

SEXUAL HARASSMENT/SEXUAL DISCRIMINATION

Sexual harassment is classified as a form of sexual discrimination under Title VII of the Civil Rights Act of 1964 and includes both verbal and physical conduct of a sexual nature.

SEXUAL HARASSMENT GUIDELINES/CHECKLIST OF TERMS AND CONCEPTS

- ___ The Equal Employment Opportunity Commission (EEOC) has adopted interpretive guidelines stating that harassment on the basis of sex - such as sexual advances for sexual favors - is behavior which is unwelcomed by the recipient and may be either physical or verbal in nature. Three criteria for sexual harassment are set forth:
 - ___ Submission to the sexual conduct is made either implicitly or explicitly a term or condition of employment.
 - ___ Employment decisions affecting the recipient are made on the basis of the recipient's acceptance or rejection of the sexual conduct.
 - ___ The conduct has the intent or effect of substantially interfering with an individual's work performance or creates an intimidating, hostile, or offensive work environment.
- ___ Decisions of various State and U.S. Courts have supported very broad interpretations of the kinds of behavior which may be the basis for a sexual harassment cause of action. While normal conversation and "by-play" intended for harmless joking was not classified as sexual harassment in early cases, more recent cases and expanded standards have created a greater likelihood that any comment, behavior, or material that contains a sexual reference may be deemed to be offensive to some individuals or groups of individuals may become a cause for action.
- ___ If the party who is subjected to sexual approaches, propositions, gestures, implications, innuendoes, stories, jokes, notes, cartoons or phrases, objects to same, the chances are greatly increased that the conduct could at least be perceived as an act of sexual harassment by that party, and may become a cause for action, even if that party participated in such by-play in the past.
- ___ Furthermore, if the party repeatedly makes his/her objections known with requests to "cut it out" or "leave me alone," etc., it further necessitates the supervisor to become involved in attempts to curtail the objected-to conduct.
- ___ The "unwanted" status of the action and the "persistency" by the acting party are two very aggravating characteristics which will increase vulnerability to sexual harassment charges and which will greatly increase degree of liability or wrongdoing. Management's awareness of sexual harassment, without corrective action, greatly increases management's vulnerability and liability.
- ___ "By-play" references to specific personal sexual attributes or specific personal sexual experiences are certainly likely to be identified as sexual harassment. Comments regarding physical body structure, virginity, etc., are highly likely areas for sexual harassment claims.
- ___ Examples of "verbal or physical conduct of a sexual nature" which may constitute harassment at the workplace include:
 - ... flashing of lewd or suggestive pictures or reading of pornographic material,
 - ... display of affection that is forward and not desired,
 - ... boisterous comments about sexual items/topics/actions/organs,
 - ... innuendoes about reputation - innuendoes about virginity,
 - ... unwelcome advances, or presentation of unwanted gifts which have sexual connotations,
 - ... requests for sexual favors,
 - ... the passing or posting of notes, cartoons, posters, or calendars which contain references to sex,
 - ... tying of sexual favors to employment,
 - ... tying of sexual favors to employment decisions (e.g., promotion),
 - ... intimidating conduct,
 - ... hostile conduct,
 - ... offensive conduct.
- ___ Double standards for males/females can lead to sexual harassment claims by individuals, such as where a company has "sexual suggestiveness" clothing standards for female but not for male employees, or where the record of past enforcement clearly indicates one-sidedness.
- ___ The following parties may be participants or "accused" parties, with accompanying liabilities, in sexual harassment incidents and cases:
 - ... companies and other employers (suppliers, customers, etc.),
 - ... individual supervisors,

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- ... individual employees,
- ... labor unions,
- ... apprenticeship committees,
- ... joint consultation committees.

- ___ Those acting in either "individual" or "agency" capacities are both subject to the law.
- ___ Any of the above parties may be considered "parties to," "contributing parties," "accessories to," "condoning parties," etc., especially if there is an "awareness" or a "responsibility for awareness." A question often raised is, "COULD YOU, OR SHOULD YOU HAVE BEEN AWARE?", not just, "WERE YOU AWARE?"
- ___ Important questions in sexual harassment cases are: 1) Was the company, employer, union, supervisor, etc., aware of the alleged incident? If not, could they or should they have been? 2) Did they take IMMEDIATE OR PROMPT AND APPROPRIATE CORRECTIVE ACTION commensurate with their responsibility to all parties to correct or curtail the harassment?
- ___ Supervisors are strongly encouraged to pursue the following steps to reduce the liability of the company and the supervisor's personal liability in sexual harassment proceedings:
 - Document all incidents where sexual harassment is either explicitly or implicitly involved, and maintain extreme confidentiality. (Especially once objections are made.) Communicate upward to top-level managers and request assistance or guidance from top-level managers and EEO/Affirmative Action specialists and representatives whenever a potential problem situation arises. Do so promptly. Take some form of prompt, responsible, and appropriate action to "nip the problem in the bud." Maintain privacy and confidentiality in all such matters.

NOTE: (See the MARC Checklist for RESPONSE TO SEXUAL HARASSMENT INCIDENTS.)

