the factors set forth above should be considered in evaluating the credibility of each of the parties.

B. SAMPLE POLICY (Cover Memo)

__Company__ continues its leadership role in the industry. With that leadership comes our continuing strong commitment to equal opportunity. We have attracted, developed and retained the most talented professionals in the industry. We must continue to take advantage of the broadest range of experience, skills, energy and innovation that a diverse workforce provides.

Our policies are clear. We will continue to recruit, hire and promote employees in all classifications without regard to race, color, national origin, religion, sex, sexual orientation, age, disability, veteran's or marital status, height or weight. People are to be judged solely on ability and performance. __Company__ will not tolerate discrimination or sexual harassment.

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Each manager at every location of the Company is responsible for treating employees in a fair, objective manner and each of us must support the Company's Affirmative Action and EEOC policies and practices.

Attached are the Fair Employment and Sexual Harassment Statements that support this philosophy. ___Name___, Senior Vice President of Human Resources, has the overall responsibility for enforcing these policies. However, each manager and each employee is responsible for supporting and assisting in the furtherance of these principles.

Questions regarding these policies should be discussed with your manager. If you need additional help, please contact the following individuals, depending upon your business unit:

FAIR EMPLOYMENT PRACTICES

It is the policy of __Company__ to afford equal opportunity to all, to discriminate against none, to take affirmative action to promote equal employment and advancement opportunity regardless of race, color, national origin, religion, sex, age, sexual orientation, disability, veteran's status, marital status, or height or weight.

Although the Sr. Vice President, Human Resources has the overall responsibility for the implementation of an Affirmative Action Plan, it is the responsibility of every _Company employee to assist in the furtherance of this policy. This includes:

(1) Recruiting, hiring, training and promoting in all job classifications without regard to race, color, national origin, religion, sex, age, sexual orientation, disability, veteran's status, marital status, or height or weight.

(2) Basing decisions on employment so as to further the principle of equal employment opportunity.

(3) Insuring that promotion decisions are in accordance with principles of equal employment opportunity by imposing only valid requirements for promotional opportunities.

(4) Insuring that all personnel actions and practices are administered in a fair, equal and consistent manner.

(5) __Company__ will not tolerate any form of harassment on account of race, color, national origin, religion, sex, age, sexual orientation, disability, veteran's status, marital status, or height or weight. The Company will investigate any issue as it arises and will take appropriate action. Any employee who engages in such harassment by any means, including in person and/or through the use of E-mail, voicemail, telephone, audio or video devices and/or computer or hard-copy documents, will be subject to discipline, up to and including termination. If a situation develops which employees feel should be investigated, they should contact

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Human Resources (phone number) in (location), or Human Resources (phone number) in (other location). No employee who exercises his or her right under this policy will be subject to any adverse employment action.

SEXUAL HARASSMENT POLICY

It has been Company policy in the past and will continue to be in the future to afford equal opportunity to all and to discriminate against none. Women and men have the same opportunities for employment and promotion within Company. There has always been and will continue to be a single standard of qualification for employment and for treatment after employment.

The Equal Employment Opportunity Commission (EEOC) has issued guidelines under Title VII of the Civil Rights Act of 1964 concerning sexual harassment. The guidelines list three criteria for determining whether such acts as unwelcome sexual advances, requests for sexual favors and other verbal or physical conduct of a sexual nature constitute unlawful sexual harassment. They are:

(1) Submission to the conduct is made either an explicit or implicit condition of employment.

(2) Submission to or rejection of the conduct is the basis for either continued employment or for decisions affecting pay, benefits or advancement opportunities.

(3) The conduct has the purpose or effect of substantially interfering with an individual's work performance or creating an intimidating, hostile or offensive work environment.

EEOC guidelines hold a company responsible for the acts of "its agents and supervisory employees with respect to sexual harassment."

It is Company's position that sexual harassment will not be tolerated. The Company will investigate any issue as it arises and will take appropriate action. Any employee who engages in such harassment by any means, including in person and/or through the use of E-mail, voicemail, telephone, audio or video devices and/or computer or hard-copy documents, will be subject to discipline, up to and including termination. If a situation develops which employees feel should be investigated, they should contact Human Resources, (phone number) in (location) or Human Resources, (phone number) in (other location. No employee who exercises his or her right under this policy will be subject to any adverse employment action.

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III. Employee/Independent Contractor

A. Recent cases highlight problems in this area for employers:

1. "Temporary" employees at Microsoft are entitled to the same benefits, including stock options, as full-time employees. Vizcaino v. Microsoft Corp., 97 F.3rd 1187 (9th Cir. 1996), aff'd 120 F.3rd 1006 (9th Cir. 1997) (en banc), Vizcaino v. U.S. District Court for W.D. of Wash., 173 F.3d 713 (9th Cir. 1999)

2. On 5/24/99, volunteers at America Online Inc. (AOL) filed a class action in federal court in New York to collect backpay and overtime as employees.

