

SEXUAL HARASSMENT IN THE WORKPLACE

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Clarence Thomas and Anita Hill, Mitsubishi, Tailhook, Senator Bob Packwood, the Citadel, Eve Bruneau, Paula Jones, the Army hearings. The litany of names associated with sexual harassment is ever-growing. Employment discrimination claims - and sexual harassment cases in particular - are unquestionably increasing, some say exponentially. Enhanced public education combined with significant changes in the rights of plaintiffs have directly caused this growth which many predict shall continue into the next decade. Sexual harassment claims can take a terrible toll at the workplace in terms of productivity and morale and be extraordinarily expensive to litigate against, whether or not the claim is legitimate. This article will summarize the factors relied upon by the courts and the enforcement agencies in determining what is and what is not sexual harassment, as well as what steps municipal employers should take to protect their employees and minimize their own liabilities.

I. What is Sexual Harassment and How Does It Differ from Sex Discrimination?

A. Legal History

In 1964, Congress enacted the Civil Rights Act ("Title VII), designed originally to extend civil rights to African Americans. In a jocular attempt to defeat the bill, an amendment was offered which included "sex" as a protected class. To the astonishment and chagrin of Congress, the amended Bill passed. Title VII provides that it is an "unlawful employment practice for an employer - (1) to fail or refuse to hire or to discharge any individual, or otherwise to discriminate against any individual with respect to his compensation, terms, conditions, or privileges of employment because of such individual's...sex...." Sex discrimination is the practice of treating people differently on the basis of their gender. For example, an employer who excludes all male employees from computer training, while allowing women at the same level to attend, is discriminating on the basis of sex. It is a pattern of behavior based on the fact of a person's gender rather than on the person's qualifications. Sexual harassment is a type of sex discrimination, and is behavior which has a sexual component. The term "sexual harassment" was coined in 1975 and popularized in Lin Farley's book *Sexual Shakedown*. Sexual harassment in the workplace is a form of sex discrimination because it tends to discriminate by forcing targeted individuals to leave or to be less productive than they would otherwise be, thereby preventing them from having fair opportunities for advancement. While sexual harassment is prohibited in many public and private arenas, this article will limit its discussion to workplace discrimination. In 1991, Congress amended Title VII to allow compensatory and punitive damages to be awarded to prevailing plaintiffs. Prior to 1991, plaintiffs could recover only lost wages and be awarded reinstatement. The 1991 amendments also allow discrimination cases to go to a jury. These amendments have made litigation much more attractive to plaintiffs.

B. Definition of Sexual Harassment

In 1980, the Equal Employment Opportunity Commission (the federal agency designated to enforce Title VII) promulgated guidelines defining sexual harassment as a form of sex discrimination under Title VII of the 1964 Civil Rights Act. The EEOC has defined

sexual harassment as: "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." The EEOC definition has been criticized both as too vague and too complex. A simpler definition? Any unwanted verbal or physical advances, sexually explicit derogatory statements, or sexually discriminatory remarks made by someone in the workplace which is, or is intended to be, offensive or objectionable to the recipient or which causes the recipient discomfort or humiliation or which interferes with the recipient's job performance. For all practical purposes, there are two kinds of sexual harassment recognized by the courts, "quid pro quo" (Latin for "this for that"), and "hostile," "offensive" or "intimidating" work environment. Either form of harassment may be alleged against a male or female. "Same sex" harassment is also recognized by the courts.

1. Quid Pro Quo

As a general rule, quid pro quo sexual harassment is relatively easy to define and recognize. It occurs when an employer offers an employee or potential employee an employment benefit or a way to avoid a negative employment action in exchange for some form of sexual conduct. (Very simply put: "Have sex with me or you are fired." Or, "If you do X, you will receive Y.") Quid pro quo sexual harassment has occurred if an employee is subjected to unwelcome sexual advances and her reaction to those advances affected the compensation, terms, conditions or privileges of her employment. *Karibian v. Columbia University*, 14 F.3d 773, 777 (2d Cir.), cert denied, 512 U.S. 1213, (1994). (The Second Circuit, in *Karibian*, has held that harassment has occurred even where the recipient accepted the advances, received benefits as a result and therefore has not suffered any financial harm.) This type of behavior is absolutely prohibited at the workplace. While it could conceivably occur between two co-workers, the vast majority of such behavior is by a manager or supervisor - somebody who has the power, or is perceived to have the power, within the company to effect such promises or threats. It is not harassment if the behavior is consensual. No law prohibits an employee from engaging in consensual sexual conduct with an employee. However, if an employee claims sexual harassment, courts will very closely scrutinize a sexual relationship between the employer and employee to determine whether or not such conduct was in fact consensual on the part of the employee. An employer is strictly liable for the acts of its managers and supervisors. Simply put, if manager X engages in quid pro quo sexual harassment, even if her supervisor did not know, the company is liable. However, more frequently, courts are finding that if a company took proactive steps to prevent sexual harassment, the company may be able to avoid liability.