- ___ Employees (male or female) working in "non-traditional" areas often perceive themselves as potential targets of alleged sexual harassment. Comments such as the following prompt such perceptions and have no part in the supervisor's phraseology-vocabulary. These comments greatly increase the likelihood that complaints regarding alleged sexual harassment will be found to have validity.
 - ... "He/She asked for it when he/she took the job."
 - ... "They knew it would be that way when they took the job."
 - ... "Boys will be boys and girls will be girls."
 - ... "What kind of man/woman would want a job like that anyway?"
 - ... "He/She made his/her own bed, now they will have to sleep in it."
 - ... "What do they expect?"
 - ... "Everyone knows it's always been that way."
- ___ The law requires the employer or its agent to take PREVENTIVE ACTION to prevent sexual harassment before and whenever incidents or alleged incidents occur. Employers are expected to confront the individuals involved, as quickly as possible, in a confidential manner, to:
 - ... clearly, straightforwardly, "affirmatively," and confidentially raise the subject,
 - ... express strong disapproval for actions which may be offensive or intimidating,
 - ... develop appropriate sanctions,
 - ... impress employees of their right to raise and how to raise the issue of harassment,
 - ... develop methods to sensitize all concerned,
 - ... inform all employees and supervisors that severe sanctions will be imposed for sexual harassment violators, up to and including the possibility of termination of employment.
 Employers should deal with all parties involved on a private and confidential basis.
- ___ The law requires employers to take CORRECTIVE ACTION that is "immediate and appropriate" when sexual harassment occurs. Ignorance of the activity on the part of supervision is a poor defense, even if the specific acts complained of were forbidden by the employer.
- ___ An excellent practice during job evaluations, job performance counseling, or disciplinary sessions is to privately ask each individual the following question (and document the answer): "Is there anything bothering you about this job?"
- ___ Remember, not only lawsuits and expensive settlements are involved in sexual harassment situations. Also at stake are:
 - ... company, supervisor, employee reputations,
 - ... loss of customers (customer relationships) and loss of suppliers (supplier relationships).

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___ It is also important to remember that sexual relationships between consenting parties (employees), while perfectly acceptable to those participating, may be offensive to other employees or may be seen as linked to job promotion, advancement, etc. Parties other than the participants in the relationship may, therefore, feel sexually harassed. Participants in consenting types of relationships may be causing each other to neglect their personal job performance obligations through visiting or absence from the assigned work area. Supervisors should take private and confidential steps to address directly the job performance deficiencies caused by any such activities.

EEOC OFFICIAL TEXT

The EEOC has issued official guidelines which define sexual harassment as a form of sex discrimination under Title VII of the Civil Rights Act of 1964. They are: (Official Text)

Section 1604.11 Sexual harassment.

- a) **Harassment on the basis of sex is a violation of Section 703 of Title VII.* Unwelcome sexual advances, requests 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.**
- b) **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.**
- c) **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. 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 either a supervisory or agency capacity.**
- 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 action.**
- 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.**
- f) **Prevention is the best tool for the elimination of sexual harassment. An employer should 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.**
- g) **Other related practices: Where employment opportunities or benefits are granted because of an individual's submission to the employer's sexual advances or requests for sexual favors, the employer may be held liable for unlawful sex discrimination against other persons who were qualified for but denied that employment opportunity or benefit.**

* The principles involved here continue to apply to race, color, religion or national origin.

(End of Official Text)

1989 EEOC GUIDELINES ON SEXUAL HARASSMENT

In following the ruling in Meritor Savings Bank v. Vinson, 477 U.S. 57 (1986), the EEOC issued the 1989 Detailed EEOC Memorandum of Standards for Evaluating Sexual Harassment Charges. These 1989 guidelines are not binding upon the courts. However, EEOC investigators are likely to utilize them in their investigations to determine whether charges have merit.

The following considerations are contained in the EEOC guidelines concerning the question of Title VII violations:

