LAW ENFORCEMENT MANAGEMENT INSTITUTE

A REPORT WITH RECOMMENDATIONS CONCERNING SEXUALLY OFFENSIVE WORK ENVIRONMENTS IN LAW ENFORCEMENT AGENCIES

A LEARNING CONTRACT

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INTRODUCTION

The purpose of the Equal Employment Opportunity Commission [EEOC] is to eliminate discrimination based on race, color, religion, sex, national origin, or age in hiring, promoting, firing, wages, testing, training, apprenticeship and all other conditions of employment. The Commission also promotes voluntary action programs by employees, unions and community organizations to make equal employment opportunity work. EEOC also is for all compliance and enforcement activities relating to equal employment opportunity among federal employees and applicants, including handicap discrimination.

Harassment on the basis of sex is a violation of Sec. 703 of Title VII of the Civil Rights Act. Unwelcome sexual advances, request 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.

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.

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.[1] 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 a supervisory or agency capacity.

Concerning conduct between fellow employees, an employer is responsible for acts of sexual harassment in the workplace where the employer knows, or should have known, of the conduct, unless the employer can show that it took immediate and appropriate corrective action.

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 knows, or should have known, of the conduct and fails to take immediate and appropriate corrective action. After 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

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[1] (Title VII, Pub. L. 88-352, 78 Stat. 253 (42 U.S.C. 2000e et. seg. [45 FR 74677, Nov. 10, 1980]

respect to the conduct of such non-employees.

EEOC DEVELOPMENT

In 1977, a federal court in the District of Columbia held that Title VII's[2] prohibition of discrimination in employment on the basis of sex, includes discrimination by sexual harassment.[3] Three years after that decision, the U.S. Equal Employment Opportunity Commission issued guidelines on sexual harassment in the workplace,[4] and many employers have referred to the guidelines to determine their responsibilities.

Employers were never really certain whether their approach to addressing and remedying sexual harassment was the one envisioned by Title VII. The reason for the uncertainty was that the court decisions interpreting Title VII and the EEOC guidelines never had the "seal of approval" of the country's highest court. The Supreme Court remedied this on June 19, 1986 when it issued it's first sexual harassment decision, Meritor Savings Bank, FSB V. Vinson.[5] Employers now have the highest court's interpretation of how sexual harassment is viewed under Title VII and what employer's responsibilities are.

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[2]Pub. L. No 88-352, tit. VII, 78 Stat. 253 (Codified as amended at 42 U.S.C. Secs. 2000c et seg [1982].

[3]Barnes V. Costle, 561 F. 2d 983 (D.C. Civ., 1977).

[4]Equal Employment Opportunity Commissions Guidelines on Discrimination Because of Sex, 29 C.F.R. Sec. 1604 11 (1985).

[5]-U.S.-, 106 S. Ct. 2399 (1986).

The Meritor decision promises to create a new wave of sexual harassment interest awareness and claims on the part of employers and employees alike. The employer's best strategy is to understand what the Meritor decision demands and implement its decisions in the workplace without delay.

Michelle Vinson, an employee of Meritor Savings Bank, alleged that Sidney Taylor, her supervisor and the branch manager of the bank where they worked, began to request sexual encounters with her soon after she came to work for Meritor. During the time Vinson worked at the bank, she received regularly scheduled raises and promotions, going from teller-trainee to assistant branch manager during her tenure. As branch manager, Taylor had the authority to recommend employees for promotions and raises, but not the authority to make these ultimate employment decisions.

Vinson claimed that she eventually submitted to Taylor out of fear of losing her job. Vinson further alleged that during the four years she worked at the Bank she was continuously subjected to such requests from Taylor. In addition, Taylor followed her into the ladies room, fondled her in front of other employees, had sex with her 40 or 50 times and raped her several times. Eventually, Vinson took extended sick leave and was fired for excessive use of leave. After taking leave, but before being fired, Vinson sued Taylor and Meritor under Title VII for sex discrimination on the basis of sexual harassment.

Meritor had a general anti-discrimination policy under the terms of which Vinson was required to report complaints to her supervisor who happened to be Taylor. Vinson asserted she did not use the complaint

procedure out of fear of Taylor. Taylor on the other hand, claimed there was no relationship between them and that her charges were in retaliation for a business-related dispute.

Meritor also denied Vinson's version of the facts and claimed that since it had no notice of what was allegedly happening to Vinson and had not requested Taylor to perform such acts, it was not liable. Taylor and Meritor introduced evidence of Vinson's provocative dress and her discussion of personal fantasies trying to show that if there was a relationship between Vinson and Taylor, it was voluntary.

The trial court dismissed Vinson's case,[6] holding that she had no basis for suit since she did not lose a tangible job benefit, such as a promotion or raise. The U.S. Circuit Court Appeals for the D.C. Circuit reversed the trial court[7] and held that an employee could bring a claim for sexual harassment under Title VII even though the employee loses no tangible job benefit, if the employee alleges that the sexually-harassing activity creates a hostile, offensive or intimidating environment in which the employee must work.

