SEXUAL HARASSMENT IN THE WORKPLACE: WHAT EMPLOYERS SHOULD KNOW

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A. Discrimination, Harassment and the Law

Sexual harassment in the workplace is a widespread problem that affects both women and men. Harassment is defined as a "course of conduct directed at a specific person that causes substantial emotional distress in such person and serves no legitimate purpose" or "words, gestures, and actions which tend to annoy, alarm and abuse another person."[2] Sexual harassment is a particular type of harassment that consists of unwelcome behavior of a sexual nature or harassment because of sex. Moreover, under the law, sexual harassment is a form of sex discrimination. Since 1977, sexual harassment in employment has been actionable as sex discrimination under federal law, Title VII of the Civil Rights Act of 1964, 42 U.S.C. 2000e *et seq*. Massachusetts law prohibits sexual harassment under the Massachusetts Fair Employment Practices Act, M.G.L. c. 151B, and under M.G.L. c. 214, section 1C. Under Massachusetts law, sexual harassment is prohibited in the workplace, educational facilities, public accommodations, and housing.

The legal definitions of sexual harassment under state and federal law are almost identical. Sexual harassment is defined as: unwelcome sexual advances, requests for sexual favors, or verbal or physical conduct of a sexual nature, when:

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[2] Black's Law Dictionary.

- submission to the conduct is a term or condition of employment or is a basis for decisions affecting employment ("quid pro quo" sexual harassment), or
- the conduct interferes with one's work performance by creating an intimidating, hostile, humiliating or sexually offensive environment ("hostile environment" sexual harassment).

B. Defining Sexual Harassment: Hostile Environment and Quid Pro Quo Harassment

Sexual harassment is separated into two types of harassment: hostile environment sexual harassment and quid pro quo harassment. The former includes unwelcome sexual conduct that unreasonably interferes with an individual's job performance or creates an intolerable working environment. The latter occurs when submission to or rejection of sexual conduct by an individual is used as the basis for employment decisions affecting that individual.

While these two types of harassment are theoretically distinct, they may occur concurrently, and the line between these two types may sometimes blur.

1. Hostile Environment Sexual Harassment

In hostile environment sexual harassment, the harasser's conduct interferes with the victim's performance by creating an intimidating, hostile or offensive environment. To show hostile environment harassment, victims must show: that they were subjected to unwelcome sexual harassment in the form of sexual advances, requests for sexual favors, or other verbal or physical conduct of a sexual nature; the harassment complained of was based on sex; the charged sexual harassment has the effect of unreasonably interfering with the employee's work performance and creating an intimidating, hostile, or offensive

working environment. In a hostile work environment claim, the unwelcome sexual conduct creates an impediment to the employee's full participation in the workplace, and alters the terms and conditions of her employment. This means that an employee may bring such a claim even when she has not been terminated, suspended or demoted. Hostile environment sexual harassment may arise out of a single, severe incident, or many more subtle incidents over time.

In evaluating whether a valid claim for hostile environment sexual harassment exists, consider these three questions:

(a) Is the conduct sexual in nature or because of sex?

Common examples of sexual conduct that might create a hostile work environment include: inappropriate touching, pinching, leaning over or cornering; sexual epithets, jokes, gossip; requests for sex; displaying sexually suggestive pictures and objects; leering, whistling, sexual gestures; sexual teasing, remarks or questions; sexually suggestive looks; pressure for dates; unwelcome letters, phone calls, cartoons, e-mails, etc.

Conduct can constitute sexual harassment even when it is not **overtly** sexual. Verbal abuse or perpetuation of sex-based stereotypes also may be considered sexual harassment. Note that men can be sexually harassed by women, and sexual harassment may also occur between members of the same gender if the harassment is based on sex.[3]

(b) Is the conduct "unwelcome?"

