DEVELOPMENT OF SEXUAL HARASSMENT LAW

- 1964 – Title VII – prohibits sex discrimination in employment.
- 1971 - Rogers v. E.E.O.C. - The Court of Appeals for the Fifth Circuit held that a Hispanic complainant could establish a Title VII violation by demonstrating that her employer created an offensive work environment for employees by giving discriminatory service to its Hispanic clientele.
- 1976 – Williams v. Saxbe – Court recognized sexual harassment as a form of sex discrimination when sexual advances by male supervisor towards female employee, if proven, would be deemed an artificial barrier to employment placed before one gender and not another.
- 1977 – Barnes v. Costle – US Court of Appeals for the Second District ruled that if a female employee was retaliated against for rejecting sexual advances of her boss is a violation of Title VII's prohibition against sex discrimination.
- 1978 - City of Los Angeles, Dept. of Water and Power v. Manhart – Supreme Court ruled that in administration of company pension plan Title VII of the Civil Rights Act of 1964 made it unlawful for an employer to discriminate against any individual because of such individual's sex.
- 1980 – EEOC issues guidelines forbidding "sexual harassment" as a form of sex discrimination.
- 1981 - Bundy v. Jackson - US Court of Appeals for the Second District ruled for the first time that Title VII liability can exist for sexual insults.
- 1985 - McKinney v. Dole - US Court of Appeals for the DC Circuit ruled that physical violence, even if it is not overtly sexual, can be sexual harassment if the unwelcome conduct is based on the victim's gender.
- 1986 - Meritor Savings Bank, FSB v. Vinson – The Supreme Court first recognized "sexual harassment" as a violation of Title VII and established the standards for analyzing whether the conduct was welcome and levels of employer liability.
- 1988 – Hall v. Gus Construction - US Court of Appeals for the Eighth District finds that when male construction workers "hazed" three female colleagues, even if the conduct was not specifically sexual in nature, was gender based harassment.
- 1991 – Robinson v. Jacksonville Shipyards – Federal District Court in Maryland found a "sexually hostile environment" where women were a small minority of the work force and crude language, sexual graffiti and pornography pervaded the workplace.
- 1991 - Ellison v. Brady – Changed analysis of conduct from reasonable person to reasonable women test when determining whether actionable sexual harassment occurred.
- 1991 – Civil Rights Act of 1991 provides for jury trials and for increased damages in Title VII sexual harassment suits.

- 1993 - Harris v. Forklift Systems, Inc – plaintiff may bring sexual harassment claim without necessarily showing psychological harm. In addition to Meritor, the factors when analyzing whether sexual harassment occurred include:
    - Frequency of conduct
    - Its Severity
    - Whether the conduct is physically threatening or humiliating
    - Or is a mere offensive utterance
    - And whether the conduct unreasonably interferes with employees work performance
    - No Single Factor is Required but Totality of the Circumstances Test
- 1996 - Cerwinski v. Insurance Services – New York District Court upholds the dismissal of a female employee who made unfounded harassment charges against a male manager after their romantic relationship had ended.
- 1996 – McKenzie v. Illinois Department of Transportation - US Court of Appeals for the Seventh Circuit dismisses sexual harassment claim based on a handful of sexually suggestive comments made over a three month period as not severe or pervasive enough even though victimized employee subjectively perceived the behavior as harassing.
- 1997 – Farley v. American Cast Iron Pipe Co - US Court of Appeals for the Eleventh Circuit rules that where an employer has an effective and well-disseminated policy against sexual harassment, the employer cannot be held liable for hostile work environment unless the victim reports the harassment under the policy.
- 1997 – Knabe v. Boury Corp - US Court of Appeals for the Third Circuit rules that a sexual harassment investigation need not be perfect and that the employer need not take the action the complainant suggests, so long as the action is reasonably calculated to prevent harassment.
- 1998- Oncale v. Sundowner Offshore Services, Inc – Supreme Court upholds complaint based on same sex harassment.
- 1998 - Faragher v. City of Boca Raton - Supreme Court decision that establishes that an employer is subject to vicarious liability for hostile environment created by a supervisor unless the employer can demonstrate that it exercised reasonable care to prevent and correct promptly any sexually harassing behavior and that the employee unreasonably failed to take advantage of any preventative or corrective opportunities provided by the employer.
- 1998 - Burlington Industries, Inc v. Ellerth - Companion Supreme Court decision to Faragher that further elaborates that the employer's "Faragher" defense to vicarious liability is not available if the employee suffers a tangible job consequence as result of supervisor's actions.
- 1999 – Kunin v. Sears Roebuck & Co. – US Court of Appeals for the Third Circuit determined that adequate notice of sexual harassment by a co-worker must include enough information to raise a probability that sexual harassment occurred in the mind of a reasonable employer.

