



WOMEN'S LEGAL DEFENSE FUND

SEXUAL HARASSMENT: LEGAL AND POLICY ISSUES

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SEXUAL HARASSMENT: LEGAL AND POLICY ISSUES

I. Introduction

- A. Although the focus on the issue of sexual harassment has been relatively recent, it has been a problem for women as long as they have worked outside their homes. Sexual harassment was documented in the federal government as early as the 1860's when women were first employed as Treasury Department Clerks; it was the subject of some of the earliest Congressional investigations.
- B. The problem persists:
 - 1. Surveys by the U.S. Merit Systems Protection Board in 1981 and in 1988 of sexual harassment in federal government indicated that 42% of the women and 14% of the men questioned had experienced some form of harassment. The 1988 survey indicated that 50% - 85% of American women will experience sexual harassment at some point in their working or academic life.
 - 2. A study released in 1990 of sexual harassment in the military revealed that two of every three women, or about 64 percent, said that they had been sexually harassed. Seventeen percent of men surveyed said that they had been harassed by male or female colleagues.

II. The Impact of Sexual Harassment

A. Economic impact

- 1. A 1988 study conducted by Working Woman magazine found that sexual harassment costs the typical Fortune 500 company \$6.7 million a year in increased absenteeism, employee turnover, low morale and low productivity.
- 2. Studies of federal government workers by the U.S. Merit Systems Protection Board estimate that sexual harassment cost the government \$267 million in two years in lost productivity and turnover.

3. Sexual harassment limits employment opportunities, especially for women. A 1986 study by Konrad & Gutek found that women are nine times more likely than men to have quit a job because of sexual harassment, five times more likely to have transferred, or three times more likely to have been fired.

B. Psychological and physical impact

1. Only five percent of the government employees who indicated in the 1988 U.S. Merit Systems Protection Board survey that they had been harassed actually filed formal complaints or requested investigations.
2. The 1988 survey conducted by Working Woman magazine found that fear of retaliation was cited as the primary reason for not reporting harassment. Other victims have indicated the following reasons for not coming forward: not being taken seriously, being labelled a "victim", or being labelled a troublemaker.
3. A 1991 study by Klein Associates, Inc. indicated that at least 90% of sexual harassment victims will not come forward because of fear of retaliation and loss of privacy.
4. The psychological symptoms and effects of harassment include anger, fear, depression, anxiety, irritability, loss of self-esteem, feelings of humiliation, embarrassment, shame and alienation, and a sense of helplessness and vulnerability.
5. Physical symptoms include headaches, loss of appetite, gastrointestinal disorders, inability to sleep, weight loss, and crying spells. See Koss, "Changed Lives: The Psychological Impact of Sexual Harassment," in Ivory Tower: Sexual Harassment on Campus (Michelle Paludi, ed.) (1990).

III. Defining Sexual Harassment

- A. The Equal Employment Opportunity Commission, the federal agency responsible for enforcing federal antidiscrimination law, defines sexual harassment as follows:

"Unwelcome sexual advances, requests for 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 individuals, or
 3. such conduct has the purpose or effect of substantially interfering with an individual's work performance or creating an intimidating, hostile, or offensive working environment." EEOC Guidelines on Sexual Harassment, 29 C.F.R. §1604.11(a)(1989).
- B. As indicated by the EEOC Guidelines, this definition means functionally that sexual harassment takes two forms:
1. quid pro quo - Occurs when an employee's job conditions or tangible employment benefits are made dependent on his or her response to sexual demands. See, e.g., Barnes v. Costle, 561 F.2d 983 (D.C. Cir. 1977) (supervisor eliminated employee's job after she rebuffed his sexual advances).
 2. hostile work environment - Occurs when an employer's conduct "has the purpose or effect of unreasonably interfering with an individual's work performance or creating an intimidating, hostile or offensive working environment." See, e.g., Bundy v. Jackson, 641 F.2d 934 (D.C. Cir. 1981).
 3. The EEOC recognizes that although the above forms of harassment are theoretically distinct, the line between the two is often blurred. Accordingly, both forms of harassment may occur in the same fact situation. Thus, a supervisor may make implicit threats regarding an employee's status in the course of making sexual advances, even though no specific retaliation occurs. And, a sexually hostile work environment may result in the constructive discharge of an employee (constructive discharge occurs when working conditions are so unpleasant or difficult that a reasonable employee would feel compelled to resign). EEOC Policy Guidance on Current Issues of Sexual Harassment, March 1990.
- C. The definition of sexual harassment may encompass a variety of sexual or sex-based unwelcome acts:
1. visual (leering and ogling)
 2. verbal (derogatory remarks, innuendos and jokes)
 3. physical (pinching, fondling and rape)
 4. pictures and graffiti