According to the United States Supreme Court, the degree of harassment should be judged by the standard of a reasonable person in the plaintiff's position, considering

[3] Oncale v. Sundowner Offshore Servs., Inc., 523 U.S. 75, 118 S. Ct. 998 (1998); Melnychenko v. 84 Lumber Company, 424 Mass. 285 (1996).

the "[s]urrounding circumstances, expectations, and relationships," as well as the social context of the workplace.[4] Under Massachusetts law, conduct must be hostile, intimidating, humiliating or offensive ***both*** from an objective and a subjective perspective, in order to rise to the level of a hostile work environment. An employee who does not subjectively perceive sexual conduct as offensive is not a victim of sexual harassment, even if other reasonable people would consider such conduct offensive; while an employee who is subjectively offended by conduct that is not objectively offensive, is also not a victim of sexual harassment under Massachusetts law.

Harassment may be unwelcome even where the alleged victim occasionally responds in kind to sexual remarks. Where an employee only submits to harassing behavior to avoid being targeted further, to cope in a hostile environment, or because participation is an implicit condition of employment, she is not considered to have welcomed the conduct.

(c) Is the conduct "severe or pervasive?"

For a claim of sexual harassment to succeed, the offending behavior must be sufficiently pervasive or severe to alter the conditions of the victim's employment and create an abusive work environment. This can only be determined on a case-by-case basis, but a victim is usually required to show more than a single comment. The occasional comment will not be adequate to constitute a "pervasive, hostile environment." M.G.L. c. 151B is not a "clean language" statute; it does not prohibit all use of profane or offensive language.

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[4] Oncale v. Sundowner Offshore Services, Inc., *supra.*

However, an employee need not subject herself to an extended period of humiliating treatment before being entitled to seek relief. The test for evaluating whether the conduct meets this standard involves looking at the "totality of the circumstances."

2. Quid Pro Quo Sexual Harassment

In quid pro quo sexual harassment, the employee is subjected to unwelcome sexual conduct in the form of sexual advances or requests for sexual favors. Here, submission to the sexual advance or request is a term or condition of employment or is a basis for decisions affecting employment. Quid pro quo sexual harassment occurs when a person's employment is adversely affected because the employee has rejected or refused to respond to these requests for sexual favors or sexual gratification. Quid pro quo harassment also occurs when an employee **does** submit to unwelcome sexual conduct as a result of a reasonable fear of an adverse employment action. Some examples of adverse employment actions include: termination; demotion; denial of promotion; alteration of duties, hours or compensation, transfer; or unjustified performance reviews. Note that a single incident of "quid pro quo" harassment may be sufficient to establish a violation of the law.[5]

[5] As people work together, inevitably issues of romance arise. With respect to situations involving consensual relationships, the EEOC has issued Policy Guidelines for Sexual Favoritism establishing some basic principles related to these issues. For example, the EEOC suggests that isolated instances of favoritism towards a "paramour" are not prohibited. These instances may be unfair, but the EEOC states that these isolated instances do not constitute discrimination against women or men in violation of Title VII. See Ritchie v. Department of State Police, 60 Mass. App. Ct. 655, 661-662 (2004) for a discussion of cases where the facts and circumstances of favoritism toward paramours rise to the level of creating a sexually hostile environment. For the federal perspective on this issue, see Bourbeau v. City of Chicopee, 445 F. Supp. 2d 106 (D. Mass. 2006).

3. Employer Liability for Hostile Environment and Quid Pro Quo Sexual Harassment

Under Massachusetts law, sexual harassment by supervisors is especially troubling for employers because the employer is held liable for supervisory conduct even if management is unaware of the conduct, and even if the employer has a policy prohibiting the conduct. Massachusetts holds employers strictly liable for sexual harassment by persons with supervisory authority.

The Massachusetts Commission Against Discrimination (the "MCAD") has issued guidelines explaining this subject. The rationale behind the Massachusetts automatic liability rule is that "harassment by a supervisor carries an implied threat that the supervisor will punish resistance through supervisory powers . . . [I]t is the authority conferred upon a supervisor by the employer that makes the supervisor particularly able to force subordinates to submit to sexual harassment." College-Town v. Mass. Commission Against Discrimination, 400 Mass. 156, 166 (1987).

The strict liability rules applies to actual supervisors, and also those who hold themselves out as having supervisory authority over the employee, whether or not they have actual authority. Accordingly, in some situations, an employer may be liable for the actions of a supervisor, even if that supervisor does not have direct supervisory authority over the complainant. The employee's belief that the harasser has authority over her, to the extent that this belief is reasonable, may be a factor in determining the employer's liability.