- ___ Actionable sexual conduct must be "unwelcome." The EEOC memorandum states that ..."the distinction between invited, uninvited-but welcome, offensive-but-tolerated and flatly rejected sexual advances may be difficult to discern."
- ___ The EEOC will look at the record "as a whole" and to the "totality of the pertinent circumstances," on a case-by-case-basis. No one factor alone determines whether a particular conduct is a violation.
- ___ The EEOC will consider the timeliness of any complaint, especially when there are questions of welcomeness or credibility.
- ___ A "contemporaneous" complaint is one which is made while the harassment is ongoing or shortly after it has ceased, and such a complaint would be helpful to the charging party's case. It is not a necessary element of a claim, however.
- ___ The EEOC stresses that occasional use of sexually explicit language by one who later files a claim will not necessarily demonstrate that sexual conduct of others was welcome. Similarly, evidence concerning a charging party's general character of past conduct towards other persons, other than the accused harasser, will be found to have "limited, if any, probative value."
- ___ The EEOC may find harassment occurred based solely on the alleged victim's allegations if such account is sufficiently detailed and internally consistent "so as to be plausible."
- ___ However, lack of corroborative evidence, when such evidence logically would be expected to exist will undermine the charging party's allegation.
- ___ The EEOC will evaluate the harasser's conduct from the objective standpoint of a reasonable person under similar circumstances, and if the challenged conduct would not substantially affect the work environment of a reasonable person, it is unlikely that a violation will be found.
- ___ The EEOC notes that unless the conduct is "quite severe," a single incident or isolated incidents of offensive sexual conduct generally will not be found to create an abusive environment. Generally, the showing of a pattern is required to sustain a hostile environment claim.
- ___ However, intentional touching of the charging party's intimate body areas is sufficiently offensive to alter the employee's working conditions and constitutes a violation.
- ___ The combination of both verbal and non-intimate physical conduct is an aggravating or exacerbating factor and would increase the likelihood of finding of a violation.
- ___ The EEOC will consider incidents of sexual harassment directed at employees other than the charging party relative to the hostile work environment claim.
- ___ EEOC investigators are likely to ask the following questions in non-physical harassment cases:
 - 1) Did the alleged harasser single out the charging party?
 - 2) Did the charging party participate?
 - 3) What was the relationship between the charging party and the alleged harasser?
 - 4) Were the remarks hostile and derogatory?
- ___ In considering whether or not the employer is liable for supervisory harassment, the EEOC will consider heavily whether the employer had a strong policy prohibiting sexual harassment which was strictly enforced.
- ___ The EEOC will consider agency liability theory in cases where the employer knew or could have known about harassment by a supervisor and failed to take prompt action.
- ___ The EEOC will consider whether or not the employer provided an internal complaint procedure and the history of use of same, including if there was retaliation for use of same.
- ___ The EEOC will encourage employers, in proven and known cases of harassment to do ..."whatever is necessary to end the harassment, make the victim whole by restoring lost employment benefits or opportunities, and prevent the misconduct from recurring."
- ___ Prompt and thorough investigative action by the employer, followed by appropriate warnings or disciplinary action that would be reasonably expected to discourage continuation of the misconduct will very likely be considered as mitigating factors and would reduce likelihood of finding a violation against the employer.

SEXUAL HARASSMENT COMPLAINT PROCEDURES

Many employers have found it beneficial to formalize and publicize a specific policy/procedure for employees to utilize in the event they believe they have been the victim of sexual harassment. A sample general sexual harassment complaint procedure is as follows:

SAMPLE SEXUAL HARASSMENT COMPLAINT PROCEDURES

In the event that an employee believes that he/she has been subject to sexual harassment as defined in the Company Policy, a complaint may be filed in the following manner:

Contact an official representative of the Company's Personnel Department or the Company's Affirmative Action Department.

Company representatives will discreetly and thoroughly and fairly investigate the complaint in an expeditious manner based upon the initial information provided. The nature and extent of the investigation will depend upon the nature and circumstances of each complaint.

At the completion of the investigation, recommendations, if any, will be reviewed with Top-Level Managers and implemented as required.

The complainant will be notified of the outcome of the investigation.

All records relative to the investigation and action ultimately taken will be maintained in confidence by Management.

In order for the Company to be able to investigate and remedy claimed sexual harassment, it is imperative that those claims be promptly brought to the attention of Management. Failure to report claims of sexual harassment may prevent the Company from taking appropriate and effective steps to remedy such situation.

SEXUAL HARASSMENT "AWARENESS" AND "PREVENTIVE ACTION" CHECKLIST

- ___ Maintain a current, unambiguous, and publicized Company policy regarding SEXUAL HARASSMENT, even if that policy in writing states that it is the employer's policy
"...to comply with provisions of Sec. 703 Title VII of the Civil Rights Act of 1964, Section 1064.11."
- ___ Routinely review the Company policy prohibiting sexual harassment, and document dates and attendance of tail gate sessions or other such communication meetings.
- ___ Do not make sexual advances, innuendoes, etc., or participate in sexually promiscuous activity with employees, and take steps to stop any such behavior which is observed (unwanted or otherwise) on Company time and on Company premises.
- ___ Be extremely careful with the use of the word "cooperation." Do not offer benefits, special considerations, promotions, or rewards to any employees "if they will cooperate," NO MATTER WHAT THE INTENDED MEANING OF THE WORD "COOPERATION."
- ___ Do not make light of or joke about specific incidents or situations which have the potential for sexual harassment claims (and maintain confidentiality).
- ___ Take immediate and appropriate action when confronted with sexual harassment situations or charges, including:
 - ... communicate upward to top-level managers,
 - ... seek advice and assistance from top-level managers, Affirmative Action Department Supervisors, Personnel Department, etc.,
 - ... document all incidents and comments accurately,
 - ... maintain privacy and preserve the respect and dignity of all parties in such matters,
 - ... tell participants to cease the activity and explain sanctions for uncorrected behavior.
 - ... See SEXUAL HARASSMENT RESPONSE CHECKLIST.
- ___ **REMEMBER:** The Supervisor is obligated (and PERSONALLY LIABLE) to take action whenever sexual harassment is known or suspected.
- ___ Maintain separate and confidential records of sexual harassment incidents.
- ___ Take special care to see that "stop that" warnings are heeded (remember, persistency aggravates the situation).
- ___ Determine if such incidents or matters affect job performance of those involved or of those about them. DOCUMENT SPECIFIC JOB PERFORMANCE effects.
- ___ **REMEMBER:** Do not tolerate, condone, or overlook "wanted" or "unwanted" outwardly visible advances or sexual harassment activity including sexual promiscuity and admitted harassment participation reports. Take steps to discourage all such activities.
 - ...Remember "alienation of affection" liabilities. Do not believe that "consent" or "mutual participation" or "if they enjoy it, it's OK" arrangements mitigate any future problems or claims. The supervisor and/or the company may face charges of encouraging or condoning such behavior, especially if either or both parties are married and if serious extreme family difficulties result for either or both parties.
- ___ **REMEMBER:** The fact that someone has a "reputation" as "active," either as a result of their own "braggadocio," admitted or widely known, doesn't mitigate the supervisor's advances. Likewise, invitations or propositions by an employee or fellow supervisor do not mitigate the supervisor's advances or aggressiveness. Comments about a person's "admitted" or "widely known" sex life may constitute claims of "defamation of character/slander" and sexual harassment, especially if these comments are untrue or unwarranted, inappropriate, unappreciated by that person, persistent, offered as "blackmail bait" for reason of personal gain or benefit, derogatory, disrespectful, or harmful to the person's ability to obtain or maintain employment or gain advancement. (These cautions apply regarding, among others, those employees who brag or joke about their own promiscuity, prowess, or activity.)
- ___ **REMEMBER:** Overlooking an incident could lead to corrective "self-help" measures, such as fighting by the subject party or from "third-party interested persons."
- ___ DO NOT TOUCH EMPLOYEES (including brushing, bumping, breathing on, etc.).
- ___ Provide for "open work areas and passage areas" to discourage employee contact. Make sure stairways, hallways, and elevators are well lighted and limit numbers of people allowed in elevators to discourage bumping and brushing.
- ___ Do not allow "sympathy" to interfere with responsible supervisory action and conduct. Beware of assuming the role of "marriage counselor" or "sex counselor."