- D. There is no "typical" victim of sexual harassment. Women are subject to sexual harassment regardless of age. Crull, "The Impact of Sexual Harassment on the Job," Sexuality in Organizations (1980) (study found victims ranging in age from 16 to 65). Women are subject to harassment regardless of marital status, (Phillips v. Smalley Maintenance Services, Inc., 711 F.2d 1524, 1532 (11th Cir. 1983) (married)), whether they are blue collar workers (Craig v. Y & Y Snacks, Inc., 721 F.2d 77, 78 (3d Cir. 1983)), clerical workers (Stewart v. Thomas, 538 F. Supp. 891 (D.D.C. 1982)), or professionals (Kyriazi v. Western Electric Co., 461 F. Supp. 894, 899 (D.N.J. 1978)). Men can also be the victims of harassment. Ross v. Communications Satellite Corp., 638 F. Supp. 1555 (D.Md. 1984). A claim of sexual harassment may be brought by an employee subjected to unwelcome homosexual advances by a supervisor. Wright v. Methodist Youth Services, Inc., 411 F. Supp. 307 (N.D. Ill. (1981)).

IV. Legal Theories of Sexual Harassment

- A. Title VII of the Civil Rights Act of 1964 prohibits sexual harassment as a form of sex-based discrimination. The Civil Rights Act of 1991 expands the remedies available under Title VII to include, in addition to back pay and attorneys' fees, limited compensatory and punitive damages for intentional discrimination, including sexual harassment. Under the Civil Rights Act of 1991, the sum of punitive damages and compensatory damages for "future pecuniary losses, emotional pain, suffering, inconvenience, mental anguish, loss of enjoyment of life, and other non-pecuniary losses" is limited, depending on the employer's size. The limitations are as follows:¹

15 to 100 employees:	\$ 50,000
101 to 200 employees:	\$100,000
201 to 500 employees:	\$200,000
501 employees or more:	\$300,000

- B. In addition to Title VII, other legal avenues are available for pursuing sexual harassment claims. For example:
1. Many states have statutes banning sex discrimination in employment. These statutes are generally interpreted to prohibit sexual harassment.
 2. Liability for sexual harassment may be established under state tort or contract law, which may include claims for assault; battery;

¹ it T e IV does not apply to employer with fewer than 15 employees.

breach of contract; intentional infliction of emotional or mental distress; tortious invasion of privacy; negligence; tortious interference with contract; and wrongful discharge in violation of public policy.

For example, an employer was held liable for intentional infliction of emotional distress in Ford v. Revlon, 43 FEP Cases 217 (S. Ct. Ariz. 1987), where he ignored sexually harassing conduct after an employee brought it to his attention, failing to confront the harassing supervisor for nine months. A supervisor was liable for battery in Arnold v. United States, 43 FEP Cases 1256 (9th Cir. 1987), where he kissed and fondled an employee and blocked his office door so she could not leave. Also, in Lucas v. Brown & Root, Inc., 35 FEP Cases 1855 (8th Cir. 1989), the court found that the plaintiff had a claim for wrongful discharge in violation of public policy where she was fired for refusing to submit to her supervisor's sexual advances.

3. In appropriate cases involving government employers, victims of harassment may have an Equal Protection Claim under the Fourteenth Amendment to the Constitution. See Andrews v. City of Philadelphia, 895 F.2d 1469, 1478 (3d Cir. 1990); King v. Board of Regents of Univ. of Wis. System, 898 F.2d 533, 537 (7th Cir. 1990); Starrett v. Woodley, 876 F.2d 808, 814 (10th Cir. 1989); Bohen v. City of East Chicago, 799 F.2d 1180 (7th Cir. 1986).
4. And, sexual harassment may be the subject of RICO violations. See Hunt v. Weatherbee, 626 F. Supp. 1097 (D. Mass. 1986) (allegation of prolonged harassment of employees by union officials states claim under RICO, rendering employees eligible for treble damages).

V. Hostile Work Environment Claims

- A. The Supreme Court has unanimously held that Title VII does not require an employee to prove tangible economic harm in order to establish sexual harassment. Meritor Savings Bank v. Vinson, 477 U.S. 57 (1986). In other words, a plaintiff may establish a violation "by proving that discrimination based on sex has created a hostile, or abusive work environment." Harassing behavior gives rise to a Title VII violation if it is (1) sexual or sex-based in nature, (2) unwelcome, and (3) "sufficiently severe or pervasive" to alter the conditions of the victim's employment.
 1. Verbal harassment by itself (although normally accompanied by physical harassment) Waltman v. International Paper Co., 875 F.2d

468, 50 FEP Cases 179 (5th Cir. 1989), is sufficient to establish sexual harassment. Katz v. Dole, 709 F.2d 251 (4th Cir. 1983); Bundy v. Jackson, 641 F.2d 934 (D.C. Cir. 1981). See also Rodgers v. Western-Southern Life Insurance Company, 58 FEP Cases, 1364 (E.D. Wis 1992) (employer cannot avoid liability for racist statements by hiding them in midst of race-neutral insults and profanity).

