Third-Party Harassment: Is Your Nonprofit at Risk?

A Risk Management Webinar

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What is Third-Party Harassment?

Third Party Harassment is the term used to describe harassment that occurs when:

- An employee of your nonprofit is harassed by a non-employee (e.g. a vendor, a client, a board member or an independent contractor or business partner to the nonprofit)
- An employee of your nonprofit harasses a non-employee with whom your nonprofit has a business relationship (e.g., an independent contractor, a vendor)
- An employee believes that a hostile environment has been created due to a sexual relationship involving two other employees at the nonprofit.

Definitions of “third-party harassment” tend to focus on one of the scenarios described above. For example:

Third-Party Harassment is defined by the Society for Human Resource Management as the

“Harassment of an employee by someone other than another employee, such as a client, customer, vendor or service provider.”

Some, but not all harassment is sexual in nature. The Web site www.workforce.com defines third-party sexual harassment as follows:

“Unwelcome sexual behavior that is directed toward one person, but negatively affects another individual’s work environment.”

According to the U.S. Equal Employment Opportunity Commission, third-party sexual harassment describes sexual harassment of employees who are not themselves the target of the harassment. Third-party sexual harassment claims may be based on either quid pro quo harassment or the existence of a hostile environment. Men and women may bring such claims. Quid pro quo third-party sexual harassment occurs when employees who are not themselves harassed lose potential job benefits to other less qualified employees who submit to harassment. Hostile environment third-party sexual harassment occurs when employees who are not themselves harassed must work in an atmosphere where such harassment is pervasive. If preferential treatment is given to employees who grant sexual favors, the motivation and work performance of other employees may be negatively affected.
Q: You might ask, “How can a nonprofit be liable for third-party harassment when the nonprofit can’t control the person who is doing the harassing?” The answer is that the EEOC and courts have found that the employer, in this case the nonprofit, is in the best possible position to STOP the harassing conduct:

The federal Equal Employment Opportunity Commission’s guidelines hold that “an employer may be responsible for the acts of non-employees with respect to harassment of employees in the workplace, where the employer, (or its agents, or supervisory employees) know or should have known of the conduct unless the management takes immediate and appropriate corrective action.”

In reviewing these cases the Commission will consider the extent of the employer's control and any other legal responsibility which the employer may have with respect to the conduct of such non-employees. The EEOC’s regulations articulate the position that, once the employer knows or should known of the harassment being perpetrated by others, the employer is under an obligation to take reasonable steps to cure that harassment, giving consideration to the extent of the employer's ability to control the conduct of the third-party perpetrator.

What is the appropriate “cure” when the person who is the alleged harasser may not be an employee of the nonprofit? First, no matter who the parties are, an effort should immediately be made to separate the alleged victim from the alleged harasser in order to reduce the risk of a continuing hostile environment. Document these steps, and all steps taken both to investigate and correct the situation. Some examples of corrective action follow:

Investigate:

- The purpose of the investigation is to test the credibility of the complaining party. This is only accomplished by interviewing the alleged victim, and then separately interviewing the alleged harasser, as well as any other individuals who might have knowledge about the situation(s) complained of, or the conduct of the alleged harasser.
- Don’t promise complete confidentiality—it may not be possible to keep all allegations completely confidential. During any investigation it is possible that someone’s identity will have to be disclosed. You can tell employees that you will do everything possible to maintain confidentiality, and to limit the people who know the details of the allegation(s). Ask those involved with the investigation similarly to be sensitive to the need not to disclose allegations that may later turn out to be false.
- Document the steps taken to investigate the allegations.

Determine Appropriate Corrective Action, which differs depending on who the alleged harasser is:

- **Vendors**: File a complaint with the vendor. Use your leverage as a consumer. Tell the vendor that another person must be assigned to service your nonprofit immediately while

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1. 29 C.F.R. § 1604.11(e) (2004).

2. Numerous federal courts have held that an employer may be liable for sexual harassment perpetrated by persons who are not employees or agents of the employer. See *Watson v. Blue Circle, Inc.*, 324 F.3d 1252, 1258 n.2 (11th Cir. 2003); *Little v. Windermere Relocation, Inc.*, 301 F.3d 958, 968 (9th Cir. 2002); *Turnbull v. Topeka State Hosp.*, 255 F.3d 1238, 1244 (10th Cir. 2001); *Lockard v. Pizza Hut, Inc.*, 162 F.3d 1062, 1073-1074 (10th Cir. 1998); *Rodriguez-Hernandez v. Miranda-Velez*, 132 F.3d 848, 854 (1st Cir. 1998); *Crist v. Focus Homes, Inc.*, 122 F.3d 1107, 1111-1112 (8th Cir. 1997); *Folkerson v. Circus Circus Enters., Inc.*, 107 F.3d 754, 756 (9th Cir. 1997).
an investigation is underway. Find out what procedures the vendor has for filing complaints about the vendor’s employees and use them.

