

HARASSMENT IN THE WORKPLACE¹

by Robert E. Gregg

Harassment in the workplace is illegal. It violates both the State and Federal equal rights laws. Harassment infringes upon equal respect in working relationships, and causes serious harm to the productivity, efficiency and stability of the operation.

Harassment is illegal if it is based upon a protected group status. Harassment is defined as any unwanted deliberate or repeated unsolicited comments, gestures, graphic materials, physical contacts, or solicitation of favors which is based upon ones' group membership when:

1. Submission to such conduct is made either explicitly or implicitly a term or condition of an individual's employment; or
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 substantially interfering with an individual's work performance or creating an intimidating, hostile or offensive working environment.

Enforcement. Harassment is a form of discrimination and is prohibited by both state and federal antidiscrimination laws.

Federal Laws

The primary federal law prohibiting harassment is §703 *Title VII of the Civil Rights Act of 1964*, 42 U.S.C. 2000e, et. seq. This prohibits discrimination, including harassment, on the basis of *race, sex, national origin, and religion*. It is enforced by the U.S. Equal Employment Opportunity Commission. In addition, the federal government has issued regulatory guidelines which give a much more detailed description of sexual harassment prohibitions. These are found at 29 Code of Federal Regulations, sec. 1604.11.

Title IX and Title IV of the Civil Rights Act of 1964, 42 U.S.C. §2000-c et seq., prohibits discrimination, including harassment and benefits or services to students in primary, secondary and

higher public education. It covers the same protected basis as does Title VII.

The Age Discrimination In Employment Act, 29 U.S.C. §621, et. seq. prohibits harassment or other discrimination on the basis of age for people over age 40. It is also enforced by the Equal Employment Opportunity Commission.

The Federal Rehabilitation Act of 1973, §501 to §504, prohibits harassment, and other discrimination, on the basis of handicapping condition. It is enforced by the Office of Federal Contract Compliance of the U.S. Department of Labor in regard to employers who receive federal monies. The OFCCP can also enforce sanctions against recipients of federal funds who engage in the other sorts of discrimination listed above.

State Laws

Virtually every state, and most larger municipalities also have anti-discrimination laws, which prohibit harassment. These laws generally duplicate the federal law. Some extend anti-harassment on a few additional protected basis, such as Sexual Preference, Marital Status, and Arrest/Conviction Record.

Because of overlapping jurisdiction it is usual for the same complaint of harassment to be filed at *both* the state and federal enforcement agencies (and often with a city or county agency as well). Generally the different agencies have cross filing agreements with each other. Therefore, only one will actively investigate a jointly filed complaint.

Complaints of harassment are handled by government agencies which investigate and make determinations about whether or not discrimination has occurred.

The agencies enforcing *the federal law* are:

Equal Employment Opportunity
Office of Federal Contract Compliance
Students U.S. Dept. of Education

Due to the great amount of publicity generated by anything with a sexual connotation, most peo-

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ple tend to automatically add the prefix "sexual" when mentioning harassment. In fact the Fair Employment Laws prohibit harassment based upon *all* of the criteria covered. So, remember that harassment on the basis of race, age, national origin, sexual preference, religion, marital status, arrest/conviction record, or handicap as well as sex are covered.

Most of the harassment cases have indeed been sexual in nature; though there are also a number of racial, ethnic or religious cases in which the workers are expected (as a condition of employment) to put up with the racial, ethnic or religious jokes, comments and names that other employees will use toward them, physical intimidation, work sabotage, or unfair discipline or discharge.

History

Though Anti-Discrimination in Employment laws have existed in some states since the 1940's, and at the Federal level since 1964, it was not until the mid 1970's that the area of harassment began to develop.

At first these cases were met with resistance by the courts.

In *Barnes v. Train*, 13 FEP Cases 123 (D.C. 1974) the court held that the complainant's refusal to have sexual relations with her supervisor, and the resulting elimination of her job, was *not* discrimination. Rather it was due to "the subtleties of an inharmonious personal relationship."