2. Non-verbal harassment has been determined by some courts to be sexual harassment. Andrews v. City of Philadelphia, 895 F.2d 1469 (3d Cir. 1990) (pornographic pictures determined to contribute to the hostility of the work environment); Brooms v. Regal Tube Co., 881 F.2d 412 (7th Cir. 1989) (racist pornographic pictures depicting sodomy and bestiality contributed to the hostile environment); Bennett v. Corroon & Black Corp., 845 F.2d 104 (5th Cir. 1988) (the posting of obscene cartoons in a men's room at plaintiff's workplace bearing name and depicting her engaged in sexual activity could create hostile work environment); Robinson v. Jacksonville Shipyards, Inc., 760 F. Supp. 1486 (M.D. Fla. 1991) (pornographic pictures contribute to a sexually hostile work environment).
3. Sexual harassment need not take the form of overt sexual advances or suggestions, but may consist, for example, of verbal abuse of women if it is sufficiently patterned to comprise a condition of employment and is apparently caused by the sex of the harassed employee. Hall v. Gus Construction Co., 842 F.2d 1010 (8th Cir. 1988) (calling plaintiff "Herpes", urinating in plaintiff's gas tank); Hicks v. Gates Rubber Co., 833 F.2d 1406 (10th Cir. 1987) (calling plaintiff "Buffalo Butt"); McKinney v. Dole, 765 F.2d 1129, 1138 (D.C. Cir. 1985) (acts of physical aggression against the female plaintiff). Such sex-based harassment, even if not sexual in content, is equally actionable.

B. Determining Whether Conduct is Unwelcome

1. Unwelcome conduct is defined as unsolicited or uninvited conduct regarded as undesirable or offensive by the employee. Burns v. McGregor, 989 F.2d 959 (8th Cir. 1993); Henson v. City of Dundee, 682 F.2d at 903 (citing Gan v. Kepro Circuit Systems, 28 FEP Cases 639 (E.D.Mo. 1982)). Even if an employee eventually voluntarily submits to an employer's advances, she can make out a Title VII claim if she can show that the employer's advances were unwelcome. Meritor Savings Bank v. Vinson.

2. Unwelcomeness is determined by the plaintiff's objectively verifiable conduct. Ukarish v. Magnesium Electron, 31 FEP Cases 1315 (D.N.J. 1983) (court found that plaintiff's diary entries, indicating her "individual interior concern" about the actions of her harasser, did not constitute objective conduct because she failed to communicate these concerns to the employer. Instead, the court looked to the plaintiff's behavior at work, where she joined in as "one of the boys"). The existence of a contemporaneous complaint will strengthen a claim that the behavior was unwelcome. Such a complaint is not, however, necessary. Vinson, EEOC Policy Guidance, pp. 7-8. The EEOC also recognizes that a victim need not confront harasser directly, as long as her conduct demonstrates that the harasser's behavior is unwelcome. EEOC Policy Guidance. Where an employee never verbally rejects the supervisor's sexual advances, yet there is no contention or evidence that the employee ever invited them, evidence that the employee consistently demonstrated her unalterable resistance to all sexual advances is enough to establish their unwelcomeness. Chamberlin v. 101 Realty, Inc., 915 F.2d 777, 783 (1st Cir. 1990) (employee changed subject of conversation or left the room whenever supervisor made sexual advances). For example, that an employee consistently refuses to respond to comments or gestures may sufficiently communicate that the behavior is unwelcome. Lipsett v. University of Puerto Rico, 864 F.2d 881, 898 (1st Cir. 1988); see also Rodgers v. Western-Southern Life Insurance Company, 58 FEP 1364 (plaintiff's failure to confront his harasser directly does not detract from the credibility of his racial harassment claims, given the plaintiff's non-confrontational nature and his harasser's abusive character).

3. Some courts have considered the following in determining whether behavior was welcome or unwelcome:
 - a. The complainant's willingness to engage in sexual banter with the harasser, Reed v. Shepard, 939 F.2d 484 (7th Cir. 1991), Ukarish v. Magnesium Electron, 31 FEP Cases 1315, 1319 (D.N.J. 1983), Lamb v. Drilco Division, 32 FEP Cases 105, 106 (S.D. Tex. 1983). An employee who initially engages in this type of conduct has an affirmative duty to notify the harasser that continued conduct is unwelcome. EEOC Commission Decision 84-1, 33 FEP Cases 1887 (1983); see also Swentek v. U.S. Air, 830 F.2d at 557 (citing Katz v. Dole, 709 F.2d 251, 254 (4th Cir. 1983));