- **Board Members:** Contact the Chair of the Board and enlist the Chair’s assistance in determining next steps. The board member who is the alleged harasser should not have any contact with the alleged victim of the harassment.

- **Clients:** Reassign the alleged victim so that s/he does not have continuing contact with the client who is the alleged harasser. Does the nonprofit have guidelines for client conduct? Can the client be terminated if his/her conduct warrants it?

  - In some cases following the investigation it will be obvious that a policy violation has occurred. In those cases, termination of any relationship with the nonprofit may be the most appropriate, albeit the most severe, step to take. If the harasser is a board member, ask for his/her resignation; if it is a vendor, terminate the business relationship and require a different representative to be on-site at the nonprofit in the meanwhile…Less severe options include freezing the salary of an employee, requiring the offending party to attend sensitivity training, or at the very least, ensuring that the alleged harasser does not have contact with the alleged victim(s) in a work-related capacity in the future.

  - In other cases, the investigation may reveal a situation where someone acted unprofessionally, but it is not clear whether the conduct justifies the most severe discipline. In such cases the offending party must at least be reprimanded and made aware of the impact of his/her actions on the victim. In many cases an apology is called for. Sometimes arranging for a counseling session with a mediator is appropriate to ensure that the parties do not continue to have conflicts in the future.

**Remember** that third-party harassment could also arise when discriminatory attitudes and conduct exists that are based on age, race, color, religion, disability, national origin, military status or any other protected category.

**Some Examples of Troublesome Third Party Harassment are described below:**

1. **The Unwelcome Vendor:** The kitchen staff of a child care center receives food deliveries each day. One of the vendors’ employees, who typically carries boxes of frozen food from his truck and places them on the shelves of a walk-in freezer, frequently flirts with the assistant cook. Sometimes he lingers in the kitchen for up to ten minutes after his delivery is completed. The Center Director is concerned about the loss of productive work time when he visits. However, before the Director has a chance to speak with her staff about this, the assistant cook enters the Director’s office, distraught, exclaiming that she needs to leave work early because yesterday the delivery person called her into the walk-in freezer, shut the door and forced her to kiss him.

   ➢ **What should the Director do next?**

   ➢ **What can the child care center do to limit its risks in this situation?**

**Jennifer’s Pointers:**

- **The Director of the Child Care Center MUST investigate the assistant cook’s allegations.** Even if the Director doesn’t believe what she hears, she must take all claims seriously and investigate fully. The Director does not have to accommodate the assistant cook’s request to take the rest of the day off, however, the Director should determine whether the employee is in a state of mind to work productively, or
whether there would be a risk of harm to herself or others should the assistant cook be required to remain at work through the end of her regular work day.

- In cases of alleged harassment, the nonprofit employer has an obligation to protect the alleged victim from continuing harassment (and retaliation) by the alleged harasser. The Director should immediately call the food service vendor and inform the vendor of the allegation and request a different delivery person until the investigation is resolved. The Director should find out what procedures the vendor has for filing complaints about the vendor’s employees. If the vendor does not cooperate, the Director should determine, with her staff, other staffing arrangements so that the assistant cook is NOT present in the kitchen when deliveries are made or not otherwise vulnerable to harassment by the delivery person.

- The investigation should include asking other kitchen staff what they have witnessed and also asking the assistant cook to provide a written account of what happened.

- After completing the investigation, and documenting the findings, the Director will need to determine the appropriate next step. Either the vendor is chastised and the Center demands that another employee of the vendor be assigned to the Center, or the Director determines that the assistant cook’s story was not credible. In the latter case, the Director may determine that the assistant cook should be counseled about her work performance, or even placed on probation or otherwise disciplined in an appropriate way.

