

## U.S. SUPREME COURT RULES AN ISOLATED INCIDENT MAY NOT BE UNLAWFUL SEXUAL HARASSMENT

Courts have long grappled with sexual harassment claims and their decisions have been inconsistent. One issue that has frequently troubled courts and Employers is when does teasing, sexual innuendoes, and isolated incidents become sexual harassment. The Supreme Court in *Clark County School District V. Breeden* (April 23, 2001) has provided guidance.

The case involved a female school district employee who was one of several staff members routinely involved in screening job applicants. The screening process included reviewing applicants' psychological evaluation reports. One such report disclosed that the applicant had once commented to a co-worker, "I hear making love to you is like making love to the Grand Canyon." The female employee's male supervisor read the comment aloud, looked at the employee, and stated, "I don't know what that means." Another

male employee at the meeting then said, "Well, I'll tell you later," and both men chuckled. The female employee later complained about the comment to the offending male, his supervisor, and to another supervisor, protesting that the male's conduct at the meeting constituted unlawful sexual harassment.

The Supreme Court stated "Just three Terms ago, we reiterated, what was plain from our previous decisions, that sexual harassment is actionable under Title VII only if it is "so 'severe or pervasive' as to 'alter the conditions of [the victim's] employment and create an abusive working environment.'" "Workplace conduct is not measured in isolation; instead, "whether an environment is sufficiently hostile or abusive" must be judged "by 'looking at all the circumstances,' including the 'frequency of the discriminatory conduct; its severity; whether it is physically threatening or humili-

ating, or a mere offensive utterance; and whether it unreasonably interferes with an employee's work performance.'" Hence, "[a] recurring point in [our] opinions is that simple teasing, offhand comments, and isolated incidents (unless extremely serious) will not amount to discriminatory changes in the 'terms and conditions of employment.'"

No reasonable person could have believed that the single incident recounted above violated Title VII's standard. The ordinary terms and conditions of respondent's job required her to review the sexually explicit statement in the course of screening job applicants. Her supervisor's comment, made at a meeting to review the application, that he did not know what the statement meant; her co-worker's responding comment; and the chuckling of both are at worst an "isolated incident[t]" that cannot remotely be considered "extremely serious," as our cases require.

## Non-English Speaking Employees Present Special Problems For Employers

The arrival of the "global economy" has brought numerous challenges to Employers. The number of non-English speaking workers in this country has increased substantially. Simultaneously, Congress and

the Courts have tightened our immigration laws, expanded the coverage of the Civil Rights Act and other employment laws to cover both legal and illegal aliens, and expanded the Employers' legal responsibility to

not only provide adequate policies and procedures and training, but to do so in a manner such that non-English speaking employees are also adequately informed and trained.

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# Exit Interviews

When an employee is heading out the door due to resignation or termination, a company may be tempted to forget about that employee and focus only on the ones staying. However, valuable information can be gained from conducting exit interviews with departing employees. This article will explain the value of such interviews and provide information on how an employer should conduct them.

The usefulness of an exit interview is that it helps the employer gather critical feedback on a variety of issues such as salaries, morale and management from an employee more likely to be candid than the workers who are staying. The interview can also help determine the cause of turnover problems, it may possibly avert serious lawsuits, and necessary administrative actions can be taken care of, all during a meeting lasting approximately half an hour. Open-ended questions about competitiveness of pay and benefits, training received, supervisor relationships, and problems in the workplace should draw out answers that will help a company improve operations. The main goal of exit interviews is to gain information that will help the company remedy or avert problems.

From a legal viewpoint, there are several areas in which valuable information can be acquired in an exit interview. The interview may be the first time a departing employee raises allegations of sexual harassment as a reason for leaving employment. Such an allegation must be taken seriously and promptly investigated. If sexual harassment is the reason an employee is quitting, it may be appropriate to request the worker to delay the resignation until the matter is investigated and corrective action taken, if warranted.

The exit interview also presents the opportunity to establish a record as to why an employee is leaving or if there are issues such as workers compensation involved. If an employee states in the interview that he/she is leaving a job for better pay, then it will be more difficult for the worker to later contend that sexual harassment or discrimination was the motivation for exiting. Likewise, if an employee is specifically asked in the interview about any safety or injury problems and does not mention them, it will be more difficult for that employee to later bring such a cause of action.