SEXUAL HARASSMENT "AWARENESS" AND "PREVENTIVE ACTION"
CHECKLIST

- ___ Do not utilize transfers or shift reassignments as alternatives to responsible supervisory corrective and preventive action.
- ___ Do not overlook "hearsay" or "off-the-record" information. CHECK IT OUT RESPONSIBLY. DO NOT OVERREACT. Do not build your entire response upon hearsay-third-party information. DOCUMENT ALL SUCH INFORMATION FOR "WHAT IT'S WORTH," and always listen to off-the-record reports and investigate them. Take action based only upon known, verifiable sensory FACTS.
- ___ Inform a top-level supervisor or manager of every formal report and every off-the-record report of sexual harassment.
- ___ Maintain records of all investigations and of action taken, if any, for both formal complaints and off-the-record reports.

SEXUAL HARASSMENT INVESTIGATION AND RESPONSE CHECKLIST

- ___ Immediately as a supervisor or management representative has been notified of an alleged sexual harassment incident, the supervisor should inform the accuser of the seriousness of the allegations and of the possible liability upon the accuser if the allegations are found to be unfounded.
- ___ The initial response of any supervisor who receives a sexual harassment complaint or who becomes aware of or who believes there may be a sexual harassment situation, should promptly be to notify his or her immediate supervisor of the situation and seek the advice and assistance of support staff in investigating and responding to the situation. The investigation should be initiated promptly and conducted in a confidential manner and expediently concluded, according to a plan agreed to in consensus fashion by appropriate management representatives.
- ___ Immediately begin to document sexual harassment incidents or reports.
- ___ Individuals accused of alleged sexual harassment acts should be notified promptly of the allegations and given a chance to tell his/her side of the story."
- ___ Require of supervisors involved that any corrective action or disciplinary action of any nature which significantly alters the job duties or obligations of either any of the involved employees be very closely coordinated with the Labor Relations Department and EEO advisors BEFORE dealing directly with the employees.
- ___ Any action taken (job performance counseling, warning, disciplinary) should be directed toward specific employees, in private, by the immediate supervisor and with the provision (automatically) of a Personnel Department witness of the same sex as the employee being dealt with.
- ___ Do not discuss any action toward involved employees in the presence of other employees or with other employees.
- ___ Confidential records should be kept of all times and activities associated with sexual harassment situations. Those records should be kept in sealed envelopes with an outside notation, such as:

CONFIDENTIAL INFORMATION: TO BE OPENED AND EXAMINED ONLY IN THE PRESENCE OF AND WITH AUTHORIZATION OF THE PERSONNEL MANAGER.

- Such records should be reviewed with and forwarded to the Company Affirmative Action Department.
- ___ Records of sexual harassment formal complaints, "off-the-record" reports, accusations and investigations and action taken, if any, should be maintained for at least seven to ten years following the incident.
- ___ Any supervisor or official who accesses such records should be required to sign and date an access record attached to the file.
- ___ Secretaries, clerks, and others who do not have a legitimate interest in such investigations should not be permitted access to such records and should not be privy to information in those records.
- ___ Investigations of alleged sexual harassment incidents should not be allowed to drag on unnecessarily, as such delay increases the likelihood of loss of confidentiality and increased gossip and rumors, all of which make it more likely that individuals involved may believe that their reputations have been defamed or harmed, regardless of the outcome of the investigations.
- ___ During the investigation the employer representative should ask both the accused and accuser to identify specific witnesses. The investigator should also ask the accused and accuser privately if either of them have any objection to the investigator's contacting the witnesses. If either has an objection, the investigator should ask them to explain the reasons for their objections. However, such objection should not deter the investigator from talking to the witnesses if the investigator determines such contact is appropriate and prudent.
- ___ **NOTE:** Care should be exercised to not expand the "circle of knowledge" during the investigation unless the value of involving additional witnesses outweighs the risk of increasing the awareness of the investigation and the allegations.