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General Practice, Solo & Small Firm Section

Sexual Harassment

The employer's role in prevention

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The elimination of sexual harassment in the workforce is extremely important for every employer. There is a financial imperative to eliminate improper conduct as well as a moral one, as such conduct can result in extensive monetary liability imposed by juries that determine sexual harassment has occurred.

It is difficult to eliminate sexual harassment because attempting to regulate romance runs contrary to some strong human urges. Ninth Circuit Court of Appeals Justice Alex Kozinski ("Gender Bias," *San Francisco Recorder*, May 27, 1992) notes that while the "bright line 'never mix business and sexual relationships'...is easy to remember, it is impossible to enforce, as men and women are drawn to each other in the workplace, as elsewhere. Even were it enforceable, do we really want to live in a society where normal flirtations, courtships and matings are routinely banned from the office and the factory?" While this question may get one answer from poets and philosophers, it will get a different one from lawyers trying to limit their client's liability.

But before you and your client can begin to consider the interplay between the rights of free people to associate and the pervasive patterns of state and federal antiharassment laws and regulations, it is important to know what sexual harassment is, and how you and your client can recognize it.

Identifying Sexual Harassmant A series of Supreme Court decisions from *Meritor Savings Bank v. Vinson* (477 U.S. 57 (1986)) through *Harris v. Forklift Systems, Inc.* (510 U.S. __, 126 L.Ed 2d 295, 114 S.Ct. 367 (1993)) has defined what sexual harassment means. Those cases, and the interpretative regulations of the Equal Employment Opportunity Commission (EEOC) (generally found at 29 C.F.R. § 1604, et seq.), define two distinct types of sexual harassment.

The more obvious is *"quid pro quo"* sexual harassment, which occurs when a beneficial condition of employment is premised upon an employee's submission to sexual advances. Frequently, that claim is also raised when an employee rejects a sexual advance, and claims a connection between that rejection and a subsequent adverse job action. That action might be a denial of a raise or promotion, a termination, or a "constructive discharge" where an employee claims that the retaliation made his or her job conditions intolerable.

Far more pervasive and more evident in the courts is harassment based upon a "hostile work environment." According to the case law and the EEOC's interpretative regulations, a "hostile environment" is one that is so pervasive that it materially alters the terms and conditions of employment (29 C.F.R. § 1604.11(a)).

There is no clear definition of a "hostile work environment." It can occur where jokes, suggestive remarks, physical interference with movement (such as blocking one's path), pictures, cartoons, or sexually derogatory comments alter the circumstances of the workplace. Generally, repeated

conduct is required to prove a hostile work environment, and a "stray comment" has been held not to alter the working conditions sufficiently to create a cause of action. However, some comments or conduct can be so severe that a single incident can create liability.

It does not matter whether the alleged harasser intended the conduct to be harassing or complimentary. Rather, the conduct is evaluated from the perspective of the victim. Thus, in *Ellison v. Brady* (924 F.2d 872 (9th Cir. 1991)), the trial court found that there was no harassment, characterizing the defendant employer as an inept Don Juan rather than a wrongdoer. The Ninth Circuit rejected the "reasonable person" standard utilized by the trial court since it "tends to be male biased and systematically ignores the experiences of women." Rather, the circuit court found that if a "reasonable woman" would find the conduct severe and pervasive enough to alter the terms and conditions of employment such that an offensive environment was created, then sexual harassment can be found.

The practical advice for employers evaluating potentially harassing conduct is to be as conservative as possible. If conduct might be construed as harassing, it has no place in the workplace. If an employee (and especially a manager or a supervisor) is not sure whether or not conduct will be unwelcome, the best advice is to avoid such conduct.

Creating a Harassment-Free Workplace

An employer's obligations with regard to sexual harassment arise before any act of sexual harassment occurs. The EEOC requires that employers take reasonable steps to prevent harassment before it occurs. Most states have discrimination prohibition enforcement agencies, which generally impose similar requirements. Many states (including California) require an employer to post a sexual harassment prevention notice advising employees of their right to a harassment-free workplace; this is different from, and over and above, an employer's obligation under Title VII to post a general discrimination prevention poster.

An important component of harassment prevention is the creation and dissemination of a sexual harassment prohibition policy and reporting procedure. This policy is critical because under federal case law, an employer fulfills its obligation if it takes all reasonable steps to prevent harassment before it occurs, and to take effective steps to remedy harassment after it takes place. If an employer demonstrates those attempts at prevention and remediation, it might not be found liable for the act of harassment itself. Other states, such as California, impose a "strict liability" test, where employers are liable for the conduct of their supervisors and managers regardless of their best efforts to prevent and to remedy harassment.

