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Inside ....This Issue

EPLI–Don't Trust Your Company's Defense to Strangers *by William C. Bovender*

Has your company purchased Employment Practices Liability Insurance? Are you getting the most for your money if you have?

Over the past few years, many companies have chosen to protect themselves from costly employment litigation. "Costly" is the word, as the average defense cost of a suit in 2001 was $305,000. Without coverage, the treasury is drained.

In some situations, Employment Practices Liability Insurance (also known as "EPLI") is combined with other types of insurance such as officers' and directors' liability coverage. This sometimes holds down the overall cost of the coverage since there are significantly fewer claims against the officers' and directors' policies. Also, some combined policies have "shared limits" – that is, a claim against one type of coverage will reduce the amount of insurance coverage available if the insured has another claim arise which falls under a separate portion of the policy.

There are some significant advantages which accrue from the purchase of EPLI coverage. First, insurance premiums are less than even one jury verdict or the cost of defense, as mentioned. Secondly, the assets of the company are protected. Third, underwriting requirements will force the reticent employer to upgrade its employment policies and procedures – which not only make claims more defensible, but could reduce or prevent claims altogether.

On the other side of the fence, EPLI is expensive coverage. Moreover, it is narrow coverage – some acts or omissions are not covered and certain types of damages a jury might award, such as punitives, are not covered.

But the biggest pitfall which has emerged related to EPLI coverage is that an employer could lose its ability to choose counsel. If this sounds self-serving, it is, to some degree. However, most sophisticated employers, regardless of size, utilize the services of skilled employment counsel – such as those here at Hunter, Smith & Davis – for preventive services.

Your employment counsel should know the "ins" and "outs" of your business. Properly using employment attorneys in the development of personnel policies and procedures will also keep down the cost of EPLI coverage.

If, however, an employer does not negotiate the right to choose counsel or utilize its own employment counsel if a charge or suit arises, it runs the risk of dealing with attorneys from other areas of the country, or having attorneys assigned to defend the claim by the insurance company because they have bid on the work, and been chosen because, in some cases, they submitted the lowest bid; or, sadly, employers end up with attorneys who simply are not all that experienced and clearly know nothing about the "culture" of the company.

In some cases, counsel selected to defend an employer by an insurance company under an EPLI policy may even have sued that same employer in the past or could sue it in the future.

Don't trust the defense of your company to strangers. Negotiate the right to choose your counsel when you purchase EPLI insurance.

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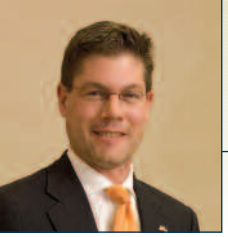


Dealing with Workplace Harassment *by Christopher D. Owens*

The United States Supreme Court first recognized workplace harassment as a violation of Title VII in the 1980s. While this recognition was originally limited to sexual harassment, the courts now generally recognize claims for racial harassment, religious harassment, national origin harassment, disability harassment and others as additional Title VII violations.

So what is harassment? In a legal sense it can take two forms: quid pro quo harassment and hostile environment harassment. Quid pro quo harassment exists whenever there is a direct cause and effect between the harassment and a change in a term or condition of employment - a supervisor's demand for sexual favors as a precondition for advancement, for instance. On the other hand, hostile environment harassment is any unwelcome speech, action or conduct of an offensive nature that is sufficiently severe and pervasive to adversely affect a term or condition of employment.

For employers, the first step in protecting against and preventing harassment claims is having an anti-harassment policy. There is no set "form" policy; however, every policy should contain the following elements:

- A definition of what is or may be considered harassing conduct;
- A statement that such conduct is inappropriate and will not be tolerated;
- An explanation of what steps the employee should take to register a complaint of harassment;
- A description of the steps the employer will take to investigate any complaint of harassment; and
- A statement that the employee who makes a complaint under the policy will not be subject to any form of retaliation for having made the complaint.

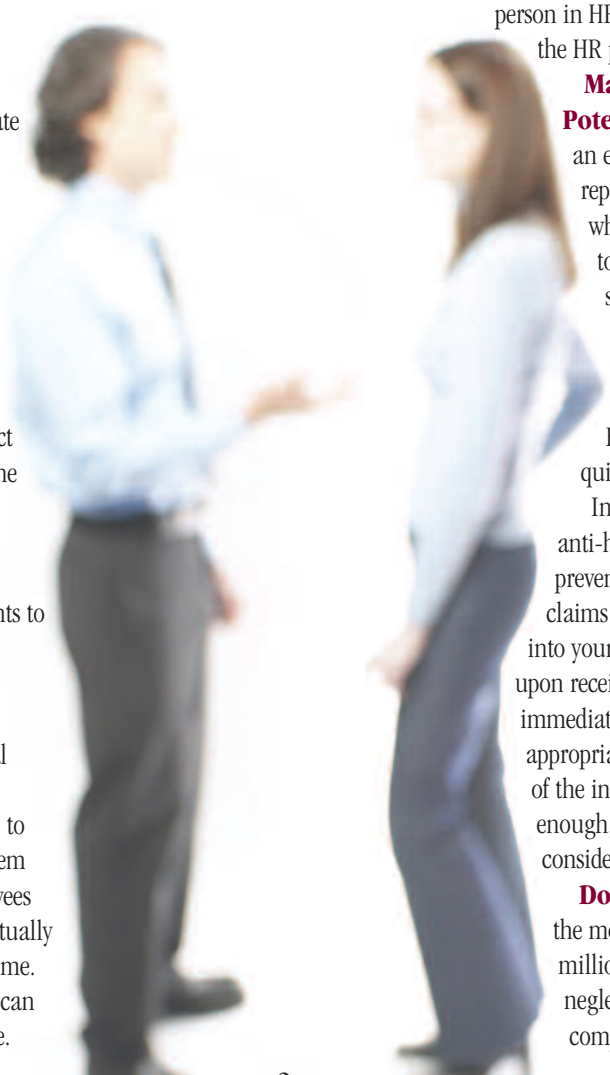
When incorporating these elements into an anti-harassment policy there are several thoughts to keep in mind.