- ___ Whether or not formal sexual harassment claims and allegations are substantiated, the employer should inform the complainant/victim of the corrective action taken. The perpetrator should be advised that the victim has been informed of the remedial action taken.

NOTE: For suggestions of specific steps to cover and specific questions to ask in an investigation and for legal references, see "The Internal Sexual Harassment Investigation," C. B. Bryson, EMPLOYEE RELATIONS LAW JOURNAL, Vol. 15, No. 4, Spring 1990, pages 551-560.

SEXUAL HARASSMENT INVESTIGATION AND RESPONSE CHECKLIST

- ___ Do not ignore the situation and hope that it will go away.
- ___ Investigate the claim. Contact the proper support department for guidance (Personnel, Affirmative Action, etc.).
- ___ Maintain all information in confidence. No information of this nature should be disclosed to any person who does not have a legitimate need to know.
- ___ Document all information gathered in the investigation. This information should be provided to the Personnel Department according to Company Policies.
- ___ If a claim is substantiated, action should be taken to stop the offensive conduct and disciplinary action taken against the offending employee, if appropriate.
- ___ If personally confronted with sexual harassment, tell the offending employee to stop, as such conduct violates Company Policy, and report such harassment to your supervisor.
- ___ Recognize that the complainant has a right to make legitimate claims.
- ___ Complaints should not be taken personally, but should be responded to in a prompt manner.
- ___ No retaliatory action should be taken against a complainant.
- ___ "Instruction Letters" may be utilized with proper confidentiality precautions in order.
- ___ Following investigation and administration of corrective action, the supervisor should meet with the complainant and discuss the supervisor's findings and any corrective action taken. The supervisor should inquire if the complainant believes such response taken was appropriate. The comments of the complainant should be documented as part of the supervisor's responsibility. Any additional action requested by the complainant should be discussed by the supervisor with appropriate company representatives to decide ultimately if any additional action is necessary.

**CHECKLIST OF CONSIDERATIONS FOR INVESTIGATION AND CORRECTIVE ACTION
IN INCIDENTS INVOLVING EMPLOYEES ENGAGED IN SEXUALLY PROMISCUOUS
ACTS, CONSENTING RELATIONSHIPS, ETC. WHICH CAUSE JOB PERFORMANCE
DEFICIENCIES OR WHICH CREATE SEXUAL DISCRIMINATION LIABILITIES**

- ___ Base any and all actions initiated by Management upon the job performance effects that the employees' action cause in either their own job performance areas or the job performance areas of co-workers or those with whom the subject employees routinely work, including Company Rules and Policies abused or violated by the actions of the employees.
- ___ Take immediate steps to ensure that there is no supervisory/management participation in this relationship or in similar relationships which cause negative job performance effects. Do not take this for granted. Address it privately and directly with the supervisor. A review of actual cases indicates that it will be more likely that a violation will be deemed to exist in those cases which arise where supervisory/management participation in a relationship involves an employee with a supervisory reporting relationship to the involved supervisor or manager.
- ___ Require of supervisors involved that any corrective action or disciplinary action of any nature which significantly alters the job duties or obligations of either any of the involved employees be very closely coordinated with the Labor Relations Department and EEO advisors BEFORE dealing directly with the employees.
- ___ Any action taken (job performance counseling, warning, disciplinary) should be directed toward specific employees in private by the immediate supervisor and with the provision (automatically) of a Personnel Department witness of the same sex as the employee being dealt with.
- ___ Do not discuss any action toward involved employees in the presence of other employees or with other employees.
- ___ Maintain all records of any and all such action in a separate sealed envelope in the employee's formal Company Personnel Records with a label affixed which reads:

**CONFIDENTIAL INFORMATION: TO BE OPENED AND EXAMINED ONLY IN THE PRESENCE
OF AND WITH AUTHORIZATION OF THE PERSONNEL MANAGER.**

- ___ Or maintain such records in a file separate and apart from the employee's personnel file. Label the file **Confidential and Highly Sensitive**, and file the information by alphabetical order by employee name and seal each entry in envelope as above with the Confidential Information label.
- ___ Do not grant Personnel Department staff members access to the above sealed records. Only the Personnel Manager or equivalent should be permitted access.
- ___ Maintain extreme confidentiality on all actions taken in such matters. Do not chide, joke, ridicule, tease, or degrade, etc., the participants.
- ___ For employee conduct in areas related to sexual promiscuity/consenting relationships, etc., which occur off-duty, see MARC Manual topics dealing with OFF-DUTY MISCONDUCT.
- ___ Make sure with regard to any action taken for the involved employees that there are not other employees who are engaged/involved in identical or similar actions where similar corrective steps are not in effect or have not been taken.
- ___ Do not take action directly toward only one of the mutually involved employees if there are job performance effects regarding both employees' performance.
- ___ Remember, non-involved employees who work in the presence of such involved employees may become litigants in sexual harassment/discrimination suits in the event they believe they are, as observers, discriminated against or as a result of the involved employees' actions if there are any detrimental job effects upon their own jobs.
- ___ Read the MARC Checklist Manual section on Sexual Harassment/Discrimination and follow the Checklists listed in that section for preventive and responsive measures.
- ___ In any action taken toward the individuals involved, do not make reference to the participants' specific sexes, ages or age differences, or to the years of service.
- ___ Research state codes regarding vulnerability/liabilities for employers/supervisors in the area of "alienation of affection", in so far as consenting relationships are concerned among employees, especially where management officials/supervisors are aware of such relationships.
- ___ Regardless of the state codes, do not allow supervisors to encourage, in any way, such actions or relationships between employees and supervisors including arranging, assisting in subterfuge or disguising, and concealing.