In *Corne v. Bausch & Lomb, Inc.*, 390 F. Supp. 161 (D.C. Ariz., 1975) the court held that it had no jurisdiction to hear a case about the unwelcome physical sexual advances of the complainant's supervisor, because it did not violate any company policy, and involved only the "personal proclivity, peculiarity of mannerisms" of the individuals. The court also stated that recognition of a cause of action for unwelcome sexual advances could open the "floodgates" for more suits.

Bell v. St. Regis Paper Co., 425 F. Supp. 1126 (D.C. Ohio, 1976) was a racial harassment case in which the complainant was subjected to six years of overt co-worker harassment due to her interracial marriage, with only token employer in-

tervention. The court refused to find enough grounds for a case.

Later in 1976, however, the decisions began to change. *Williams v. Saxbe*, 1413 F. Supp. 654 (D.C., D.C. 1976) was a case in which the complainant refused her supervisor's sexual advances and, as a result, was subjected to a pattern and practice of humiliation and unfair discipline. The Court held that the harassment was discriminatory, creating "an artificial barrier to employment," and that the acts of the supervisor were imputed to the company.

Finally, in 1977, the appeals court used the new interpretation of the law to *reverse* the original *Barnes* case. It held that even if the actions of the supervisor were "personal escapades," the employer would be responsible. *Barnes v. Castle*, 561 F.2d 983 D.C. Cir., 1977).

Acts of Supervisors

Since *Williams v. Saxbe* (cited earlier), a complainant could file a federal suit over the effects of harassment by a supervisor. However, exactly under what conditions took some time to clarify.

In *Miller v. Bank of America*, 418 F. Supp. 233 (D.C. Calif. 1976), the complainant's supervisor offered her a better job if she were sexually cooperative. She refused, and was fired. The trial court dismissed the case because she had not pursued her *internal* complaint process, and not told higher management before filing her suit.

In *Neidhardt v. D. Holmes Co.*, 624 F.2d 109, 21 FEP cases (D.C. La. 1979) the court held that a company was *not* liable for a supervisor's harassing behavior, *unless* the victim first reported it to higher management and then nothing was done to cure the problem.

An early Wisconsin case was *Hamilton v. DILHR*, 94 Wis.2d 611 (1980). A female employee was subjected to the continuing unwelcome sexual advances of more than one supervisor. Though they made her work life miserable, neither supervisor threatened her with discipline, discharge or any other job action. Therefore, the court found no harassment. [The Wisconsin legislatures 1982 revision of state law to include a concrete definition of sexual harassment was a direct result of the *Hamilton* decision].

In *Meyer v. ITT Diversified Credit Corp.*, 527 F.

Supp. 1064 (D.C. Mo., 1981) the court found that harassment *did* exist where the employee did report the supervisor's conduct to higher management, and no one did anything to prevent her discharge.

In *Toscano v. Nimmo*, 570 F. Supp. 1197 (D.C. Del. 1983), the Veterans Administration was found liable for condoning harassment, when it failed to discipline a supervisor who it found was promoting women on the basis of giving in to his sexual demands.

In *Rhode v. KO Steel Casing, Inc.*, 649 F.2d 317 (5th Cir. 1981) a female employee was fired after she broke off a relationship with her supervisor-boyfriend. The court found the company liable for failure to control (and discipline) the supervisor after the harassment was reported. So, there was precedent established to find that harassment existed, even though the complainant initially voluntarily entered into a relationship with the harassor. However, the party charging harassment from conduct in which he or she initially voluntarily participated, must clearly notify others that the behavior is no longer welcome before a harassment claim can be made. EEOC Decision 84-1 (Nov. 28, 1983).