- To limit the risk of outside parties harassing staff (or clients) during work time, every nonprofit should consider the following procedures:
  - Having a written anti-harassment policy that all employees are aware of – with a clear procedure for reporting alleged harassment, and a definition of harassment as including the existence of a ‘hostile environment’ whether created by co-workers or otherwise. Similarly, a code of conduct for staff and a Client’s Bill of Rights can also articulate the nonprofit’s prohibition against harassment and reporting requirement.
  - Having a policy that all vendors must adhere to the nonprofit’s anti-harassment policy, and if possible including into any contracts with vendors language giving the nonprofit the right to terminate the relationship with the vendor if the policy is breached; or the right to request that the vendor replace the offending employee with another one.
  - Having an internal grievance procedure and internal investigation procedures in place so that an allegation is promptly attended to as soon as the allegation comes to light. At the very least the nonprofit should encourage an “open door policy” so that everyone feels comfortable coming to the Executive Director with concerns in a timely fashion.

(2) Board Member Out of Bounds: The Board is currently working very hard on a capital campaign that requires the campaign committee to spend late nights around the table strategizing. The Development Director has recently been skipping some of these evening meetings and this has the Executive Director concerned. When the ED asks the Development Director about this, she replies that she is no longer comfortable working after hours with the Chair of the Capital Campaign. She won’t disclose any further information, but just crosses her arms and glares at the ED. The Chair of the Capital Campaign soon begins complaining to the ED that the
Development Director isn’t working hard enough and proposes that the ED fire the Development Director.

➢ What should the ED do next?

➢ What can the nonprofit do to limit its risks in this situation?

Jennifer’s pointers:

- The ED should not act solely on the board member’s recommendation to terminate the Development Director without carefully investigating the business-related reason for a termination in this instance. The ED should explore the concerns he has with the DD’s performance and also elicit feedback from other board members.

- The fact pattern here suggests that the Chair of the Capital Campaign’s conduct has created a hostile environment for the DD—perhaps the Chair of the Capital Campaign even sought sexual favors from the DD, in which case the DD could allege that her termination, as suggested by the board member, was a direct result of her refusal to satisfy the Chair of the Capital Campaign’s requests. In such cases the nonprofit organization would be directly liable for sexual harassment because a board member is the personification of the management of the nonprofit.

- At this point, the nonprofit has to do some damage control. If the ED does nothing, she risks angering the Chair of the Capital Campaign— if she caves in to the Chair’s request to terminate the DD, the nonprofit is at risk for a wrongful discharge claim, probably based on sexual harassment. The best course of action at this stage is for the DD to require the Chair of the Capital Campaign to articulate the justification for termination of the DD, and for the ED and board members to investigate the credibility of the justification, as well as the cause of the DD’s reluctance to work after hours with the Chair of the Capital Campaign.

- Having a clear policy requiring employees to file a complaint and procedures for the internal resolution of such complaints would be another helpful strategy to reduce the risk of a lawsuit in this situation.

(3) Client Out of Control: A female supervisor who is devoutly religious and who works in a group home for teens finds herself increasingly unable to schedule time for prayer during the work day without being harassed and made fun of by the teens under her care. She requests a transfer to another assignment, but the nonprofit’s management responds that there are no other positions available. Her attendance and performance decline. She receives a ‘needs improvement’ overall rating in her performance review and in response complains that she is being harassed on the basis of her religion. Again she requests a new assignment, and again the response is that there are no available openings. When she expresses a desire to reduce her hours of work, she is terminated. She later sues the nonprofit for wrongful termination, claiming that her termination was in retaliation for her complaints of harassment.

➢ What could the nonprofit have done differently to avoid this result?

Jennifer’s pointers:

- In cases of religion, there is a requirement that the employer find a reasonable ACCOMMODATION for the employee. Here, the employee’s request for a transfer of responsibility, in order to avoid the ‘hostile’ environment created when the teens taunted
her about her prayers, should have been explored further by the nonprofit. Even though the clients might not be under the control of the nonprofit employer, the employer still has an obligation to negotiate with the employee about possible reasonable accommodations. If there were no other position available for the employee to transfer to, what other reasonable accommodation could have been created to permit the employee to pray without hostility?

- If the nonprofit employer had sensitivity training for clients as well as staff, this entire situation might be avoided.
- Also, if the nonprofit had a clear policy requiring employees to file a complaint, then there might have been an opportunity to resolve this conflict before it reached the flash point of a termination that the employee claim was motivated by retaliation for her allegations of harassment based on her religion.

How Can I Protect My Staff, Volunteers and Service Recipients from Harassment in General, and Third Party Harassment in Particular?