The exit interview is also a good time to go over departure paperwork, such as health

insurance continuation, pension rollover, and final paycheck with the employee, although subjects such as COBRA will likely have been brought up earlier. The interview is also a good time to remind the employee of any non-compete agreements and to collect company property such as keys and uniforms.



## Who to Interview

Exit interviews should be conducted with all terminating employees, regardless of their reasons for leaving. In the event of a major layoff or a lot of seasonal employees, this may not be practical but otherwise the goal should be to interview all departing employees. A statement in the employee handbook explaining the company policy on exit interviews will notify employees as to what to expect when they depart. Involuntary terminations may be a difficult interview to conduct but they provide the employee a chance to vent frustration and a feeling that someone in the company is listening to them. Simply providing the disgruntled employee a chance to talk things out with a concerned professional interviewer can blunt negative feelings and thwart impulsive desires to file a lawsuit. Regardless of the reasons for leaving, a well-conducted exit interview is an opportunity to create good will between the employee and the employer and have the employee leave with a good feeling about the company.

## Who Should Conduct the Interview

The immediate manager or supervisor is not the most appropriate person to conduct the interview, since the employee is less likely to

be candid about his or her thoughts and concerns or may go overboard with criticisms. Someone who is seen as neutral, objective, and able to maintain confidentiality should conduct the exit interview. A member of the company's HR staff with proper training and preparation and experience in interviewing is

a good choice to conduct exit interviews. Providing more integrity and experience to the process is the use of an outside consulting firm to conduct the interviews. For example, HR-OneSource consultants can advise employers regarding permissible exit interview formats, as well as provide other helpful guidance on the subject. Skillful interviewers will be alert to ask probing follow-up questions by observing the employee's body language, primarily facial expressions, that hint at unspoken concerns or opinions.

## When and Where

The best time for a meaningful, productive exit interview is a day or two before the final day of employment. An employee's last day at the workplace will likely be taken up by requisite paperwork, collecting and packing up personal belongings, wrapping up or handing off undone tasks, and the usual farewells. The interview should be conducted in an office that provides privacy and no chance of others overhearing the exchange. A face-to-face interview is best but for companies with many branch offices, a telephone interview or submission of written questions, with a stamped envelope provided, may have to suffice. To gain further insight from departing employees, many experts recommend a second, fol-

# Exit Interviews

low-up interview (either by phone or by questionnaire) anywhere from four to six months after termination.

## What to Ask

Getting workers to talk honestly about their work environment is the biggest challenge of the exit interview. As mentioned previously, a skilled, insightful counselor who can elicit the desired information is vital. Also important is asking the right questions. Open-ended questions are the best way to start, with follow up questions to gain specific examples. Questions should always be asked in a positive and non-threatening tone. Employees should be reassured that their answers will be kept confidential.

To keep the interview flowing smoothly and have a logical sequence, questions should be scripted in advance, with follow-up questions anticipated. Broad issues to cover include: reason for leaving, job satisfaction, working conditions, relationships with supervisors, morale, career development, and satisfaction with compensation.

Some suggested specific questions are:

- How satisfied were you with pay, benefits, and working conditions?
- What comments have you about safety and health issues?
- What kinds of problems, if any, did you experience with supervisors and co-workers?
- How well were you trained; how could it be improved?
- Did you have the proper equipment and materials?
- What kinds of opportunities for advancement were presented to you?
- How can we improve support for individual growth and career progress?
- What about workload? Did you feel overworked, or were you insufficiently challenged?
- What can you tell me about your new position; what attracted you to it (if applicable)?
- What are your principal reasons for leaving the organization?
- What did you like most about this job and organization; what did you like least?
- Did you receive adequate recognition for your job performance?

- Any suggestions you would make for improving this company?

## Utilizing the Information

A successful exit interview will provide a lot of useful information to the company but the information alone is worthless if it is not properly analyzed and utilized. The results of exit interviews should be reviewed for patterns of turnover and negative factors, as well as positive aspects that can be built upon. Summarized data should be provided to appropriate supervisors and management on a regular basis. The report can highlight problem areas, such as noncompetitive pay and benefit packages, patterns of poor supervision, or lack of adequate training to insure acceptable performance and safe work prac-

tices. The evaluation should include concrete recommendations for improvements. To be balanced, the report should also reflect areas that generate positive comments about the company.

