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Sexual Harrassment: No Longer the Perfect Crime (Informational Guide)

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**SEXUAL HARASSMENT
NO LONGER THE PERFECT CRIME
(Informational Guide)**

Sexual harassment is a form of
sexual discrimination that was initially covered under
Title VII of the Civil Rights Act (CRA) of 1964, and is
now covered under the Civil Rights Act of 1991.

Title VII of the CRA of 1964 and the CRA of 1991
prohibit an employer from practicing or discriminating
against any **Daniel K. Fee, B.S.**
employee because of that person's race,
color, religion, sex or national origin.

The CRA of 1991 has now put some teeth into the
law by allowing compensatory and punitive damages, and
the right to a jury trial which was previously not
available. Any behavior in the workplace taking place
because of a person's gender is sex discrimination
prohibited by Title VII.

**An Abstract Presented to the Faculty of the Graduate School
of Lindenwood College in Partial Fulfillment of
the Requirements for a Degree of Master of Marketing**

ABSTRACT

This "applied learning" study will focus on sexual harassment, its many perspectives, and how to prevent it from occurring. Sexual harassment is a form of sexual discrimination that was initially covered under Title VII of the Civil Rights Act (CRA) of 1964, and is now also covered under the Civil Rights Act of 1991.

Title VII of the CRA of 1964 and the CRA of 1991 make it an unlawful employment practice to discriminate against any individual with respect to terms and conditions of employment because of that person's race, color, religion, sex or national origin.

The CRA of 1991 has now put some teeth into the law by allowing compensatory and punitive damages, and the right to a jury trial which was previously not available. Any behavior in the workplace taking place because of a person's gender is sex discrimination prohibited by Title VII.

This manual's focus is on the many perspectives of sexual harassment. It will also offer suggestions how companies may reduce liability while engaging in the process of eliminating sexual harassment.

SEXUAL HARASSMENT
NO LONGER THE PERFECT CRIME
(Informational Guide)

Daniel K. Fee, B.S.

A Culminating Project Presented to the Faculty of the
Graduate School of Lindenwood College in Partial Fulfillment of
the Requirements for a Degree of Master of Marketing

1992

COMMITTEE IN CHARGE OF CANDIDACY:

Adjunct Instructor and Faculty Advisor	Joe Ancona
Adjunct Instructor	Joe Silverio
Southwestern Bell Telephone Company EEO/Labor Relations Manager	Thomas Goughenour

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Is Sexual Harassment a Crime?

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"Harassment on the basis of sex is a violation of Section 703 of Title VII." The word perfect in the title of this study is used only in the sense that some people get away with it when it's caught or fined.

The EEOC says "you must view allegations from the perspective of the victim." So the word perfect is often used by government agencies when describing someone having been harassed. If someone truly perceives they have been harassed, in their mind, they have been.

As a result, someone is gone alone, that person

¹ Title VII is the employment discrimination section of the Federal Civil Rights Act of 1964.

² Equal Employment Opportunity Commission's guidelines and discrimination based on sex 2001, as 24 CFR 1004

Chapter I

INTRODUCTION

Is Sexual Harassment a Crime?

"Harassment on the basis of sex is a violation of Section 703 of Title VII¹."² The word perfect in the title of this study is used only in the sense that more people get away with it than get caught or fined.

The EEOC says "you must view allegations from the perspective of the victim," so the word victim is often used by government agencies when describing someone having been harassed. If someone truly perceives they have been harassed, in their mind, they have been.

An analogy: Someone is home alone, that person

¹ Title VII -- The employment discrimination section of the federal Civil Rights Act of 1964.

² Equal Employment Opportunity Commission's guidelines and discrimination based on sex codified as 29 CFR 1604

hears someone trying to break into the front door. What happens to his/her body functions? The heart rate climbs, adrenaline rages, and fear takes over. In reality, no one is there, it is just the wind. However, if it is perceived someone there, the body functions still react the same. If someone perceives they have been harassed, they have been, at least in their mind. However, a person merely having the perception of harassment is not sufficient to legally prevail.

A question employers should ask "how productive is the employee or the work group going to be until the situation is resolved?"

Everyone understands "If you don't sleep with me, you're fired". However, all sexual harassment does not fall into this category, in fact, most of the time harassment is so subtle it may go undetected. Many times the behavior regarded as rude or simply a personality conflict may be legally considered harassment. That type of behavior can cause managers to change their calendar to spend a day in court to defend their company's actions. The actions may have been committed by one of their subordinates, one of their co-workers, or even an

outside contractor.

Alleged sexual harassment needs to be viewed on a case by case basis. There is no one particular set of ingredients to the recipe of sexual harassment. Therefore, sometimes it becomes an ordeal of trial and error. Remember, even if you work at it that way, the important thing is, that you are working at it. You may receive the benefit of a doubt, if you have made a good faith effort.

You must also be aware, even if management does everything right, a charge may still be filed. Sexual harassment can occur in a wide variety of circumstances and consist of many variables. The most recognizable form is a male supervisor making inappropriate advances to a female subordinate. The issue at this point is sex.

However, it could be a male harassing another male, or a female harassing another female. The person committing the harassment does not have to be a supervisor, but could be a co-worker or a non-employee.

The victim can be an indirect victim, and does not have to be the one being directly harassed. It can be a co-worker finding the actions to someone else so

upsetting a hostile work-environment is created.

It is not a requirement for the victim to report the incident to their direct supervisor. However, for the company to be held liable they need to have actually known or should have known of the situation.

It is imperative you have the knowledge of: the understanding of how the definition of sexual harassment has changed in light of recent court decisions; how to view and judge some "borderline" cases of sexual harassment; and you should learn basic guidelines for recognizing sexual harassment. The EEOC says "prevention is the best tool for the elimination of sexual harassment."³

Table 1

**Sexual Harassment Questionnaire
Answer True or False**

Consulting Group in 1992 (Answers in Appendix A)

³ Equal Employment Opportunity Commission Guidelines on discrimination based on sex, codified as 29 CAR 1604

1. The charging party⁴ must suffer a personal loss (e.g. Lost promotion, lost wages, fired) in order for the employer to be held liable in a sexual harassment case.
2. If your company has not received a complaint you do not have to worry about sexual harassment existing in your workplace.
3. Someone guilty of harassment can be required to personally pay part of a judgement to a victim of harassment.
4. Sexually suggestive calendars or pictures in a personal work area can not be considered cause for a sexual harassment complaint.
5. You can not be found guilty of sexual harassment unless it is intentional.
6. Employee A tells employee B a sexually suggestive joke, employee C could file a charge of sexual harassment against the company.
7. A manager may be held responsible for sexual harassment committed only by people working for the company.
8. For six months the Vice President of the company was seeing a consenting first line manager sexually. After six months she told him it was over, but he still pursued her after hours. Since his activities are after hours the company can not be charged with sexual harassment.
9. Someone resigns of their own accord and later charges the company of sexual harassment. The charging party admits they never complained to management. The company can still be held liable.
10. When someone initially brings charges of sexual harassment, good managers can usually tell if the charges are valid.

SOURCE: Developed by the Equal Employment Opportunity Consulting Group in 1992 (Answers in Appendix A)

⁴ Charging Party: An individual who files a discrimination charge with a state or federal EEO agency.

Managers can not afford to be indifferent to what is going on around them. If for no other reason, they can be held personally liable if they have knowledge and fail to act, and are punishable by fines up to \$300,000⁵ plus possible additional cost for companies with over 500 employees.

Be aware, "Title VII does not proscribe all conduct of a sexual nature in the workplace."⁶ All sexual conduct in the workplace will not automatically be defined by law as sexual harassment.

Determining whether sexual behavior is to be considered sexual harassment or gender based harassment as defined by the law is sometimes difficult. As such, you must understand there are different types of sexual advances to be understood. If a manager calls the males in the work force "men," and the women "girls" is it harassment? "As noted by the Commission, there is an implication of female inferiority inherent in such disparate treatment. However, such discriminatory verbal

⁵ Civil Rights Act of 1991

⁶ EEOC Policy Statement N-915-050 March 19, 1990

conduct is not sexual in nature and, therefore, is not sexual harassment."⁷

Some sexual conduct (covered later in this text) is: invited, uninvited but desired, offensive or bothersome but tolerated, and others are openly rejected.

Behavior which can be labeled illegal sexual harassment can occur at the workplace, at events sponsored by the company, or between co-workers off the job.

"Guidelines also recognize that unwelcome sexual conduct that "unreasonably interfer[es] with an individual's job performance" or creates an "intimidating, hostile, or offensive working environment" can constitute sex discrimination."⁸ If the activity is of a sexual nature and unwelcome, it is classified as sexual harassment under the law.

Sexual activity can be considered Quid pro quo⁹

⁷ Equal Employment Opportunity Commission Decision No. 72-0679 (1973)

⁸ EEOC Policy Statement N-915-050 March 19, 1990

⁹ Quid pro quo is Latin for "Something for something", e.g., Sex for favors.

harassment when: acceptance or rejection of the conduct is used to make employment decisions; e.g., hiring, promotion, work assignments, pay increases affecting the person claiming harassment. Sexual behavior having the effect of unreasonably interfering with the victim's work is also against the law. Finally, conduct which creates an intimidating, hostile or offensive work environment is unlawful.

Sexual Harassment or Discrimination, Which Is it ?

Both, Title VII of the Civil Rights Act (CRA) of 1964 and the CRA of 1991 make it an unlawful employment practice to discriminate against any individual with respect to terms and conditions of employment because of that person's race, color, religion, sex or national origin. Unwelcome sexual advances, requests for sexual favors, and other verbal or physical conduct of a sexual nature constitute sexual harassment when (1) submission to such conduct is made either explicitly or implicitly a term or condition of an individual's employment, (2) submission to or rejection of such conduct by an

individual is used as the basis for employment decisions affecting such individual, or (3) such conduct has the purpose or effect of unreasonably interfering with an individual's work performance or creating an intimidating, hostile, or offensive working environment.¹⁰

The CRA has now put some teeth into the law by allowing compensatory and punitive monetary damages, and the right to a jury trial. Sexual behavior in the workplace taking place because of a person's gender is sex discrimination prohibited by Title VII.

When male managers request sexual favors from females under their authority courts have found it to be unlawful sex discrimination in violation of Title VII. Women have been discharged or forced to resign for not agreeing to have sex with the manager. The courts have ruled¹¹ if a woman becomes a target of a male manager's advances she is a victim of discrimination based on her status as a woman.