- b. The complainant's past conduct with the harasser, Ukarish 31 FEP Cases at 1319, Lamb 32 FEP Cases at 106;
- c. The complainant's sexually provocative style of dress, Vinson, 477 U.S. at 57, and;
- d. The complainant's use of sexually oriented language, Gan v. Kepro Circuit Systems, 28 FEP Cases 639 (E.D. Mo. 1982), Loftin-Boggs v. City of Meridan, 633 F. Supp. 1172 (D. Del. 1983); but see Burns v. McGregor, 989 F.2d 959 (8th Cir. 1993) (plaintiff's prior public sexual behavior did not preclude finding of sexual harassment).
- e. Consensual relationship - As is the case with participation in sexual banter, when a consensual sexual relationship sours with a supervisor, the employee has an affirmative duty to notify the supervisor that continued sexual advances are unwelcome. Shrout v. Black Clawson Co., 689 F. Supp. 774 (S.D. Oh. 1988);
- f. No one of these factors will necessarily be dispositive to a claim of unwelcomeness. EEOC 1980 regulations and most recent policy guidance focus on the totality of the circumstances.

C. Determining Whether Unwelcome Conduct Is Sufficiently Severe or Pervasive

- 1. The plaintiff must show that the harassment was sufficiently severe or pervasive to substantially interfere with his or her work performance or to create an intimidating, hostile, or offensive working environment. To show such severe or pervasive activity, plaintiffs usually must point to multiple incidents or one particularly egregious incident. Barret v. Omaha National Bank, 584 F. Supp. 22 (D. Neb. 1983) aff'd, 726 F.2d 424 (8th Cir. 1984). Generally, isolated instances of unwelcome sexual or sex-based conduct will be insufficient. Strickland v. Sears Roebuck and Co., 693 F. Supp. 403, 405 (E.D. Va. 1988) (court found no hostile environment where plaintiff was touched only on one occasion, and employer took prompt remedial action); Neville v. Taft Broadcasting Co., 42 FEP Cases 1314 (W.D.N.Y. 1987) (one advance, rebuffed by the plaintiff, may establish a prima facie case of quid pro quo harassment, but is not severe enough to create a hostile environment). But see Carrero v. NYC Housing Authority, 890 F.2d 569, 51 FEP 596, 602 (2nd Cir.

- 1989) (it is not necessary to have an extended period of demeaning conduct in order to establish pervasiveness. Two kisses, three arm strokes and several degrading epithets were held to be sufficiently pervasive to invoke Title VII protection). See also Daniels v. Essex Group, 937 F.2d 1264 (7th Cir. 1991) (the number of instances of harassment is but one factor to be considered; there is no "magic" threshold number).
2. That a plaintiff suffered psychological injury as the result of the harassment may be relevant in establishing severity or pervasiveness. However, a showing of psychological injury is generally not required. Henson v. City of Dundee, 682 F.2d 897, 903 (11th Cir. 1982); Ellison v. Brady, 924 F.2d 872, 878 and n.8 (9th Cir. 1991); EEOC Policy Guidance, p. 15 at n.20. But see Harris v. Forklift Systems, Inc., 976 F.2d 733 (6th Cir. 1992) cert. granted, 113 S. Ct. 1382 (1993) (plaintiff must show injury to psychological well-being to make out hostile work environment claim).
 3. Incidents of racial harassment may be aggregated with incidents of sexual harassment to demonstrate the hostility of the workplace. Hicks v. Gates Rubber Co., 833 F.2d 1046 (10th Cir. 1987).
 4. Standard To Be Applied in Determining Whether the Harassment is Sufficiently Severe or Pervasive
 - a. Many courts attempt to determine how the hypothetical reasonable person in the victim's position would have reacted to the conduct in question. If the conduct complained of would have substantially affected the reasonable person's work environment, a Title VII violation may exist. E.g., Brooms v. Regal Tube Co., 881 F.2d 412 (7th Cir. 1989).
 - b. This reasonable person standard should take into account victim's perspective, and not stereotyped notions of acceptable behavior. E.g., EEOC Policy Guidance on Sexual Harassment (March 19, 1990). Cf. Rabidue v. Osceola Refining Co., 805 F.2d 611 (6th Cir. 1986), cert. denied, 481 U.S. 1041 (1987) (However, the Rabidue majority went on to find no hostile working environment in that case, remarking that sex-based obscenities and offensive posters have de minimus effect on workplace because society tolerates this kind of conduct in printed media, on television, and through pictorial display.) 805 F.2d at 622. See also Brooms v. Regal Tube, 881 F.2d 1412 (7th Cir. 1989) (among the factors that

may be considered are the nature of the alleged harassment; the background and experience of the plaintiff, co-workers, and supervisor; and the physical environment of the plaintiff's work area).