These were all cases in which the victim had reported the supervisory harassment to higher management, and received no action. In 1983, the courts expanded the liability coverage a little more. *Craig v. Y Y Snacks, Inc.*, 721 F2d 77 (3rd Cir., 1983) was a case in which the complainant was discharged after refusing the sexual advances of a supervisor who had "complete direction" over the work unit. The court stated that where a supervisor "with plenary authority over hiring, discipline and dismissal makes an employment decision, that decision may be *imputed* to the employer." (emphasis added)

In 1985 the Court took the next step in *Vinson v. Taylor*, 753 F2d 141. This case involved an employee who had knuckled under and acquiesced to the sexual advances of her supervisor. However, she never told any higher managers about the harassment, before filing suit. The court held that a supervisor's acts *are* the acts of the employer. When "management" engages in harassing behavior there is a violation of the law which requires no further information to

other management before a case can be started. There was no language in this about the supervisor having "plenary power."

This case, under the new title of *Meritor Savings Bank, FSB v. Vinson*, 91 L.Ed.2d 49 (1986), was appealed to the U.S. Supreme Court, which upheld the concept that an employer can be liable, without further notice, for acts of supervisors. If a supervisor commits harassment, the company may not get a chance to discover and correct the situation before a complaint is filed with state or Federal agencies.

In *Vinson* the Supreme Court cited reasons which were weighed into the decision against the employer.

1. No company policy against harassment.
2. The company grievance procedure had no alternatives except to go first to ones' immediate supervisor (the very person that was doing the harassing).

The *Vinson* decision did not make a company automatically, absolutely liable in every situation for acts of supervisors. [It did not, though, say what acts wouldn't generate automatic liability]. The court held that absence of notice to top management no longer automatically insulates the company from liability. [A four justice "concurring opinion" *would* impose *strict liability* for supervisory acts].

With this sort of ruling, with all doors left open, the best approach is to assume that the acts of supervisors *will* generate liability. *All supervisors* should receive antiharassment training.

The most well known form of sexual harassment is where a hire or promotion is conditioned upon the candidates either dating or engaging in sexual activity with the boss. Rather than basing the hire upon valid business criteria, it is based upon sexuality. This gives the candidates a good harassment case.

If the candidate *accepts* the condition and gets the job, the "rejected" candidates probably have good *discrimination* cases. Remember harassment is one form of discrimination, but there are lots of other types of discrimination. Suppose a female candidate accepted the propositioned and was hired. The rejected male candidates were *not* "harassed" in any way, but they *were* discriminated against because the male boss

wasn't interested in dating them, and denied them the right to compete on an equal basis with the female candidates. Men have filed, and won, such *discrimination* cases.

At one point it was argued that a defense of homosexuality should defeat a sexual harassment case because the male boss was bisexual and an "equal opportunity" harassor." *Tomkins v. Public Service Electric & Gas Co.*, 16 FEP cases 22 (3rd Cir., 1977).

Others have tried to argue that homosexual harassment is not covered, because the law is intended to protect one from harassment by members of other groups. The courts have rejected this, holding that unwelcome sexual advances by any sexed supervisor toward any sex of employee are sexual harassment. *Wright v. Methodist Youth Services, Inc.*, 511 F. Supp. 307 (N.D. Ill. 1981); *Joyner v. AAA Cooper Transportation*, 597 F. Supp. 537 (M.D. Ala. 1983).

Harassment by Co-workers

Co-workers are those who have no power to threaten another worker with loss of pay, discipline, or discharge. Neither can they hold out promises of jobs, better pay, or promotions if one gives in to sexual advances.

Co-workers can, however, threaten physical harm, do job sabotage, or make life incredibly miserable.