¹⁰ Equal Employment Opportunity Commission Guidelines on discrimination based on sex, codified as 29 CAR 1604

¹¹ The courts have ruled that way because similar demands related to the job were not placed on male workers.

In one case, a female employee established a genuine issue of material fact as to whether her discharge after she rebuffed the sexual advances of her male supervisor was quid pro quo sexual harassment. When she was fired there was evidence that it was not an independent decision of another official, as the employer claimed, but was the direct result of the harassing supervisor influencing the official in order to retaliate against the claimant because of her reaction to his advances.¹²

Do Men & Women Speak the Same Language ?

One court has described the difference between the perspective of men and women on sexual harassment in this manner: "Because women are more often the victims of rape and sexual assault, women have a stronger incentive to be concerned with sexual behavior."¹³ It should be noted that while violence may be a question sometimes, conduct can be unlawful even without the fear of

¹² Barbara Sparks, Plaintiff-Appellant v. Pilot Freight Carriers, Inc., Defendant-Appellee.

¹³ EEOC Compliance Manual Commerce Clearing House

violence.

Women who are victims of mild forms of sexual harassment may understandably worry whether a harasser's behavior is merely a prelude to violent sexual assault. Men, because they are rarely victims of sexual assault, may view sexual behavior in a vacuum without a full appreciation of the social setting or the underlying treat of violence that a woman may perceive.

When a company receives a complaint they should perform a complete investigation before making any judgements or taking action. If a female employee complains to a manager that a co-worker is making unwelcome "advances." An investigation should take place. If a reasonable woman would view the "advances" as being innocent, then a hostile work environment claim would probably not be substantiated.

However, it is appropriate to instruct the co-worker or the workforce as to what type of behavior might constitute a hostile environment. Action of that nature will show a good faith effort, as well as reassure the employee the complaint was taken seriously. It may also encourage other employees to come forward with more

serious complaints of unwelcome sexual behavior. The EEOC recommends an anonymous hotline for employees to report harassment.

The EEOC defines two kinds of sexual harassment: "quid pro quo", in which "submission to or rejection of (unwelcome sexual) conduct by an individual is used as the basis for employment decisions affecting such individual;" and "hostile environment", in which "unwelcome sexual conduct creates an intimidating, hostile or offensive work environment."

While the law has been written, the definition has really been developed by the courts. Quid pro quo harassment is the definition every manager should be aware of; and a manager with authority to affect an employee's working conditions under whatever method:

" Quid Pro Quo: This used to be for the giving of one valuable thing for another.

" EEOC Policy #29, issued 2-18-85, 014, January 1990

Chapter II

THE DEFINITION OF SEXUAL HARASSMENT

Define Sexual Harassment, Legally Please

"EEOC's Guidelines define two kinds of sexual harassment: "quid pro quo"¹⁴, in which "submission to or rejection of [unwelcome sexual] conduct by an individual is used as the basis for employment decisions affecting such individual," and "hostile environment", in which unwelcome sexual conduct "unreasonably interfer[es] with an individual's job performance" or creates an "intimidating, hostile or offensive working environment."¹⁵

While the law has been written, the definition has really been developed by the courts. Quid pro quo harassment is one definition every manager should be aware of; e.g., A manager with authority to affect an employee's working conditions makes unwelcome sexual

¹⁴ Quid Pro Quo -- Term used in law for the giving of one valuable thing for another.

¹⁵ EEOC Policy Statement N-915.048, January 1990

advances.

The manager says: "you realize we are going to become very close friends at the motel tonight, if you want to keep your job." The activity is illegal because the advance is an expressed or implied condition for receiving job benefits, and the refusal results in the forfeiture of a job benefit or in discharge.

This type of sexual harassment is called quid pro quo (which comes from a Latin phrase meaning something for something). This type of harassment should become less frequent as employers train managers and discipline persons found guilty of harassment.

The other major type of sexual harassment is known as the hostile work environment. This type of harassment can have the effect of interfering with an employee's job performance. It can also be persistent and continual unwelcome sexual conduct in the workplace.

Hostile work environment harassment can also be found from any unfavorable working conditions applying to only one sex¹⁶; e.g., being obnoxious or excessive

¹⁶ This is gender based harassment v. sexual harassment.

rudeness directed at only one sex, can be the basis for hostile work environment claim.

Quid Pro Quo:

Managers are normally the only employees capable of engaging in Quid pro quo harassment. However, there has been a case involving a manager requiring an employee to grant sexual favors to a third party.¹⁷ "Quid pro quo harassment occurs when employment benefits are based upon an exchange for sexual favors."¹⁸ History tells us the most likely source of sexual harassment involves unwelcome sexual advances by a manager with the capability of affecting the working conditions of an employee.

A company may be held liable for a manager's actions, even if other members of management did not know about the harassment, and even if the advances did not

¹⁷ Susan Waltman, Plaintiff-Appellant v. International Paper Co., Defendant-Appellee.

¹⁸ Terry E. Schraeder "What to do if charged with sexual harassment" Material Handling Engineering April 1992: D19-20

occur in the workplace. In one case, a bank's female employee was hired and progressed during her tenure. After approximately four years she called in and indicated she was going out on sick leave for an indefinite period. About a month later the bank terminated her employment. She brought an action against the bank for sexual harassment claiming her manager had harassed her. In part of the court text it says "As to the bank's liability, the Court of Appeals held that an employer is absolutely liable for sexual harassment practiced by supervisory personnel, whether or not the employer knew or should have known about the misconduct."¹⁹

Trying to prove the sexual advances were beyond the scope of a manager's authority normally is not a successful defense to quid pro quo sexual harassment charges. The EEOC considers managers to be agents of their company. "Lack of knowledge does not relieve the employer of liability for a supervisor's actions."²⁰ The

¹⁹ Meritor Savings Bank, FSB, Petitioner v. Mechelle Vinson et al., Respondents.

²⁰ Chris Lee "Sexual Harassment" Training March 1992: 23-31

EEOC's view is on the basis that when managers take action affecting the working conditions employees, it is the company taking the action.

Table 2

Examples of Quid Pro Quo Harassment

-
1. There is an express pledge of a job benefit in return for sexual favor
 2. A threat of unfavorable working conditions is made for the refusal of sexual favor
 3. There is an insinuation of adverse consequences, and the employee does not agree to participate in the unwelcome sexual activity.
-

SOURCE: EEOC Policy Statement N-915-050 March 19, 1990 (Paraphrased)

I Can't Take This Anymore !

How can you tell when the work environment has become hostile? Harassment having the effect of interfering with work and serious enough to alter the working conditions may be enough for the work environment to be considered "hostile."

Table 3

Factors in Determining if a "Hostile Environment" Exist

-
1. whether the conduct was verbal or physical, or both;
 2. how frequently it was repeated;
 3. whether the conduct was hostile and patently offensive;
 4. whether the alleged harasser was a co-worker or a supervisor;
 5. whether others joined in perpetrating the harassment; and
 6. whether the harassment was directed at more than one individual.
-

SOURCE: EEOC Policy Statement N-915-050 March 19, 1990

The eleventh circuit court has said "Surely, a requirement that a man or woman run a gauntlet of sexual abuse in return for the privilege of being allowed to work and make a living can be as demeaning and disconcerting as the harshest of racial epithets."²¹

The environment may be considered hostile if the sexual behavior has the effect of progressively interfering with an individual's job performance or creates an intimidating, hostile or distasteful work environment.

²¹ Henson v. City of Dundee

Flirtations or even indecent language of a merely annoying nature would probably not meet the legal definition of a hostile work environment. However, such behavior may still be prohibited by company policy, if so the behavior should be stopped when management becomes aware of it.

My Boss Makes My Life Miserable

"Sexual harassment which creates a hostile or offensive environment for members of one sex is every bit the arbitrary barrier to sexual equality at the workplace that racial harassment is to racial equality."²² A hostile work environment is the other type of sexual harassment that can be created by managers. Companies may be held liable for the actions of managers creating a hostile work environment when they actually knew or should have known of the harassment.

When someone complains, if the company takes prompt action in the form of an investigation about the

²² Henson v. City of Dundee

harassment in question, they would find out facts possibly sustaining the charge. If they chose to ignore the complaint, by not investigating, the inactivity on their part may be an expensive lesson (for failing to make a good faith effort).

The knowledge about a complaint may come from various sources. It could come from other members of management, company "hotline," first-hand observation, or a formal charge of harassment submitted to the EEOC or other government agency.

Most EEOC investigators will normally assume employers know about sexual harassment when it is well-known among employees in the workplace. If a member of management becomes aware of sexual harassment by another manager, that manager is obligated to help stop it. Once you have knowledge you can become personally liable under the law.

Liability for Sexual Harassment

The legal responsibility of a company for sexual harassment will depend upon the type of sexual behavior

which takes place in the workplace. It also depends upon who is engaging in the unwelcome sexual behavior resulting in a harassment charge.

There are two primary questions used for determining whether a company is liable for sexual harassment. The questions are:

1. Did the employer actually know or should have known harassment was taking place?
2. Did the employer make a good faith effort to stop the harassment?

[Faint, illegible text, likely a footnote or reference]

Chapter III

WHO ENFORCES SEXUAL HARASSMENT CLAIMS

EEOC Enforcement

What happens when an employee files a sexual harassment complaint with the EEOC. An person may file a charge of sexual harassment through the mail, by telephone, telegram, or in person.²³

The charge must be filed within 180 days of the alleged harassment if the charge is filed in a non-deferral jurisdiction (non-deferral jurisdiction is meant to be a state where there is no state or local fair employment practice agency). If the actions concerning the alleged harassment occur in a deferral jurisdiction (a state or local fair employment practice agency does exist) then the discrimination charge must be filed

²³ Commerce Clearing House, Inc. "EEOC Compliance Manual" Charges, Systemic Case Processing

within 300 days of the alleged violation.²⁴ The charge filing time limits can be extended on a case-by-case basis by the courts for reasons of fairness.

The charge is filed, docketed, and assigned a number within ten days of receipt of the charge. The EEOC will serve notice to the employer by sending a copy of the allegations and interrogatories. In this notice the EEOC will normally ask the employer to provide a reply.

The reply the employer returns should give an explanation or reason for its actions with regard to the action[s] complained about.