**CHECKLIST OF CONSIDERATIONS FOR INVESTIGATION AND CORRECTIVE ACTION
IN INCIDENTS INVOLVING EMPLOYEES ENGAGED IN SEXUALLY PROMISCUOUS
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DEFICIENCIES OR WHICH CREATE SEXUAL DISCRIMINATION LIABILITIES**

- ___ The use of Company funds (expense reports, travel expenses, meals) to support consenting relationships, promiscuity, or sexual liaison, etc., aggravate the wrongdoing by the employee; but such wrongdoings uncorrected by management may also increase the employer's vulnerability and increase the employer's/supervisor's liability. (Condonement, encouragement)
- ___ Make sure that Company-sponsored transportation (motor pools, vanpools, buses) is supervised and publish and display in transportation vehicles rules governing employee conduct.
- ___ Do not take action toward an employee in a non-related area to correct problems in areas which are sensitive, with which you would rather not deal. Use multiple-track disciplinary techniques.
- ___ Do not utilize transfer (solely) or promotion by-pass (denial of promotion) as a means to solve the problem, as this may indicate support for or condonement of the action which caused the job performance effect. Address the job performance deficiencies and correct them.
- ___ Enforce the rules among all employees that:
 - "Employees are to remain in their assigned work areas, alert and attending to their job duties,"
 - and "No employee is to be out of their assigned work area without the knowledge and approval of his/her supervisors."
- ___ Oftentimes corrective action should be taken toward employees who:
 - A) are not in areas to which they have been assigned,
 - B) are in areas where they have not been assigned, or,
 - C) are in controlled access areas without authorization and/or without a legitimate job performance business reason.
- ___ Supervisors may be required to take corrective action toward an employee(s) whose actions affect the morale of other employees. Such effects upon morale should be determined solely by supervisory sensory fact observations and not based solely upon hearsay, opinions, innuendo, etc.
- ___ A supervisor is often involved in disciplinary action toward an employee for absenteeism and it may become obvious that an absence/sickness pattern exists which coincides with the regularly scheduled days off of another employee or with sickness absences of another employee, where both employees are involved in the same consenting relationship. Such action should be directed toward correction of the absences, not toward the relationship which may be affecting the patterned absences; however, it may be necessary to address the relationship privately with each individual, as it may be contributing to the absence problems.
- ___ **REMEMBER:** It is the employee's responsibility to correct the problem. It is the supervisor's responsibility to:
 - A) inform the employee of the acceptable standard of performance,
 - B) inform the employee of the fact that the employee's present record/pattern is not acceptable, and,
 - C) to provide the employee the opportunity to improve.
- ___ **REMEMBER:** Job performance standards/criteria should be fair and reasonable and should not be arbitrary, capricious, or discriminatory. They should be enforced or demanded in a fair and even-handed manner toward all employees, uniformly and consistently.
- ___ Do not condone or demonstrate support for consenting relationships by allowing employees so involved to obtain each other's paychecks, assignments, etc. Follow company rules/policies regarding release of paychecks directly to the employee, unless the employee has provided the employer with specific current written approval/direction to give his/her paycheck to another person. (See MARC Manual regarding the topic of "ostensible agent.")
- ___ Supervisors should not become involved in family disputes of employees. If calls are received for an employee who is not at work, inform the caller, "I have not seen the employee." If the caller is told that the employee is not at work, the speaker should be absolutely sure that is the case. Do not create problems for the employee who may have been called in to work or who may be visiting the premises on business. Make an effort to confirm whether or not the employee is there. A better response would be, after asking the caller identity, "The employee is not at this number at this time. I do not know of his/her whereabouts. Is this an emergency? Is there a number you would like to leave in the event I see the employee?" At all times follow company policy regarding incoming telephone calls for employees.

**CHECKLIST OF CONSIDERATIONS FOR INVESTIGATION AND CORRECTIVE ACTION
IN INCIDENTS INVOLVING EMPLOYEES ENGAGED IN SEXUALLY PROMISCUOUS
ACTS, CONSENTING RELATIONSHIPS, ETC. WHICH CAUSE JOB PERFORMANCE
DEFICIENCIES OR WHICH CREATE SEXUAL DISCRIMINATION LIABILITIES**

