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EMPLOYERS NEED TO REFINER
INVESTIGATION PROCESS FOR BIAS,
HARASSMENT

Column

Employment Law

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Federal and state legislation and case law make it clear that employers who have effective policies against discrimination and harassment reduce their risk of liability for employee misconduct and that good investigation practices are central to the effectiveness of such policies.

Employers should be aware that recent case law asks them to refine their investigation process in order to be more discerning of subtle evidence of discrimination and harassment.

Ellison v. Brady, 924 F.2d 872 (9th Cir. 1991), requires investigators to assess female employees' allegations of a sexually hostile workplace from the perspective of a reasonable female employee.

The 9th Circuit observed in *Ellison* that "[m]en, who are rarely victims of sexual assault, may view sexual conduct in a vacuum without a full appreciation of the social setting or the underlying threat of violence that a woman may perceive."

In the recent case of *McGinest v. GTE Services Corp.*, 360 F.3d 1103 (2004), the 9th Circuit extended this notion and held that allegations of a racially hostile workplace must be assessed from the perspective of a reasonable person belonging to the complainant's racial or ethnic group.

In *McGinest*, an African-American employee alleged that he was forced to endure racial taunts and insults by supervisors and co-workers and was subjected to racial graffiti in the workplace bathrooms.

The employer downplayed the racial significance of the statements. For example, with respect to the employee being referred to as a drug dealer, the employer stated that there was no necessary association between African-Americans and drug dealers and thus the statement was not evidence of racial animus.

The 9th Circuit disagreed. It noted that certain terms that may appear on their face racially neutral are in fact code words imbued with racial hostility.

The court noted, "Racially motivated comments or actions may appear innocent or only mildly offensive to one who is not a member of the targeted group, but in reality be intolerably abusive or threatening when understood from the perspective of a plaintiff who is a member of the targeted group."

The *McGinest* opinion contains a review of many such code words and historically charged terms. Among other things, the court was not impressed with a supervisor's response of "Can't we all get along?" to the African-American employee's complaint of racial graffiti.

In a similar light, in *Stegall v. Citadel Broadcasting*, 350 F.3d 1061 (2004), the 9th Circuit made a special point that a manager's stereotypical statements about a strong, assertive female employee being "difficult," having a "negative attitude" and not being a "team player" should be considered possible evidence of workplace bias.

What these cases have in common is that they indicate both a greater sensitivity and appreciation for circumstantial evidence, that is, indirect evidence or evidence from which discrimination or harassment may be inferred, and an impatience with the claimed naivety of employers to the racial or sexist overtones of certain words and statements.

Thus, the 9th Circuit, expressing frustration at the devaluation of circumstantial evidence by some employers and courts, states in effect that if circumstantial evidence is good enough for criminal cases, where proof must be beyond a reasonable doubt, then it is certainly sufficient for civil matters of discrimination and harassment. *Stegall*.

Employers should be on notice that the 9th Circuit's sensitivity to gender-based and race-based stereotypical statements, coupled with its greater appreciation for circumstantial evidence, could apply easily to statements about sexual orientation, religion, disability and other protected categories.

Given this requirement for greater alertness to circumstantial and subtle evidence of discrimination and harassment, it is doubly important that employers ultimately and accurately distinguish between harassment based on a protected category and what some call "generic" harassment, which is harassing behavior of some sort but not based on one of these protected categories.

The distinction is important because generic harassment does not violate an employer's policy against discrimination and harassment. Generic harassment may very well violate other policies and be cause for disciplinary action and may be more

serious, or less serious, than harassment based on a protected category. It depends on the specific facts.

But harassment based on membership in a protected category, regardless of its severity, imparts a serious social and possibly legal stigma that does not attach to generic harassment. A clear distinction between these two types of harassment must be maintained in any report of investigation.

Courts continue to require employers to be more attentive to circumstantial and subtle evidence of discrimination and harassment. Employers that earnestly attempt to meet these requirements not only reduce their liability but also help create a work environment that is more positive and more productive.

Adopting the perspective of a reasonable complainant is a challenging requirement that involves not only an intent to be sensitive but also substantive knowledge and an active awareness of the possible historical and social connotations associated with certain words and actions for female employees and employees of particular racial or ethnic groups.

The *McGinest* and *Stegall* cases are ready-made training tools to assist human resources investigators in this process.

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