In defining prohibited conduct, use plain English! Employers often make the mistake of providing a legal definition of sexual harassment in their personnel policies, such as "behavior that is sufficiently severe or pervasive to create a hostile work environment." The problem with that wording is that it might cause employees to skip reporting small incidents that may eventually lead to a full-blown hostile environment over time. You need to know about those incidents so you can put a stop to the harassment as soon as possible.

Solution: Define sexual harassment as "any unwelcome speech, action, or conduct of an offensive nature." Doing so is not only practical and readily understandable, but also promotes a good working environment and higher worker morale.

Make Reporting Mandatory. Sometimes an employee will have a good reason for not reporting harassing behavior. However, you must make clear the importance of reporting harassment as soon as it starts. It's much easier to end the conduct from the outset. **Solution:** When hiring new employees or implementing a new anti-harassment policy, make employees sign an agreement that they understand what constitutes harassment and will report any unwelcome and/or offensive behavior. In the agreement, clearly state that if an employee fails to report the conduct, then you'll presume that it wasn't unwelcome or offensive.

Don't Make Supervisors the Sole Recipients for Harassment Complaints. Through your experience in HR, you probably know how complicated dealing with harassment can be. Therefore, you can't assume that your supervisors are fully versed on the subject. **Solution:** Instead of making your supervisors the point of contact for harassment complaints, assign that task to a central person in HR. Also, designate an alternative in case the HR person is the harasser.



Make Sure Supervisors Report Potential Claims. Your company will be in an especially difficult situation if an employee reports harassing incidents to a supervisor who then fails to pass the information along to HR. **Solution:** Have your supervisors sign an acknowledgement that they understand their potential liability for harassment. Also, make sure they know to report any questionable situation to HR so you can deal with it early and quickly.

In addition to having an effective anti-harassment policy, the second step in preventing and protecting against harassment claims is to incorporate a proactive mentality into your workplace environment. In other words, upon receiving a harassment complaint, you need to immediately begin the investigation and take appropriate corrective measures at the conclusion of the investigation. While this sounds simple enough, once again, there are several considerations to keep in mind.

Don't Just Sit There! This tip is probably the most important point. Companies have paid millions of dollars in damages because HR neglected to follow up on harassment complaints. **Solution:** When an employee

continued on page 4

The Tennessee Uniform Arbitration Act: An Overview

by R. Lee McVey II

For most clients, the time and expense of any conflict are expenses that you would rather not incur. In addition to attorneys' fees, there are court costs and the time you or your company must take to deal with the situation. In order to speed up the process, disputing parties may engage in alternative dispute resolution (ADR).

The most popular forms of ADR are mediation and arbitration. This article will focus on the Uniform Arbitration Act and its enactment in the State of Tennessee. Before summarizing some of the more important parts of the Act, it should be noted that these are the default rules that apply to arbitration, but these can be modified by a contract or arbitration agreement.

Under the Act:

- Agreements to arbitrate, as well as provisions within contracts which call for arbitration, are binding on the parties and are irrevocable except for usual contract defenses (fraud, illegality, undue influence, etc.).
- The arbitration agreement or contract can specify the way in which the arbitrator(s) will be selected. However, if either party has a dispute as to the selection of an arbitrator the parties can apply for the court to appoint an arbitrator.
- Many of the procedures used in court can be used in the arbitration. For instance, subpoenas may be issued and depositions taken for unavailable witnesses.
- Witnesses are sworn and there can be repercussions for perjury.

A majority of the panel of arbitrators will deliver their decision, the award.

A party may apply to the court to either confirm or vacate the award. If the award is vacated the court will usually order a new arbitration. The following are grounds for vacating the award:

- Corruption or fraud in the procurement of the award;
- Evident partiality or corruption of an arbitrator;
- The arbitrator exceeds his or her powers;
- Refusal of the arbitrator to postpone the hearing for sufficient cause which prejudices the rights of a party; or
- If there is no arbitration agreement and a party objects to arbitration and the objection is not heard by a court.
- It should also be noted that the fact that a court could not grant the relief given in the award is NOT a ground to have an arbitration award vacated.

