



Presented below is a hypothetical fact pattern based on a compilation of questions related to discipline and termination issues received by Associated Industries' In-house Counsel. The information below is not a substitution for competent legal advice, nor does it create an attorney-client relationship between Associated Industries' In-house Counsel and any readers or recipients of this information. Additionally, this material reflects the current state of the law at the time of development. Where specific legal issues arise, recipients or readers should seek private legal counsel.

THE DILEMMA

You are the client services manager of a local marketing firm. The organization employs 47 people. The management team consists of the CEO, CFO, Operations Manager, Artistic Director, and you. You supervise all of the sales staff.

Last week one of the firm's artists, Jim, was sitting with you in the lunchroom and suddenly told you that he had been working with the President of one of the firm's largest clients, Vandelay Industries, to develop a new logo.

Over the course of the last couple of months, Vandelay's President had begun to barrage him with a series of race-based comments and questions about Jim's immigrant status. Jim explained that he is really bothered by these comments but has said nothing to his supervisor, the Artistic Director, because he did not want to jeopardize the business relationship. Jim said he was just telling you so he could vent a bit about it.

Do you, as a member of the management team, need to do anything about this comment?

The information was not provided in writing. It was not provided in keeping with the chain of command in your company's complaint procedure. And you cannot control what someone from another company does anyway, can you?

THE ANSWER

The short answer is yes, you should do something about this comment.

1. A hostile work environment may be created where this kind of activity is targeted and severe enough to unreasonably interfere with an employee's ability to work. In such cases, the complained-of conduct must be unwelcome in the sense that the employee did not solicit or incite it, and in the further sense that the employee regarded the conduct as undesirable or offensive. The activity must be based on the individual's race, color, age, sex, creed, national origin, sexual orientation, veteran or disability status.

A hostile work environment claim is based on the cumulative effect of individual acts that are sufficiently pervasive so as to alter the conditions of employment and create an environment a reasonable person would find abusive.

Last, the activity must be tied back to the employment relationship. This may occur where a third party or vendor carries out the harassing conduct and the employer authorized, knew, or should have known of the harassment and failed to take reasonably prompt and adequate corrective action.

2. The employee has made clear to you as a management team member that issues relating to unlawful harassment and/or discrimination may have occurred; it is not necessary that the concern be raised in writing or any particular form. The law does not require that complaints regarding harassment or discrimination be in writing or that any formalized procedure be followed.

The important point is that a manager/supervisor of the organization is aware of the concern and therefore, the company is on notice. Supervisors and managers are viewed as agents of the employer and act on the employer's behalf. As such, the supervisor or manager becomes a conduit for information between the employer and its employees. The information obtained by a supervisor in the workplace is deemed known by the employer and the employer must take action at this time.

3. "Off the record" complaints really are not off the record and do require action. As discussed previously, knowledge obtained by you, as a manager, is imputed to the company as a whole. Thus, any supervisor who receives an "off the record" complaint must let the individual know the information will be reported as stated in the organization's policy and treated with discretion.

4. Now that employer is aware of possible inappropriate action, it must investigate the concerns. This is typically performed by a Human Resources Director or Manager, but may also be done by another appointed individual who can conduct a neutral and thorough investigation. Once the investigation is complete, if substantiated, the company must take action sufficient to end the behavior.

This can be particularly sticky where the alleged harasser is not only a customer, but a top ranking management member within that organization. While you cannot control the outcome or action that another business may make, your business can present the facts to the customer and if necessary, may have to end the business relationship.

Absent exceptional circumstances, it would not generally be advisable to transfer Jim to another account. Although it may eliminate his contact with the offending customer, it may appear to be retaliation for Jim's complaint. Moreover, if the matter is not addressed with Vandelay, the President's offensive behavior may simply be directed toward another employee of your company, giving the appearance that you and the employer have failed to take action on Jim's complaint.