An on-site investigation²⁵ may be scheduled by the EEOC as a fact-finding²⁶ conference²⁷ between the EEOC, the charging party, and the employer. This meeting allows

²⁴ Commerce Clearing House, Inc. "EEOC Compliance Manual" Charges, Systemic Case Processing

²⁵ On-Site Investigation -- An investigation in which the Equal Opportunity Specialist goes to the employer's facility to view the premises, interview witnesses and examine documents.

²⁶ A fact finding conference does not have to occur on-site.

²⁷ Fact Finding Conference: A conference conducted by an EEOC Equal Opportunity Specialist (EOS) and attended by the charging party and an employer representative. The conference allows the EOS to clarify the evidence, define the issues and attempt to conciliate the case.

the charging party and the employer to meet together in the presence of the EEOC agent to discuss and define the issues in the charge. If the EEOC determines the discrimination did take place, they will discuss the possibility of obtaining a negotiated settlement with the employer.

If a settlement can not be reached, the EEOC will then issue a letter of determination. In the letter, the EEOC provides a written summary of the charge and the finding, including a legal analysis. The letter is also accompanied by a notice of the charging party's right to sue, which is sent to the employer and the charging party. The right to sue letter notifies the charging party of his/her right to file a civil action in federal court, and that such action must be filed within 90 days of receipt of the right to sue notice.

The Waiting Game

You are a manager, today someone comes to you with a sexual harassment complaint, and you ask "When did this begin?" The employee responds "ten months ago." What

happens if an employee waits before complaining? One of the next questions could be "when was the last time this sort of thing occurred?"

There are time limits on the amount of time a victim can take to file. "An individual claiming discrimination must file a charge with the EEOC within 180 days after the alleged discrimination occurs. Where there is a state or local fair employment practice agency authorized to grant relief (a deferral agency) and the individual has instituted proceedings before that agency, the deadline for filing with the EEOC is extended to 300 days after the occurrence."²⁸

Some people think because an employee waits before complaining about sexual behavior it was welcomed. That is not necessarily the case. The courts have recognized many victims of sexual harassment often fear retaliation by management or co-workers if they complain. Therefore, the delay in reporting the behavior is sometimes understandable.

An example may be, a male manager makes sexual

²⁸ National Foundation for the Study of Employment Policy
"Basic EEO Resource Manual" 1990

advances toward a female employee beginning in January 1990. The employee does not complain until November 1991. The delay in complaining will not necessarily hurt her case if there is no other evidence to indicate that the behavior was welcome.

That's Ancient History

What would you do if an employee comes to you with the following statement: "I was sexually harassed by my manager three years ago." I am telling you now because I was watching the Thomas hearings and now am aware of information about sexual harassment I previously did not know. I didn't know the manager was breaking the law back then.

Question from the manager: Did the harassment stop three years ago? If the answer is yes, the employee may go to a government agency, however they should tell her she is too late. The time elapsed has exceeded the limits set under the EEOC rules for filing charges, and under most state statute of limitations.

However, you will make a serious error in judgement,

if you fail to take the complaint seriously. Don't quote the time limits set out by law to the person complaining, and do not just tell him/her "you're too late."

Ask the person if any activity of a similar nature has occurred lately. Start looking into the workplace for any similar complaints by any other workers.

If the reported manager is still employed there, discuss the allegations with him/her in confidence. Experts on harassment have noted that many cases indicate a repeated pattern of harassing behavior by managers that have chosen to engage in that type of behavior.

Use the complaint as a warning to stop similar behavior that otherwise may be repeated, even though the time limit has expired. Keep in mind that time limits do not have to apply when enforcing company policy against sexual harassment. Disciplinary action may be taken against an employee when the company gains knowledge. The company may also want to evaluate its complaint procedure and hold training sessions for all employees.

My Company is Making its Own Rules, Can they do that ?

e.g., low morale, turnover, and loss of productivity
Management is allowed to run their business, and part of that may be setting and enforcing policies with higher standards than the legal definition. The better informed companies do this to prohibit all types of sexual conduct in the workplace.

There may be sexual advances or behavior that do not meet the legal definition of sexual harassment which the company nevertheless should prevent. The EEOC has said "prevention is the best tool for the elimination of sexual harassment."²⁹ Therefore, in an effort to eliminate harassment, a company policy may set stricter limits on sexual activity in the workplace.

The best rule for managers to follow is to avoid any type of sexual behavior in the workplace. What once may have been a welcome affair can quickly become an unwelcome disruption of the workplace. Have you ever seen a relationship stay exactly the same? They sometimes change, and if it becomes unwelcome, the

²⁹ Equal Employment Opportunity Commission Guidelines on discrimination based on sex, codified as 29 CAR 1604

company risks the legal cost as well as the results; e.g., low morale, turnover, and lack of productivity while dealing with a sexual harassment lawsuit.

... people ask the question, Where's the harm? They say, The person did not lose any money or benefits. However, the EEOC has said in its policy statement "The victim need not suffer economic loss or job loss to file a claim."

... EEOC has said "The person who is fired, demoted, or punished is not the only one who is harmed by sexual harassment. In its new policy statement, the EEOC stated, 'The victim's right to work is an important factor in determining whether a claim is warranted. The victim's right to work is an important factor in determining whether a claim is warranted. The victim's right to work is an important factor in determining whether a claim is warranted.'

11 EEOC Policy Statement 2-112-001 March 19, 1980
12 EEOC Policy Statement 2-115-001 March 19, 1980

UNDERSTANDING THE LAW

Where's the Harm ?

Many people ask the question, Where's the harm? They mean, the person did not lose any money or benefits. However, the EEOC has said in its policy statement "The victim need not suffer economic harm or job loss to file a claim."³⁰

Thus, it is not required the person be fired, demoted, lose promotion opportunities or lose a pay raise in order to make a claim of sexual harassment. In the same policy statement, the EEOC stated, "Title VII affords employees the right to work in an environment that is free from discriminatory intimidation, ridicule, and insult"³¹ based upon sex.

³⁰ EEOC Policy Statement N-915-050 March 19, 1990

³¹ EEOC Policy Statement N-915-050 March 19, 1990

It Was Just Harmless Fun

Flirtations of a sexual nature, innuendos or profane language of an inconsequential or merely aggravating nature does not necessarily create a hostile work environment meeting the legal definition of sexual harassment.

However, Helen Gurley Brown, editor of Cosmopolitan magazine told about a game called "scuttling"³² previously played at a radio station where she worked. "In this game, announcers and engineers (all male) chased secretaries (all female) around the office. When the engineers caught them, they took their panties off. Nothing wicked ever happened. De-pantying was the sole object of the game."³³

While this "game" above would definitely be classified as illegal behavior under Title VII, some activities in the workplace may not be illegal under the definition of the law. Nevertheless, a company has the

³² Chris Lee "Sexual Harassment" Training March 1992 p 30

³³ Chris Lee "Sexual Harassment" Training March 1992 p 30

right to insist on a professional work environment. In doing so, they also have the right to enact and enforce a policy, including discipline, banning behavior in the workplace that may not be unlawful under the act.

I Only Talked to Her Once !

It normally requires many incidents of verbal behavior³⁴ to be considered as a hostile work environment. A single incident or an isolated occurrence of an offensive sexual remark is not normally enough justification to file a charge of hostile work environment.

The severity of the offense does make a difference. A single remark resulting in offended feelings will not normally be considered hostile work environment sexual harassment. However, it would be in the company's best interest to stop the actions when brought to the their attention.

A hostile work environment customarily requires a

³⁴ Unless the verbal behavior is of a serious nature; e.g., "If you don't go to bed with me, you won't get the promotion."

pattern of abusive or offensive behavior. This is different from the quid pro quo type of sexual harassment which can be based on a single sexual advance by a manager if it is linked to giving or denying job related benefits.

It is true however, one severe incident of unwelcome sexual behavior can create a hostile work environment, especially when the harassment is physical; e.g., a single incident of unwanted touching may be grounds for a finding of unlawful sexual harassment. Anyone can file a charge at anytime, however it has nothing to do with the merits of the charge.

Question: If a manager calls the males in the work force "men," and the women "girls" is it harassment? "As noted by the Commission, there is an implication of female inferiority inherent in such disparate treatment. However, such discriminatory verbal conduct is not sexual in nature and, therefore, is not sexual harassment."³⁵

³⁵ Equal Employment Opportunity Commission Decision No. 72-0679 (1973)

Oh, These People I Work With !

"Environmental sexual harassment, which would include a supervisor or another employee using lewd suggestions, touching, crude spoken or written comments, or other objectionable behavior to create a working situation that is offensive"³⁶ can be considered hostile environment sexual harassment.

Even though your co-workers do not have the power to affect your job benefits, they can create a hostile work environment. Consequently, your co-workers cannot normally engage in quid pro quo sexual harassment. The EEOC will investigate complaints based on the assumption the employer or a member of management actually knew or should have known about the improper sexual behavior by co-workers.

Management may be able to avoid liability, if they take swift and appropriate action to stop the behavior as soon as they become aware of the behavior.

³⁶ Haggerty, Alfred G. "Sex Harassment Policies Scrutinized" National Underwriter Dec 9, 1991 pp: 3,24

What Can I Do, He Doesn't Work Here !

"The EEOC Guidelines would hold an employer responsible for the acts of non-employees where the employer actually knows or should have known of the harassment, but failed to remedy the situation. Some courts, for example, have held that the employer is responsible where an employee is exposed to harassment by the public while wearing clothing required as part of the job."³⁷ It is a question of control, the clothing required by management is what led to a finding of unlawful harassment in this case.

Non-employees; e.g., customers, vendors filling the vending machines, repair people, subcontractors, or sales people, can cause an employer to be held responsible for sexual harassment. The key question the courts will ask again is "did the employer know or should they have known about the sexual harassment?"

Immediate action to correct the situation must be taken if the investigation shows improper behavior. Be

³⁷ National Foundation of Study of Employment Policy "Basic EEO Resource Manual" 1990

aware the courts will determine the degree of control the employer had over the situation to stop the behavior by the third party.

I Never Even Spoke to Her !

Sexual behavior does not have to be directed at the person making a complaint. It is possible for an employee to be an indirect victim of sexual harassment. This type of situation can occur in a work location where sexual activity is carried on openly between managers and subordinates, or just between co-workers but with the knowledge of management.

Be aware, someone may be sitting back, and even though the harassment is not directed at them, they know their turn is coming. Courts have ruled behavior in the office can be so evident that it affects motivation and job performance of employees who find the behavior repugnant.

