SEXUAL HARASSMENT AND GENDER DISCRIMINATION

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At a time when public safety agencies are grappling with a number of highly publicized issues with substantial legal liability and community relations implications, the issue of sexual harassment and gender discrimination should not be lost in the shuffle. A quick glance at local headlines indicates that this is an area of great concern for public safety agencies looking to minimize the costs—financial and otherwise—that often result from these claims.

- In June of 2015, a police officer in Martinsburg, WV received a $270,000 settlement after filing a lawsuit claiming hostile work environment sexual harassment.
- In December of 2014, a police sergeant in Lake Stevens, WA received a $325,000 settlement after filing a lawsuit claiming sexual harassment and retaliation.
- In February of 2015, a police officer in Virginia Beach, VA received a $350,000 settlement after filing a lawsuit claiming sexual harassment and gender discrimination.
- In May of 2014, two police officers in Neptune, NJ received a settlement of $660,000 and were granted promotions after filing a lawsuit claiming sexual harassment and gender discrimination.

These figures do not include the costs incurred by agencies and municipalities in defending the lawsuits prior to settlement. Nor do they account for the hours of productive work lost to the handling of the lawsuits. And there is no way to determine with certainty the negative financial effect these settlements have on agencies with respect to hiring new officers, acquiring new equipment and other expenditures necessary to carrying out the mission of serving and protecting the communities they serve.

These figures also fail to indicate the cost of these suits in terms of community trust. The public perception that those trusted to serve and protect are engaging in harassing behavior when they are supposed to be serving the community can be very damaging. And this perception is made worse by concerns that those who engage in harassing fellow officers are likely to engage in similar misconduct in citizen interactions.

This very small sampling of recent cases throughout the country is indicative of a widespread challenge facing public safety agencies. Are departments willing to invest in training their members—and particularly their supervisors—in this area before they are caught up in a lawsuit? Or are they content to wait until the lawsuits come, engage in legal battles, write checks and then engage in substantive training?
The Agency’s Responsibility to Investigate and Take Corrective Action

The most common form of sexual harassment liability is hostile work environment claims, as opposed to quid pro quo harassment claims (typically alleging that an employee was forced to choose between submitting to a supervisor’s sexual advances or losing a tangible job benefit). The legal mandates in dealing with hostile work environment sexual harassment are fairly straightforward: create and effectively communicate a harassment policy with clear avenues for reporting harassment and then follow that policy.

An integral part of the sexual harassment policy should be a good-faith inquiry into the particular allegation. In fact, it is not the alleged harassment itself that triggers agency liability in the hostile work environment context, but the agency’s failure to respond appropriately when notified of the alleged harassment.

If an allegation is substantiated, the agency is required to take corrective action—commonly defined as action reasonably likely to prevent the harassing behavior from recurring. The goal in taking corrective action is prevention of future harassment rather than punishment—even though termination seems the most certain means of preventing future harassment. Agency leaders should be clear on this distinction. An officer can be demoted or suspended without pay in light of a substantiated allegation of harassment, but if that officer still has consistent contact with the victim, the agency has likely failed in its obligation to reasonably prevent future harassment.

The Danger of Retaliatory Liability

As costly as it can be when a court finds that an agency failed in its obligations to investigate and remedy sexual harassment, the finding that an individual was somehow retaliated against for bringing forward a harassment complaint can be just as costly in court. Laws that prohibit sexual harassment tend to also prohibit retaliating against an individual for opposing what they believe to be harassment. In other words, an employee with a history of positive performance evaluations and a lack of documented performance or conduct issues who alleges harassment and is subsequently demoted, suspended or subjected to some other adverse action is likely to have a strong case for retaliation.

There are two key points regarding retaliation liability that are often misunderstood. First, even if a court ultimately dismisses the underlying harassment claim, the complainant can still successfully sue the agency for retaliation. Second, many personnel actions ultimately found to be retaliatory are not financial—meaning that the complainant was not demoted or suspended without pay or denied a promotion. Rather, many retaliation cases are built on the claim that being transferred from a prestigious unit or moved to a smaller windowless office was the result of an unlawful retaliatory motivation.

Sexually Harassing Behavior as Evidence of Gender Discrimination

Even if particular statements or actions are not of such severity or pervasiveness as to give rise to a valid hostile work environment claim, instances of harassing behavior can often prove central to the success of a gender discrimination claim. If an employee is passed over for a promotion, for instance, and claims that the promotional decision was due to gender discrimination, instances of harassing behavior can often prove central to the success of that discrimination claim.

In addition to the ethical imperative of ensuring that agency members are able to work in a professional and respectful environment, the common link between inappropriately harassing behavior and gender discrimination claims should offer a further incentive for agency leaders to make certain that harassment policies are developed, communicated and followed.
When looking to minimize sexual harassment liability and the gender discrimination liability that often accompanies it, agencies should be sure to:

1. Create and effectively communicate a harassment policy with clear avenues for employees to report alleged harassment.
2. When a complainant comes forward, investigate the complaint in good faith and, if substantiated, take reasonable measures to prevent future harassment.
3. When a complainant comes forward, be aware of the risks associated with engaging in actions that might appear retaliatory.
4. Be aware that harassing statements and/or actions that may not rise to the level of legally actionable harassment may nonetheless be damaging evidence of gender-based discrimination.

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**Note:** Court holdings can vary significantly between jurisdictions. As such, it is advisable to seek the advice of a local prosecutor or legal adviser regarding questions on specific cases. This article is not intended to constitute legal advice on a specific case.