- ___ Consenting relationships and other similar activities by employees often result in phone calls and other interruptions at work by employee spouses, relatives, or friends. Steps should be taken with the employees to correct such interruptions, for example, do not as a corrective measure threaten to, "inform the employee's spouse of the relationship if he/she does not get the spouse to stop calling, interrupting, etc!"
- ___ If involved employees, for the convenience of or for the enhancement of their relationship, purposely exclude others from joint employee participation job performance activities, and if such exclusion has a negative impact upon job performance, training exposure/opportunity, keep-current-ability, etc., then correct the problem with proper attention and controls by the supervisor, and through direction or direct assignment by the supervisor or through presence of the supervisor.
- ___ **REMEMBER:** Observing employees at work is a reasonable means of supervision, but observation should be "reasonable" and related to the employee's job performance obligation and not snooping, entrapment, discriminatory, obtrusive, or otherwise abusive toward the employee.
- ___ Call to the attention of the participants (privately and individually) any telephone misuse emanating from the employee's actions/participation in a consenting relationship, only if similar corrective action is being taken toward other employees engaged in telephone misuse/abuse for any reason.
- ___ **Remember:** Any investigation of any employees involved in such activity should be limited to their actions:
 - A) while on the job and in the performance of their job, or,
 - B) which have a direct negative effect or impact upon their job or jobs of other employees or upon customers, vendors, etc.,
 - C) off the job only when such conduct constitutes a disruptive job-performance effect.
- ___ Consenting relationships which involve or produce joint violations of company rules, policies, or Agreement clauses should be addressed by administering corrective action (job performance counseling, warning, disciplinary action) toward the individuals privately and with reference to the job performance of the individual. Misconduct is, of course, aggravated on the part of each employee where joint action was involved in carrying out the misconduct, such as:
 - ... two employees falsifying records,
 - ... two employees assisting in theft-related misconduct,
 - ... two employees improperly manipulating schedule change provisions, overtime provisions, attendance-overtime, etc. for unfair and unjust personal enrichment, and other similar instances.
 Penalties are usually accelerated or increased in such instances. For illegal acts, prosecution of those involved is recommended.
- ___ Be respectful of the employees' rights to engage in protected concerted activity (e.g., grievances), even though their other actions, which are not protected, are causing job performance difficulties. Do not overreact!
- ___ When conducting fact-finding interviews with or when disciplining bargaining-unit employees for sexual harassment, sexual promiscuity, etc. inform the employee of the general nature of the meeting at the very start of the meeting, in the presence of a Personnel Department representative (same sex as employee) and allow the employee to exercise his/her right (Weingarten) to have a union representative (witness) present for the interview. Companies whose policies provide for "automatic provision" of union representation during disciplinary fact-finding interviews or disciplinary sessions may want to consider this format for employee misconduct/actions which are of a moral turpitude nature (sexual promiscuity, theft-related misconduct, etc.).
- ___ NOTE: The presence of a Personnel Department witness and/or a union representative requested by the employee should not create vulnerability for the employer or the supervisor involved in the areas of defamation, libel, or slander where the supervisor's actions are based upon "due process" guidelines outlined in this manual.
- ___ While some courts and regulatory agencies seem to be supportive of transfer or job reassignment in order to separate employees involved in sexual harassment incidents or consenting relationships which may result in sexual harassment allegations, the use of such transfers or reassignments should not leave the impression that the continuation of the objectionable and inappropriate conduct will be condoned in the new jobs/locations.

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PARAMOUR CLAIMS/REDUCING EMPLOYER LIABILITY FOR CO-WORKER/EMPLOYER CONSENTING SEXUAL RELATIONSHIP

Under Title VII, employers may be liable when employees are denied employment benefits because of a co-worker's consenting sexual liaison or relationship with a representative of the employer. Such claims are called paramour claims.

As with employer liability under Title VII for sexual harassment claims, an employer's potential liability may be predicated upon conduct by agents, supervisors, co-workers, and non-employee third parties.

The EEOC recognizes paramour claims as an issue related to sexual harassment, thereby making paramour issues governed by general Title VII principles.

Employer preventive measures or protections against paramour claims parallel protection against sexual harassment claims and include:

- ___ provisions of an internal complaint/resolution process with confidentiality protections,
- ___ training of all employees in how to make such internal appeals,
- ___ provisions of a policy which prohibits sexual harassment and which addresses sexual liaisons on the job,
- ___ training of supervisors and employees in that policy and specifically warning supervisors of the legal perils associated with sexual liaisons and of the potential for paramour claims,
- ___ promptly identifying and prudently taking steps to correct job performance deficiencies caused by relationships, on or off company premises, between employees and between employees and supervisors,
- ___ utilizing "confidential" record keeping procedures in documenting (such as sealed envelopes with limited access notations), corrective job performance counseling, disciplinary action, or other corrective measures taken toward employees and supervisors,
- ___ requiring that supervisors justify in writing (for review by top-level managers) reasons for all promotions where two or more aspirants or potential promotees exist, whether or not there exists any form of consenting relationship and whether or not there is a difference in sex or sexual preference between the job aspirants or between a job aspirant and the supervisor,
- ___ management review of all such promotions, whether or not sexual liaison/relationships are known to exist, even if company policies do not explicitly prohibit such relationships,
- ___ MARC CHECKLIST/CONSIDERATIONS IN "SEXUAL LIAISON" OR "SEXUAL PROMISCUITY" SITUATIONS.

Reference: EMPLOYEE RELATIONS LAW JOURNAL Vol. 15, No. 1, Summer 1989, pgs. 57-66.

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CARTOONS, PIN-UP PHOTOS, VERBAL ABUSE AS SEXUAL HARASSMENT

The United States District Court for the Middle District of Florida, in Jacksonville, on February 1, 1991, held that workplace display of posters and calendars showing nude women in sexually suggestive or submissive poses and demeaning remarks by male supervisors and employees would, in the eyes of a "reasonable woman" constitute sexual harassment prohibited by Title VII of the Civil Rights Act of 1964.