It's My Office

Title VII gives employees the right to work in an environment free from intimidation, insult or ridicule based on race, sex, religion or national origin, and under some state laws sexual preference and marital status.

Pinups, calendars, or graffiti hanging in someone's office or work area may be cause for a sexual harassment complaint. Jokes passed around with vulgar statements, abusive language, innuendoes to sexual activity, or overt sexual behavior by fellow workers can also be unlawful sex discrimination.

Women in increasing numbers are finding work in vocations once staffed by an all-male work force, and the tradition of the good-old-boy system (network of predominantly all males) may prevail. The EEOC has stated women do not assume the risk of sexual harassment by entering traditionally all-male work environments.

Pornographic magazines, vulgar comments about women, pinups, sexually oriented calendars or lewd jokes may tend to create a hostile environment amounting to sexual

harassment. However, any unwanted abusive or sexual behavior directed towards one gender in the workplace can be considered gender based harassment. The activity does not necessarily have to relate to sexual activity.

Chapter V

TYPE OF ADVANCES

Can't You Take a Hint ?

How can you tell when sexual conduct is unwelcome? Normally, if someone complains it is a sign the behavior is unwelcome. Sexual behavior in the workplace is unwelcome when the person does not solicit or initiate the behavior and when the individual regards the conduct as unacceptable and offensive.

Think about it, if a person complains or objects close to the time that sexual activity takes place, wouldn't it be a good sign the behavior is unwelcome--- YES!

If someone in the company complains to a manager, makes a complaint, remark, or an offhand comment to the manager expressing concern about sexual behavior in the workplace, it should be taken as a sign of unwelcome behavior. An investigation of the behavior should take place at that time. However, if that is how the investigation is started the system for complaining about

harassment may need to be looked into.

Sex was Never Even Mentioned !

Nonsexual abuse aimed only at a particular gender can be harassment. Acts of aggression, intimidation, hostility, rudeness, name calling or other types of abusive behavior directed toward one gender may not be sexual harassment. However, the nonsexual behavior directed toward one gender can be cause for a Title VII violation.

Gender based harassment does not always come in the form of obvious sexual advances or suggestions. It may be any abusive treatment of one gender that is not directed toward the other in a similar circumstance.

I Asked Her Out, and She Said Yes !

Have you ever wondered why someone files a charge of sexual harassment when they agreed to go out in the first place. Just because someone agrees to advances, does not mean it is welcome behavior. The person may do so

out of fear of losing job benefits, not necessarily because of desire.

The law will try to determine if the employee gave any indication indicating the sexual advances were unwelcome; e.g., did the employee make any complaining remarks to friends or co-workers, to the person making the advances, or to any manager?

Actual participation in sexual behavior may be voluntary, but it can still be unwelcome sexual harassment. If an employee voluntarily participates in unwelcome sexual behavior because of the fear of losing his/her job the sexual advances may be considered sexual harassment.

If the behavior observed is inconsistent with the claim that the advances were unwelcome, the behavior cause the EEOC to not find in favor of the charging party. If the charging party is visiting the harasser at home, then the assertion of sexual harassment may not be considered credible. This is because that behavior is not consistent with the allegation that the charging party does not wish to be with that person.

If someone complaining of sexual harassment refused

a transfer that would have allowed them a chance to get away from the harassment the court may want to know why. Would this action be consistent with someone complaining of harassment?

she Started It !

It may not seem logical that an employee who starts sexually suggestive talk can later claim harassment. Keep in mind, anyone can file a claim of sexual harassment. The deciding vote comes from the courts. The courts have investigated whether the complaining employee welcomed sexual behavior by using sexually oriented language or by soliciting the sexual behavior.

A person regularly using vulgar language, initiating sexual conversations with co-workers, or asking others about their marital sex lives, may become upset when the tables are turned, and file a charge.

The court will consider if the claim of hostile environment sexual harassment was self-induced. Occasionally courts have found propositions or sexual remarks by co-workers have been promoted by the

employee's own sexual aggressiveness and sexually explicit conversation.

In other cases, occasional use of sexually explicit language did not necessarily defeat a claim that sexual behavior was unwelcome. Verbal harassment can quickly become unwelcome if comments change and begin to be more extreme and abusive, or if they are more persistent than in the past. Also, a physical assault will never be excused by past use of sexual language. Neither will sexual advances by a manager in exchange for job benefits.

Sexual joking or innuendo, whether welcome or not, is inappropriate in the workplace. A company is inviting trouble if sexual comments are tolerated in the workplace. Comments by one person should not be regarded as an invitation for the rest of the work force to join in.

All comments of a sexual nature observed by managers should be stopped immediately. Employees should be told such conversations are not appropriate for the workplace.

She Was Asking For It !

She was asking for it, just look at the way she dresses every day. The unwelcome intentional touching of an employee's intimate body areas is more than enough to be offensive and justify a charge of hostile work environment sexual harassment.

A single unwelcome incident of touching can seriously contaminate the victim's work environment. If a manager touches an employee sexually, the EEOC will almost always find cause for sexual harassment. Sexual harassment has been found in a case where a harasser forcibly grabbed and kissed the victim in a storeroom.

Sexual pictures and comments alone, can be enough to be the basis for sexual harassment. An environment of that type has the effect of slowing down the progress of women in the workplace. The conveyed message is: women do not belong in the workplace, and they are not welcome unless they act men expect them too.

she Did It Too !

The EEOC has stated active participation in sexual behavior at the workplace, i.e., by "using dirty remarks and telling dirty jokes,"³⁸ may show the sexual advances complained of were not unwelcome. So, what if an employee participates in the group telling sexual jokes in the office. Does it indicate the behavior is welcome? Sometimes it does, and if it is, then it does not meet the legal definition of sexual harassment. However, it does not mean the behavior should be tolerated by a manager or the company.

Even if nobody complains about it, if a manager observes such activity in the workplace, the people involved should be talked to about such behavior, and told it is unacceptable in the workplace.

If an employee does complain and says it has gone too far, even if that person has been an active member of the behavior in the past, the manager should put a stop to all such behavior immediately. Just because an

³⁸ Equal Employment Decision No. 84-1

employee has used vulgar language or sexual innuendos in the past is not enough to show the court system the employee would never be offended by such behavior.

... you just don't know. Some managers make the mistake of thinking someone is just being emotional or there may be a personality conflict with another employee.

... The DOJ says you must evaluate sexual complaints from the perspective of the person complaining of harassment. The real test involved is to determine if a "reasonable person" would find the conduct offensive. However, the courts have begun looking at whether behavior would offend a "reasonable woman" on a case-by-case basis.

... If sexual harassment is viewed from the perspective and experience of the "reasonable person" standard, which tends to be gender-blind, it tends to be self-

Arthur F. Silberman, "Sexual Harassment: Victim Pays for Jobbing Unsafe Environment Sexual Harassment Cases" *Employment Relations Today* August 1991, p. 103

Chapter VI

MISTAKES

But I Just Thought !

Don't make assumptions about how someone feels, you just don't know. Some managers make the mistake of thinking someone is just being emotional or there may be a personality conflict with another employee.

The EEOC says you must evaluate sexual complaints from the perspective of the person complaining of harassment. The real test involved is to determine if a "reasonable person" would find the conditions offensive. However, the courts have begun looking at whether behavior would offend a "reasonable woman"³⁹ on a case-by-case basis.

If sexual behavior is viewed from the perspective and experiences of the "reasonable person" standard, which tends to be gender-blind, it tends to be male-

³⁹ Arthur F. Silbergeld "Reasonable Victim Test for Judging Hostile Environment Sexual Harassment Cases" Employment Relations Today Summer 1991 p 263

biased and some believe it ignores the perspective of women.

Some behavior many men do not find offensive may offend a majority of women. Male managers must be trained not to dismiss complaints by females simply because they are complaining about behavior that has taken place for some time.

Will You Listen to Me? Please !

Reporting sexual harassment is never easy on the victim. If someone has finally gotten to the point of making a complaint, management needs to listen and pay attention. Filing a complaint on sexual harassment is not an easy decision for someone to make. Listen to the complaining party and take the charges seriously. Do not make the mistake of dismissing the charge as inconsequential. Remember, it is in a company's best interest to make a good faith effort to resolve sexual harassment complaints without the help of the court system.

It is just not good business for a company to risk



sexual harassment complaints by allowing sexual conduct to occur. "Sexual harassment is a significant problem in the workplace. It has been estimated that sexual harassment costs a typical Fortune 500 company \$6.7 million a year in absenteeism, employee turnover, low morale, and low productivity."⁴⁰

This is especially true considering the changing climate of the court decisions on whether conduct is welcome or unwelcome. Some situations the court used to view as personality conflicts are now considered sexual harassment. If confronted with a sexual harassment complaint, or if you observe sexual conduct, you need to deal with the complaint and stop the activity if it is occurring.

I Didn't Do Anything Wrong, Did I?

If dealing with sexual harassment, and you fail to take each complaint seriously or fail to have a viable

⁴⁰ Aalberts, Robert J.; Rubin, Harvey W. "A Risk Management Analysis of Employee Sexual Harassment" CPCU Journal Dec 1989 pp: 209-215

complaint system it may be one of the worst mistakes a company may ever make. All complaints must be investigated thoroughly. Judging the complaint based on what you know about the people involved in the charge may be the next mistake. You must understand, it is not only young, attractive females who are sexually harassed.

Do not assume the person complaining is being emotional or unnecessarily sensitive. While the content of the text of the law has not changed much over the years, different forms of sexual harassment of a more subtle nature are being recognized by the courts.

The need for everyone to understand the wide range of activity in the workplace capable of being classified as sexual harassment is increasing.

Be Careful Who Gets Punished

If a company chooses to separate a victim and harasser, moving the victim could be perceived as punishment for being a victim.

Use extra caution if you are going to separate anyone. If the employee making the complaint is

reassigned and is not happy with the new assignment the company may be viewed as retaliating against the employee for making a complaint, and for having failed to punish the harasser.

Things to Avoid

Some articles such as one featured in Computerworld November 18, 1991,⁴¹ suggests sexual harassment does not exist in some work places because women are tough enough to discourage it. This pronouncement is synonymous to the claim women are responsible for the existence of sexual harassment in the workplace, which is just not true.

