

# Why your sexual harassment policy needs a contingency plan

When news broke earlier this month that McDonald's CEO Steve Easterbrook had been dismissed for having a consensual romantic relationship with a woman at work, it sounded like another #MeToo moment.

But in the days after the termination, details emerged showing that the fast food company had prepared in advance to handle relationships between C-suite executives and subordinates. The company's policy had already defined such power-imbalanced relationships as violations of its sexual harassment policy.

Easterbrook had already signed a non-compete and severance pay agreement that took immediate effect. He acknowledged breaking a company rule against dating a subordinate.

McDonald's was able to act fast because it had a contingency plan. Your organization needs one, too. It should:

**Include a clear sexual harassment policy** that covers all workplace relationships between leaders and their subordinates. It must include company owners, executives and board members.

**Require managers and supervisors to report any sexual harassment** (as well as consensual relationships) up the chain of command. The policy must also include specific consequences for failing to report consensual relationships.

**Note:** Days after Easterbrook stepped down, McDonald's head of HR also resigned. Published reports indicated that he had known about Easterbrook's relationship and done nothing about it. By itself, that violated a McDonald's policy that requires bystanders to report harassment when they learn of it.

**Address procedures for handling high-level rule transgressions.** Get pre-approval from your board of directors to launch internal investigations and make policy enforcement recommendations. Spell out specific sanctions that would follow any finding that harassment or an improper relationship had occurred. (If appropriate, ensure your plan includes provisions that cover board members in addition to employees.)

**Make sure all employment agreements list dischargeable offenses**, including sexual harassment and consensual relationships with subordinates. Failing to report as a bystander should be included too.

**Equally important: ensure sexual harassment policy spells out exactly how employees should report allegations**

The best defense against harassment lawsuits is to have a solid policy that encourages employees to report alleged incidents of sexual harassment. The policy should provide multiple avenues for reporting harassment, including ways to bypass a harasser who might be the victim's supervisor or otherwise higher up in the chain of command.

You will probably survive a harassment lawsuit if you trained all employees on how to use the policy and followed up with discipline whenever an investigation uncovered harassment.

**Recent case:** Jennifer was a personnel assistant in the HR department at Nan Ya Plastics in Wharton. She had access to employee personal information, including pay records, Social Security numbers, addresses and the like. Her supervisor was John. Nan Ya Plastics is a subsidiary of Formosa Plastics.

In June 2017, Jennifer reported to Formosa Plastics that John was sexually harassing her. Formosa immediately investigated. Within 10 days, Nan Ya Plastics terminated him for unprofessional conduct.

Jennifer was fired a few days later. She immediately filed an EEOC complaint and, eventually, a federal lawsuit.

Jennifer's lawsuit alleged that she had endured a sexually hostile work environment, and then had been fired for reporting sexual harassment. She described what John had allegedly done, including stating he wanted to have sex with her. He allegedly grabbed her crotch, breasts, and buttocks and said he wished he could be her cell phone in her back pocket.

Nan Ya Plastics told the court that it had a robust anti-harassment policy and that all employees, including Jennifer, had received a copy. It pointed out that the policy included numerous ways to report harassment, including ways that bypassed supervisors and managers. It also had a general Code of Business Conduct that included a hotline for reporting violations.

It argued that Jennifer could have used any of those methods, but chose to remain silent until finally reporting the harassment. It added that once it got the report, it took swift action, firing the harasser within 10 days.

The company argued that it had legitimate reasons to fire Jennifer. Management had learned that she had recently been arrested for identity theft, which was reported in the local newspaper. Several employees claimed this made them uncomfortable, given that she had access to confidential data that could be used for identity theft.

Jennifer tried to tell the court that she hadn't reported the harassment earlier because she viewed the process as "a joke," since her harasser had been one of the people who provided training on the sexual harassment policy. She added that during presentations, John had made sexually-oriented jokes, further highlighting why she felt the harassment policy would be ineffective.

She also argued that the company should not be allowed to use her arrest as the basis for termination since she had not been convicted of the charges when fired.

The court sided with the employer and tossed out the lawsuit. It reasoned that the harassment policy was effective since John was fired shortly after Jennifer reported the harassment. It also noted that given Jennifer's access to confidential information, terminating her over the identity theft arrest was appropriate. (*Fillmore v. Nan Ya Plastics*, SD TX, 2019)