2. Hostile Work Environment

EEOC's inclusion of "hostile work environment" sexual harassment in their 1980 guidelines was controversial until the Supreme Court in 1986 confirmed the viability of that concept in the case of *Meritor Savings Bank, F.S.B. v. Vinson*, 477 U.S. 57 (1986).

A hostile work environment is one which is "permeated with 'discriminatory intimidation, ridicule, and insult' 'sufficiently severe or pervasive [enough] to alter the conditions of the victim's employment.'" "Harris v. Forklift Sys., Inc., 510 U.S. 17 (1993), quoting Meritor, supra. The courts will apply both a "reasonable person" and a "reasonable victim" standard. That is, the behavior complained of must be subjectively perceived by the recipient to be abusive, and of a nature that a reasonable person (of the same sex) would find hostile. Most courts have held that the employer is liable for a hostile workplace environment if it "knew or should have known" about the offensive behavior. See, e.g., Carmon v. Lubrizol Corporation, 17 F3d 791 (5th Cir. 1994). However, the federal Second Circuit Court of Appeals (which includes New York) expanded employer liability for hostile work environment to include situations where a supervisor uses the authority of his or her position, whether or not the employer had reason to know this offensive conduct was taking place. Karibian, supra. Determination of a hostile work environment claim must be made on a case-by-case basis. The courts will look to a number of criteria in assessing a claim: the unwelcomeness of the conduct; the severity or pervasiveness; the type of conduct; its purpose or effect; and its interference in the workplace.

- Unwelcomeness. The courts apply a subjective standard to determine whether the alleged conduct was offensive to this particular man or woman. The recipient's participation in the conduct, while possibly relevant, is not dispositive. Recognizing the difficulty of a vulnerable employee asserting themselves, the courts do not require that the recipient necessarily explicitly rejected the conduct.

- "Severe or pervasive." Generally, the courts use a type of sliding scale analysis: the more egregious the alleged conduct, the less it has to occur to constitute harassment.

- Conduct. Sexual harassment can be visual, verbal or physical acts, e.g., leering and ogling; dirty pictures, calendars or posters; obscene words or jokes; lewd comments; requests for dates; mail (yes, e-mail, too); unnecessary touching; physical assault; stalking; rape.

- Effect and intent. Even if a co-worker or employer has the best of intentions, that person's actions may still be harassment if their effect is to create a hostile work environment. Conversely, an employee's ill-intentioned actions, which do not in fact intimidate the complainant, may indeed be sexual harassment. The Supreme Court, in Forklift found the complainant need not prove psychological injury to establish a case of sexual harassment. If psychological injury is alleged, however, proving that the psychological injury was caused by the harassment can be an arduous battle for most plaintiffs and must be proved in order to receive an award.

II. Miscellaneous Issues

Workplace romances are perfectly legal if they are consensual. The problems may arise if and when the romance terminates and the employment relationship does not. A jilted manager, supervisor or co-worker is not permitted to take any retaliatory action toward an "ex" at work. Certain groups of employees are inherently more vulnerable to sexual harassment of either sort. For example, workers in non-traditional areas, non-permanent employees (probationary, seasonal, temporary), and individuals from under-represented

classes. Each of these classes has reason to be less apt to come forward with complaints, and to tolerate inappropriate behavior. Third-party harassment may occur, and be actionable, where a non-employee harasses an employee, and the employer knew or should have known. False charges of sexual harassment may occur, although far less frequently than feared. The consequences of making a sexual harassment claim are enormous, including illegal retaliation; ostracization at work; difficulty in finding employment; being branded as a trouble maker; placing one's personal life at issue in a public way; and legal fees and costs. Cultural differences may lead to charges of sexual harassment. Some cultures include more physical contact; others inhibit a recipient of sexual harassment from strongly objecting. Communication styles between men and women may result in unfortunate misunderstandings. (He said: "She was definitely interested in going out with me." She said: "I told him four or five times that I was busy when he kept asking me out - he obviously should have got the picture that I was NOT interested!") Hazing of new employees, if it targets certain individuals or groups, may be discrimination. If the behavior includes a sexual component, the actions may be sexual harassment.

