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# MISSOURI

## EMPLOYMENT LAW LETTER

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#### Unions

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- HR Sample Policy — Solicitation, [www.HRhero.com/lc/policies/213.html](http://www.HRhero.com/lc/policies/213.html)
- HR Sample Policy — Bulletin Boards, [www.HRhero.com/lc/policies/214.html](http://www.HRhero.com/lc/policies/214.html)

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### SEXUAL HARASSMENT

## A picture is worth a thousand words — or \$500,000 in punitive damages

by Mark G. Jacobs

*Sexual harassment allegations continue to be one of the most challenging situations that HR personnel must handle. If allegations of sexual harassment aren't taken seriously, thoroughly investigated, and appropriately addressed, the potential liability for employers is severe. While the following case was sent back to the lower court for a new trial based on a purely legal issue, the punitive damages awarded by the jury in the initial trial serve as an important reminder of the potentially severe penalties that await an employer that doesn't promptly and thoroughly investigate allegations of sexual harassment. For a discussion of the underlying facts of a recent Missouri case that led to a jury awarding a former employee \$500,000 in punitive damages, read on.*

### Facts

Donna Lindahl was a civilian custodial employee at the Missouri National Guard Armory on Whiteman Air Force Base in Knob Noster. She had worked at the armory in that capacity since 1999. Beginning in August 2002, she was subjected to multiple incidents of sexual harassment by sergeant Mike Lewis, who also worked at the armory. For example, he would stop by her office and joke that he was the man in the poster hanging on one of her office walls. The poster depicted a muscular man wrapped in

a large American flag. He repeatedly asked her when she was going to retake the photo.

Lindahl, who is an amateur photographer, consented to taking photographs of Lewis. In fact, she eventually took photographs of him naked and holding a small flag on a stick in front of his genitals. The photographs were taken on work property. After the photograph incident, he began flashing his penis at her during work hours, and on two occasions, he lured her to a secluded location, prevented her from leaving, and exposed himself to her before proceeding to masturbate in front of her.

The incidents occurred during a 15-month period between August 2002 and November 2003. One of the facts in dispute during the trial was when and to whom Lindahl first reported the harassment. She claims she reported it to her immediate supervisor, sergeant Carla Caldwell. There was also testimony that other individuals in the chain of command were aware of Lewis' conduct, but an investigation wasn't immediately initiated.

What wasn't in dispute is that in February 2004, Lindahl reported to Whiteman Air Force Base military police that she was being sexually harassed by Lewis. Her report prompted an investigation that revealed Lewis had acted inappropriately. He received

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discipline in the form of a demotion, pay reduction, and transfer from the armory.

After reporting the sexual harassment, Lindahl believed she was retaliated against for making the report. Specifically, she claimed she was suspended without pay for one month after reporting the harassment to the military police. Her employer stated that the suspension was due to her taking the inappropriate photographs of Lewis on armory property. Lindahl also complained that after she reported the harassment, her work hours were reduced, her job duties were changed, and her work environment deteriorated.

In 2005, Lindahl filed a lawsuit in state court against the state of Missouri and the Missouri Army National Guard, claiming sexual harassment, sex discrimination, and retaliation under the Missouri Human Rights Act (MHRA).

### ***Sexual harassment and retaliation under the MHRA***

Under the MHRA, an employer can be held liable for the sexual harassment of one coworker by another if it knew or should have known of the harassment and failed to take prompt and effective remedial action. Most often, this claim takes the form of a sexual harassment hostile work environment claim. For an employee to prevail on a hostile work environment claim, she must show:

- (1) she is a member of a protected group;
- (2) she was subjected to unwelcome sexual harassment;
- (3) her gender was a contributing factor in the harassment;
- (4) a term, condition, or privilege of her employment was affected by the harassment; and
- (5) the employer knew or should have known of the harassment and failed to take appropriate action.

If the alleged harasser is a supervisory-level employee, then it is conceded that the employer “knew” of the harassment. Under certain circumstances, an employer may defend against liability by showing that (1) it exercised reasonable care to prevent and promptly correct any sexually harassing behavior and (2) the employee unreasonably failed to take advantage of any preventive or corrective opportunities provided.

Further, under the MHRA, it is unlawful to retaliate against an employee because she has opposed a practice prohibited by the Act. When making a complaint of sexual harassment, an employee can demonstrate retaliation by proving that (1) she complained about being the victim of sexual harassment or a sexually hostile work environment to the employer and (2) as a direct result, she suffered damages because of an act of reprisal by the employer.

### ***Lindahl’s case***

At trial, Lindahl sought \$12,500 in damages for lost income, \$250,000 for emotional distress, and an unspecified amount in punitive damages that would “send the message that this kind of conduct in an organization can’t be tolerated.” The jury returned a verdict finding no actual damages but awarded \$500,000 in punitive damages. The trial court entered a judgment consistent with the jury’s verdict, and the employer appealed.

While it’s not pertinent to the discussion of sexual harassment in the workplace, it’s worth noting that Missouri follows the general rule that punitive damages may not be awarded when actual damages aren’t awarded. This is the “legal” issue that caused the Missouri Court of Appeals to send the case back to the trial court for a new trial. The employer has asked the Supreme Court of Missouri to hear the case. *Donna J. Lindahl v. State of Missouri, et al.* (Appeal No. WD72555).

### ***Bottom line***

Claims of harassment in the workplace are still all too common and continue to be a costly and disruptive issue. The employer in this lawsuit likely will go through a second trial, and based on disputed testimony from the first trial, it remains to be seen whether it “did everything right.” There was some indication that the employee reported the harassment to a supervisor before she contacted the police. Under those circumstances, it cannot be said that the employer “exercised reasonable care to prevent and promptly correct any sexually harassing behavior.” This case is another reminder of the importance of ensuring you are taking the steps necessary to avoid liability. Specifically, you should:

- Have a clear and defined sexual harassment policy and reporting procedure (preferably in your employee handbook) that is distributed periodically to employees for their review and signature of receipt.
- Conduct and document mandatory sexual harassment awareness training for all employees, including regular refresher training.
- Train supervisors and managers to take every complaint of sexual harassment seriously and not to base their action (or inaction) on their own opinions of any particular employee.
- Provide supervisors and managers with a checklist of specific steps they must follow if they receive a report of sexual harassment.
- Conduct a thorough independent investigation when there is a report of sexual harassment. An independent investigation often will uncover omitted facts or misrepresentations and provide a clear and objective picture.
- Handle all reports and investigations of harassment as confidentially and discreetly as possible,

consistent with your obligation to investigate complaints fairly and appropriately.

- Document each step of the investigation and decision-making process. Agencies such as the Equal Employment Opportunity Commission and the Missouri Commission on Human Rights are “paper agencies.” They want to see documentation of the investigation, including when the employee reported the harassment, to whom she made the report, when the investigation began and ended, who the witnesses were, what they said, and when they were interviewed, and the final decision and action taken by the employer.

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