Interpreting the New Sexual Harassment Guidelines

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The Equal Employment Opportunity Commission (EEOC) issued Interpretative Guidelines on Sexual Harassment in March 1980. The purpose of these Guidelines was to reaffirm the EEOC's long-held position that sexual harassment is an unlawful employment practice under Title VII of the Civil Rights Act of 1964.

The EEOC believes these guidelines are necessary because sexual harassment continues to be a widespread problem.

Some early surveys and studies lend support to this belief. In 1975, Cornell University conducted the first study specifically addressing the topic of sexual harassment in the workplace. Respondents were drawn from women who were members of a Civil Service Employee's Association and women attending a convention on sexual harassment. Seventy percent of the 155 women responding had experienced some form of sexual harassment.[1] In 1976, *Redbook* published a questionnaire to which all readers nationwide had the opportunity to respond. Ninety percent of those responding reported they had personally experienced unwanted sexual attentions on the job.[2]

Sexual harassment is a widespread problem in government offices. In 1976, the Ad Hoc Group on Equal Rights for Women conducted a study of members of the United Nations Secretariat. The questionnaire included an item specifically addressing the question of sexual harassment. Although this questionnaire was confiscated before completion so the data are incomplete, 875 U.N. staff members did respond. Seventy-three percent of the respondents were women, and over half of them admitted that they had been the victim of or were aware of sexual harassment in the U.N.[3]

Another study conducted by Sangamon State University in the fall of 1979 also exposed widespread sexual harassment in Illinois state government offices. This study was the first random-sample survey conducted on the subject of sexual harassment.[4] Of the 4859 female employees sampled, 1495 or 31% responded. Fifty-nine percent of the respondents reported experiencing one or more incidents of sexual harassment in their present place of employment.[5]

Sexual Harassment: An Urgent Problem

With the issuance of the new Guidelines there is no longer any doubt that the problem of sexual harassment must be addressed by employers. The Guidelines state: ". . . the employer has an affirmative duty to maintain a workplace free of sexual harassment and intimidation."[6] Notwithstanding the employers' outcry that the Guidelines are too broad and too subjective, there may be some strong reasons for compliance based on a cost-benefit analysis. Besides being vulnerable to a lawsuit, the employer may lose the trust of his or her employees if harassment is permitted. A breakdown in communication may also occur if complaints and grievances are not taken seriously.

This lack of trust and the breakdown in communication could manifest itself in several ways. Turnover may increase if harassed employees feel there is no hope for remedying the situation. Glueck estimates that turnover costs American industry 11 billion dollars a year.[7]

Absenteeism could be another outcome if harassment of employees is permitted. Even if an employee does remain on the job, other problems such as low morale may develop. Inefficiency, lack of teamwork and low productivity could result from low morale. Extreme dissatisfaction—if present—may lead to stress, which is detrimental to both the employer and

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the employee as it has been linked to physiclogical problems which can cause increased absenteeism and higher medical bills.

Reflecting upon these negative repercussions, it seems logical that an employer would want to minimize sexual harassment, especially as the new Guidelines require an employer to take action. This was not always the case, as a review of the history of the Courts' attitude to sexual harassment indicates.

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Sexual Harassment: The Legal View

There has been much controversy among the courts whether sexual harassment constitutes sex discrimination under Title VII and whether the employer is liable for harassment by supervisors. Many early decisions held that Title VII did not cover sexual harassment and that an employer was not to be held liable unless the behavior was an employer's policy.

The first major decision finding for employer liability was *Barnes* vs. *Costle* (1972).[8] The majority opinion in the case stated that an employer is liable for Title VII violations committed by supervisory personnel. The court, however, held that liability was waived if the employer promptly rectified the situation after the supervisor's conduct was known about.

The second, major court case finding an employer liable for the conduct of supervisors is *Tomkins II*. This appellate decision reversed *Tomkins* vs. *Public Service Electric and Gas Company* (1976) or *Tomkins I*.[9] In the Tomkins[9] case, the plaintiff was sexually "approached" by her supervisor during a discussion about the plaintiff's job advancement. Tomkins rejected his propositions and was thereafter harassed by the supervisor with layoffs and threats of demotion. Fifteen months after the incident Tomkins was fired. In the *Tomkins I* ruling the court denied the plaintiff recovery, on the grounds that discrimination due to sexual activities is not sex discrimination under Title VII.[10]

In *Tomkins II*, the court ruled that the employer was liable, and it developed a three-part test to be used in deciding employer liability in sexual harassment cases:

- **The harassment must somehow be linked to the victim's job status.**
- **The employer must have had knowledge of the supervisor's conduct.**
- **The employer has a defense if prompt remedial action is taken on learning of the misbehavior.**[11]

This apparent confusion over whether sexual harassment constitutes unlawful behavior under Title VII and when an employer is liable for employee's actions indicates the usefulness of the new EEOC Guidelines. They clarify the legal confusion.