Accordingly, under Massachusetts law, the organization is liable when a supervisor engages in unlawful harassing conduct, even if the employer takes immediate

actions to address the situation and conducts prompt investigations.[6] Moreover, even where an employer had no notice of a sexual harassment situation involving a supervisor, it may be held liable.

Under both state and federal law, the question of whether someone is a supervisor is a factual question, to be determined by that person's degree of authority over the terms and conditions of the plaintiff's employment focusing on the power to hire, fire, demote, promote, transfer and discipline. Under Massachusetts law, strict liability can be imposed even on supervisors who are not in the plaintiff's chain of command. MCAD v. Aramark Corp., 98-BEM-1796, 27 MDLR 73; 2004 WL 1920884 at **2 (2004) (full commission). Strict liability may also be imposed if the employee believes that the harasser is a supervisor, but the belief must be reasonable in light of all the circumstances, including whether the harasser held himself out as a supervisor. Newell v. Celadon Security Services, Inc., 417 F. Supp. 2d 85 (D. Mass. 2006).

Under federal law, an employer is always responsible for unlawful sexual harassment by a supervisor that culminates in a tangible adverse employment action. However, if the harassment did not lead to an adverse action, the employer can avoid liability by proving that:

(1) it exercised reasonable care to prevent and promptly correct the harassment; and

(2) the employee unreasonably failed to complain to management or to otherwise avoid harm.

[6] Prompt remedial action, however, will help the employer in its efforts toward a harassment-free workplace and may reduce the likelihood of a lawsuit. In the event of litigation, prompt remedial action can decrease the amount of damages for which the employer may be found liable.

Of course, sexual harassment may not always involve a supervisor. Sexual harassment may also occur between co-workers. Because co-workers are not normally in a position to influence or alter each other's employment status, the employer is not strictly liable when co-workers engage in unlawful sexual harassment. Rather, the institution is liable only when it is found that the institution knew or should have known about the unlawful co-worker harassment and failed to take reasonable and prompt remedial action. Knowledge of sexual harassment can be imputed to the employer from internal complaints, the pervasiveness of the harassment, or the employer's indifference to the situation, as reflected by a failure to establish a policy and a grievance procedure to redress it, or a failure to follow the policy or procedure that is in place.

Sexual harassment by third parties, such as patients in a health care setting or customers, may also be actionable under state and federal law.[7] The main difference between employer liability for co-worker harassment and harassment by non-employees is the extent of employer control over the non-employee. The greater the employer's ability to control the non-employee, the more likely the employer will be liable for harassment. Note however that the Massachusetts Supreme Judicial Court has recently held that sexual harassment by volunteers in the workplace is not actionable under M.G.L. c. 214, section 1.[8]

[7] See Modern Continental/Obiyashi v. MCAD, 445 Mass. 96 (2005) (subcontractor); Muldowney v. Americare Health Services., Inc., 19 Mass. L. Rep. 658, 2005 Mass. Super. LEXIS 338, 2005 WL 2009545 No. 044861 (Mass. Super. Jun.23, 2005) (patient).
[8] Lowery v. Klemm, 446 Mass. 572 (2006).

C. Unlawful Retaliation and Other Related Legal Claims

Under Massachusetts law, it is unlawful to retaliate or discriminate against a person because they have opposed any practices forbidden by anti-discrimination laws. Accordingly, an employer must not retaliate against an individual who alleges sexual harassment. This means that an employer may not demote, discharge, or undertake any adverse employment action against such an individual in retaliation for their claims. Further, retaliation is prohibited against all those who engage in protected activities such as: speaking to someone at the Massachusetts Commission Against Discrimination or Equal Employment Opportunity Commission (EEOC), filing a complaint, talking to investigators about another's complaint, testifying as a witness, asking co-workers to stop engaging in the harassing conduct, or cooperating in internal investigations.

To prove a case of retaliation, a complainant must show that: (1) she engaged in a protected activity; (2) the employer was aware of the protected activity; (3) she was subsequently subjected to an adverse employment action; and (4) that the employer had a retaliatory motive, or that the adverse action followed the protected activity within such a timeframe that the retaliatory motive can be inferred.