On the other hand there is a lot of "banter" in some workplaces. The law does not prohibit the mention of sex, race, religion, national origin, etc. in the workplace. Even romantic or sexual advances of a limited number, or unaccompanied by an implication of coercion, are not always seen as harassment. *Banket v. National Urban League, Inc.*, 730 F.2d 799 (D.C. App., 1984); *Downes v. F.A.A.*, 755 F.2d 288 (Fed Cir. 1985); *Glasser v. DHSS*, 79-PC-ER-63 (Wis. Personnel Comm., 1981). The issue in harassment cases is not necessarily the words used, but whether they are *unwelcome*.

Even if the attention from co-workers is unwelcome or threatening, an employer is *not* automatically liable. Non supervisory employees are not "agents" of the company for this sort of case. *Guyette v. Stauffer Chemical Co.*, 49 L.W.

2819 (D.C. N.J. 1981).

In the Wisconsin case of *Crew v. LIRC*, 339 N.W.2d 350 (Wis. App. 1983), an employee was racially harassed by co-workers, but never mentioned it to anyone in management. The court held that the employer could not be held responsible for any "unpleasant working conditions" unless a "supervisor or others in management . . . knew or should have known" of the situation. [See also, *Orgill v. Guardsmark*, Wis. Labor Industry Rev. Comm. (1983).

In order to file a case of co-worker harassment the complainant must allege that: (1) management knew or should have known about the situation; (2) failed to do anything, and therefore, (3) approved or condoned the harassment. *Ludington v. Sambo's Restaurants, Inc.*, 476 F. Supp. 639 (D.C. Tenn, 1979).

Where management has been aware of co-worker harassment, the court's have had no problem in finding the employer liable. In *Continental Can Co. v. State of Minnesota*, 297 N.W.2d 241 (1980) on appeal from the determination of the state fair employment agency, the state supreme court held that a series of harassing episodes which included physical contact by fellow employees, in response to which the complainant's supervisors took no action after notification by complainant, and where the employer made no attempt to investigate the situation for several months, did constitute sexual harassment by fellow employees for which the employer was liable.

Kyriazi v. Western Electric Co., 461 F. Supp. 894, (D.C. N.J., 1978) was a class action alleging sex discrimination in hiring, promotion, training opportunities and pay, in addition to individual causes of action, including Kyriazi's claim of sexual harassment. On the harassment issue, the court found for complainant. Over a number of years complainant had been subject to verbal harassment, including direct insults, placing of obscene materials on her desk, physical intimidation, and other actions by a number of co-workers as part of an "overall effort by fellow workers to make life generally unpleasant for her." Complainant's supervisors were well aware of the harassment, via her complaints, and knew she intended to file a suit. The termination was triggered by the

last information.

Be aware that it does not take much information to create sufficient management knowledge to make the employer liable for lower level harassment. *Any* information that an employee is being intimidated, coerced, threatened, etc., could be enough.

It is *not* necessary for the victim to put information in writing. It is *not* necessary for the victim to follow the company's established official harassment reporting process or EEO complaint procedures. Oral, "unofficial" information to management is still "information."

"Management" means anyone in a functional supervisory capacity. If the victim tells the lowest level line supervisor it is sufficient. It is not necessary for the victim to go up the chair of command to try to get action. Once the *lowest* level supervisor has been informed, "the company knows."

It is, also, not even necessary for the victim to report the situation at all. If a third party (friend, customer, family, "the grapevine") provides management with information, then there is sufficient knowledge to require that the situation be checked out.

Neither can a supervisor turn a head, pretending not to see, and hope that no one comes up and actively gives information. The statutes and the cases use the language "know or *should have known*." Management is supposed to be "somewhat aware" of what is going on in its own operation; if it can be proven that the harassment situation was obvious to those who had bothered to look, then the employer will be liable.

In the overwhelming majority of cases someone in management has been told about the harassment, then done little or nothing.

Prompt and thorough investigations are required. In *Heelan v. Johns-Manville Corp.*, 451 F. Supp. 1382 (D.C. Colo. 1978) the court found employer liability after an improper investigation. After having been told of harassment by a victim, the supervisor did nothing more than ask the harasser if the allegation was true.