State and federal laws prohibit discrimination in the workplace, with state statutes providing at least as much protection against discrimination as the federal law. Federal laws protecting employees from discrimination include Title VII of the Civil Rights Act of 1964, the Americans with Disabilities Act of 1990, and the Age Discrimination in Employment Act of 1967. Federal laws provide protection for the following categories: race, sex (including pregnancy), religion, color, age, national origin, and disability. Many states and some municipalities offer additional protections for marital status, military status, sexual orientation, various medical conditions and physical appearance.

For most nonprofit organizations, a three-pronged approach is your best bet:

1. a clear policy prohibiting harassment by anyone, including non-employees, and prohibiting retaliation against anyone who alleges that they are being harassed;
2. training in the organization’s policy; and
3. clearly defined reporting procedures for employees to use if there is a violation of the policy.

Clear Policy Prohibiting Harassment by Anyone

The following are examples of broadly-written policies prohibiting workplace harassment. More detailed policy language is required to describe a nonprofit’s prohibition against sexual harassment. Nonprofits are advised to seek legal advice on what policy language is required or recommended in your state.

SAMPLE A
Harassment of any staff member of [Name of Nonprofit] by anyone, including other employees, volunteers, clients, or any other party, will not be tolerated. This policy applies to conduct in the workplace, at functions sponsored by the organization, and protects employees at all levels and positions within the organization. Violations of this policy must be reported to [fill in title of appropriate persons]. In addition, retaliation against anyone who reports a policy violation will not be tolerated. Violations of this policy may result in termination.

SAMPLE B
Harassment can occur between co-workers, subordinate and supervisor, outside vendor and employee, or between client and employee. Harassment will not be tolerated in any form, whether committed by supervisors, other employees or non-employees. Employees who believe that a policy violation has occurred must report the harassment to their supervisor or (another suitable person). Any employee found violating this policy may be subject to disciplinary action
up to and including termination. [Name of Nonprofit] will also not tolerate retaliation against anyone for filing a report of a policy violation. Individuals who engage in retaliation may also be subject to discipline, up to and including termination of employment.

**Basic Risk Management Steps to Reduce Liability for Harassment**

1. **Communicate a clear policy that the nonprofit will not tolerate harassment.** Make sure all employees and volunteers are familiar with the organization’s harassment policy, not only by including the written policy in any handbook of personnel policies, but also by holding periodic staff/volunteer trainings on the topic.

2. **Have a clear reporting procedure.** Give employees/volunteers options about who to report harassment to in case the person harassing them is the person they are supposed to report to.

3. **Take all complaints of harassment or discrimination very seriously.**

4. **Investigate allegations** by speaking with the complaining party, and then the alleged harasser, and any witnesses who could lend information to test the credibility of all parties.

5. **Determine appropriate action and take action.**

6. **Report back to the complaining party** so that s/he knows that the allegation was taken seriously and appropriate action taken.

7. **Do not retaliate** against anyone for filing a complaint of harassment.

**What Liability Does the Nonprofit Face for Third Party Harassment?**

Most courts to consider the issue have held that Title VII permits employers to be held liable for harassment committed against their employees by third parties, at least when the victim-employee is forced to interact with the harasser as part of her job.

When a supervisor (such as a board member) is the harasser, employers are **automatically liable**—subject to an affirmative defense the employer can raise when the harassment does not result in a tangible employment action (that is, it does not result in the victim being fired, demoted, or similarly disadvantaged).

For co-worker harassment employers can be liable based on their own negligence—when they **knew, or should have known** harassment was occurring and failed to stop it, or when they didn’t have a policy prohibiting harassment, didn’t sensitize their workforce about harassment issues, or didn’t take an allegation of harassment seriously or investigate an allegation thoroughly. Employers do have an affirmative defense if the alleged victim did not follow the employer’s procedures requiring reports of harassment, however, even in such cases, when the facts are egregious courts have found the employer liable on the basis that filing a report of harassment would have been futile to prevent the harassment.

**How Can I Protect My Nonprofit from Liability?**

The best thing a nonprofit can do is to have clear policies and communicate those policies to its staff and volunteers. Make sure your staff knows that your harassment policies cover conduct by non-employees, such as vendors, suppliers, clients, service recipients, and the general public. Offer ways of reporting all types of harassment, including third-party harassment.