A plaintiff's claim of retaliation may succeed even if her underlying claim of harassment fails, as long as the plaintiff can prove that she reasonably and in good faith believed that the employer was engaged in wrongful discrimination. Abramian v. President and Fellows of Harvard College, 432 Mass. 107, 121 (2000); Bain v. Springfield, 424 Mass. 758, 765 (1997).

To ensure that retaliation does not occur, an employer should make clear that it will not tolerate adverse treatment of employees because they report harassment or

provide information related to such complaints. Supervisors should take explicit steps to prevent retaliation when a harassment claim arises. For instance, when investigating a complaint of sexual harassment, the parties interviewed should be reminded about the prohibition against retaliation. Further, employers should carefully scrutinize employment decisions affecting the complainant and witnesses during and after the investigation to ensure that such decision are not based on retaliatory motives.

If an employee makes a false or bad faith claim of harassment, supervisors do have the right to take appropriate disciplinary action against that employee. But supervisors must be careful to avoid a retaliation charge.

Finally, note that a party who has a claim for discrimination or for retaliation under state and/or federal law may also have other potential claims including intentional infliction of emotional distress, negligent infliction of emotional distress, interference with advantageous/contractual relationship, defamation, or assault and battery.

D. Liability of Supervisors and Co-Workers

Under Massachusetts law, individuals may be held personally liable for sexual harassment in the workplace.[9] For example, under M.G.L. c. 151B, section 4(1) and section 4(16A), individuals may be so closely identified with the organization that the individual is held personally liable as the employer.

Further, both supervisors and co-workers may be held liable under M.G.L. c. 151B, section 4(A), which states that it is an unlawful practice: "for any person to coerce, intimidate, threaten or interfere with another person in the exercise or enjoyment

[9] In the First Circuit, which encompasses Massachusetts, the courts have held that Title VII does not provide for individual liability.

of any right granted or protected by this chapter." If supervisors, co-workers, or even third parties engage in such conduct, they may be held liable.

Additionally, supervisors and co-workers may be held liable for aiding and abetting sexual harassment under Chapter 151B, section 4(5). Aiding and abetting liability may be found where:

- The wrongful act is separate from the underlying harassment claim;
- The aider and abettor had an intent to discriminate;
- The aider and abettor knew of his supporting role in an enterprise that deprived the victim of his rights.

Under certain circumstances, inaction by an employee may give rise to aiding and abetting liability.

Finally, Massachusetts law also provides that individuals may be held liable for retaliation against victims of sexual harassment, or those who complain of unlawful sexual harassment or cooperate with an investigation. (See discussion of unlawful retaliation above.)

E. Legal Recourse and Remedies

1. Massachusetts General Laws

Under Massachusetts General Laws Chapter 151B, the Massachusetts Fair Employment Practices Act, a victim of sexual harassment in the workplace must file a charge of discrimination with the MCAD within 300 days of the allegedly unlawful

conduct.[10] Once the claim is filed, an investigating commissioner with the MCAD will evaluate whether probable cause exists to credit the allegations contained in the complaint. A complainant can choose to pursue her claims through the MCAD or in state court. Upon a finding of liability, the statute provides for remedies including compensatory damages for lost wages and benefits, front (future) pay, and emotional distress. The statute also provides for recovery of attorney's fees, plus statutory interest. In some instances, a complainant may be awarded punitive damages; and injunctive relief is also available.

The Massachusetts Supreme Judicial Court has specifically upheld the MCAD's authority to award emotional distress damages and provided guidelines for doing so. The Court required that emotional distress damages be reasonable and appropriate to the distress suffered. Each case must rest on its own facts, and a finding of discrimination or retaliation, by itself, is no longer sufficient to permit an inference of, or a presumption of, emotional distress. Stonehill College v. Massachusetts Commission Against Discrimination and another, 441 Mass. 549, 576 (2004).

Typical remedies might include the following:

- Employer must cease and desist from engaging in unlawful discrimination.
- Employer must pay damages for lost wages and emotional distress plus interest at the statutory rate (12%) from the date the complaint was filed.
- Employer must pay front (future) pay.