The Guidelines on Sexual Discrimination

The Guidelines state that harassment may be verbal or physical. The employer is required to take affirmative action to achieve a workplace free from sexual harassment and intimidation of a verbal or physical nature. Thus, the Guidelines are broader than some of the previous case law.

However, they are, in some respects, consistent with some of the key court decisions mentioned above. For instance, the Guidelines are in line with the *Barnes* vs. *Costle* decision where the court found the employer liable for the discriminatory practices of its supervisory personnel. The Guidelines state that the employer will be held liable for the behavior of its "supervisory employees or agents" *whether or not*

the employer knew or should have known of the behavior and *regardless* of whether or not the employer condoned or forbade such behavior. The Guidelines do not hold an employer responsible for the acts of other employees or non-employees unless the employer knew or should have known of the harassing incidents. The employer has the defense of having taken "immediate and corrective action" in those cases.

The Guidelines provide three criteria to use when deciding if a certain act is indeed unlawful:

- **Submission to the conduct** is either an explicit term or condition of employment.
- **Submission to or rejection of the conduct** is used as a basis for employment decisions affecting the person who did the submitting or rejecting.
- **The conduct has the purpose** or effect of unreasonably interfering with an individual's work performance or creating an intimidating, hostile or offensive work environment.[12]

The Guidelines are consistent with two of the three points in *Tomkins'* three-part test. Firstly, the harassment must be a condition of employment; and secondly, the employer has the defense of prompt remedial action. The Guidelines differ from *Tomkins II* in that the employer is not required to have knowledge of the supervisor's behavior to be held liable under the Guidelines. Furthermore, the Guidelines are broader than *Tomkins* in that an employer *is* required to maintain a workplace free from harassment and intimidation.

Each case arising under these new Guidelines will be decided individually and on a factual basis.[13] The Commission will look at the whole record and at the context in which the behavior occurred.

The Guidelines state that no "regulatory burdens or record-keeping requirements"[14] are necessary for compliance. However, agencies are required to submit a plan stating what steps they propose to take in prevention of sexual harassment. This will be a supplement to the Phase II Affirmative Action Planning Process.

The Definition of Sexual Harassment

The Guidelines raise three problematic issues for the personnel manager:

- **The definition of sexual harassment** is very broad.
- **There is a new role for the personnel manager** called for under the Guidelines.
- **There are some unresolved legal issues** raised by the Guidelines which will affect the disposition of future cases.

The breadth of this definition will probably be praised by the women's groups who advocated more protection for women in the workplace. However, inasmuch as the definition is broad and ambiguous, it poses problems for personnel managers who are attempting to comply. The fact that sexual harassment may be verbal could prove problematic because with verbal harassment—much more so than with physical harassment—opinions may differ over what constitutes harassment. Thus what one person perceives to be harassment, another perceives to be a compliment. It may be virtually impossible for a personnel manager to issue a standard set of rules and proscribed behaviors in order to prevent charges of verbal harassment by employees against fellow employees.

The second way in which the definition of sexual harassment has been broadened is that, now, the employer is responsible for any harassing behavior by supervisors whether or not it has been authorized. Furthermore, the employer has an obligation to prevent sexual harassment by other employees and non-employees, provided that the employer has knowledge of the behavior. This may mean a much more vigorous system of monitoring the behavior of supervisory personnel, as well as new training programs for supervisors. There may be the classic problem of distinguishing biased information in determining if there is a problem, since the only source of information is often the supervisors' own reports.