"Sexual harassment cases have far-reaching impact on both the employers and employees."⁴² In quid pro quo cases, courts have held employers strictly liable for sexual harassment keeping in mind that the managers for

⁴¹ Nasser, Kate "Women in IS Shouldn't Have to Be Tough" Computerworld Dec 16, 1991 pp: 25

⁴² Garvin, Stacey J. "Employer Liability for Sexual Harassment" HR Magazine June 1991 p 101

the company involved possess the power to grant or deny job benefits on the basis of sex. "The court held that a supervisor is an "agent" of his employer for Title VII purposes, even if he lacks authority to hire, fire, or promote, since " the mere existence-or even the appearance-of significant degree of influence in vital job decisions gives any supervisor the opportunity to impose on employees."⁴³

Do not get caught up in the emotions of the moment. Maintain a professional attitude, and do not make judgments, gather information and facts. When you are initially listening to the complainant do not try to determine if the complaint is valid. Maybe the most important part of your job at this time is to gather the facts necessary for your investigation into the allegations.

Do not make comments like, "Most women would view that as a compliment" or "Maybe you shouldn't dress the way you do." Do not pass responsibility for sexual harassment to individual women in an after the fact

⁴³ Meritor Savings Bank, FSB, Petitioner v. Mechelle Vinson et al., Respondents.

fashion. Companies should be proactive in preventing sexual harassment. "Sexual harassment that is hidden in the workplace eventually comes out and can lead to turnover, poor morale, and lead to costly court action."⁴⁴

If an employee tells a manager about behavior that could be considered as sexual harassment, but does not want to make a formal complaint saying she wishes to "handle it" alone without causing any problems, do not allow it happen that way.

It is not for the victim to decide, even if the victim doesn't want any action to be taken, the company is now in a position to later be held liable for harassment. The employer has been informed by the victim through its agent, the manager. The company is now aware of the situation and will be held liable if it does not investigate and take immediate corrective action.

It should be explained to the victim the company has an independent duty to enforce its policy and the law forbidding unwelcome sexual behavior.

⁴⁴ Nasser, Kate "Women in IS Shouldn't Have to Be Tough" Computerworld Dec 16, 1991 pp: 25

Sexual Favoritism

Sexual favoritism is another example of a mistake a manager or company can make. The following are examples from the EEOC guidelines.

Example 1

(Mary) alleges that she lost a promotion for which she was qualified because the co-worker who obtained the promotion was engaged in a sexual relationship with their manager. EEOC's investigation discloses that the relationship at issue was consensual and that the manager had never subjected (Mary's) co-worker or any other employee to unwelcome sexual advances. The commission would find no violation of Title VII in these circumstances, because men and women were equally disadvantaged by the manager's behavior for reasons other than their genders. Even if (Mary) is genuinely offended by the manager's behavior, she will not prevail under Title VII.

Example 2

Same as above, except the relationship at issue was not consensual. Instead, (Mary's) manager regularly harassed the co-worker in front of other employees, demanded sexual favors as a condition for her promotion, and then audibly boasted about his "conquest." In these circumstances, (Mary) may be able to establish a violation of Title VII by showing that in order to have obtained the promotion, it would have been necessary to grant sexual favors. In addition, she and other qualified men and women who were denied the promotion would have standing to challenge the favoritism on the basis that they were injured as a result of the discrimination leveled against their co-workers.

Example 3

Same as Example 1, except (Mary's) manager and other management personnel regularly solicited sexual favors from subordinate employees and offered job opportunities to those who complied. Some of those employees willingly consented to the sexual requests and in turn received promotions and awards. Other consented because they recognized that their opportunities for advancement would otherwise be limited. (Mary), who did not welcome this behavior, was not approached for sexual favors. However, she and other female and male co-workers may be able to establish that the behavior created a hostile work environment. She can also claim that, by their behavior, the managers communicated to all female employees that they can obtain job benefits only by acquiescing in sexual behavior.⁴⁵

⁴⁵ EEOC Policy Guidance, N-915.048, January 1990

Chapter VII

HOW CAN COMPANIES REDUCE LIABILITY

No One Complained

"One way to avoid these types of problems, is for management to actively discuss the problem and make clear that conduct of that type is inappropriate. Companies need to keep in mind the number of incidents reported is not an accurate measure of the problem. If a company waits for a certain number of reports before taking action, they are implying that sexual harassment is acceptable in small doses."⁴⁶ One rape is an incident, does it take three to become a problem?

Even if a complaint procedure is in place and no one complains, the employer is still obligated to investigate and stop harassment if it is obvious by observation of the workplace. Employees can file an EEOC sexual harassment charge without using the company's internal

⁴⁶ Nasser, Kate "Women in IS Shouldn't Have to Be Tough" Computerworld Dec 16, 1991 pp: 25

complaint procedure. Employers should take quick action to investigate and remedy a complaint, regardless if the complaint is made to the EEOC or as part of the internal complaint procedure.

I Went to a Seminar, Isn't that Enough ?

If someone asks "are you trained in sexual harassment?", think about your answer. If you think attending one seminar on sexual harassment is enough training, you should think again. Even full time consultants and attorneys are not capable of figuring out which way a jury or judge is going to interpret the law on each individual case. The real problem is passage of law cannot and does not cause an immediate cessation of habits and attitudes that have existed for years, look at racism.

"Knowing what behaviors constitute sexual harassment and knowing how to protect employees position supervisors as key figures in eliminating sexual

harassment from their companies."⁴⁷

This means managers must not be involved in any activity that may be viewed as sexual harassment. They must also be able to identify activity by other people in the workplace that may be considered sexual harassment.

If a manager knows or should have known about harassment taking place, they are required to take appropriate action to stop it. If they do not, they may be personally required to pay a judgement.

The manner in which managers respond to complaints about harassment will be a consideration for the EEOC when they decide if the company or the manager will be held liable for sexual harassment.

Many times managers are the first to see or be informed of improper sexual activity in the workplace. Also, as defined by law, managers are the only people in the company who are capable of engaging in certain types of sexual harassment (Quid pro Quo).

⁴⁷ Flynn, Kelly "Protecting the Team from Sexual Harassment" Supervision Dec 1991 pp: 6-8

I Didn't Understand What That Meant

"Clearly articulated expectations regarding sexual harassment are imperative, and a clearly defined policy and grievance procedure should be developed and communicated to all employees. The organization also should: 1. establish effective educational programs, 2. consistently monitor potentially abusive situations, and 3. enforce company policy regarding this issue. It is hoped that, by taking such steps, companies will be able to reduce, or possibly eliminate, sexual harassment in the workplace."⁴⁸

The company should give each employee a copy of the policy and train them. It should be read and explained to employees in group meetings. Efforts should be made to educate employees to recognize and confront harassment.

Managers should be sensitized to recognize improper behavior among co-workers, and they should be educated on what the appropriate actions are to prevent and remedy

⁴⁸ Woods, Maureen P.; Flynn, Walter J. "Heading Off Sexual Harassment" Personnel Nov 1989 pp: 45-49

situations.

Which Road (Steps to Prevention)

The cat in Alice in Wonderland told Alice, "if you don't know where you want to go, it doesn't matter which road you take." You, on the other hand, should know which road to take, it is the road to prevention.

There are some specific steps a company should take to emphasize to employees sexual harassment will not be tolerated in the workplace. First, establish a written policy prohibiting sexual and any other form of harassment. Every company should have a written policy specifically prohibiting sexual harassment.

The policy should be covered with employees on a regular basis. At least annual coverage is suggested. The policy should contain language stating sexual harassment will not be tolerated in any form.

The policy should define both "quid pro quo" and "hostile work environment" harassment. The policy should also outline the procedure employees need to take to make complaints about sexual harassment. It should have the

name of a person with enough authority to resolve the complaint.

Employees need to be assured all complaints will be treated confidentially, and anyone complaining about sexual harassment will not suffer any adverse job consequences as a result of a complaint. It should also inform all employees, anyone engaging in sexual harassment will be subject to discipline up to and including dismissal.

I Tried to Stop This Stuff

One of the first questions the EEOC will want to ask is, what steps did the company take to prevent or stop the harassment? If a company can prove it took the necessary steps to eliminate sexual harassment, it can generally avoid liability.

The EEOC will normally dismiss any charge of sexual harassment if they determine: the sexual harassment has been eliminated, all lost job benefits have been restored to all victims, and the company has put in place preventive measures to stop the harassment. Quick

corrective action can save time and money.

Keep Track

The EEOC has said "prevention is the best tool for the elimination of sexual harassment."⁴⁹ Even after a policy against sexual harassment has been put in place, the company should watch the workplace to ensure no one is engaging in prohibited activity.

After the policy is covered in a meeting to inform employees to stop certain behavior, managers should make sure to observe the policy is being followed.

Informal Complaint

A company wide informal "Hotline" is a good idea. It is a way to self-investigate without self-incriminating. The process should begin with establishing an effective company complaint procedure which should encourage employees to come forward with

⁴⁹ Equal Employment Opportunity Commission Guidelines on discrimination base on sex, codified as 29 CAR 1604

allegations of sexual harassment.

The person designated to receive complaints should be trained and preferably experienced in how to handle these types of situations. There is a difference between trained and experienced. When dealing with this type of situation an investigator walks a fine line. You must show empathy for the victim and the alleged harasser at the same time. There should be someone other than the employee's direct manager, in case the manager is the harasser. The procedure should state all complaints will be confidential, and that there will be no retaliation against someone filing a complaint.

This is an important step to reduce employer liability. The EEOC will ask if any procedure was available for an employee to come forward with a harassment complaint. In fact, if the EEOC knows you have an internal process, they will sometime send the employee back to you⁵⁰.

The employees may have the view that if there is no effective complaint procedure in place, the harassment

⁵⁰ I personally handled a case in which the employee told me the EEOC suggested he use the company's internal process first.

will be ignored, tolerated or even condoned by the company.

As a result, the effects of harassment

When you have heard it said, "If you can't do the time, don't do the crime." While saving time may not be on the agenda for many managers, there is time lost due to low productivity. It has been estimated that sexual harassment costs a typical Fortune 500 company \$6.7 million a year in commission, employee turnover, low morale, and low productivity.¹

When situations get bad enough for someone to file a charge of sexual harassment, it will be the main topic of conversation in the workplace. If that is what the employees are talking about, who is doing the work?

Harassment of any nature may have the effect of reducing productivity, or contribute to the workplace. The activity also affects what employees are learning about

¹ Gilbert, Robert J., and David S. "A Risk Management Analysis of Employee Sexual Harassment" *HRD Journal*, Dec 1994 pp: 309-315

Chapter VIII

THE POSSIBLE COST OF HARASSMENT

My Company Can't Afford That !

