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In the Spotlight: Same-Sex Harassment, *By Ed Piantek, Senior Underwriter*

Prior to 1998, most people thought of sexual harassment as "opposite-sex" harassment—for example, a male supervisor acting in a sexually inappropriate way towards a female subordinate. However, in its March 4, 1998, ruling on *Oncale v. Sundowner Offshore Services*, the Supreme Court broadened the scope of sexual harassment to include same-sex harassment.

In the *Oncale* case, an oil rig worker alleged that he was sexually assaulted, battered, and repeatedly threatened with rape by male supervisors and a male co-worker while working. The decision overturned the federal appeals court, which had dismissed the lawsuit on the basis that Title VII of the Civil Rights Act of 1964 prohibited only "opposite-sex" harassment. The Supreme Court, however, determined that since it was possible for members of the same racial group to discriminate against one another, there was no justification for excluding same-sex harassment from Title VII. *Oncale v. Sundowner Offshore Services* represented the first test of Title VII where the harasser and the person being harassed were the same sex. In an effort to head off a multitude of potential lawsuits in this area, the Supreme Court cautioned that Title VII only forbids sexually harassing behavior so offensive that it alters the conditions of the victim's employment.

Sexual harassment can take two forms: *quid pro quo* sexual harassment, and sexual harassment that creates an intimidating or hostile work environment. *Quid pro quo* ("this for that") sexual harassment occurs when a supervisor or someone with authority requests sexual favors from a subordinate as a condition of employment. While it is entirely possible that a male supervisor could request sexual favors from a male subordinate—constituting *quid pro quo* sexual harassment—the recent Supreme Court case focuses on hostile work environment sexual harassment.

Not only did the Supreme Court ruling make same-sex harassment illegal under Title VII, it also required companies to recognize that roughhousing or bantering among members of the same sex could cross the threshold into the realm of a hostile work environment. Employers must pay close attention to any disputes that arise between any two employees, regardless of their sex. They must also take a much more aggressive, hands-on approach to monitoring the workplace and adjudicating workplace disputes to prevent them from unnecessarily erupting into lawsuits.

Review the Company's Harassment Policy As a result of two June 1998 Supreme Court rulings, companies are now responsible for the employment-related actions of their supervisors. Companies' broadening exposure to employment practices claims is expected to result in a further increase in employment practices liability lawsuits. Employers should reduce their liability any way they can. The most effective way employers can reduce their liability associated with sexual harassment is to be sure that they exercise reasonable care in trying to prevent harassment from taking place, and when it does happen by taking prompt corrective action. For an employer, a key to successfully asserting an "affirmative" defense is having an anti-harassment policy and a complaint procedure in place for all employees.

In order to help reduce their liability in this area, employers should take the time to review their sexual harassment policy. A good policy should include: A firm message to employees that the company will not tolerate any form of harassment (sexual or otherwise) in the workplace and that all incidents will be taken seriously.

A clear definition of what constitutes harassment. Harassment can take any of three forms: verbal, physical, or visual. Workers seldom realize that politically incorrect jokes or cartoons may be offensive to others in the workplace. Alternative reporting provisions. There should be several people in various areas within the company who can handle allegations of harassment. It is also a

good practice to have both males and females on the list of people to contact. A clear statement that employees should come forward with complaints without fear of retaliation, which is the single biggest reason why acts of harassment go unreported. In addition, employees should be assured that any investigation will be kept as confidential as possible, but since others may have to be questioned concerning the matter, complete confidentiality cannot be guaranteed.

In addition to a well-written sexual harassment policy, employers should provide sexual harassment training for supervisors and managers to ensure that they know what constitutes sexual harassment in the workplace, how to recognize it, and how to handle situations when they arise. Many states require that any person with supervisory duties must take at least two hours of sexual harassment training within six months of appointment to that position. Having a solid harassment policy and procedures is only the first step to decreasing the overall risk associated with harassment in the workplace. Employers must also ensure that all employees are familiar with and understand the policy, and that all supervisors are trained to recognize (and avoid) all types of harassment—including same-sex harassment.

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