Finally, the definition is broad in that unlawful behavior may have occurred whether or not the victim's employment was adversely affected. This may benefit certain plaintiffs, particularly the ones who resign or who fail to apply for promotions because of the perceived consequences of sexual harassment. The problem that the personnel manager faces here is again one of determining which supervisors are engaging in harassing behavior. This is especially true because tolerance for this behavior may vary among employees. In summary, what the potential plaintiff gains in terms of protection, the personnel manager inherits in the form of an ambiguous mandate.
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The Preventive Role of Personnel

The second issue raised by the new guidelines is the expanded role of personnel managers implied in the Guidelines. There is an affirmative action role prescribed by the new Guidelines which is drastically different from that currently required under Title VII. It is, in fact, more similar to the role required of employers in developing Affirmative Action Plans (Executive Order 11246). The Guidelines require that employers take "all steps necessary" to create an environment which prevents sexual harassment. The actions suggested in the Guidelines include "affirmatively raising the subject [of sexual harassment,] expressing strong disapproval, developing appropriate sanctions, informing employees of their right to raise the issue of sexual harassment under Title VII and developing methods to sensitize all concerned."

Although the goal of creating an environment free of harassment is commendable—and consistent with a public policy goal of no sex discrimination—it poses the following mechanical problems for a personnel manager. First of all, the employer has to develop some form of disciplinary action against one employee for harassing another employee. Since there may be disputes

over whether harassment occurred, the employer may need to develop a mechanism for resolving disputes. In other words, the employer may be thrust into the unpopular role of referee or judge in this case, before disciplinary action is taken.

In unionized settings, the situations may become even more complicated, since a contract and its provisions may determine under what conditions an employee can protest a disciplinary action. The recent increase in the number of employees appealing the issuance of disciplinary notices makes this more of a potential conflict area.

Besides affecting the employer's disciplinary procedures, the Guidelines may have implications for training programs. The employer can limit his or her liability for harassment if "immediate and appropriate corrective action" is taken. This requires training of personnel to detect incidents and take action.

Finally, the Guidelines may require extensive efforts if the employer is to fulfill this affirmative action clause in other than a symbolic manner. Technically, no new record-keeping is required. However, how will this preventative program of informing employees and later disciplining them be carried out if not through a series of written guidelines, training manuals and discipline records?

There are related questions which arise from the employer's affirmative action role. What is the standard for whether the employer has fulfilled this affirmative action obligation? Will it be a good-faith test, as under Executive Order 11246? Secondly, will a charge brought by an employee against an employer for violation of the affirmative action obligation be sustained? In other words, can we construe this affirmative action obligation literally? Finally, will the existence of an employer affirmative action plan against sexual harassment exonerate the employer in cases where swift remedial action has not been taken? In other words, will the presence of a plan be a "clean hands" defense against individual allegations of harassment?

The Legal Basis of Sexual Discrimination

The final issue raised by the Guidelines is: what is the legal basis for deciding sexual harassment cases? The cases involving supervisory personnel are to be handled on a case-by-case basis with the Commission examining the particular circumstances of each case and making a "factual determination." In many of these cases, this may amount simply to one person's word against another's. In this respect, the Commission's task will be similar to that of the National Labor Relations Board when it has to make a credibility finding in unfair labor practice cases.

It may be interesting to see under what conditions an employee can establish successfully a *prima facie* case of sex discrimination because of sexual harassment. Under the *McDonnel Douglas*[15] (1973) case ruling, the employee had to meet a three-part test:

- **The plaintiff was denied the job.**
- **The plaintiff was a member of a protected class** and was qualified for the position.
- **The person who got the job was not a minority.**

Applying the *McDonnell Douglas* test, a plaintiff could establish a *prima facie* case by simply alleging that sexual harassment has occurred, that the plaintiff has experienced an adverse employment effect, and that another person who was not harassed did not experience this adverse employment.

There may also be a problem of remedies, particularly in lay-off and promotion cases. Back pay may be awarded if the charge is about non-promotion. However, the more difficult question is: Who gets the job—the person already in the job or the person who was harassed? This raises some of the same issues found in the lay-off and promotion cases in terms of what remedy is appropriate for restoring the person's "rightful place."

Model Program

In order to comply with the Guidelines' affirmative action obligation, the employer could delegate the responsibility for developing a program to the personnel department since it is in most frequent and direct contact with employees.

The foundation of an employer's compliance program is a strong statement from top management that sexual harassment will not be tolerated (see figure). If employers establish a precedent for disciplining employees involved in harassing others, statements of this sort will be taken more seriously.

Training programs for current employees or orientation programs for new employees may be a logical first step to take in meeting the requirements of the new Guidelines. Employers may want to concentrate these training programs on supervisors since they are liable for incidents of sexual harassment, regardless of whether or not they were aware of the behavior. A message from the president of the company, stating the company's position on this issue, may add credibility to the program. This message could be shown on videotape at the training session and be included in the handbook.