Among the elements of a proper sexual harassment policy are the following:

- *A statement of policy*. An appropriately high decision maker, such as a company president or human resources department vice president, should set forth a firm policy banning sexual harassment, and identifying himself or herself as the person ultimately responsible for preventing harassment at the company.

- *Definition of sexual harassmen*t. A broad definition should be set forth that includes illegal sexual discrimination; unwelcome advances; requests for sexual favors; and any other verbal, visual, or physical conduct of a sexual nature. It should make clear that submission to any of that conduct cannot be made, explicitly or implicitly, a term or condition of employment, or used as a basis for any employment decisions. It must ban all behavior that has the purpose or effect of unreasonably interfering with an individual's work performance, or creating an intimidating, hostile, or offensive work environment. It should include examples of sexual harassment, while making very clear that the list of examples is not intended to be all-inclusive.

- *Non-retaliation policy*. It is critical that the policy, and company practice, protect complainants and witnesses from any retaliation from any source as a result of initiating or supporting a sexual harassment allegation.

- *Specific procedures for prevention*. The policy should make sexual harassment a disciplinary offense, and reserve the right to terminate an employee who is found to take part in that conduct. For employers who can do so, it should establish training programs in sexual harassment prevention, and urge employees to raise and resolve their concerns at an early stage. Where an employer has a history of sexual harassment that has been the subject of prior litigation, or that is widely known within the company, a training program is a critically important policy to consider. However, neither a commitment to training, nor any other written promise, should be put in a sexual harassment policy document unless it will be accomplished. It is better to have no procedure at all than to establish a procedure and then fail to comply with it. Therefore, while even the smallest of employers should have a written policy, small employers should probably delete this training component in most cases.

- Establish and enforce a clear and thorough investigation and remediation procedure. Your policy must actively encourage victims of sexual harassment to report the behavior, and expressly identify several appropriate individuals authorized to receive the harassment complaint. This will prevent the situation in which the alleged harasser is the person to whom the complaint would logically be addressed. Your application of the policy must be uniformly neutral and consistent.

- *Establish a reporting procedure*. The policy should be broadly disseminated to every employee, putting them on notice of the company's reporting procedure. In fact, because remedying harassment is so important to the company, the policy should put an affirmative duty on the employee to report any harassment that they have either suffered or observed.

- *Timely reporting requirements*. In most jurisdictions, there is a time limitation on a formal administrative charge ranging from six months to a year; an employer will not be able to impose a shorter time period as a legal prerequisite to filing a harassment complaint. However, the failure to meet a shorter complaint period (for example, 60 to 90 days) so that a "rapid response" and remediation may occur, and to help to ensure a harassment-free environment, could be raised as a defense to a claim of a series of harassing events that the company had no opportunity to remedy because of the late report.

  Supervisors should be told to take seriously, and to report, any report of potential harassment, no matter how "offhand" or informal. In addition, especially when dealing with some relatively more serious acts of harassment, a company may need to take action whether or not the employee reporting the harassment wants to. For example, an employee reports that her supervisor propositioned her on an out-of-town business trip, but concludes "I can take care of the situation myself, and I don't need anybody getting involved on my behalf. I'd rather let the matter drop." The next employee who might be propositioned by that same supervisor on an out-of-town trip might not be able to handle the situation herself, and the employer would almost certainly be liable to that second employee if she proved that the company knew about the supervisor's conduct and did nothing to stop it.

  For the same reason, confidentiality regarding a complaint and its investigation can only be promised "to the extent possible under the circumstances." While it is important to maintain all reasonable discretion and confidentiality during an investigation, sometimes it will be impossible. At some point during this process (at litigation, if not before), the alleged harasser will be able to find out the name of a complainant. A witness to forcible, physical sexual harassment may "not want to get involved"; but if a factual dispute arises, that witness might have no choice.
  The reporting procedure should impress upon all levels of the organization the importance of reporting complaints of harassment, and communicating those complaints to the appropriate level of management.

- Act upon a report of harassment. The investigation should be designed to obtain a prompt and thorough collection of the facts, an appropriate responsive action, and an expeditious report to the complainant that the investigation has been concluded, and, to the full extent

appropriate, the action taken. To accomplish that result, a company should establish a formal investigative process.

The investigative effort is not an easy one. When interviewing the complainant and the alleged harasser, the questions need to be asked in a way that is not accusatory, overly familiar, or impartially supportive. Especially at the start of the investigation, questions should be asked in an open-ended manner; more pointed questions should be saved for the end of the interview or investigation. Make sure that all witnesses are identified as well as any other similar acts of harassment that allegedly occurred. During the investigation, the complainant's feelings and conduct should be inquired into. How did she respond to the alleged harassment? What action does the complainant want the employer to take as a consequence of the harassment? Advise the complainant that you will commence an investigation rapidly, and provide some idea of when you might get back to the complainant.