III. The Best Defense Is Prevention

By very recent decision, the Supreme Court underscored the importance of providing preventive training programs to employees. In *Board of the County Commissioners of Bryan County v. Brown*, the Court rejected a claim that a single hiring decision by a county can be a "policy" which triggers municipal liability, and required that a plaintiff must demonstrate that "through its deliberate conduct, the municipality was the 'moving force' behind the injury alleged." However, the Court further noted that "the existence of a pattern of tortious conduct by inadequately trained employees may tend to show that the lack of proper training...is the 'moving force' behind [a] plaintiff's injury." Now, more than ever, a strong sexual harassment prevention program is necessary to insulate a municipality from liability. Municipalities are confronted with a unique set of employment issues related to sexual harassment. Municipalities should take a proactive posture regarding sexual harassment, both to protect their employees against sexual harassment, and to minimize their liability should a claim be made. To best prevent and respond to claims of sexual harassment, an employer should enact a strong anti-sexual harassment policy, educate all employees (management and staff) concerning their rights and obligations, and enforce the policy if a claim of harassment is made. The EEOC itself has endorsed prevention as the best means to address sexual harassment. This endorsement has been reiterated in New York State by the Governor's Task Force on Sexual Harassment.

A. Policy and Procedures

Management sets the tone for how sexual harassment is perceived at the workplace. If supervisors and managers take a lighthearted, laughing view toward sexual conduct at work, the employees will get the wrong message and assume that sexual harassing behavior will be tolerated. It is critical that the municipality have a strong and consistent sexual harassment policy and that it be in writing and provided to its employees. If the municipality does not have a competent human resources person in this area, consider hiring one, or an outside attorney in this field who consults with municipalities in the

drafting and communication of a sexual harassment policy to its employees. A sexual harassment policy should address the following issues:

1. No tolerance level

The policy should state in the strongest terms possible that sexual harassment will not be tolerated.

2. Definition

Define sexual harassment. While you may quote from the EEOC guidelines, also use simple straightforward language. Give examples, but indicate they are in no way exhaustive.

3. Complaint Procedure

Provide a process to address complaints of sexual harassment, which because of their sensitivity often require specialized responses. Designate at least two persons to whom complaints may be made. All too often, the person designated is the alleged harasser. If possible, one should be female. An employee who feels he or she has been sexually harassed may be very uncomfortable discussing the alleged sexual conduct - give them a choice of whom to speak with. There should be a visible and approachable network of potential resources for the employees.

4. Other rights

Make it clear that the municipality's policy in no way abrogates the other rights of the employees. The employees will still have available the right to grieve an action through their union, to file a claim with the EEOC, etc.

5. Investigation

Provide for a prompt, thorough, and to the extent possible, confidential investigation. The policy should advise that the organization will make every effort to maintain confidentiality, but may need to interview potential witnesses to ensure a full and fair investigation. Carefully choose your investigators. They need not be the same persons designated to receive complaints. (Be aware that using your attorneys to investigate may preclude the use of that attorney as litigation counsel and may waive attorney-client privilege.)

6. No retaliation

State that no employee shall be retaliated against for raising a claim of sexual harassment.

7. False Claims

State that false claims will be treated very seriously and appropriate disciplinary action taken. This will help to alleviate concerns.

8. Resolve the Complaint

Resolve the complaint, one way or the other. If no basis for the charge is found, inform both parties of the finding. Don't say, "well, it's a 'he said, she said' situation and therefore we can't make a decision." That IS a decision - against the complainant. Evaluate credibility. Document reasons for your decision and keep records.

9. Appropriate Disciplinary Steps

Provide for and take appropriate disciplinary measures if sexual harassment is found. Such measures may include: counseling memo; change of assignment; withholding promotion or raise; giving a lower performance rating. Civil service law provides for a similar range of remedies: written reprimand, fine, suspension, demotion, termination and reassignment. The penalty should be reasonably related to the seriousness of the offense, and to the employee's record.