- c. Some courts have adopted a reasonable woman standard, which takes into account the unique experiences of women. For example, since women are more frequently victims of rape, they may perceive certain forms of harassment as a prelude to a violent sexual assault. Ellison v. Brady, 924 F.2d 871 (9th Cir. 1991) (reasonable woman would consider bizarre "love" letters sent to her from a male co-worker sufficiently severe to create a hostile work environment). See also Cerillo v. Ward, 770 F. Supp. 815 (S.D.N.Y. 1991) (female plaintiff establishes prima facie case of hostile environment sexual harassment when she alleges conduct which a reasonable woman would consider sufficiently severe or pervasive to alter the conditions of her employment and create an abusive environment); Robinson v. Jacksonville Shipyards, Inc., 760 F. Supp. 1486 (M.D. Fla. 1991) (reasonable woman would find that the sexual remarks, sexual jokes, and sexually-oriented pictures of women created an abusive working environment); Austin v. State of Hawaii, 759 F. Supp. 612 (D. Hawaii, 1991).

In Jenson v. Eveleth Taconite Co., et al., 57 FEP Cases 867 (D. Minn. 1991), the district court relied on the reasonable woman standard in certifying a class of women workers. The court relied on evidence of "pervasive offensive conduct," including sexually explicit graffiti and posters on walls, in lunchroom areas, tool rooms, lockers, etc. Such material was also found in women's restrooms, their cars, and office mail. Women also reported unwelcome touching, kissing, pinching, and grabbing, as well as offensive language directed at individuals. Although the employer argued that "reactions to profanity, pornography, or other potentially offensive material are highly individualized," the court found that the issue was whether a reasonable woman would find the work environment hostile. The court subsequently found that class-wide sexual harassment had occurred. 61 FEP Cases 1252 (1993).

- d. But some advocates point out that nothing in the language of Title VII, Meritor, or the 1980 EEOC Guidelines requires

any showing as to the reaction of some hypothetical "reasonable" person or woman by plaintiffs alleging hostile environment harassment. Under Meritor, once an employee has established that the conduct was severe or pervasive enough "to alter the conditions of [the victim's] employment and create an abusive working environment", Meritor, 477 U.S. at 67, and that the employer is responsible for the conduct, she has established liability for a hostile work environment." See, e.g., Briefs as Amici Curiae in support of Petitioner of Women's Legal Defense Fund, et.al, and of NAACP Legal Defense and Education Fund, et.al., in Harris v. Forklift Systems, cert. granted, 113 S.Ct. 1382 (1993).

VI. "Third Party" Sexual Harassment

- A. Sexual harassment is generally thought of as unwelcome conduct that is directed to or experienced by the plaintiff. The terms and conditions of a worker's employment may also be adversely affected by the apparently consensual sexual activity of other employees.
- B. EEOC regulations provide that Title VII may be violated when one individual loses employment opportunities or benefits because of another individual's submission to a supervisor's sexual advances or requests for sexual favors. 29 C.F.R. §16.4.11(g).

It is the Commission's position, however, that "Title VII does not prohibit isolated instances of preferential treatment based on consensual romantic relationships." EEOC Policy Guidance on Employer Liability For Sexual Favoritism, February 1990. In DeCintio v. Westchester County Medical Center, 807 F.2d 304 (2d Cir. 1986) cert. denied 108 S. Ct. 455 (1987), seven male plaintiffs filed charges when their supervisor defined the criteria for a promotion so that only his lover met them. The Second Circuit found that since the plaintiffs did not claim that they and other staff members were forced to submit to the supervisor's sexual advances in order to win the promotion, the facts did not fit within the EEOC's definition of "submission," as necessary to establish a quid pro quo claim. The court also held that females would have been similarly disadvantaged and therefore no gender-based discrimination existed. The court acknowledged that the situation constituted blatant favoritism, but determined that such favoritism alone did not violate Title VII. See also Miller v. Aluminum Co. of America, 679 F. Supp. 495, aff'd mem., 856 F.2d 184 (3d Cir. 1988).

C. Preferential Treatment of a Co-worker May Serve as Evidence of Quid Pro Quo Harassment: EEOC and courts indicate that in order to make out quid pro quo harassment in third party cases, the plaintiff generally must persuade the fact-finder that:

1. gender was a "substantial factor" in the preferential treatment, and
2. the evidence also must show that the sexual activity complained of was a condition for the co-worker receiving the preferential treatment.

The plaintiff satisfied these requirements in King v. Palmer, 778 F.2d 878 (D.C. Cir. 1985), where she established that the sexual relationship between her employer and a co-worker was a "substantial factor" in the co-worker being promoted in lieu of the more qualified plaintiff.

D. Preferential Treatment of a Co-Worker as Evidence of a Hostile Work Environment

1. The EEOC indicates that pervasive favoritism based on the granting of sexual favors may also establish a hostile work environment claim. Such a violation may be established regardless of whether the unwelcome conduct is directed at the plaintiffs themselves and regardless of whether the employees who received favorable treatment willingly bestowed sexual favors. EEOC Policy Guidance on Sexual Favoritism.
2. In Broderick v. Ruder, 685 F. Supp. 1269, (D.D.C. 1988), the district court found a hostile work environment where an attorney at the Securities Exchange Commission was forced to work in a situation where promotions and other preferential treatment were bestowed only on those who submitted to sexual advances.