The Supreme Court generally agreed with the circuit court's decision, but came to different conclusions about several of the points at issue. In the final analysis, the Court held that:

1. Under Title VII of the 1964 Civil Rights Act, a cause of action exists for sexual harassment as a form of sex discrimination where the employee loses or is denied tangible benefits ("pro quo" sexual harassment) or is subjected to sexual comments, requests or activities in the workplace that create a hostile, intimidating or offensive

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[6]Vinson V. Taylor, 22, E. PD 30708, 23 FEP Cases 37 (D.D.C. 1980).

[7]243 U.S. APD. D.C. 323, 753 D. 2d 141; Mo. reh. den. 760 F. 2d 1330 (1985).

atmosphere though no tangible job benefits are lost ("hostile environment" sexual harassment).

2. The EEOC guidelines can be used to determine what activity constitutes sexual harassment, what an employer can do to lessen or avoid liability and what an employer may be liable for in sexual harassment claims.

3. Testimony regarding a claimant's provocative dress or discussion of personal fantasies need not necessarily be excluded from evidence as irrelevant and may be used to show the sexual requests by the alleged perpetrator are not "unwelcome," as the EEOC guidelines require they must be for a claim to be actionable.

4. An employer is not automatically strictly liable for sexual harassment committed by a supervisory employee.

5. When a sexual harassment claim is brought, it is not required that the supervisory employee who perpetrated the alleged act(s) possess the authority to hire or fire in order to be deemed a supervisory employee who can bind an employer by his/her actions.

6. An employer's adoption of a general anti-discrimination policy does not suffice as a sexual harassment policy which may protect the employer from liability or afford the employer protection if sexual harassment claims arise.

7. If an employee fails to use an employer's complaint procedure to report sexual harassment, it does not automatically mean that the employee cannot bring a sexual harassment claim.

8. A sexual harassment claim can be brought by an employee even if the employee consented to the activity. Voluntariness, in the sense of consent by the claimant to the sexual activity, is not a defense an employer can use to avoid liability in a sexual harassment suit.

Each of these holdings had a direct effect on the employer's and manager's activities in the workplace. The Court's decision on specific guidelines can help the employer and manager avoid litigation.

PROCEDURES FOR FILING AN EEOC COMPLAINT

Charges of Title VII[8] violations in private industry or state or local governments must be filed with the Commission within 180 days of the alleged violation, (or up to 300 days where a state or local fair employment practices agency initially was contacted), and the Commission is responsible for notifying persons so charged within 10 days of the receipt of a new charge. Before investigation, a charge must be deferred for 60 days to a local fair employment practices agency in states and municipalities where an agency with an enforceable fair employment practice law exists. The deferral period is 120 days for an agency which had been operating less than 1 year. Under a worksharing agreement executed between the Commission and state and local fair employment practices agencies, the Commission routinely will assume jurisdiction over charges of discrimination and proceed with its investigation rather than wait for the expiration of the deferral period.

The Commission had instituted new procedural regulations under Title VII which encourage settlement of charges of discrimination prior to a determination by the agency on the merits of the charges. In addition, factfinding conferences may be required as part of the investigation and may assist in establishing the framework for a negotiated settlement. After an investigation, if there is reasonable

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[8](Title VII, Pub. L. 88-352, 78 Stat. 253 (42 U.S.C. 2000e et seq.) [45 FR 74677. Nov. 10, 1980]

cause to believe the charge is true, the district, area or local office attempts to remedy the alleged unlawful practices through the informal methods of concilication, conference, and persuasion.

Unless an acceptable conciliation agreement has been secured, the Commission may, after 30 days from the date the charge was filed, bring suit in an appropriate federal district court. The Attorney General brings suit when a state or local government, governmental agency or a political subdivision, is involved. If the Commission of the Attorney General does not proceed in this manner, at the conclusion of the administrative procedures, or earlier at the request of the charging party, a Notice of Right-to-Sue is issued which allows the charging party to proceed within 90 days in a federal district court. In appropriate cases, the Commission may intervene in such civil action if the case is of general public interest. The investigation and conciliation of charges having an industrywide or national impact are coordinated or conducted by the Office of Systemic Programs.

Under the provisions of Title VII section 706 F. 2d. as amended by section 5 of the Equal Employment Opportunity Act of 1972 (83 Stat. 107; 42 U.S.C. 2000e 6), if it is concluded after a preliminary investigation that prompt judicial action is necessary to carry out the purpose of the act, the Commission or the Attorney General, in a case involving a state or local government, governmental agency or political subdivision, may bring an action for appropriate temporary or preliminary relief pending final disposition of a charge.