You have heard it said, "If you can't do the time, don't do the crime." While serving time may not be on the agenda currently for harassers, there is time lost due to low productivity. "It has been estimated that sexual harassment costs a typical Fortune 500 company \$6.7 million a year in absenteeism, employee turnover, low morale, and low productivity."⁵¹

When situations get bad enough for someone to file a charge of sexual harassment, it will be the main topic of conversation in the workplace. If that is what the employees are talking about, who is doing the work?

Harassment of the victim may have the effect of reducing their ability to contribute to the workplace. The activity also upsets other employees who learn about

⁵¹ Aalberts, Robert J.; Rubin, Harvey W. "A Risk Management Analysis of Employee Sexual Harassment" CPCU Journal Dec 1989 pp: 209-215

the harassment.

If management does nothing, fails to make a good faith effort, to stop the harassment it can be very demoralizing to employees. Turnover and absenteeism are other symptoms of the problem. If harassment claims become public knowledge, the company's reputation in the community will not be helped.

\$300,000 Plus Other Costs, Are You Kidding ?

While the CRA of 1991 sets caps for compensatory and punitive damages, a company found to be responsible for sexual harassment can be ordered to additionally compensate the victim for the harassment in different ways.

A court may order the company to rehire an employee, be forced to pay wages to the employee for the period he/she was out of work, and they may be ordered to pay the attorney's fees for the person who successfully charges harassment in court.

Under the Civil Rights Act of 1991 employers may be required to pay damages to victims of sexual harassment

up to certain limits. The caps on damages are as follows: \$50,000 for companies with fewer than 100 workers; \$100,000 for companies with up to 500 workers; and up to \$300,000 for companies with more than 500 workers. Moreover, if a class action suit is filed, the EEOC takes the position that the cap is per capita.

Million Dollar Mistake

Million dollar jury awards are being handed out to victims in state courts. Attorneys who represent employees claiming sexual harassment file lawsuits in state court because more damages are available.

"Plaintiffs suing under Title 42 of the United States Code Sections 1981 and 1983 generally can get greater damages than would be available under Title VII and can avoid some of the complex procedural requirements and time limitations involved in a Title VII suit.

Nonstatutory causes of action for sexual harassment are: 1. intentional infliction of emotional distress, 2. assault and battery, 3. invasion of privacy, and 4. intentional interference with contract. Some workers are exploring

possible civil action under the Racketeer Influenced and Corrupt Organizations Act"⁵² (RICO).

A jury trial in state court does not have a limit on damages. Since, the sexual harassment victim in a state court can get damages for wrongful discharge, pain and suffering, emotional and physical stress, doctor's bills, damaged relationships and/or the inability to work at other jobs punitive damages can also be awarded.

Awards by a jury for over \$1,000,000 have been awarded in these types of cases.

Good Faith Effort

A good faith effort is basically any effort initiated on your own to discourage harassment or once it is identified when you take remedial action to correct past, even if no longer occurring, harassment. In regard to past harassment the company should to take whatever action is necessary to stop the harassment. Dealing with

⁵² Dworkin, Terry M.; Ginger, Laura; Mallor, Jane P. "Theories of Recovery for Sexual Harassment: Going Beyond Title VII" San Diego Law Review Jan/Feb 1988 pp:125-159

the victim's needs by restoring lost job benefits or opportunities incurred because of the harassment is a good step. Finally, in some cases it may be appropriate to offer counseling services to overcome the stress caused by harassment.

Resolving this type of situation should begin by attempting to change the behavior. Avoid any kind of action that would appear to penalize the victim of harassment; e.g., working a different and less desirable shift, or transferring the victim to a different work location without getting an agreement.

Whoever was responsible for the harassment needs to be educated and possibly disciplined. Discipline may include a warning, demotion, suspension and/or probation. If the behavior was of a very offensive nature, or if the harasser's ability to perform is impaired severely by this incident, discharge may be the only choice.

Any discipline falling short of termination should be accompanied with a warning indicating any similar conduct in the future will result in immediate discharge.

Chapter IX

INVESTIGATING A CLAIM OF SEXUAL HARASSMENT

Dig Deeper

"The proper investigation of a sexual harassment complaint can enhance productivity and limit liability exposure. The goal is an objective, truthful investigation that will result in remedial action against the harasser and not the organization. Success of this objective will depend on the investigator's ability to recognize and pursue the relevant issues."⁵³

Once a complaint of sexual harassment is made and the employer has been made aware of the problem, an immediate investigation of the alleged behavior should be begun by someone trained to investigate, according to company policy.

To be able to effectively investigate this type of situation, a person should have a clear understanding of what constitutes sexual harassment. This person should

⁵³ Connell, Michael E. "How to Investigate Sexual Harassment" Security Mgmt Dec 1987 pp: 32-38

be very familiar with the definition of sexual harassment.

Guidelines

"The first step is to understand the laws that apply to this type of complaint. Sexual harassment is unlawful discrimination in violation of Title VII of the Civil Rights Act of 1964."⁵⁴ While an investigation is being conducted sensitivity should be shown toward both the complainant and the accused harasser (at this point, it has not been ascertained if the allegations are perception or fact). All information given by the complainant should be examined, and the charging party's account of what happened should be documented. The person accused of the actions should be informed of the investigation and allowed an opportunity to respond to every allegation. Circumstances of the case will determine if witnesses should be brought into the investigation.

⁵⁴ Connell, Michael E. "How to Investigate Sexual Harassment" Security Mgmt Dec 1987 pp: 32-38

A thorough investigation should be started within two or three working days of being advised of the situation. Prolonging the investigation longer causes everyone involved additional stress and concern.

All allegations should be taken seriously, regardless of how they may appear on the surface. While it is not possible to guarantee complete confidentiality, keep the investigation and the information under a strict "need to know" basis. Inform all involved in the investigation, including the complainant, the accused and witnesses, they need to keep discussions strictly confidential, and back up the instructions with warnings of discipline if needed.

The number of persons in the company who have access to this type of information should be limited. Do not divulge any unnecessary information to witnesses. For example, instead of asking "Did you see Bill touch Linda's back?" ask "Have you seen anyone touch Linda at work in a way to make her uncomfortable?" The purpose of the investigation is to gather facts, not distribute allegations.

The investigation will be hindered if the victim

refuses to give any further information on the behavior. In this type of case, it is especially important to document the answers to questions and any other investigatory actions you may have taken. Even if you feel the investigation was non-effective, you can take some action. It may be time to redistribute the company's written sexual harassment policy to employees.

Do I Look Like a Reporter

When interviewing the Complainant ask for specific details regarding the alleged sexual harassment including questions regarding the type of behavior. Inquire into the frequency of the occurrence, what was said, what was done, and where it occurred.

If the charging party complains of touching, find out where the charging party was touched. Find out when the behavior occurred, and the time span involved. Find out if this is a single incident or if there were multiple incidents.

Get specific information about the location the incident took place. Did the behavior occur during

working hours, after hours, on or off the job?
Determine the effect of the behavior. Did the incident cause any damage; e.g., economic or psychological?

I'm Not Sherlock Holmes

Even though you may not be Sherlock Holmes, when investigating you need to get answers to: "who, what, when, where, why and how." Start by asking the basic questions of who did what to whom, when, where, how and why?

Find out if the employee is afraid of retaliation because of reporting the incident[s]? What does the employee want to see happen to resolve the problem? A manager should react to a sexual harassment complaint in a professional manner. This includes listening, taking the complaint seriously, and being non-judgmental.

Taking a sexual harassment complaint to a manager is one of the most difficult things a person may ever have to do in their career. Even if not difficult, it will be uncomfortable for the person.

All complaints should be taken seriously, even if

the person making the complaint complains about other things a lot or even if the behavior doesn't initially sound like harassment to you. Employers can face a wrongful discharge lawsuit if an employee quits his/her job because they walked away with the impression the company didn't take the complaint seriously. Don't make a comment like "I'm sure nothing was meant by it."

Giving the employee a copy of the company's policy against sexual harassment may be a good start. It may help to show that company takes sexual harassment seriously. Let the employee know you are aware that bringing a sexual harassment complaint is a difficult thing to do, and it is normal for the person to feel uncomfortable.

INTERVIEWING

The Line Up, Interviewing the Accused

"If the allegations are such that the accused will likely admit to them, you may want to postpone your witness interviews."⁵⁵ The investigator should identify the relationship of the accused to the complainant. In addition the investigator should include a statement of the accused response to the allegations; the position of the accused manager in the company. Other questions are: did the complainant ever have a consensual relationship with the accused at any time in the past; how long have the parties known each other; have the two been thrown together (by choice or not) in past social situations because of business; is the complainant subordinate to the accused; was the accused in a position to recommend employment decisions affecting the charging party?

Considering the accused person will normally deny

⁵⁵ Connell, Michael E., "How to Investigate Sexual Harassment" Security Management December 1987 p 35

the charges, it is important to watch their physical reaction to the charges. Was the person surprised or angry. Explain details of the allegation and document any allegations not agreed on. If the accused denies the charges you need to investigate further with the accused why the charging party would say such things. Corroborating evidence should be sought for the motivation of the complaint.

Who is In Charge? The Accused's Manager

During the investigation you need to talk with a manager responsible for both the accused and the complainant. Determine if there have been any discipline problems or behavior patterns by the accused or the complainant, and determine if the manager had any knowledge of the relationship between the parties.

To help determine the company's position and liability find out if the complainant ever reported the behavior to the manager? Was the manager in a position to observe the behavior? Were there any rumors or did someone else talk about the problem with the manager, or

did he/she see or hear it?

Interviewing Witnesses

"Remember, witnesses are not restricted to those who see the prohibited conduct; they may be witnesses of a circumstantial nature."⁵⁶ People that have been told about incidents can also be considered witnesses as well. While investigating you should look for surrounding evidence to support or disprove a harassment claim. Do co-workers have any knowledge, or did anyone observe the complainant's behavior shortly after the alleged incident.

The EEOC can determine sexual harassment has occurred based solely on the credibility of the complainant's summary of what happened. The description of the behavior must be detailed enough and believable enough to be conceivable.

Find out if the complainant discussed the matter with anyone else, such as an adviser, or physician. For

⁵⁶ Connell, Michael E. "How to Investigate Sexual Harassment" Security Management December 1987 p 35

example, the complainant walks out of the boss's office and says to George "I don't know why he talks to me that way, or why he keeps referring to my body as being hot, I really don't appreciate it." George is in a position to possibly support one of the complainant's allegations. This type of information is critical to the investigation because without it, it is simply the complainant's word against the accused.