[10] M.G.L. c. 151B applies to employers of six or more employees. M.G.L. c. 214, s. 1C prohibits sexual harassment in general and applies to smaller employers. The Massachusetts Commission Against Discrimination does not have jurisdiction over
M.G. L. c. 214, s. 1C.

- Employer must arrange for all employees to attend comprehensive training that addresses sexual harassment and discrimination in the workplace.
- Employer must adopt written policy against sexual harassment and post and distribute this policy to all employees.
- Employer must set up recordkeeping for all complaint and investigations.

2. Title VII

A victim of sexual harassment may also seek recourse under federal law, Title VII of the Civil Rights Act of 1964, 42 U.S.C. 2000e *et seq*., by bringing a claim with the Equal Employment Opportunity Commission within 300 days of the allegedly unlawful conduct. The complainant may file a Title VII claim with the MCAD concurrently with a claim under Chapter 151B, and may choose to pursue her claims through the agencies or in state or federal court. As noted above, federal guidelines for evaluating employer liability differ somewhat from Massachusetts law.

Under Title VII, compensatory damages are available. Such remedies may include damages for lost wages and benefits, front (future) pay and emotional distress. The statute also provides for attorney's fees and statutory interest. Injunctive relief is also available. If the unlawful acts are found to be malicious, punitive damages may also be awarded.

3. Other Remedies

Additionally, public employees who experience sexual harassment may seek recourse under other federal laws, including 42 U.S.C. Section 1983 or under the Equal Protection Clause of the Constitution. Sexual harassment of employees and students in

federally funded programs is also regulated by Title IX of the Education Amendments of 1972. These federal laws have been interpreted to allow the full range of remedies against public entities, including compensatory and punitive damages.

(a) 42 U.S.C. Section 1983

An employee of a public employer who suffers sexual harassment may bring suit against the institution and against individuals under federal statute 42 U.S.C. section 1983 for an alleged violation of the Constitution or federal law where the institution has a policy of sexual harassment "under color of state law."

Plaintiffs may succeed in their claims under section 1983 by establishing that a supervisor who has policy-making authority engages in the harassment act. However, a public employer will not be liable for harassment by a supervisor merely because it gives a supervisor discretion regarding employment decisions. Under these cases, a clear sexual harassment policy that includes reporting and investigation procedures is crucial for institutions attempting to avoid liability.

If a plaintiff does succeed in her Section 1983 claims, she will be permitted to receive compensatory, and in some instances punitive, damages, as well as injunctive relief.

(b) The Equal Protection Clause

A public employee may sue the institution for violation of the Equal Protection Clause of the Constitution. However, to recover here, the victim must establish that the sexual harassment is intentional. If an employee can demonstrate intentional sexual harassment, the Equal Protection claim will be actionable, giving rise to compensatory and punitive damages, as well as injunctive relief.

(c) Title IX

Under Title IX of the Education Amendments of 1972, both employees and students of private and public schools can bring suit for sexual harassment of students or employees in programs that receive federal funds. Under Title IX, compensatory damages and injunctive relief are available to victims, while punitive damages are not.

F. Case Studies

(1) A female university employee alleged that her manager threatened to fire her unless she consented to participate in sexual acts with him. She complied with his requests and engaged in sexual acts for a period of a year and a half. She brought suit against the University and against the manager individually. The employer settled with the employee after two days of trial. The manager did not settle. Instead, he denied all the allegations of sexual activity and testified that he had counseled the employee during the occasions when she had alleged that the sexual acts took place. The jury believed the employee and rendered a verdict against the manager of $250,000 in compensatory damages and $760,000 in punitive damages.[11]

(2) A male employee alleged that a male coworker created a hostile work environment by making crude remarks, blowing kisses, grabbing the plaintiff's genitals and leaving a diamond ring on plaintiff's desk. As a result of the mental distress from the coworker's harassment, the plaintiff attempted suicide on two occasions. Based on this evidence, and the fact that the company did not respond properly to the plaintiff's complaints, the Massachusetts jury awarded the plaintiff $634,000 ($102,000 in back

[11] Stephen Rodolakis, Chapter 7 Trustee for Janice Daigle v. University of Mass. & Michael Rudomin, No. 91-2114A (Worcester Super. Ct.).