VII. Employer Liability for Sexual Harassment

- A. Quid Pro Quo: An employer is always liable for acts of this nature, where the supervisor has made or threatened to make a decision affecting the victim's employment status. See Sparks v. Pilot Freight Carriers, Inc., 830 F.2d 1554 (11th Cir. 1987); Schroeder v. Schock, 42 FEP Cases 1112 (D. Kansas 1986). In Schroeder, the court held employer liable for quid pro quo harassment by a supervisor who had authority to recommend the plaintiff's discharge. The employer maintained that the supervisor's acts were beyond the scope of his employment because the sexual advances

were made after working hours. However, the court held that because the supervisor was acting within the scope of his authority when making or recommending employment decisions, his conduct could be fairly imputed to the employer.

- B. Hostile Work Environment: In Vinson, the Supreme Court held that courts must look to "agency principles" to determine whether an employer is liable for a hostile work environment. Courts have generally interpreted this to mean that employers are always liable if they have actual or constructive knowledge of the harassment (whether it be by supervisor, co-worker or customer) and fail to take immediate and appropriate corrective action. 29 C.F.R. §1604.11(d) and (e); Baker v. Weyerhaeuser Co., 903 F.2d 1342, 1346 (10th Cir. 1990).

Moreover, the employer is almost always liable for a supervisor's hostile environment harassment even without actual or constructive knowledge if the employer fails to take immediate and effective action.

1. Actual knowledge means that an employer knows about the harassment. Garziano v. E.I. DuPont de Nemours & Co., 818 F.2d 380, 388 (5th Cir. 1987). For example, in Andrews v. City of Philadelphia, 895 F.2d 1469, (3d Cir. 1990), the Third Circuit found that a captain acquiesced in the sexual harassment of female police officers because he was aware of the problems concerning foul language and pornographic materials but did nothing to stop them, and failed to investigate many of the complaints brought by the women. See also Davis v. Tri-State Mack Distributors, 60 FEP Cases 642, 644 (8th Cir. 1992) (employer had notice of harassment - and duty to take prompt remedial action -- as soon as employee complained to branch manager).
2. Constructive knowledge means that, upon reasonably diligent inquiry the employer should have known of the harassment. Courts have held employers liable for failing to prevent harassment when they had reason to believe that it would occur. Paroline v. Unisys Corp., 879 F.2d 100, (4th Cir. 1989), partially vacated on other grounds, 900 F.2d 27 (4th Cir. 1990) (where the employer had previously reprimanded the alleged harasser for conduct aimed at other female employees, it should have foreseen and prevented the harassment of the plaintiff). See also Yates v. Avco Corp., 819 F.2d 630, 636 (6th Cir. 1987) (supervisor harassed two women almost daily, employer's grievance procedure ineffective).

The Sixth Circuit has held that the "knew or should have known" standard applies only to coworker harassment. The Sixth Circuit will hold an employee liable for hostile work environment harassment by a supervisor if it took place "in the scope of the supervisor's employment." This determination requires an examination of when and where the harassment took place, and whether it was foreseeable. Kaufman v. Allied-Signal, 59 FEP 606 (6th Cir. 1992.)

3. Once an employer becomes aware of the harassment, he or she can limit liability by taking prompt and effective remedial action. See Steele v. Offshore Shipbuilding, Inc., 867 F.2d 1311, 1316 (11th Cir. 1989) (employer was not held liable because, upon learning of the harassing activity, it promptly investigated the allegations, reprimanded the harasser, and informed the employees that the harassment would stop); Spencer v. General Electric, 894 F.2d 651 (4th Cir. 1990) (employer was not liable for the harasser's actions because, once the plaintiff informed it of the conduct, it immediately transferred her to the same grade level position in another office and promptly investigated the allegations).

VIII. Individual Liability of Alleged Harassers

- A. In addition to the employer's liability as an economic institution, managers and supervisors may be personally liable for harassment under certain limited circumstances. Under Title VII, the term "employer" includes any person acting as an "agent" of an employer. Some courts have held that supervisors and other "agents" are themselves "employers" for liability purposes. Any person who qualifies as an employer may be individually liable for a Title VII violation under certain circumstances.
 1. In racial harassment cases, supervisory employees have been personally liable when they acted as agents of the employer. The same analysis may be applied to sexual harassment cases. See, e.g., Hamilton v. Rodgers, 40 FEP Cases 1814 (5th Cir. 1986) (where two supervisors used their authority, including the authority to recommend that employees be suspended, to racially discriminate against plaintiff). But see Miller v. Maxwell's International, 61 FEP Cases, 948, 952-53 (9th Cir. 1993) (individual supervisors not personally liable as employers under Title VII).
 2. Non-supervisory employees are generally not held personally liable--even for harassment they themselves commit. For example, an alleged harasser who had trained the two plaintiffs, but held the

same job title, was found not to be a supervisor because he had no authority over their employment opportunities. Thus, he was not held personally liable. Guyette v. Stauffer Chem. Co., 27 FEP Cases 483, 484-85 (D.N.J. 1985).