Did anyone else notice any changes in the complainant's behavior on the job or in the way the alleged harasser treated the complainant? During the investigation find out if other employees have been treated in a similar manner by the alleged harasser? Be aware witnesses are often reluctant to come forward because of their fear of retaliation.

When you interview the witnesses insure each witness their testimony is confidential, and they will not be retaliated against for testifying.

The policy must be reviewed with all employees. Sexual harassment is specifically prohibited as unlawful and against company policy. Additionally, management

Chapter XI

POLICY

Sexual Harassment Policy

The following is information to help a company formulate a sexual harassment policy. The company's sexual harassment policy should state all employees have the right to work in an environment free from all forms of discrimination and behavior which could be considered harassing, coercive or disruptive. The policy should explain that sexual harassment is an unacceptable form of behavior. No one should be subject to unwelcome sexual advances or behavior, whether verbal or physical. Sexual harassment refers to behavior that is not welcome, that may be personally offensive, morale lowering, and therefore it has the effect of interfering with job performance. Employees need to be aware such behavior may result in disciplinary action up to and including dismissal.

The policy needs to be covered with all employees. Sexual harassment is specifically prohibited as unlawful and against company policy. Additionally, management

personnel are responsible for taking action against acts of sexual harassment by anyone, once they gain knowledge.

There should be a procedure in place for complaints of sexual harassment to gain the attention of the company. There should be more than one place to bring complaints to; e.g., manager, the Affirmative Action Hotline, Human Resources manager, or possibly a counselor.

If the alleged harasser is the employee's manager, the employee should feel free to bypass the manager, and take the complaint to one of the other departments.

Sexual Harassment by a Manager

The president of the company where Katherine worked as an employee, while riding in his vehicle, advanced towards her and while riding in the president's vehicle, Katherine was told she had a "good body" and "if you want me, you'd have a great body." These remarks along with the president's "half smile" and "grin" were, said Katherine, very

THESE WENT TO COURT

One of the best ways to get an idea of how a specific activity will be viewed is to look at actual situations that have been the source of sexual harassment complaints.

It is not intended for the examples given to provide a comprehensive listing of behavior classified as sexual harassment, however, they do illustrate the types of situations viewed by courts worthy of being taken to trial on the basis of sexual harassment.

Sexual Advances by a Manager

The president of the company where Katherine worked as an architectural designer made unwelcome sexual advances towards her; e.g., while riding with the president in his vehicle, Katherine was told she had a "good body" and "If you worked out, you'd have a great body." Those remarks along with the president's "half smile" and lustful tone, made Katherine very

uncomfortable. At that time she made no response and changed the subject.

On a visit to a construction site two weeks after that, he approached her and came within a foot of her. He scanned her body from head to toe and back up to her head, and in a soft voice said "You look good in tight jeans. It shows off your butt." Katherine turned and walked away.

He repeated the statement "You look good in tight jeans" to Katherine on a subsequent visit to another construction site. Katherine continued to ignore the remark, hoping he would stop.

During lunch at a local restaurant, the president took Katherine's hands, looked at her and commented "I like my women with good looks and brains." Katherine promptly removed her hands and, after a brief period of silence, started talking about business matters.

Finally, during another luncheon he described how women are treated in Hungary - treatment Katherine found much distaste for. He then took Katherine's hand and said "My women are special. I like to put them on a pedestal." She removed her hand, sat back in her chair,

and she changed the subject.

About a month after these sexual advances, the president began to find fault with Katherine's work. He also gave Katherine a "substantial work load" before he left for vacation. Katherine failed to complete the work before he returned, despite working diligently for long hours. Katherine was discharged soon thereafter.⁵⁷ Katherine prevailed in court.

An Unwelcome Co-worker

The foreman for a construction company hired three women in April as "flag persons" or traffic controllers. All three of the women were in their thirties, and two of them were single mothers with small children at home. They were the only women on this particular crew.

Immediately after the women started work, the male members of the crew began to inflict verbal sexual abuse on the women. The men referred to them as "f--king flag girls" and called one of them "Herpes" after she

⁵⁷ Katherine M. Chamberlin, Plaintiff-Appellee v. 101 Realty, Incorporated et al., Defendants-Appellants.

experienced a skin reaction to the sun. On one occasion one of the women returned to her car, and she found "Cavern Cunt" written in the dust on the driver's side and "Blond Bitch" written on the passenger side.

All three women experienced other types of abuse on a regular basis, including frequent "mooning" by the male workers. The male crew members would use company surveying equipment to spy on the women as they were relieving themselves in a ditch after being refused a truck to drive to town for bathroom breaks. The foreman was aware of the above actions and failed to discipline anyone.

In August all three women quit their jobs. Claiming constructive discharge, they went through the procedural prerequisites to obtain a "right to sue" letter from the EEOC. A bench trial was held in which the women won.⁵⁸

⁵⁸ Darla G. Hall et al., Appellees v. Gus Construction Co., Inc. et al., Appellants.

Love Letters

Kerry, a female, worked as revenue agent with the Internal Revenue Service, and was asked out to lunch by a male co-worker (Sterling), and she accepted his offer. In that office it was customary for agents at the office to go out to lunch in groups. Sterling asked Kerry to have lunch at a time when no one else was in the office.

After accepting that lunch offer, Sterling began to spend more time around Kerry's desk unnecessarily. About four months later he asked Kerry to have a drink with him after work. Kerry refused the offer, she suggested instead to have lunch the next week, even though she did not want to have lunch with him alone, and she attempted to avoid him during lunch time. During the next week he dressed in a three-piece suit which was not normal for him, and asked Kerry to have lunch with him, but she refused.

A few days later, he handed Kerry a note he had written on a telephone message slip, it read: "I cried over you last night and I'm totally drained today. I have never been in such constant term oil (turmoil).

Thank you for talking with me. I could not stand to feel your hatred another day." The note shocked and frightened Kerry. She left the room, and he followed her into the hallway insisting she talk to him. She then left the building.

The memo pad note was followed by a card and a typed, single-spaced, three-page letter mailed to Kerry while she was out of town on training. Kerry described the letter as much weirder than the prior note and indicated she thought he was crazy and she was frightened.⁵⁹

Homosexual Advances

Timothy had been employed as a shop mechanic for six or seven months. One day Timothy was approached by a terminal manager, who invited him into his automobile. Upon entering the automobile the manager grabbed Timothy's private parts. Timothy strongly objected and immediately left the car.

⁵⁹ Kerry Ellison, Plaintiff-Appellant v. Nicholas F. Brady, Secretary of the Treasury, Defendant-Appellee.

Sometime after the incident Timothy complained to higher management. Higher management called the terminal manager and told him of the allegations, he denied the incident. Later, the terminal manager told Timothy he was going to get him fired (Timothy's interpretation).

A short time later Timothy was transferred to a higher paying job, even though he objected. He objected to moving because he would be losing his seniority as a shop mechanic. He was transferred anyway, and became the lowest senior person. He was laid off with others shortly thereafter. Timothy was never recalled, while all the others were, and additionally a new person was hired.

The EEOC found no cause in this case. However, upon receiving his "right to sue" letter Timothy did sue, and won his court action.⁶⁰

⁶⁰ Timothy L. Joyner, Plaintiff v. AAA Cooper Transportation, Defendant

Graffiti, Comments, and Photographs

Lois worked as a welder in a shipyard. Pictures of nude and partially nude women in sexually suggestive or submissive poses were posted throughout the shipyard. Pictures on the walls showed exposed breasts, pubic areas, and buttocks. Magazines and photographs torn from magazines were also placed on walls or attached to vendor advertising calendars. The calendars themselves also sometimes depicted nude or partially nude women. Some sexually offensive drawings and graffiti ("eat me," "pussy," and "Men Only") were placed on the walls. No pictures of nude or partially nude men were posted anywhere in the workplace.

Along with the pictures there were sexually demeaning comments and jokes made by male employees and managers towards Lois and other female employees. Among the comments were: "Hey pussycat, come here and give me a whiff," "The more you lick it, the harder it gets," the references "honey," "dear," "baby," "sugar," "sugarbooger," "momma," and "there's nothing worse than

having to work around women."⁶¹ In this case judgement was entered in favor of Lois.

pictures Cause A 1000 Words

Catherine was exposed to nude photographs posted in various areas of the glass works plant in which she worked. She eventually complained about the pictures to the plant manager. Upon hearing her complaint he made inappropriate personal and sexual remarks to her, addressed her as "honey" and "dear," and insinuated she was a trouble-maker. After complaining, some, but not all, of the pictures were removed. This was despite the fact the company had a policy to remove sexually explicit materials upon delivery.

When Catherine's immediate manager heard of her complaint, he indicated that he disapproved of "women's liberation" and told Catherine a story about employees being forced to quit their jobs after their jobs were made intolerable. Another manager and co-workers

⁶¹ Lois Robinson, Plaintiff v. Jacksonville Shipyards, Incorporated et al., Defendants.

expressed to Catherine their annoyance over her complaint. She was subjected to cat calls and harassing whistles from those people. Catherine reported these instances of harassment to her immediate manager and the plant manager. They told her she was somehow encouraging the harassment, and management failed to end the whistling and cat calls.

One of the other features of the company's policy on harassment was to institute a policy of using gender-neutral terms in place of traditional, gender-specific job titles. However, the company not only failed to enforce the policy, it further mistreated Catherine for encouraging better enforcement of the policy.⁶² Since adequate proof was given that the sexual harassment she was subjected to was "sufficiently severe or pervasive to alter the conditions of her employment and create an abusive working environment," she prevailed.

⁶² Catherine S. Tunis, Plaintiff v. Corning Glass Works, Defendant.

Is Being Rude Illegal

John felt his position of head of a military EEO office was being threatened by women, so he continually abused his female subordinates. He offered little guidance, and refused his staff access to needed documents and mail. Expressions such as "Okay babe" and "Listen here woman" in reference to Virginia, an EEO Specialist under his supervision were used by him. He also screamed and threatened Virginia for leaving the office on occasion and once physically barred her from leaving the room. On still another occasion he blew cigar smoke in her face. The two other subordinates were also subjected to his shouting and insults.