Complaints against the Federal Government or federal employees or applicants who want to file complaints of job discrimination based on race, color, national origin, sex, religion, age, or physical or

mental handicap must first consult an equal employment opportunity counselor within their agency within 30 calendar days of the alleged act. If the complaint cannot be resolved informally, the person may file a formal complaint within 15 calendar days following the final interview with the counselor.

GENERAL AND SEXUALLY OFFENSIVE WORK ENVIRONMENT

In general, law enforcement agencies charged with policing state or local governments fall into the category and responsibilities discussed in "PROCEDURES FOR FILING AN EEOC COMPLAINT". Procedures for federal agencies differ slightly.

There is a section of the EEOC that deals with a type of complaint that mey be the most overlooked or ignored, but most potentially dangerous complaint of all. A sexually offensive or harassing work environment will produce more nightmares for an employer that he/she can imagine possible. The sexually offensive or harassing work environ-ment may evolve in many ways. Complaints ranging from unwelcome sexual activity to comments is a pretty broad spectrum. Unwelcome sexual activity is fairly well defined. However, on the other end of the spectrum, gestures, comments or what could be considered "locker-room talk" may be pretty difficult to defend, once in court. Add to that, the complainant's participation and the fact that afterward the complainant said he felt offended, but did not report the numerous incidents in which he was involved. Only after being terminated for an unrelated charge, and a grievance committee upheld the termination, was the EEOC charge of sexually offensive work environment filed. The charge was investigated by the City, and a settlement was made with the complainant. Part of the settlement was that the complainant be reinstated with back pay and benefits. In this case the Equal Employment Opportunity Commission

was used as a tool and used effectively because the charges were proven.

DUTIES OF EMPLOYERS

In the landmark court case of Meritor Savings Bank vs. Vinson, the U.S. Supreme Court approved of the EEOC's interpretation of Sexual Harassment. Prevention should begin with an open discussion of issues, followed by adoption of a strict code of conduct.

An effective prevention program is an explicit policy against sexual harassment that is widely and regularly disseminated to employees and consistently enforced. A sexual harassment prevention program should include a procedure for resolving sexual harassment complaints, which encourage victims of harassment to come forward and which does not require a victim to complain first to the offending supervisor. The program should also ensure confidentiality and provide effective remedies.[9]

With regards to preventing claims of a hostile environment, a program opposing sexual harassment in the workplace that includes an effective complaint procedure is the most effective means for employers to avoid liability. If employees know that recourse is available, they cannot reasonably believe that a sexually hostile work environment is authorized or condoned by the employer.

Well advised employers will ensure that preventative mechanisms are in place before a sexual harassment case arises. However, regardless of good intentions and strong actions taken by employers to prevent

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[9]Peter A. Susser, "Sexual Harassment After Vinson". Employment Relations Today 16 (Spring 1989) :81-87

sexual harassment, sexual harassment claims may arise. If an employer receives a complaint or otherwise learns of alleged sexual harassment in the workplace, the employer should investigate promptly and thoroughly. In the EEOC's view, the filing of a charge triggers a duty to investigate and remedy any ongoing illegal activity. If the investigation determines that sexual harassment had occurred, or is occurring, the employer should immediately do whatever is necessary to end the harassment, make the victim whole by restoring any lost employment benefits or opportunities, and prevent the misconduct from reoccurring. The corrective action taken should reflect the severity of the conduct. Futhermore, the corrective action should take place shortly after having received the information of the sexual harassment and having verified the allegations. If the commission or court determines that (1) the harassment has been eliminated by corrective actions taken by the employers, (2) all victims have been made whole, (3) preventative measures have been instituted, a claim of sexual harassment will not stand against the employer.

CONCLUSION

In many law enforcement agencies EEOC guidelines pertaining to Sexual Harassment have been taken for granted or in some cases ignored until a suit is filed. Administrators and supervisors of some civil service-governed departments and most non-civil service governed departments have no realization of the definition of a sexually harassing or offensive work environment.

A sexually harassing or offensive work environment can be defined and prosecuted in a court of law by violating Title VII of the Civil Rights Act. The elements to be proven in court range from sexual abuse and threats to verbal comments, horseplay and locker-room talk. The offended party may have participated in the events but this will have little to no bearing on the case; however, each case is supposed to be judged on its own merits. The offended party does not have to suffer economic injury.

Employers are absolutely responsible when the conduct is perpetrated by agents and/or supervisory employees, even if the conduct is forbidden. An employer who knows of the conduct and does not take action is certainly responsible.

The expressions of sexual harassment in the working environment require that employers develop and implement appropriate policies of conduct. Top management must understand and support efforts to control sexual harassment. A strong policy statement must be written and an

effective grievance procedure developed. Both the policy statement and grievance procedure must be made available to all employees.

In some cases, a sexually offensive work environment can appear to be innocent while in reality it has great potential for liability. Law Enforcement Agencies having a policy should contact EEOC and request a sample policy drawn to conform to the established guidelines and compare it to ascertain compliance with federal standards. If you do not have an existing policy, draft one for approval.

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