B. Supervisors and other individuals who are found to be "employers" are individually liable only when they themselves participate in or affirmatively acquiesce to the alleged harassment.

1. Where defendants circulated an obscene cartoon depiction of the plaintiff and "engaged in boisterous speculation about her virginity," they were found to have participated in the harassment. Kyriazi v. Western Electric Co., 26 FEP Cases 413, 417 (D.N.J. 1979). A supervisor was held liable for acquiescing to the alleged harassment, i.e., communicating implicit approval of the harassment directly to the plaintiff, where he told the plaintiff "not to let it bother you" and, when the plaintiff gave him the option of his ending the harassment or her resignation, he chose the latter. Robson v. Eva's Supermarket, Inc., 30 FEP Cases 1212, 1217 (N.D. Ohio 1982).
2. Actual or constructive knowledge of the harassment is not sufficient by itself to establish individual liability. Where only one of the defendants participated in the harassment, while the others were aware of the conduct and did nothing to stop it, the defendants who only knew of the conduct were not individually liable. Hendrix v. Fleming Cos., 42 FEP Cases 461, 462 (W.D. Okla. 1986).

IX. Preventing Sexual Harassment in the Workplace: Guidelines for Employers

- A. To protect themselves from liability, employers must take affirmative steps to create an environment free of harassment and abuse. EEOC guidelines encourage employers to "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." 29 C.F.R. §1604.11(f).
- B. Basics of an effective program:
 1. The employer must have an explicit policy against sexual harassment that is clearly and regularly communicated to all employees.
 2. The employer should:

- a. raise the subject of sexual harassment with all supervisory and non-supervisory employees;
 - b. express strong disapproval; and
 - c. explain the sanctions for harassment.
3. Once an employer becomes aware of a harassment complaint, he or she has an affirmative duty to investigate and to take prompt and effective remedial action, e.g., Intlekofer v. Turnage, 59 FEP Cases 929, 932 (9th Cir. 1992). ("If an employer knows or should have known of the harassment, it must take some form of disciplinary action.")

Employers should have a procedure for investigating complaints that:

- a. encourages complainants to come forward;
- b. treats all complaints seriously;
- c. does not require the victim to complain to the offending supervisor, e.g., by designating more than one person to receive complaints;
- d. is as confidential as possible;
- e. protects the victim and potential witnesses from retaliation; and
- f. is timely. Where an employer was aware of sexual harassment for two years but took no action, and where he waited two weeks after the employee filed a formal complaint to investigate, the employer was liable. Llewellyn v. Celanese Corp., 693 F. Supp. 369, 380-81 (W.D.N.C. 1988).
- g. An investigation that is not thorough may contribute to a court's finding of employer liability for a supervisor's conduct. For example, one court found that the employer had failed to respond adequately to a complaint of sexual harassment where, among other factors, the investigation consisted of interviewing only the complaining party and the alleged harasser. Brooms v. Regal Tube Co., 881 F.2d 412, 416 (7th Cir. 1989). However, where the Chief of Police promptly

investigated a department employee's numerous claims of sexual harassment and found no evidence to support them, the court found he would not be liable under agency principles. Sapp v. City of Warner Robbins, 655 F. Supp 1043, 1049-50 (M.D. Cal. 1987).

4. Sanctions should be applied consistently and in a timely fashion. The employer's response is ineffective if it is unduly delayed and if action taken, however promptly, is not likely to prevent the misconduct from recurring. Guess v. Bethlehem Steel Corp., 913 F.2d 463, 465 (7th Cir. 1990).
 - a. Appropriate remedial action depends on the facts of each case, with a focus on the severity and persistence of the harassment and the effectiveness of any initial remedial steps. Hansel v. Public Service Company, 57 FEP Cases 858 (D. Colo. 1991).
 - b. An employer notified that an employee is engaging in harassment is not obliged to discharge or demote the harasser in every case. While egregious cases may require such an action, in less serious cases a reprimand, mandatory counseling, brief suspension or other remedial steps may be sufficient to remedy the situation. See Intlekofer v. Turnage, 59 FEP Cases 929, 932 (9th Cir. 1992); Hirschfield v. New Mexico Corrections Dept. 916 F.2d 572, 578, n.6 (10th Cir. 1990).
 - c. However, failure to discipline employees for offending conduct will result in liability. See Intlekofer v. Turnage, 59 FEP Cases 929, 932 (9th Cir. 1992); Baker v. Weyerhaeuser Co., 52 FEP Cases 1872 (10th Cir. 1990).
 - d. An oral warning is sufficient discipline only when it is severe enough to stop the harassment. Where the employer summoned the alleged harasser to the U.S. office from an overseas assignment and told him that he would be fired if the harassment continued, the employer was not held liable. Steele v. Offshore Shipbuilding Inc., 867 F.2d 1311, 1313 (11th Cir. 1989). However, while an oral warning may be an effective first step, the employer must impose more severe measures if verbal counseling does not stop the harassment. For example, where the employer's warning consisted of questioning the alleged harasser occasionally during the two-

