

Personnel Notebook

For Your Most Important Resource -- The Human Resource

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SEXUAL HARASSMENT

LOOKING FOR LOVE IN ALL THE WRONG PLACES

Every morning Loretta and Jane meet at the office coffee pot and exchange the most recent "naughty" joke they have heard. Fifteen feet away, Fred is in his office over-hearing these jokes. He has twice told his supervisor that he is personally offended by them. His supervisor laughed and told him that he is sure the women do not mean any harm and not to make a federal case of it.

But Fred did just that. He filed, against his employer, a sexual harassment charge with his union, the local Human Rights Commission, the U.S. Equal Employment Opportunity Commission and a civil case through his lawyer.

This certainly doesn't sound like the classic case of a male boss forcing his female secretary to submit to his sexual advances or be fired. But Fred's case is, in fact, more typical today than the old classic. Just what is sexual harassment and does it exist in your company?

Sexual harassment is governed by Federal law. Specifically, Title VII of the Civil Rights Act of 1964. This issue is enforced by the Equal Employment Opportunity Commission (EEOC).

Actually, there is no sexual harassment law! In 1980 it was determined by the U.S. Supreme Court that sexual harassment is actually discrimination against an individual based on their sex. Therefore, the Civil Rights Act of 1964, which outlawed discrimination based on sex, became the law used to enforce sexual harassment. EEOC then, instead of creating a special law, issued guidelines defining what they have determined to be sexual harassment.

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What do those guidelines say?

SEXUAL HARASSMENT IS:

- any unwelcome sexual conduct, whether physical or verbal, is considered sexual harassment if:
 1. Submission is a condition of employment.
 2. It is used as a basis for employment decisions.
 3. It creates an environment or atmosphere that is intimidating, hostile or offensive, or interferes with work performance.

It's easy to understand how Item 1 and Item 2 above would be illegal. Courts often define these acts as extortion. It is Item 3 that is so different from our earlier mentioned "classic case." An example of a "hostile environment" might be a situation where a woman is propositioned for sexual favors every day by a fellow employee who works next to her. She objects to this. She is embarrassed, intimidated and finds it difficult to concentrate on her work as a result. Her career may suffer through lack of proper concentration and she may be psychologically affected by this. She is being subjected to a hostile, intimidating and offensive work environment. That is considered sexual harassment.

SEXUAL HARASSMENT CAN BE:

- when salesmen (even though not in your employ) call on your company and tell offensive jokes in front of your receptionist,

the receptionist may well have grounds for EEOC charges against you, the employer.

- in the eye of the beholder. If Teresa views Steve's actions as offensive by her standards, then they constitute sexual harassment to her. If Loretta does not see the same actions as offensive, then it is not sexual harassment to Loretta.
- chargeable by third parties. Employees who feel that they are being passed over for promotions, pay increases or other employment advantages as a result of a sexual, employment relationship between two other parties, may have grounds for charges. The employer may be held liable for damages by those that were denied these employment advantages.

SEXUAL HARASSMENT IS NOT:

- a personal relationship that has no employment involvement.
- a relationship that is welcomed, a personal relationship between employees (including

supervisors) that is not unwelcome. But be careful here, the issue is not whether the actions were voluntary, but did she make it known that they were unwelcome. You cannot defend a charge by attempting to prove that the relationship was voluntary. A female might voluntarily give in to job threats. The issue is whether or not the act was unwelcome.

- an employee who individually feels sexually harassed but who never makes it known that this is unwanted.
- an employee asking for a date, or complimenting an employee on their appearance or expressing affection. It can become sexual harassment if it is employment related, unwelcome and continues to occur.
- determined by the marital status of either party. A married individual asking for a date or establishing a relationship in and of itself does not constitute sexual harassment. If the actions are not employment related there is no liability. The issue of sexual harassment is not an

Your company's liability is affected by who the offender is:

Offensive Acts Toward An Employee By:	Your Liability:	Best Solution:
A supervisor	Supervisors, managers, etc., are agents of the company, the company is liable <u>whether they knew of the problem or not</u> .	Train supervisors thoroughly, in advance, to recognize and deal with sexual harassment.
A fellow employee	The company is liable if they <u>knew of the problem or should have known</u> .	Inform employees of company position, train supervisors to respond immediately and sensitively. Train employees to understand what sexual harassment is and is not.
Customers, salesmen (not in your employ), visitors	The company is liable if they <u>knew of the problem or should have known</u> .	Establish standards and post signs. Use grievance procedure. Change environment. Respond to complaints immediately.

issue of morals or manners, it is an issue of employment.

