Third-Party Harassment:
What Nonprofit Employers Need to Know

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Just like any other employer, nonprofits have an affirmative duty to investigate and, when necessary, remediate discriminatory conduct if management knows, or has reason to know, that an employee is being subjected to illegal discrimination, including harassment and retaliation.

Employers are often aware of their obligation to prevent unlawful harassment between employees in the workplace. But did you know employers may also be responsible for the acts of nonemployees? This is especially true in the nonprofit setting where a combination of employee, client, donor, and volunteer relationships can — if an organization is not careful — present unique challenges when it comes to preventing harassment.

The Laws

Federal laws including Title VII of the Civil Rights Act, the Age Discrimination in Employment Act, and the Americans with Disabilities Act (collectively, "EEO" laws), make it illegal to base employment decisions on characteristics such as race, color, religion, sex (including pregnancy, transgender status and sexual orientation), national origin, age, disability or genetic information. The Equal Employment Opportunity (EEO) laws also prohibit harassment against an employee because of these characteristics and include anti-retaliation provisions. Most employers with at least 15 employees are covered by the EEO laws (except for age discrimination, which requires 20 employees). State or locality specific laws often contain more protective language for employees. For instance, the Pennsylvania Human Relations Act generally applies to employers with four or more employees.

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The EEO laws, unequivocally, require employers to provide employees with nondiscriminatory working conditions. While employers do not always have the ability to control the actions of a third party, working conditions are not affected only by those inside the organization itself. Therefore, employers must educate themselves and their workforce about third-party harassment.

Third-party harassment is defined as unwelcome conduct based on a protected characteristic committed by someone other than a fellow employee or supervisor at the organization. Typically, harassment becomes unlawful under two circumstances: quid pro quo harassment and hostile work environment. Quid pro quo harassment occurs where receipt of job-related benefits or opportunities is conditioned upon enduring the offensive conduct. A hostile work environment occurs where the conduct is severe or pervasive enough to create a work environment that a reasonable person would consider intimidating, hostile or abusive.

In the nonprofit setting, dynamics to be aware of include, but are not limited to:

- Employee-to-client or volunteer-to-client relationships;
- Employee-to-volunteer relationships; and
- Donor-to-employee or donor-to-volunteer relationships.

For example, a donor who makes sexual advances in exchange for securing a contribution, or a volunteer who flirts constantly with a staff member making suggestive comments and asking inappropriate personal questions, may have created a hostile work environment. Independent contractors and vendors from other companies who interact with the organization regularly may also affect working conditions (e.g., vendor who stocks the snack machine in the breakroom repeatedly makes racial jokes).

With respect to employer liability for third-party harassment, courts typically apply the same standard applicable for co-worker harassment. Employers are held liable where the employer knows or should have known of the conduct and fails to take immediate and appropriate corrective action. This theory of liability is grounded in the employer's negligence and ratification of the harassment through its failure to take appropriate and reasonable responsive action rather than in the harassing act itself.

Bottom Line

Quick and proper response to harassment allegations is essential to avoid liability no matter where the illegal behavior comes from, an employee or a third party. Nonprofit employers should address third-party harassment claims with employees, the board of directors, and volunteers as part of regular harassment training and provide specific examples such as the ones mentioned above. Nonprofit employers should also review their existing anti-harassment policy to ensure that it is broad and clearly explains the procedures for reporting third-party harassment. ■

For questions about harassment training or legal matters regarding nonprofit organizations, contact Attorney Lauren A. Holler 814/870-7605 or lholler@mijb.com.