year period of harassment, and the harassment did not stop, the employer was liable. Maturo v. National Graphics Inc., 722 F. Supp. 916, 920-22 (D. Conn. 1989).

- e. Harassment should be remedied through actions directed at the harasser, not the victim, e.g., Ellison v. Brady, 924 F.2d 872 (9th Cir. 1991).
 - f. Transferring either the alleged harasser or the complaining party, if she so requests, is appropriate if it is definite - i.e. calculated to permanently separate the alleged harasser and the complaining party - and is reasonably expected to stop the harassment. E.g., the employer was not liable where he immediately transferred the harassing supervisor after a complaint was filed. Long v. First Family Financial Serv. Inc., 677 F. Supp. 1226, 1233 (S.D.Ga. 1987). On the other hand, the employer was liable when he hired a trainee who could replace the harassing supervisor, but did not transfer the supervisor or inform the complaining party that he would do so. Wheeler v. Southland Corp., 875 F.2d 1246, 1249-50 (6th Cir. 1989).
 - g. The employer should also consider penalties for supervisors who fail to report complaints of sexual harassment or who fail to take timely action in responding to complaints. Supervisors' management of equal employment opportunity issues - such as sexual harassment - should be part of their job description; performance reviews should consider supervisors' treatment of these issues.
5. Concerns of alleged harassers should be considered carefully in any internal grievance procedure and accompanying investigation.
- a. Defamation claims have been brought by alleged harassers as the result of investigation/action by employer. However, "qualified privilege" exists where employer carried out good faith investigation of complaints. See Garziano v. E.I. DuPont de Nemours, 818 F.2d 380, 390-91 (5th Cir. 1987).
 - b. Similarly, wrongful discharge claims brought by alleged harasser have been unsuccessful where termination was based on investigation and subsequent good faith belief that harassment had occurred. See, e.g., Crimm v. Missouri Pac. R.R. Co., 750 F.2d 703 (8th Cir. 1984).

6. At the conclusion of the investigation, both the complainant and alleged harasser should be informed of the results of the investigation.
7. Employer policy should include ongoing monitoring of situations to ensure that no problems develop or recur.

X. Handling Sexual Harassment in the Workplace: Guidelines for Employees

- A. While EEOC guidelines and the courts have made clear that employers have a duty to maintain workplaces that are free of discrimination, it is also true that employees have a duty to educate themselves about the sexual harassment and how to deal with it, and to inform their employer of such behavior whenever possible. Employees should consider the following if faced with harassment:
1. When confronted with sexual harassment, clearly communicate to the harasser(s) that the "attention" is unwelcome: unwanted and uninvited. Similarly, employees who are asked to stop any unwelcome conduct should take such requests seriously, and stop.
 2. Employees should be careful about engaging in sexual banter and profanity on the job. If an employee has engaged in sexual conduct in the workplace, she has to overcome the presumption that such conduct is welcome by giving notice to an alleged harasser that the conduct is no longer welcome. It is not enough merely to stop participating in the conduct without further comment.
 3. Report the problem to your supervisor and to the harasser's superior or supervisor, asking that the harassment stop. Where the harasser is a customer or client, inform your supervisor and ask that the harassment be stopped.
 4. Where an explicit request to stop has not worked, keep a written record of what happens:
 - a. Who said what? did what? when?
 - b. Were there witnesses? who?
 - c. What was your response?
 - d. How did you feel about the harassment? (Angry? Humiliated? Sick?)

Make the record as soon as possible after any incident occurs, while it remains fresh in your memory. Keep the record at home, not in your desk or locker at work.

5. If you suspect that other workers may have been treated similarly, talk to them; joint action may be possible. If you can, discuss the problem with co-workers so they are aware of what is happening and that you are upset about it. Suffering in silence is rarely effective in stopping harassment and may backfire, if later action rests only on your word against the harasser's.
6. If it becomes necessary, file a formal grievance if your company has an internal complaint procedure or if you are represented by a union.
7. If it becomes necessary, file a charge with the local office of the Equal Employment Opportunity Commission, your state or local human rights agency. You may also want to talk to a private attorney. Even if you decide not to pursue a claim in court, it helps to know what your legal options are.