

EEOC Identifies Restaurant Industry as “Single Largest” Source of Sexual Harassment Claims

The Equal Employment Opportunity Commission (“EEOC”) has targeted the restaurant industry as the “single largest” source of sexual harassment claims. Recent cases show a prevalence of inappropriate workplace conduct among younger, less experienced workers. A recent 2005 case suggests that when an employee complains that a co-worker physically touched her, simply warning the offending co-worker may be an insufficient response if other employees subsequently engage in similar conduct.

Before you dismiss this case as something unlikely to happen in your workplace, ask yourself:

1. Would any of your managers handle an oral complaint of touching themselves, rather than notify their District Manager or Human Resources? Would they be more apt to warn (rather than fire) the offending employees if they personally liked them, thought they were valuable employees or felt the complaining employee might have contributed to the conduct?
2. Does your policy require employees who believe the company did not adequately address their complaint to state the reasons (in writing) to Human Resources? Or, could you end up in a situation where your manager thought s/he adequately addressed the complaint, but the next incident is more severe and the complaining employee now contends that you never properly addressed her complaint in the first place?

In *Loughman v. Malnati Org. Inc., d/b/a Lou Malnati’s Pizzeria*, plaintiff began working as a cashier at the age of 17. From the outset, kitchen workers whistled at her and made inappropriate comments regarding sex. She complained but the comments continued. Five months later, a kitchen worker pushed her into a room and tried to kiss her. He blocked her path for several minutes when she tried to get away. Plaintiff complained to a manager, who warned the kitchen worker that he would be fired if he ever touched plaintiff again. He never did.

One year later, two other kitchen workers followed plaintiff into the walk-in cooler, then turned off the light and closed the door. One pinned plaintiff against

the wall, grabbed her chest and tried to put his hands down her pants. She screamed and he backed off. Plaintiff told a female co-worker, who reported the incident to a manager. Despite the apparent severity of the incident, the kitchen workers were not fired or even moved to a different shift. Instead, the manager warned them that they would be fired if they touched plaintiff again, which they never did, but they continued to make inappropriate comments to her. Another manager counseled plaintiff that the kitchen workers' national origin made them prone to the offending behavior, and that she should just "be a bitch" to them.

Nine months later, a co-worker slid his hand under plaintiff's shirt to wiggle his fingers on her stomach, giggled and ran off. Plaintiff reported the incident to a manager. A District Manager investigated, fired the kitchen worker who pinned plaintiff in the walk-in 9 months earlier, and made the third employee apologize to plaintiff before transferring him to another store.

Rulings: The district court initially dismissed plaintiff's harassment claim, finding that the restaurant had taken reasonable steps to discover and remedy the harassment. The Court of Appeals reversed and found that the harassment claim should go to trial because a reasonable jury could find that at some point, the restaurant "needed to stop merely issuing warnings and start taking disciplinary action against the offending employees." The mere fact that none of the individual employees touched plaintiff more than once did "not necessarily mean that [the restaurant's] response was adequate."

Net/Net: Because losing an employee is less of a hardship and less costly for employers than defending a sexual harassment claim, I would have recommended that each of the kitchen workers who touched plaintiff be fired. That would have been a more appropriate response, especially when two of the incidents could have resulted in assault and false imprisonment charges.

The restaurant should have disciplined the manager who made the racist remarks and instituted annual anti-harassment training. Anti-harassment training should educate employees on what conduct is prohibited by the employer's policy, how employees can avoid sending mixed signals to alleged harassers, the complaint procedure, and that employees must inform the company (in writing) of any dissatisfaction with how the company resolved their complaint. Much of the harassment litigation I see these days could have been prevented had the employer's policy had this last requirement. If the complaining employee fails to inform her employer that she believed its response was inadequate, she will be

hard-pressed to later claim that the employer ignored her complaint or that it failed to take reasonable steps to remedy the alleged harassment.