Manager/Supervisor Risk Management
#75– 7/26/12
A twice weekly e-mail training for YCPARMIA members

TOPIC: EMPLOYMENT LIABILITY – SEXUAL HARASSMENT

AB 1825 mandates that supervisors receive two hours of sexual harassment training every other year. We anticipate that this repeated training allows us to treat this topic with a brief overview.

Both the state FEHA and federal Title VII hake it an unlawful employment practice to harass someone on the basis of sex. Sexual harassment (unwelcome sexual conduct) falls into two main types:

- Quid Pro Quo (or something for something) and
- Hostile Work Environment (unreasonable interference with the work place).

Quid pro quo claims would involve allegations that an individual used their position to coerce unwelcome sexual favors; "have sex with me and you will be promoted" or in the alternative "not fired." This sort of thing generally would take place behind closed doors, and while it can be overt and direct, it can also often be more subtle or implicit like "work with me and there is no telling how far you can go," or "let's grab dinner and talk about your career." Fortunately we have never had a quid pro quo claim.

The sexual harassment claims that we have seen involve allegations of a hostile work environment. We have already covered this type of claim in previous topics, and here are only isolating it to one of the protected classes, sex. The requirements are that the worker was:

- subjected to conduct that was based on sex (as opposed to one of the other protected classes),
- that the conduct was unwelcome, and
- sufficiently severe or pervasive to:
    - alter the conditions of the claimant's employment and
    - create an abusive working environment.

The standard to be met is both objective and subjective; would the reasonable person and this particular employee find the conduct abusive? Severe and pervasive conduct is the key. Looking at the totality of circumstances, including the context, was the conduct so frequent and/or severe that it impacted the employee's ability to work. The more severe the conduct, the less pervasive that it needs to be to support a claim; if sufficiently severe a single act might suffice.

There is one important issue that supervisors must understand in sexual harassment claims. The FEHA (state) makes the employer strictly liable for the acts of their supervisors. This is true even if the employer had no knowledge of the supervisor's conduct, or had taken steps to remedy the situation. But, the supervisor's inappropriate conduct could be considered outside the course and scope of their employment (sexual harassment is not part of their job duties), and therefore the employer might not have a duty to defend or indemnify the supervisor. The employer is still liable as the employing entity, but the supervisor could find their personal assets at risk for their own conduct.

Next topic: Employment Liability – Disability Discrimination