Finally, an employer must determine whether any immediate, temporary action must be taken to separate the harasser from the complainant while the investigation is underway. Because that temporary action frequently causes operational problems, the solution should be used sparingly. However, in extreme cases it must be considered.

The alleged harasser must also be given a full opportunity to tell his or her side of the story as part of the investigation. It is important that no conclusions be reached until the alleged harasser has a chance to tell his or her story. Like the complainant, the alleged harasser must also be given an opportunity to identify all supporting witnesses, and asked in an open-ended fashion to provide any information that he or she believes might be helpful as part of the investigation.

Typically, the alleged harasser will hold some supervisory authority for the employer; where that is the case, he or she must be told that there can be no retaliation for the sexual harassment complaint, and that any retaliation will result in termination of employment.

If the investigation finds that sexual harassment has occurred, some level of formal sanctions should be imposed. The range of sanctions could include a written reprimand, removal of management authority or duties, suspension, or termination; the proper remedy has to be determined on a case-by-case basis. The sanctions should be communicated in writing as part of that employee's personnel file. The complainant should be advised of the remedial action against the harasser, though the specific sanction imposed is generally not disclosed.

If the investigation does not yield proof that the claimed harassment occurred, that fact should be communicated to both the complainant and alleged harasser. That communication should include a restatement of the company policy against harassment or retaliation, and assure the complainant that no adverse action will be taken as a result of the complaint (see "False Accusations" Policies).

Conclusion

The difficulty in differentiating between wholesome human romance and offensive sexual harassment is that it is always determined in retrospect, through a veil of human emotions, observations, and stereotypes.

Is it sexual harassment to use a company's electronic mail system to ask a subordinate out on a date? Why is it the company's business if a company executive and a secretary go out on dates over the weekend, and agree to keep their relationship out of the office? Doesn't it aid the workplace environment if a co-ed group of employees who all seem to appreciate risque jokes has a pattern of telling those jokes to each other in the office? In support of the view that the workplace should not prohibit any of that conduct, Justice Kozinski ("Gender Bias," *San Francisco Recorder,* May 27, 1992) wrote: "While many frown on romance in the workplace, it is a fact of life. Indeed, I would suggest that it is an important and enduring reality and that, within bounds of propriety and good taste, romance in the workplace should be accepted rather than forbidden."

The problem, from the point of view of an admittedly cynical litigator, is that the "bounds of propriety and good taste" are very difficult for a jury to demarcate two years after the fact. Whether a liaison was a voluntary, mature choice made by two adults or an abuse of power by a supervisor requesting sexual favors is hard to prove in retrospect. A claim that an employee was too intimidated to challenge the sexually charged work environment created by the supervisor is even harder to disprove. Whether a consensual sexual relationship will stay out of the office won't be known until it is too late.

I recognize the appeal in Justice Kozinski's suggestion; as an employer, I might even make the decision to adopt it--risks and all. However, as a lawyer advising clients as to how to limit liability in an ever more litigious employment setting, I don't recommend it.

Society demands two mutually exclusive things from employers. First, the workplace has become a place where workers bring much of their personal lives, as a central point of their existence. However, the workplace environment is not permitted to cross an ill-defined line; if crossed, allegations of medical discrimination, age discrimination, sexual harassment, or other forms of unlawful conduct can be made. Employers must walk a tightrope between an emotionally rich environment and a legally prohibited one. A proper sexual harassment policy that is consistently enforced can help maintain that fine distinction.

Sidebar: "False Accusations" Policies

I do not recommend a published and identified procedure for a finding that a complaint is a "false accusation," which calls for action against the complainant. Such a procedure can have a chilling effect against the raising of complaints. More important, it can be argued that an employee failed to report harassment for fear of disciplinary action under the guise of the "false accusations" procedure. Especially because many claims of harassment are proven solely by one person's word against another's, such a policy is ill advised.

However, many thoughtful and comprehensive policy statements contain such a procedure. For example, the ABA Commission on Women in the Profession published a model sexual harassment policy document in June 1992, which suggests the following policy:

> The firm recognizes that the question of whether a particular course of conduct constitutes sexual harassment requires a factual determination. The firm recognizes also that false accusations of sexual harassment can have serious effects on innocent persons. If an investigation results in a finding that a person who has accused another of sexual harassment has maliciously or recklessly made false accusations, the accuser will be subject to appropriate sanctions, including discharge.