Corrective action, however, can take the employer off the liability hook. If the harassment ceases, and damage is corrected after the victim complains, then the courts find no liability.

Downes v. F.A.A., 755 F.2d 288 (Fed. Cir., 1985).

Information about harassment gives the employer fair warning and a chance to do something to correct the situation. Failure to use that chance generates legal liability.

Costumes

Harassment statutes cover terms and conditions of employment. Requiring or coercing an employee to wear a sexually demeaning (revealing) costume is a condition of employment, and can be sexual harassment. Owners of restaurants and cocktail lounges take heed!

In *EEOC v. Sage Realty Corp.*, 507 F. Supp. 599 (D.C. N.Y. 1980) the complainant was required to wear a revealing uniform that subjected her to repeated sexual comments from members of the public. The court found no legitimate business reason for the uniform and found the employer liable.

In *EEOC v. Holiday Inn*, Case No. 83-2105 (D.C. Mass., 1983) (unpublished decision) the court granted an injunction to prevent a hotel from requiring cocktail waitresses to wear a "hot pants uniform." The court rejected the hotel's argument that the uniform was job related because the waitresses were hired as "entertainment packages" to attract male customers.

So, requiring an employee to wear a sexually revealing "uniform" as a condition of employment has been held to be sexual harassment. This does not eliminate such costumes from the bar, restaurant or other business. However, the wearing of the costume must be totally voluntary. An employer may not require a sexually demeaning costume, may not pressure employees to wear one, and may not give incentives to those who do. If an employee objects to the uniform due to its being sexually offensive the employer must accept a reasonable accommodation of a uniform that is not offensive for that employee. The law reasons that the business of a bar or restaurant is to serve drinks and food, not to put on sex shows. Unless the employer blatantly advertises sex as the main business of the establishment, the sexually revealing costumes can be challenged within the scope of the antiharassment provisions.

Intimidating, Hostile, or Offensive Work Environment.

Most of the cases cited so far have dealt with tangible economic harm. The employer was found liable because a victim of harassment was fired or not hired. Real economic loss occurred in terms of missed pay.

Originally the courts were inclined to require a tangible economic loss before they would recognize a cause of action of harassment. However, they quickly changed, to accept the concept of harassment which "poisons the environment," such as offensive jokes, racial slurs, and overt sexual innuendo. A showing of tangible loss is not necessary for recovery in a harassment case. *Bundy v. Jackson*, 19 FEP cases 828 (D.C. D.C., 1979); *Morgan v. Hertz*, 524 F. Supp. 123 (W.D. Tenn, 1981)

Another common form of harassment case involves posters, calendars and pinups of a sexual nature or cartoons of a racial or ethnic nature. An employee sees these displays, complains, and is told that the pictures are there to stay. This, in effect, creates a term or condition of employment. Employees or job candidates are told that if they want to work, a condition of working there will be

to put up with the hostile, offensive and intimidating visual display of sex pictures, or racial and ethnic cartoons.

These pictures should come down following a complaint. Again the business of an auto repair shop is cars, not sex. The business of a farm equipment dealership is tractors, combines, repairs, etc., not sex. The business of an offensive, nonbusiness related display the posters, calendars and pinups cannot be legally justified as necessary to the business.

The above situation can also be filed as a *religious* harassment issue. In fact it may arise that way more frequently than as a sexual harassment complaint. Out of the 13 cases involving sexual posters, pinups, and calendars handled by the author, *only two* were filed by women alleging sexual harassment. The rest were filed by men, most on the basis of offensiveness to their religious beliefs.

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Abstract

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American Nurseryman readers list their picks in 14 genera. We document what is currently popular in the national marketplace. We also chart what growers like vs. landscapers and retailers, and vice versa. Together, this information may provide some light entertainment or possibly a few ideas. You might investigate the plants listed here that you haven't considered before.