3. An employee of a laboratory providing services exclusively to one hospital can sue the hospital for sex discrimination despite the fact that the claimant was not a hospital employee, according to the Texas Supreme Court. NME Hospitals Inc. v. Rennels, 79 Fair Empl. Prac. Cases (BNA) 1807 (Texas Sup. Ct. 1999)

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1. The U.S. Court of Appeals for the 9th Circuit rejected Microsoft's attempt to avoid an obligation to pay benefits including stock options to a class of workers it initially called "independent contractors."

   In 1990, the IRS determined that Microsoft's independent contractors were actually employees for tax purposes, based primarily on the degree to which Microsoft controlled the "means and methods" of the work performed by the disputed workers and applying a codification of the old common-law principles of "master and servant." Then, Microsoft converted the independent contractors to temps by requiring them to register with employment agencies to continue to perform services for the company. This suit was brought both by some workers who registered with temporary employment agencies and some who did not and all sought coverage under the various Microsoft pension, welfare and stock option plans on the same basis as full-time employees.

   The Microsoft court rejected the independent contractor agreements which Microsoft had required the workers to sign and which expressly provided that each worker was responsible for his or her own benefits. The Court concluded that neither the independent contractor agreement nor the temp agency procedure precluded the workers from having the status of common-law employee at Microsoft. It applied the common-law analysis of the right-to-control the manner and means of production and the ERISA definition of employee. The Microsoft court relied on a number of "common-law employee" factors articulated in Nationwide Mutual Ins. Co. v. Darden, 503 US 318, 323-24 (1992), an ERISA case

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brought by an insurance salesman classified as an independent contractor ineligible to participate in the company benefit plans. The Court concluded that, following these tests the plaintiffs were common-law employees of Microsoft and as such entitled to the same benefits as staff employees.

2. The complaint against AOL is novel but noteworthy. The plaintiffs were "community leaders" for AOL who monitored chat rooms, message boards and online discussions for AOL. They claim that AOL required minimum hours of work, reserved the right to terminate them and provided them "tools" such as computer memory upgrades and free access to AOL. They claim that AOL violated the Fair Labor Standards Act by failing to pay them. The same plaintiffs are involved in a Department of Labor investigation of the AOL volunteer program and they created a Website at "www.observers.net."

   Conversely, technology-based employers should ascertain that work performed by an independent contractor or a temporary employee will belong to the employer and not to the person responsible for its creation. The Supreme Court faced that issue in Community for Creative Non-Violence v. Reid, 490 U.S. 730 (1989). The case turned on the definition of "employee" under the Copyright Act. The Reid court applied traditional copyright concepts, such as "work-for-hire." If deemed a work-for-hire, the end product would be owned exclusively by the employer because copyright ownership of such works vests in the employer unless there is a written agreement to the contrary. *Reid* held that work-for-hire disputes should be resolved by applying the common-law definition of "employee" set forth in *Darden.*

3. The Texas case turned on control by the hospital of the lab and its continued employment of the plaintiff. The Texas court noted that Title VII affords protections to "persons aggrieved" not "employees." It rejected the notion that a plaintiff would have standing to pursue a sex discrimination claim only if he or she had a direct employer/employee relationship with the defendant. It ruled that the test is whether a defendant employer controlled access to plaintiff's employment opportunities and denied or interfered with that access based on unlawful criteria.

   Applying this standard, employers can be subjected to a wide variety of employment discrimination suits by people other than their employees as long as some sort of employment relationship exists and the company controls access to employment opportunities and denies or interferes with those opportunities.

   In summary, it is important for company counsel in areas such as ERISA, tax, employment and intellectual property to communicate with one another because anyone alone might take an action that could adversely affect the company. Temps or independent contractors should not be imbued with employee status. Companies should require independent contractors developing new products or intellectual property to sign agreements acknowledging that their finished products are works-for-hire. Finally, companies should review all contracts with outside service providers to avoid liability as employers.

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SMALL LAW DEPARTMENT SECTION

RECENT DEVELOPMENTS – INTELLECTUAL PROPERTY

1 Dickinson v. Zurko, _ S.Ct. _, (1999) No. 98-377, 6/10/99, 50 USPQ2d 1930 (1999)

USPTO standard of review is same as for other federal agency decisions – "arbitrary and capricious" or "unsupported by substantial evidence", rather than "clearly erroneous".

1 A & H Sportwear Inc. v. Victoria's Secret Stores Inc., , 3rd Cir., 97-1570, 1/21/99

Likelihood of confusion of confusion, not possibility of confusion determines trademark infringement liability.

1 Porsche Cars North America Inc., and Dr. Ing. H.C.F. Porsche AG v. Porsche.com, et al, E.D. Virginia, 99-0006-A, 6/8/99

Trademark law doesn't permit in rem claim; registration of net name constitutes commercial use for proving damages claim.

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