Additionally John complained to another manager he had "dumb females working for him who couldn't read or write." John's abusive treatment was directed only towards female workers, and therefore considered sexual harassment.⁶³ A navy employer was liable for sexual

⁶³ Virginia Delgado, Plaintiff v. John F. Lehman, Secretary of the Navy, Defendant.

harassment by John. She had brought to this issue to the attention of her commanding officer, but it went unremedied, except for a single meeting of the department. There was no evidence the commanding officer checked to see that his proposed remedial suggestions were followed, and she prevailed.

I Quit

The first occurrence of harassment at the paper mill in which Susan worked began as co-workers broadcasted obscenities directed toward her over the public address system. Those broadcasts caused other employees to make suggestive comments to Susan. Following Susan's complaint to her immediate manager, the employee who broadcasted the obscenities was told by a foreman to stop, but he receive no punishment.

About five months later Susan was moved to another shift. During that time her manager and his assistant urged her to have sex with a co-worker. Susan's manager

also pinched her buttocks with pliers and attempted to put his hands in her back pockets. Furthermore, the manager and other employees often made comments to Susan such a "I would like a piece of that," referring to Susan.

Susan also received over 30 pornographic notes in her locker and was exposed to sexually explicit pictures and graffiti on the walls and in the elevator, some of the material was directed at her personally.

Additionally there were sexually oriented calendars on the walls and in lockers that were left open, and used tampons were left hanging from lockers. After about three years of this type of sexual abuse, including threats of physical harm, Susan finally resigned. While Susan never invoked the established grievance procedures at the plant during this time, she did complain to management, which never resulted in disciplinary action towards her harassers,⁶⁴ and she prevailed.

⁶⁴ Susan Waltman, Plaintiff-Appellant v. International Paper Co., Defendant-Appellee.

pregnancy

Teodora was subjected to a number of sexually offensive remarks by management personnel concerning her pregnancy. For example, a male manager told her "that's what you get for sleeping without your underwear." She also was asked by the manager why she became pregnant by another man, and comments were made about her "ass." A female manager would laugh about the offensive remarks made in her presence and would add a few of her own, such as "(I don't like) stupid women who have kids" and the expressions "dog," "whore" and "slut." In addition, the male manager assured her she would never be fired if she had sex with him.⁶⁵ Since a hotel's general manager and a supervisor with authority to discipline had actual knowledge of housekeeping employees' allegations of sexual harassment by supervisors, and should have known of the harassment because of its serious and pervasive nature, but did not take any prompt remedial action, the employer could be held liable for the actions of the

⁶⁵ Equal Employment Opportunity Commission, Plaintiff-Appellee v. Hacienda Hotel, Defendant-Appellant.

supervisors. The fact that the employees did not utilize a grievance procedure did not preclude a finding of liability.

I Was Just Joking

Upon experiencing chest pain, Joyce went to her employer's first aid station where she was required to remove her shirt to have an electrocardiogram performed. She was not happy with the level of care she received at the first aid station and complained during a meeting with co-workers and managers. After complaining she began to be the recipient of numerous sexual jokes from male employees and managers about the EKG and the physical examination.

The remarks were made in person and on the company's communication radio, and lasted for about a year. Some of the comments included: a comment by a male co-worker that he would become a gynecologist in order to massage Joyce's breasts; an employee's remark indicating he could not breathe, which was made while he made massaging gestures with his hands; a manager made a statement

indicating the emergency medical technician (EMT) who treated her had gotten a "hard-on" while performing the EKG; there were references to mouth-to-mouth resuscitation; and reference to coed "showers" at physical examinations.⁶⁶ She did not prevail in the first case, however she did win the appeal.

It Never Stops

Sunday, a female police officer, was subjected to numerous sexual innuendoes and incidents by fellow police officers and a mayor. The harassment included moaning, kissing, sighing and other disturbing noises transmitted over the police radio. She also was the subject of many pieces of sexually insulting graffiti, posters, pinups and pictures that were placed on walls throughout the police department; e.g., she was accused of being a lesbian. Additionally, items were placed in her mailbox; e.g., a urinal device, a sanitary napkin, two vibrators

⁶⁶ Joyce Wyerick, Plaintiff-Appellant v. Bayou Steel Corporation, Defendant-Appellee.

and a soiled condom.⁶⁷ The city was liable for creating a hostile working environment within its police department where female officers were subjected to offensive sexual jokes and innuendos over the police radio, on posters and graffiti in the police station. Comments were even made by public officials, and the city took no meaningful action to stop the conduct.

Romantic Relationships

Male managers at the office where Catherine worked as a staff attorney granted preferential treatment upon female employees who submitted to their sexual advances. The preferential treatment was in the form of accelerated promotions, cash advances and high performance ratings. Catherine did not take part in the office affairs and protested to management about them. This was found to be hostile work environment sexual harassment.

Shortly after Catherine began working as a staff attorney, a male manager repeatedly offered to drive her

⁶⁷ Sunday L. Sanchez, Plaintiff v. City of Miami Beach, Defendant.

home, and when she finally accepted the offer, he barged into her apartment and toured the premises. Additionally, another manager untied her sweater and kissed her at an office party.⁶⁸ Following findings of unlawful sexual harassment and retaliation for opposing such conduct, a joint order was signed calling for promotions, a new title, back pay, and a transfer with appropriate work assignments and responsibilities for the plaintiff. It also called for up to 208 psychiatric counseling sessions over a two year period, as well as payment of reasonable costs for outplacement services should the plaintiff seek other employment. The agency also agreed to retain an expert to review its EEO procedures and to consider possible disciplinary action against individuals accused by the plaintiff of sexual harassment.

⁶⁸ Catherine A. Broderick, Plaintiff v. David S. Ruder, Chairman, United States Securities Exchange Commission, Defendant.

Chapter XIII

Summary

One of today's major challenges is the elimination of sexual harassment. Possibly, because sexual harassment has been accepted and gone unchecked for so long it has become a major consideration in the workplace today.

Many victims of sexual harassment don't know what to do or who they should turn to when a problem arises. Because they have been beaten down for so long or so many times many victims are afraid.

Some managers believe they have the right to do anything to their employees they wish, as if they were children. Others feel they need to put their victims in their place, how dare they work in an occupation previously considered to be for a single gender. Still other managers merely treat employees as they have been trained or as they have observed their predecessors doing.

Many victims do not blame the harasser, but rather look to themselves for the answer. The question seems to

be "what did I do to cause this situation to exist?" However, a glimmer of light appears at the end of the tunnel when a victim realizes they did nothing wrong and refuses to be treated in that manner any longer.

It is sad to realize something as simple as the way a victim is looked at can send fear running through them.

Is it any wonder some become paranoid, and it is possible for these situations to become life threatening. It is not fair! Victims repeatedly re-live these physical, emotional, and unwanted memories.

You may have a relative or friend in a difficult situation, and you may never know it. They do not know how to deal with it and many times simply keep it to themselves. Some victims have said that it is like having a body, but at the same time not being in it. They have been forced out of their own being. Some have even expressed that they would rather be dead than to continue in the present mode.

Eliminating sexual harassment is a challenge we as a society must meet. It can lead to mental and physical cruelty, broken homes, lost income, and lost self-esteem. Even when a court settlement is reached and the victim

has been compensated, the memories live on.

Solutions are available. Companies must let everyone know sexual harassment will not be tolerated. They must also take steps to inform and train all employees, management and non-management, to be aware of what constitutes sexual harassment. Some companies fully train their managers, but are afraid to give all information to the non-management employees.

If you perceive you are a victim, don't keep it inside, and don't make the mistake of thinking it will just go away---It won't. Write it down and report it. Prevention is the only way to eliminate sexual harassment.

Appendix A

Sexual Harassment Questionnaire and Answers to Table 1

1. False --- The charging party must suffer a personal loss (e.g. Lost promotion, lost wages, fired) in order for the employer to be held liable in a sexual harassment case.

It is not a requirement that the charging party suffer a personal loss. All employees are entitled to work in an environment free of intimidation, insults or ridicule based upon sex. Unwelcome sexual conduct reasonably interfering with a person's ability to work or that creates a hostile, intimidating, or an offensive work environment can be considered sexual harassment.

2. False --- If your company has not received a complaint you do not have to worry about sexual harassment existing in your workplace.

Many people are hesitant to talk about this type of problem, much less file a formal complaint. The fear of retaliation is normally present.

3. True --- Someone guilty of harassment can be required to personally pay part of a judgement to a victim of harassment.

In some court cases the actual person harassing the victim is being required to pay money out of their own pocket.

4. False --- Sexually suggestive calendars or pictures in a personal work area can not be considered cause for a sexual harassment complaint.

In a court case in a Florida shipyard pictures of nude or partially nude women appeared throughout the shipyard. These were in the form of photographs torn from magazines or calendars supplied by tool supply companies. The court noted the pictures may not have been put up with

the intent of offending women. However, when women gained jobs the posters had a significant, demeaning impact on the female employee.

5. False --- You can not be found guilty of sexual harassment unless it is intentional. Just as in question four the focus is on the result, not the intention. If it has the effect of discrimination or harassment the company can be found liable.

6. True --- Employee A tells employee B a sexually suggestive joke, employee C could file a charge of sexual harassment against the company. If the joke was told in the workplace, and was loud enough to be overheard by a third party, it could constitute sexual harassment. A hostile work environment could be claimed. It is always a good idea to maintain a professional work environment.

7. False --- A manager may be held responsible for sexual harassment committed only by people working for the company. If the employer knows of or should have known and did not take immediate corrective action they can be held liable. This is true even if it is someone outside the company, e.g., an outside vendor filling vending machines.

8. False --- For six months the Vice President of the company was seeing a consenting first line manager sexually. After six months she told him it was over, but he still pursued her after hours. Since his activities are after hours the company can not be charged with sexual harassment. From the moment she said stop, it could be viewed the harassment started. It could be perceived that he is in control of her destiny at the company based on his position, and that his unwelcome sexual conduct is reasonably interfering with her ability to work.

9. True --- Someone resigns of their own accord and later charges the company of sexual harassment. The charging party admits they never complained to management. The company can still be held liable. The person could maintain that conditions grew to be so intolerable that

staying there was impossible. The question is "did management know of the conditions and do nothing?" If management knew or should have known, and in fact they did exist and they did nothing, they may be held liable.

10.False --- When someone initially brings charges of sexual harassment, good managers can usually tell if the charges are valid. A thorough investigation should be performed whenever anyone complains of sexual harassment. Only afterward can it be determined if in fact a violation exists.

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