Policies and procedures can shield your organization from liability. They can establish a forum for open communication at an early stage so that a misunderstanding or insensitivity can be corrected before it explodes into a legal complaint. Not only may policies avoid costly litigation, they may prevent escalation to more serious assaults. In one case, after a supervisor disregarded a serious sexual harassment complaint, the alleged harasser attacked a coworker after an office party and was later convicted of attempted rape.
The policies, however, must be effective. If a victim does not complain, or delays in complaining, the court may scrutinize the victim's reasons in order to determine whether the organization permitted or condoned the behavior. The suggestions offered here can help you develop appropriate policies and procedures. The section below lists critical items for inclusion in the rules you develop. The details of policy implementation are up to you.

- **Start at the Top.** The board of directors plays an important role in eliminating sexual harassment. It can create a healthy workplace by emphatically stating a commitment to creating and maintaining a harassment-free workplace—regardless of the rank or position of the alleged harasser. The board can demonstrate its commitment by supervising the implementation of the organization's policies and procedures, rather than merely asking the executive director to write something down to "please the lawyers." A "zero tolerance" policy will set the tone, discourage inappropriate behavior, and encourage open communication. Board members should also be invited to attend staff trainings on the subject.

- **Policies and Procedures.** Policies should prohibit both harassment and malicious or unfounded accusations of misconduct as well as retaliation against those who invoke the policies reporting procedures. Violation of the policies should result in appropriate disciplinary action. The policies should be backed by a procedure for investigating allegations that protects the privacy of all parties, to the extent possible.

- **Commit the Policies to Writing.** Written policies are easily distributed in a variety of ways (e.g., in the staff handbook or on the lunchroom bulletin board). Supervisors can be required to sign an agreement stating that they have read the written policies and will adhere to them. Written policies can be referred to as needed and used to document your organization's position should an allegation be made.

- **Spread the Word.** Policies and procedures that go no farther than the written page are of limited value. Cover your organization's policies at staff orientations and provide ongoing communication, through written memos or training sessions, to make the policies widely known.

- **Supervise for Compliance.** Require notification of the executive director, or other top manager, of any and all complaints and ask the board of directors to hold that individual accountable for the resulting investigation and course of action.

- **Make Changes as Necessary.** Solicit staff feedback, through interviews or surveys, in order to assess the adequacy and effectiveness of your organization's policies and procedures. Review your policies and procedures periodically to ensure that your organization is still in compliance with applicable laws.

Although most anti-discrimination laws address only harassment affecting "employees," there is no reason to so limit your policies. Any harassment, whether directed at clients, paid staff or volunteers, minimizes productivity, scares away volunteer support, garners bad publicity, and erodes community (and donor) good-will. Volunteers may still be able to sue (e.g., for negligent infliction of emotional distress), and, if an employee later sues for similar unwelcome conduct, a jury may perceive the volunteer's complaint as notice of a problem. While drafting your organizational policies and procedures, you can include the young high-schooler who volunteers every Saturday morning—even though the law may not specifically require it.

You can protect your organization from harassment claims by enhancing communication, taking each claim seriously, investigating each allegation thoroughly and fairly, and taking
appropriate disciplinary action. Specific policies and procedures as well as staff trainings may prevent inappropriate behavior in the first place, and they can guide the staff or board’s response to allegations, ensure fair and equal treatment, prevent retaliation and result in documentation of the reasonableness of the nonprofit’s action if you still end up in court.

Resources:

- Society for Human Resource Management
  1800 Duke Street
  Alexandria, VA 22314
  Phone: (800) 283-SHRM
  TTY/TDD: (703) 548-6999
  Fax: (703) 535-6490
  Web site www.shrm.org

- U.S. Equal Employment Opportunity Commission
  P.O. Box 7033
  Lawrence, Kansas 66044
  Phone: (800) 669-4000
  Web site www.eeoc.gov

- Workforce Management
  Crain Communications, Inc.
  4 Executive Circle, Suite 185
  Irvine, CA 92614
  Phone: (949) 255-5340
  Fax: (949) 221-8964
  Web site www.workforce.com

- Employment Law Information Network
  The Innovation Center @ Wilkes-Barre
  2nd Floor, Suite 219
  7 South Main Street
  Wilkes-Barre, PA 18701
  Web site www.elinfonet.com

- Personnel Policy Service, Inc. Publishers
  159 St. Matthews Avenue
  Louisville, KY 40207
  Phone: (800) 437-3735
  Fax: (800) 755-7011
  Web site www.ppspark.com