B. Training

Provide training both to management and to staff. While in-house training certainly may be adequate, consider hiring outside trainers. Although initially this may be more expensive, outside trainers bring a legitimacy and weight to the training process, which may avoid later problems. It is often difficult for human resource personnel to be objective and direct with co-workers whom they deal with on a range of personal and professional matters on a daily basis, particularly those in a more powerful position to them and often responsible for their own hiring and firing. Keeping the training process free of conflict is essential to its success and outside training can ensure this.

C. Enforcement

When a complaint is made, follow up on it. Too often, managers and supervisors are uncomfortable and nervous when dealing with such complaints. Try to deal with the complaint at the lowest level in the organization - not because it is not an important issue, but because frequently, sexual harassment complaints may result simply from misunderstandings which can be easily cleared up, if a manager makes the time and effort.

D. General Guidelines for Managers

Make sure that your managerial staff is fully familiar with your policy and complaint procedures. All managers and supervisors should be trained before the other employees are trained. Respond promptly to complaints; you ignore a complaint at a great risk of litigation. Ensure protections for the accused - a fair environment will benefit both claimant and the accused. Managers should role-model acceptable behavior and monitor their environments. Keep an eye on things; be aware of your surroundings and fellow employees. Always maintain confidentiality, because nobody will confide in you if they know that the next day you will be telling the story at the water-cooler. Protect against any kind of retaliation for raising a claim. Finally, when a claim comes in, inform your supervisor at the highest level.

E. Going to Court or Not

If a sexual harassment complaint is ignored, or the employee believes that he or she has been unfairly treated by the municipality, the employee may either threaten or actually commence a lawsuit. Even though the employee is extremely angry, and through counsel, may appear to be unreasonable in his or her demands, the municipality must keep in mind the optimal end result, which in most cases means to avoid litigation. Litigation is extremely costly, resource intensive and time consuming, not to mention the negative publicity that can result from a claim of sexual harassment. In most cases not only the

municipality is seeking to avoid litigation but the employee bringing the claim is as well. Unless the employee has been fired, it is usually in his or her best interest to keep their job, at least for the present time. This means staying at work, keeping communications open and working out a settlement. If there is an opening early on in the process for working out a settlement through an alternative dispute resolution mechanism such as mediation or arbitration, the municipality should take advantage of it. The municipality should take aggressive action toward resolving the complaint - and making a determination. If harassment is found, the municipality must remedy it. If the claim is unfounded, that too must be decided as mentioned above, and in that case settlement may not be possible. If the employee insists on litigating, the municipality may be forced into court. However, a timely and thorough investigation will, at the very least, provide a strong defense.

Other issues which may arise during the course of settling a sexual harassment claim may include the following: the claimant's future protection against further sexual harassment if he or she stays with the job; putting a policy into effect to protect against harassment at the workplace (if one doesn't already exist); compensation for damages resulting from the harassments (i.e., counseling fees, pain and suffering, loss of overtime, etc.); and protection from retaliation by the employer for bringing the claim in the first place.

Often, an employee will bring an EEOC charge while settlement is still a possibility in order to pressure the employer into settling. The municipality should view the charge as an opportunity to mitigate the situation before it gets to court rather than as the only place to do battle. It is not too late to act on the complaint and attempt settlement. A municipality will often get credit from the EEOC or later, from the court, for attempting to mitigate the damage and act responsibly even if it was after the alleged illegal acts.

Going forward with litigation is not always the worst alternative. When a municipality, after careful investigation, determines that it has no liability or that the harassment claim is unfounded, it may be the only solution, particularly to discourage future law suits. In this regard, it is important to note that the majority of federal courts hold that, in any kind of discrimination case or harassment case, employers will not be liable for the acts of mid-level managers under the principles of respondeat superior. In these cases the courts often require either actual knowledge by - or a complaint filed with - a corporate officer, director or the individual designated to receive complaints of discrimination. These decisions run contrary to the EEOC's longstanding position regarding agency liability in general. While this issue is ripe for a Supreme Court decision, the one issue not in dispute by any Court or agency is that employers who implement harassment policies, promptly investigate claims, and impose appropriate and timely disciplinary sanctions, significantly lessen their liability.

Conclusion

Municipalities should not sit back and wait for a sexual harassment claim. Each should take three proactive, and prophylactic steps: enact policies and procedures; educate workforce; and enforce the policies. These steps will provide a strong measure of

protection for municipalities, their managers and supervisors, their employees and their budget.