Some additional points of interest:

- Regardless of the message from current movies and TV shows, sexually provocative dress, actions or speech are relevant in determining whether or not sexual advances were unwelcome.
- The history of the relationship and prior practices of the harasser and harassee are also relevant. If he has always told off color jokes to her and she has always approved, that may establish that the acts were not unwelcome.
- Sexual harassment is not just between males and females, but applies equally to male/male and female/female situations.
- This is one of the few employment charges where the company and the individual perpetrator may be held liable.

Some interesting statistics:

- In a Harvard Business Review survey of 9,000 women, over 80% said that they had experienced sexual harassment on the job.
- In a survey of Government employees, 15% of the male respondents said they had experienced sexual harassment on the job. Sexual harassment by females is increasing every year.
- Surveys generally show that most sexual harassment is committed by co-workers (65%) while much less is committed by supervisors (31%).

HOW ARE CHARGES HANDLED?

- Charges must be filed with the EEOC within 180 days of the occurrence. However, if a state or local agency exists,

such as a local Human Rights Commission (HRC), the EEOC will usually defer the matter to them for investigation. In such cases, the time for filing charges with the EEOC is extended to 300 days total.

- Investigations are usually coordinated through the employer, but the meetings with employees and witnesses are usually private.
- If the investigating group (EEOC or the local HRC) finds that there is no probable cause for charges, they will not recommend filing charges with EEOC. If they find that there is probable cause for charges, they will attempt to reach a settlement between the parties. This usually means correcting the offensive situation, improving the environment, resolving any back pay issues and appeasing the charging party. If no settlement can be reached, the matter is forwarded to EEOC with a recommendation on whether or not to proceed with Federal charges. EEOC will never find nor state that you are innocent of the charge. They will only state that they have or have not found sufficient probable cause to continue.

The charging party may elect to file a civil suit which can provide payments for mental anguish and punitive damages in addition to the back pay and attorney costs allowed by EEOC.

- If the employer is a Federal contractor, then Executive Orders 11246 and 11375 take preference, in which case the charges are filed with the U.S. Office of Federal Contract Compliance Programs (OFCCP).

EIGHT THINGS YOU CAN DO NOW!

Do not wait for a charge to occur. Preventing this problem is always better for public relations, employee relations, as well as dollar savings.

1. Establish a training program for all supervisors and managers and other agents of the company. Emphasize the company's strong position against sexual harassment. Let them know that they personally, as well as the company, may be liable in the event of charges. Train employees when they become supervisors. They must be trained to:

- understand the company's committed policy
- recognize sexual harassment: what it is, and what it is not
- investigate fairly all complaints
- eliminate sexual harassment in the workplace.

Remember, you are almost always held liable for violations of supervisors.

2. Train all non-supervisory employees to know what is and is not sexual harassment. This act alone will eliminate most of the complaints.

3. Inform all employees of the company's resolve to provide a harassment-free environment. Post a notice stating the company's determined position.

4. Meet with supervisors to identify potential situations among employees and resolve them quickly.

5. Establish a grievance procedure for employees. Word it so as to encourage them to use the procedure whenever they feel it necessary. Channels of communication should be open. An effective grievance procedure is to the advantage of the employer as well as to the employee because:

- EEOC and the courts look more favorably upon a company that provides a grievance procedure.
- Failure of an employee to exercise this in-house grievance procedure will often result in the charges being rejected because the charging party failed to exercise the procedure established to resolve such matters.
- Even if the employer cannot resolve the matter through the grievance procedure,

they will at least be familiar with both sides of the issue. This will not only allow them the opportunity to correct the condition, but to also be better prepared for a court case.

- Many expensive court cases are eliminated by resolving an issue in house, without trial lawyers, while you can still speak with the employee instead of his/her attorney.
- The health and well being of your employees and your company is enhanced when you know what your employees think and what their problems are.

6. Respond immediately to all complaints of sexual harassment. Handle the investigation sensitively, protecting the reputation of the parties. Do not joke about the incident to employees. Take action against the perpetrators. In many court cases this action alone will provide your greatest advantage.

7. Document all complaints, responses, actions, witness statements, dates, etc., whenever such a problem is brought to the company's attention. Documents win law suits!

8. Create an atmosphere in your company in which this behavior is identified as inappropriate and will not be tolerated. Such an atmosphere is more likely to be productive for all employees.

