

Legal Update

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SEXUAL HARASSMENT: BE SMART, NOT PARANOID

By Jon Vegosen

Suppose you receive the following inquiry from a male executive who we will call Mike: “Yesterday, I congratulated a female employee who reports to me on her excellent performance regarding a challenging project. While congratulating her, I tried to give her a high-five, but missed her hand and accidentally hit the top of her breast. I immediately apologized, but she just walked away. With the many harassment allegations in the business world coming out against corporate executives, am I going to be fired for having done that?”

Mike raises an interesting question. Had he engaged in the kind of predatory misconduct that some in the corporate and media worlds have perpetrated, there is no question that he would and should be fired. With respect to his congratulatory praise and accidental touching of his subordinate, his conduct, as a legal matter, should not constitute sexual harassment. From what Mike said, it was a one-time, isolated occurrence that was neither pervasive nor widespread. Moreover, according to Mike, the touching was not an unwelcome sexual advance but an unintentional accident while attempting to praise a subordinate on a job well done.

Having said the foregoing, both Mike and employers need to be mindful about workplace interactions. Like beauty, sexual harassment can be in the eye of the beholder. Mike’s subordinate might have been offended or felt uncomfortable by Mike accidentally touching her chest. Why do anything that might instill discomfort in an employee? Moreover, why risk being the subject of a sexual harassment investigation, even if ultimately vindicated? To be sure that employees feel safe, in the future, Mike should refrain from taking actions that could result in touching employees, other than, say, shaking their hand to greet or congratulate them.

With respect to employers, Mike’s question underscores how important it is that they do the following things, if they have not done so already:

- (1) adopt and distribute comprehensive zero-tolerance anti-harassment policies;
- (2) train managers about (a) what constitutes (and does not constitute) sexual and other harassment and how even innocent encounters can cause discomfort or be misinterpreted, (b) how to prevent and investigate harassment, and (c) proper documentation of reports and investigations of alleged harassment;
- (3) hold educational workshops emphasizing the importance of reporting harassment, should it occur, and that the employer will not retaliate against employees for reporting harassment;
- (4) promptly and thoroughly investigate allegations of harassment; and
- (5) take appropriate action against those who violate the employer’s anti-harassment policy.

Mike is not paranoid, but he has raised a prudent question. Especially given the stories in the news today, executives and employers are wise to take harassment seriously and take proactive, preventive measures to ensure that their working environments are safe and professional for all employees.

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