## Summing Up

Information gained from well-structured exit interviews help a company gauge the effectiveness of human resource policies and management practices. It can shed light on heretofore-unrevealed problems and provide insight into the cause of turnover. Employers who are not presently conducting exit interviews may wish to add this tool. HR-OneSource would be happy to answer any questions you have in this area.

## Non-English Speaking Employees Present Special Problems For Employers

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The implications and potential liability of these changes are significant for Employers. For example:

- In harassment cases, courts not only consider whether an Employer has an anti-harassment policy, but also whether the policy has been effectively communicated to all employees and supervisors. This includes developing policies and providing training in the appropriate language.
- As the workforce becomes increasingly diverse, multi-language training emerges as a critical safety issue. OSHA deputy administrator R. Davis Layne reported that there has been a 40% increase in Hispanic fatalities in the construction industry.
- An arbitrator refused to uphold an Employer's discipline of an employee where the employee failed to understand the supervisor's directive due to the employee's non proficiency in the English language.
- Two medical service providers will pay \$133,000 to six plaintiffs to resolve retaliation and discrimination charges arising from an alleged unwritten English-only rule, under a settlement reached with the EEOC.

- The University of the Incarnate Word in San Antonio, Texas, agreed to a \$2.4 million settlement to resolve charges that it subjected 18 former housekeepers to verbal and physical abuse for speaking Spanish on the job.
- In a case involving written language, a federal district court in Texas ruled that two Spanish-speaking maintenance employees who brought personal injury claims were not bound by the terms of an arbitration agreement written in English. The employees signed the agreement under pressure from their supervisors. The agreement provided that all disputes-whether with the company, its customers, or its clients-would be resolved by binding arbitration. The district court termed the agreements "procedurally unconscionable" and held that the employees were not bound because they could not read English at the time the agreements were signed and no translation was provided.

*HR-OneSource can assist you in dealing with these and other problem areas. Lou Herrera is on staff at HR-OneSource. Lou has practiced law for 20 years and specialized in employment and immigration law. Lou is fluent in Spanish and is available to assist Employers dealing with Hispanic employees.*

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## SHORT FACTS

- *CPI* - The Department of Labor reported that for the 12-month period ending June, the CPI-U increased 3.2%
- *Unemployment* - The national unemployment rate for June increased slightly pushing the national unemployment rate up from 4.4% to 4.5%. The nation's jobless rate was 4% for the same month one year ago. Iowa's unemployment rate for June remained at 2.8%, the same as in May. The Iowa rate, one year ago, was 2.7%.
- *Domestic partner benefits* - The percentage of respondents offering domestic partner benefits has grown in recent years. In 1997, 6 percent said they offered domestic partner benefits. In 2000, 16% of the respondents offered domestic partner benefits.
- *Percentage of two income families increase* - The proportion of two-income families in the United States inched higher during 2000, rising 0.2 percentage points from 1999 figures to 53.2 percent of married-couple households.

## TELECOMMUTING

Many workers remain reluctant to work from home because of the lack of camaraderie with co-workers that telecommuters sometimes feel.

A survey done in November 2000 by CareerEngine Inc., a network of career Web sites, found that while half of 648 employers allowed telecommuting, 62 percent of those companies wanted to reduce the practice and 21 percent wanted to phase it out completely. "They felt that it hurt teamwork and loyalty, that the people were difficult to supervise, and that it created resentment among co-workers who were not allowed to telecommute."

## MEN ARE BECOMING TRAILING SPOUSES

With the number of women assuming the role of primary wage earner on the rise, more men are finding themselves as the trailing spouse in a career-related relocation. As a result, many employed men are in need of job-search assistance. Data from the Census Bureau confirm that more women than ever are classified as heads of household. As more women take positions of leadership within companies, they are more likely to be targeted for transfers.

In today's economy, relocation of executives and their families has become a fact of corporate life. While this may be an opportunity for growth and advancement for the employee, it often creates significant challenges for the spouse or partner.

For "dual career" couples, relocation can be a contentious issue. Employees may be reluctant or unwilling to move abroad if the spouse/partner must suspend his or her career. Even when the offer of an international assignment has been accepted, a spouse's inability to adapt to a different lifestyle, culture and environment can cause considerable stress which may affect the employee's effectiveness on the job or result in premature repatriation.