Any training program conducted on sexual harassment should at least include how to recognize sexual harassment, internal and external sanctions against it and where to go for help. The personnel department could develop a handbook reiterating the points made in the training sessions. This handbook should be distributed to all levels of employees.

Sensitivity training may be necessary for personnel managers and other people in supervisory positions, in how to develop a good rapport with employees and how to handle sensitive topics. A person skilful in this area will have greater success in gaining employees' confidence especially if anonymity can be guaranteed. Role-playing is a useful tool to employ in developing this skill.

However, training programs *alone* will not suffice. An employer should follow up with the development of sanctions and the development of performance appraisal programs which monitor employee and supervisory compliance. The severity of the punishment should match the severity of the violation. If a union is present, management must work cooperatively with it to ensure acceptance of the sanctions.

Model Program

Sexual Harassment

(Excerpted from the National Labor Relations Board Policy, Administrative Policy Circular APC 80-2, issued February 21, 1980)

Sexual harassment is a form of employee misconduct which undermines the integrity of the employment relationship. All employees must be allowed to work in an environment free from unsolicited and unwelcome sexual overtures. Sexual harassment does not refer to occasional compliments. It refers to behavior which is not welcome, which is personally offensive, which debilitates morale and which therefore interferes with the work effectiveness of its victims and their co-workers. Sexual harassment may include actions such as:

- **Sex-oriented verbal "kidding" or abuse**
- **Subtle pressure for sexual activity**
- **Physical contact such as patting,** pinching or constant brushing against another's body
- **Demands for sexual favors,** accompanied by implied or overt promises of preferential treatment or threats concerning an individual's employment status.

Sexual harassment is a prohibited personnel practice when it results in discrimination for or against an employee on the basis of conduct not related to work performance, such as the taking or refusal to take a personnel action, including promotion of employees who submit to sexual advances or refusal to promote employees who resist or protest sexual overtures.

Complaints of sexual harassment involving misuse of one's official position should be made orally or in writing to a higher-level supervisor, to an appropriate personnel official, or to anyone authorized to deal with discrimination complaints (e.g., EEO counselor, union official, etc.).

Because of differences in employees' values and backgrounds, some individuals may find it difficult to recognize their own behavior as sexual harassment. To create an awareness of office conduct which may be construed as sexual harassment, we will incorporate sexual harassment awareness training in future managerial, supervisory, EEO, employee orientation and other appropriate training courses. Additionally, a copy of this policy will be placed in each new employee orientation kit. ▲

The Guidelines: Pros and Cons

Inasmuch as the sexual harassment Guidelines provide a legal definition of sexual harassment as sex discrimination, they are a boon to people, particularly women, who face harassment on the job. However, inasmuch as they displace what is a socially based problem onto the shoulders of personnel managers in firms, they appear to be unrealistic in their goals. It is understandable that a personnel manager or employer may be overwhelmed by the time and costs involved in implementing some or all of these suggestions. These are short-run costs, however. What is sometimes overlooked are the long-term benefits of a workplace free from harassment and intimidation: improved morale, lower absenteeism and less turnover. ■

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9. William C. Seymour, *op. cit.*, p. 143.
10. *Ibid.*
11. *Ibid.*
12. EEOC Interpretative Guidelines on Sexual Harassment, issued March 11, 1980. The Final Guidelines were issued in an interpretative memo on September 23, 1980 and were published in the Federal Register later that week. The primary change in the Final Guidelines was the word "unreasonably" for substantially in the third criterion. Also, the agency expanded coverage from supervisors and employees to include non-employees. The new Guidelines divided Section 1604d into 1604.11d and 1604.11e. Section 1604.11d covers other employees and 1604.11e covers nonemployees Section 1604.11d reads:
    "(d) With respect to conduct between fellow employees, an employer is responsible for acts of sexual harassment in the workplace where the employer, its agents or supervisory employees, knows or should have known of the conduct unless it can show that it took immediate and appropriate corrective action."
    Section 1604.11e reads:
    "(e) An employer may also be responsible for the acts of non-employees, with respect to sexual harassment of employees in the workplace where the employer, its agents or supervisory employees knows or should have known of the conduct and fails to take immediate and appropriate corrective action. In reviewing these cases the Commission will consider the extent of the employer's control and any other legal responsibility which the employer may have with respect to the conduct of such non-employees."
13. *Ibid.*
14. *Ibid.*
15. *McDonnell Douglas Corp. v. Green* (411 U.S. 792).