pay, $372,000 in front pay, $52,000 for emotional distress, $108,000 in punitive damages, plus interest).[12]

(3) A female employee brought a claim for hostile environment sexual harassment against her employer. She testified that a co-worker began harassing her soon after she began her employment, making lewd comments, propositioning her for sex, and telling her that she could make a lot of money as a stripper. This co-worker also approached her in a walk-in cooler at work and placed his hands on her breasts and buttocks. Complainant reported this incident to the management. The MCAD ultimately found in favor of the complainant, concluding that the employer did not undertake a fair, adequate or thorough investigation of the employee's complaint. As a result the MCAD ordered that the employer pay the complainant $50,000 in damages for emotional distress plus interest, arrange comprehensive sexual harassment training, prepare a written policy against sexual harassment, and reorganize its investigation procedure.[13]

(4) An employee brought a claim against her employer for quid pro quo harassment. Her claim was based on an encounter with her supervisor after she mistakenly failed to sign a memo. Plaintiff's supervisor said he would "forget all about" the problem if she would "go out" with him. The court ruled against the employer's motion for summary judgment and sent the claim to the jury, concluding that a jury could find that this encounter amounted to quid pro quo sexual harassment.[14]

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[12] Belanger v. Saint-Gobain Indus. Ceramics, Inc.., No. 95-1767B, 9 Mass. L. Rep. 585, 1999 Mass. Super. LEXIS 72, at *1, n.1 (Mass. Sup. Ct. Feb. 24, 1999).
[13] Eng v. American Pie, Inc., 93-BEM-2391 (1998).
[14] Richards v. Walter Fernald State School, 12 Mass. L. Rep. 180, 2000 Mass. Super. LEXIS 355, 2000 WL 1473024 at *3 (Mass. Super. Ct. July 31, 2000).

G. Zero Tolerance

Employers must have zero tolerance for sexual harassment. Zero tolerance means that an employer must:

- Thoroughly educate all employees about policies and procedures.
- Pay attention.
- Respond to all complaints.
- Take prompt, effective action to correct sexually harassing behavior.

As part of the employer's duty to prevent sexual harassment, the employer must have an effective sexual harassment prevention policy. As a general rule, the more efforts that are taken to educate and inform about the policy on sexual harassment, the more chance that the employer could be absolved of liability for harassment. The policy should contain an explicit and genuine commitment to a harassment-free workplace. All supervisors and employees must be regularly reminded of the policy and reporting procedure. At minimum, the written policy must be distributed to all employees on an annual basis and to all new employees and it must be posted in appropriate locations in the workplace (employee lunch rooms, teacher lounges, etc.). Employers should consider hosting workshops or providing in-service programs on sexual harassment on an annual basis.

As the "eyes and ears" of the institution, supervisors and teachers must be on the lookout for harassment. Don't assume that sexual harassment is not taking place just because you don't know about it – employees must be encouraged to come forward with information. Research shows that victims of sexual harassment do not freely report sexual harassment, nor are they encouraged to do so. Institutions must have policies that encourage employees to report harassment, without fear of reprisal. The procedure for

reporting harassment should provide a choice of people to talk to. Further, the procedure must assure confidentiality to the extent possible, as well as assure non-retaliation.

When a complaint is lodged, a prompt and fair investigation procedure is required. This means that you must be prepared to make the investigation an immediate priority. You will need to make appropriate communication with the complainant and the alleged harasser, while maintaining confidentiality to the extent practicable. The complainant must receive feedback regarding the results of the investigation. "Zero tolerance," however, does ***not*** mean that the employer must take immediate punitive action against the accused. Doing so could make matters worse if the allegations turn out to be false or exaggerated. Employers should take interim non-punitive measures to separate the complainant and alleged harasser and stop the offending conduct while a prompt and thorough investigation is undertaken.

Finally, as part of the "zero tolerance" for sexual harassment, employers must be prepared to take appropriate corrective action to eliminate harassing behavior and remedy any harm to the complainant that has resulted from the misconduct.

An employer facing a sexual harassment lawsuit has a lot to lose. Therefore, an institution's best solution is prevention, coupled with a user-friendly complaint procedure, prompt and thorough investigation and appropriate corrective action when a potential sexual harassment claim does arise.

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