An order from the court confirming the award causes a judgment incorporating the arbitration award to be entered. This judgment can be enforced like any other judgment, which includes execution, garnishment and other collection procedures allowed by the law. A party may also apply to have the award modified.

There are several advantages and disadvantages of entering into arbitration.

Advantages:

- Ability of someone knowledgeable deciding intricate facts in each case. For instance, a CPA can arbitrate a case involving intricate financial issues.
- Confirmation of the award is a fairly simple process and can be enforced through the same recourse as if it were a judgment.
- Ability of award to be creative and go outside the bounds of a regular court.
- Quick resolution.

Disadvantages:

- Can be expensive – many arbitrators have costly hourly rates.
- Ability of award to be creative and go outside the bounds of a regular court.
- No room for compromise, the arbitrator will usually adopt one side or the other.

The above should be kept in mind not only when determining if arbitration is appropriate but also in drafting agreements to arbitrate and contract provisions calling for arbitration. For more information on arbitration, you can visit the website of the American Arbitration Association at www.adr.org.

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Dealing with Workplace Harassment *cont'd.*

complains about inappropriate behavior, immediately investigate the complaint and keep the complaining employee apprised of the progress of the investigation. Interview the complaining employee and get an account of the complained-of activity. Interview the accused. Get a list of potential witnesses for both the complainant and the accused and interview each regarding their account of the events and other possible witnesses. Don't sit idly by while the harassment festers into a problem you can't easily solve.

Document. This cannot be overstated. Have the complaining employee sign his or her account of the events. As you continue to investigate have witnesses, including the accused, sign their statements as well.

Discipline. Once the investigation is complete, take action. If the investigation is inconclusive, inform the complainant of the results and explain that the accused has been counseled regarding harassment and that further complaints will be investigated. As noted, counsel the accused in harassment and explain once again the company's zero tolerance policy.

In closing, it should be made clear that while the above considerations highlight global considerations every employer should adopt they are just the very basics in harassment prevention and protection techniques. Furthermore, every employer is unique and needs a tailored policy. In that regard, we welcome any questions you have in regards to your existing policies or to assist you in implementing an anti-harassment policy for the first time.

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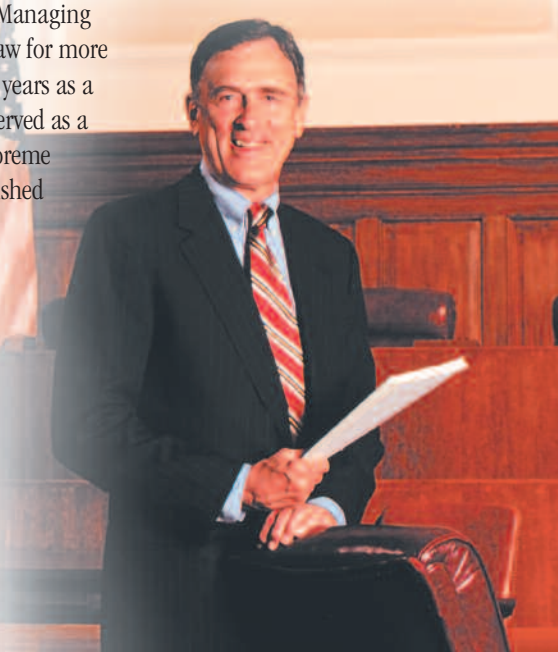
Morris Hadden elected Fellow of the American Bar Foundation

S. Morris Hadden, the senior partner of Hunter, Smith & Davis law firm, was recently elected by the Board of Directors to become a Fellow of the American Bar Foundation. According to the American Bar Foundation, "The Fellows of the American Bar Foundation" is the preeminent attorney group in the country. Membership in The Fellows is limited to one third of one percent (1/3 of 1%) of the lawyers in America (or about one in every 300 lawyers.)

According to information released by the American Bar Foundation, "Selection as a Fellow of the American Bar Foundation is recognition of a lawyer as one whose professional, public and private career has demonstrated outstanding dedication to the welfare of the community, the traditions of the profession and the maintenance and advancement of the objectives of the American Bar Association."

Hadden, a litigator and former Managing Partner of the firm, has practiced law for more than 30 years. Hadden served three years as a Special Agent for the FBI. He also served as a Special Justice to the Tennessee Supreme Court in 1996. During his distinguished legal career he has tried more than 200 jury trials. He is also a Fellow of the American College of Trial Lawyers. He is a graduate of the University of Tennessee College of Law where he was a member of the Dean's Circle and the U.T. Law Alumni Council.



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Save the Date...

Employment Law Seminar

"Your Employment Law Flight Plan: Planning and Preparing for Your Employment Law Questions"

Thursday, September 21, 2006
8:00 am - 1:00 pm (includes lunch)
Centre at Millennium Park
Johnson City, Tennessee

For more information or to register, please visit www.hsdlaw.com.