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OFFICIAL TEXT OF EEOC GUIDELINES ON SEXUAL HARASSMENT

(Official Text)

Section 1604.11 Sexual harassment.

a) Harassment on the basis of sex is a violation of Sec. 703 of Title VII.* 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 as 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.

b) In determining whether alleged conduct constitutes sexual harassment, the Commission will look at the record as a whole and at the totality of the circumstances, such as the nature of the sexual advances and the context in which the alleged incidents occurred. The determination of the legality of a particular action will be made from the facts, on a case by case basis.

c) Applying general Title VII principles, an employer, employment agency, joint apprenticeship committee or labor organization (hereinafter collectively referred to as "employer") is responsible for its acts and those of its agents and supervisory employees with respect to sexual harassment regardless of whether the specific acts complained of were authorized or even forbidden by the employer and regardless of whether the employer knew or should have known of their occurrence. The Commission will examine the circumstances of the particular employment relationship and the job functions performed by the individual in determining whether an individual acts in either a supervisory or agency capacity.

d) With respect to conduct between fellow employees, an employer is responsible for acts of sexual harassment in the workplace where the employer (its agents or supervisory employees) knows or should have known of the conduct, unless it can show that it took immediate and appropriate corrective action.

e) An employer may also be responsible for the acts of non-employees, with respect to sexual harassment of employees in the workplace, where the employer (its agents or supervisory employees) knows or should have known of the conduct and fails to take immediate and appropriate corrective action. In reviewing these cases the Commission will consider the extent of the employer's control and any other legal responsibility which the employer may have with respect to the conduct of such non-employees.

f) Prevention is the best tool for the elimination of sexual harassment. An employer should take all steps necessary to prevent sexual harassment from occurring, such as affirmatively raising the subject, expressing strong disapproval, developing appropriate sanctions, informing employees of their right to raise and how to raise the issue of harassment under Title VII, and developing methods to sensitize all concerned.

g) Other related practices: Where employment opportunities or benefits are granted because of an individual's submission to the employer's sexual advances or requests for sexual favors, the employer may be held liable for unlawful sex discrimination against other persons who were qualified for but denied that employment opportunity or benefit.

*THE PRINCIPLES INVOLVED HERE CONTINUE TO APPLY TO RACE, COLOR, RELIGION OR NATIONAL ORIGIN.

(END OF OFFICIAL TEXT)

Key Developments In The EEOC Drive Against Sexual Harassment

1964

The Civil Rights Act is signed. Prohibits employment discrimination and creates the Equal Employment Opportunity Commission (EEOC) to investigate complaints. Title VII of the Act prohibits discrimination in employment based on sex.

1972

The Equal Employment Opportunity Act signed. It expands the coverage of The Civil Rights Act and gives the EEOC enforcement powers.

1975

The first reported court case of sexual harassment is filed in Arizona. Two women charge verbal and physical abuse against their supervisor.

1977

The District of Columbia Court of Appeals rules that sexual harassment constitutes sex discrimination under Title VII of the 1964 Civil Rights Act if it adversely affects a person's job.

1980

The EEOC publishes guidelines defining sexual harassment. It defines sexual harassment to be "in the eyes of the beholder" and is determined by each individual's sensitivity and standards.

1986

The Supreme Court, in its first sexual harassment case, upholds the EEOC guidelines and confirms that sexual harassment is illegal, not only when it affects jobs or promotions, but also when it creates an offensive or hostile working environment.

1991

The U.S. Court of Appeals in Florida rules that nude pinups in the workplace constitutes sexual harassment.

1991

The U.S. Circuit Court of Appeals in California rules that, in order to determine what is or is not sexual harassment, the courts will consider what would be offensive to "a reasonable woman" as opposed to the formerly "eyes of the beholder" doctrine. (However, until enough precedent has been established through the eyes of "a reasonable woman," it is advised for companies to continue to follow the standard that sexual harassment is in the "eyes of the beholder.")

1996

Recent court cases have established that the offending actions, although they must be employment related, may not have to adversely affect an individual's job.

SEXUAL HARASSMENT POLICY STATEMENT

It is the policy of this company to prohibit sexual harassment in the workplace.

The Equal Employment Opportunity Commission (EEOC) has defined sexual harassment as any unwelcome act of a sexual nature (verbal or physical) if:

- it is used as a basis for employment decisions,
 - submission is a condition of employment,
 - it creates an environment or atmosphere that is intimidating, hostile, humiliating or offensive, or that interferes with an individual's productivity.
-

Each employee in this company must be allowed to work in an environment that is free from unwelcome sexual overtones.

Sexual harassment in any form is against the law and will not be tolerated. Employees who feel that they are being so subjected should bring this matter to the attention of company supervision. Each supervisor is to bring all such complaints to management for action immediately and to take steps to prevent all such acts.

We ask all employees to support our efforts to foster an open and friendly work environment that is free of such inappropriate, intimidating pressures.

Eliminating the negative impact of sexual harassment will result in a more healthy and productive work environment for us all.

_____ (President's signature)