Similarly, the U. S. Court of Appeals for the Ninth Circuit Court adopted a similar "reasonable woman" standard and stressed that employers should take strong and effective steps to remedy sexual harassment in the workplace. The Ninth Circuit case involved objections from a female employee who had received unsolicited and unwelcome notes from a male co-worker.

The material deemed to be objectionable in the Florida case consisted of a pictorial dart board and pictures and posters, some of them attached to advertisements of tool supply companies, and featuring nude or scantily clad women, some of them in what the Court identified as " ... various stages of undress and in sexually suggestive or submissive poses."

The case is likely to have widespread impact throughout the nation, as it is unlikely that a higher court or courts in other regions or jurisdictions would rule contradictory to the rationale applied by the Florida court. The Ninth Circuit Court ruling follows rationale similar to that utilized in the Florida case.

Employers and their representatives are liable for the harassment which may occur from sexually explicit cartoons, posters, drawings, and verbal remarks which may be offensive or intimidating and which may constitute sexual harassment.

The plaintiff in the Florida case was a female welder who was a member of a nearly exclusive male work force. The shipyard employer employed two women and 958 men in 1980, seven women and 1,010 men in 1983, and six women and 846 men in 1986.

Some of the circumstances which supported the findings of the Florida Court included:

- ___ The plaintiff repeatedly complained to her supervisors regarding the nude and pornographic posters and calendars.
- ___ The plaintiff alleged, that in retaliation for her complaints, she was subjected to verbal harassment by male employees and her supervisors.
- ___ Employees described the shipyard as "a boy's club" and "more or less a man's world."
- ___ The employer had no rules forbidding the objectionable material and apparently made little if any effort to discourage or prevent posting of the material.
- ___ Management representatives "...condoned these displays; (and) often they had their own pictures."
- ___ Management did not adequately investigate the complaints.
- ___ One supervisor informed male members of the work force that the men had "constitutional rights" to post the pictures.
- ___ The plaintiff's complaints to management were met by increased harassment instead of corrective action.
- ___ A door of a fitter's trailer contained the words "Men Only," following plaintiff's complaints.
- ___ Female employees testified that there was an increase in the posting of pictures and in the verbal harassment following the complaints.
- ___ The plaintiff was subjected to crude and severe verbal comments concerning her sex "in the presence of the pictures of nude or partially nude women."
- ___ A management representative had informed the plaintiff that rules against vulgar and abusive language did not apply to the "cussing" commonly heard there.
- ___ The Court's rationale was similar to rationale utilized in racial discrimination and other sexual harassment claims.
- ___ The "totality of circumstances" (including sexual remarks, sexual jokes, sexually oriented pictures of women, and non-sexual rejection of women by co-workers) was examined by the court to determine if a sexual harassment violation had occurred.
- ___ The Court ruled that there were sufficient signs present that the employer had "constructive knowledge" and that a "reasonably alert management" would have been aware of the problem and its effects.

CARTOONS, PIN-UP PHOTOS, VERBAL ABUSE AS SEXUAL HARASSMENT

The Florida Court ruling is significant in that it concluded or indicated:

- ___ Sexual harassment has a profound impact on women's job performance and promotes stereotyping of women in terms of sex-object status.
- ___ The effects of sexual harassment in the workplace include emotional upset, reduced job satisfaction, an increase in women quitting jobs or getting transferred or being fired, and discouraging women from seeking jobs and promotions.
- ___ There is a correlation between the presence of pictures and sexual comments and the level of sexual preoccupation of male workers.
- ___ The conduct objected to in the case created and contributed to a sexually hostile work environment.
- ___ Sexually explicit materials in the workplace may constitute sexual harassment (with accompanying employer liability), even though society, as a whole, may appear to tolerate such materials.
- ___ Verbal comments, such as those pertaining to a co-worker's legs, body, or style of dress (male or female) may be contested even if such comments are intended as compliments.

The Florida court, in effect, criticized the representatives of the employer for failure to take prompt, effective remedial action regarding the sexual harassment about which they knew or should have known.

The Florida Court and the Ninth Circuit U. S. Court of Appeals, in two separate cases, also applied what they defined as a "reasonable woman" standard, namely: "The objective standard asks whether a ... 'reasonable woman' would perceive that an abusive working environment has been created."

The Ninth Circuit U. S. Court of Appeals decision is also enlightening in that the Court ruled that sexual harassment can occur "...even when harassers do not realize that their conduct creates a hostile work environment."

Well-intentioned compliments "... can form the basis of a sexual harassment cause of action..." Decisions such as this one may have the effect of making nearly every sex-or romance-related comment, including comments which compliment personal appearance, a potential basis for sexual harassment.

Employers and their representatives should be aware of visually displayed materials and verbal comments, notes, and cartoons, and similar materials and how they affect workers, and appropriate steps should be taken by supervisors to object to the display of such materials and to see that they are removed without incident when they appear.

Citations:

1. Robinson v. Jacksonville Shipyards, Inc., 1991 U.S. App. LEXIS 794 (Feb. 1, 1991).
2. Ellison v. Brady, 1991 U.S. App. LEXIS 875 (Jan. 23, 1991).