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# Sexual Harassment: A Long-Dormant Demon

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# Sexual Harassment: A Long-Dormant Demon

## **Abstract**

Because of its service nature, the hospitality industry is especially prone to cases of sexual harassment in the workplace, particularly from female employees. The author discusses Title VII of the Civil Rights Act of 1964 and the legal and moral implications of its guidelines for the industry.

## **Keywords**

Professor Elio Belucci, Sexual harassment, Title VII of the Civil Rights Act of 1964, Equal Employment Opportunity Commission in 1972, EEOC, Heelan v. Johns Mansville case, FIU

# **Sexual Harassment: A Long-Dormant Demon**

by  
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*Because of its service nature, the hospitality industry is especially prone to cases of sexual harassment in the workplace, particularly from female employees. The author discusses Title VII of the Civil Rights Act of 1964 and the legal and moral implications of its guidelines for the industry.*

If you were turned on to these words in the mistaken belief that this article held promises of sexual adventures *a la Hustler*, feel free to go on to the next article. The scene which will be portrayed consists, instead, of a series of patterns which when assembled should result in a tremendous sense of concern rather than in an entertaining kaleidoscope of color.

In the hospitality industry, the potential for sexual harassment claims on any one property is tremendous. Managers must therefore prepare themselves and their properties to deal with the "demon."

Congress sharpened the fangs and claws of the demon by the passage of Title VII of the Civil Rights Act of 1964 and set them in motion through the creation of the Equal Employment Opportunity Commission in 1972. The legislatures of at least 46 states have honed them to a keener degree of sharpness by the enactment of legislation attacking such practices on a state level as well. In addition to knowing the prohibitions of Title VII, all managers are admonished to acquaint themselves with any state or municipal laws addressing the problem in the locale in which their property is located.

Perhaps the best way to approach the problem is to examine the laws controlling such activity, as well as look at the sort of conduct which gives rise to claims.

An important fact to realize is that although sexual harassment is usually thought of as being addressed to female victims, men are just as susceptible to such conduct and can just as readily file a claim. For example, in July of 1982, a United States district court jury in Madison, Wisconsin, ordered a woman to pay \$114,600 in

damages to a male subordinate whom she caused to be demoted after he had refused her sexual advances. The jury assessed her \$90,000 in compensatory damages and \$24,600 in punitive damages. This was not all. The jury also assessed damages in the amount of \$81,900 against the female defendant's boss for his "callous indifference" to what the woman did to her subordinate. His damages were assessed at \$45,000 compensatory and \$36,900 punitive. The total paid to the sexually harassed male victim was \$196,500. Even though this article will deal primarily with women victims, sexual harassment is a double-edged sword as the numbers of women assuming managerial positions in the industry increase; managers must be alert to the problem, regardless of the sex of the aggressor or victim.

### **Women Are Traditional Victims**

Women have traditionally been the principal victims of sexual harassment, and until recently they have been reluctant to press any claims against their harassers. This reluctance has been the by-product of many fears which heretofore were not necessarily without foundation. A woman feared that, should she complain that a man, especially a superior, was sexually harassing her, she would be regarded as a troublemaker or as the one who encouraged the man. She was also afraid of retribution either from the individual himself or from a friend of his in a supervisory position.

The Equal Employment Opportunity Commission (EEOC) defines sexual harassment as follows: "Unwelcome sexual advances, requests for sexual favors, and other verbal or physical conduct of a sexual nature." Such activity becomes actionable when it adversely affects an individual's employment status, i.e., terms and conditions of employment.

Perhaps one of the most unusual acts of sexual harassment recorded to date involved an employer in Massachusetts who enjoyed poking his short-skirted waitresses in indelicate spots with the tip of his crutch, and laughing. The Massachusetts Commission Against Discrimination, however, failed to see any humor in this type of activity; the court deplored this type of conduct and found that the employer's dress code requiring female employees to wear very short skirts was sexual harassment. One lady was awarded \$10,538 and another, \$8,030.

Almost universally directed toward women, the practice of sexual harassment has been attributed to many things, ranging from a continuance of the slowly-dying double standard system to the recognition that the labor force has been traditionally male-dominated and male-supervised. Studies have indicated that those most susceptible to sexual harassment are usually on the lower strata of the employability pool and have the greatest economic need. The Atlanta Community Relations Commission and the U.S.

Labor Department in a combined report concluded that those most vulnerable to sexual harassment were recently divorced women who had few, if any, job skills and had children to support.

### **Harassment Is Similar to Rape**

Studies have shown that when a man sexually harasses a woman, the act is comparable to the commission of rape or sexual assault. The rationale in both cases is the assertion of power and the desire to inflict humiliation and degradation on the victim. A woman who, threatened by the loss of the support needed for herself and her dependents, submits to the demands of her supervisor has been raped just as surely as the woman whose body is violated as the result of being beaten into submission. In neither case is the sexual act truly voluntary. The day may be coming when an indictment charging rape will indeed be returned against a man who compels a female employee to submit to him under threat of such economic retaliation as job transfer, job loss, unbearable working conditions, etc. Nonviolent intimidation can be just as powerful a force as its violent counterpart, if economic survival is involved.

Reports of the emotional and physical reactions of sexually-harassed women have been found to be similar to those of a woman who has been raped. Many felt that they could not tell their boyfriends or husbands about it, and that they must have contributed in some way to the harassment; they therefore started to present themselves as less feminine to discourage such advances. They stopped using makeup and wore clothing calculated to hide all femininity. The stress and pressures created by the condition often put them on the verge of nervous breakdowns. Many began to develop imagined or psychosomatic ailments, such as fainting spells, backaches, chronic fatigue, loss of strength, depression, and symptoms of depression, including sleeplessness, lack of motivation, nervousness, and memory loss. As in the instance of an actual rape, they felt used and degraded, and suffered a loss of self esteem. Effects were extreme and, in many instances, long-lasting, and only alleviated by psychiatric treatment.

Not until the mid-70s were studies done which demonstrated the extent to which sexual harassment was imposed upon working women in the United States. In 1976, *Redbook* magazine conducted an extensive inquiry about sexual harassment among its readers; the results were rather startling. Some 9000 readers responded. The majority were in the age group 20 to the early 30s, earning \$5,000 to \$10,000 per year doing what might be categorized as "white collar" jobs. A staggering 902 of those responding said that they had been subjected to unsolicited and unwanted sexual conduct while on the job. The conduct ranged from suggestive looks or leers to verbal remarks concerning sex to outright requests for sexual activity with either the implied or actual threat of retaliatory

measures in the event of non-compliance with the request.

The *Redbook* survey results were in no way unique as examinations of other survey results were compared. In 1975, just before the *Redbook* survey, a survey was conducted among the men and women employees of the United Nations in New York City. A total of 875 responses were received from both men and women; they revealed at least 50 percent of the women and 31 percent of the men had either been personally subjected to sexual harassment of one form or another or had witnessed someone else being subjected to it. In all instances, the sexual harassment was being imposed by supervisors in positions of authority. A breakdown of the occasions in which the harassment was inflicted revealed the following information: 62 percent of the women who reported experiencing sexual harassment said that it occurred relative to promotions; 13 percent said during recruitment for the position; 11 percent in obtaining permanent contracts; 7 percent when requesting transfers; and 7 percent when seeking to go on a mission.

The October 1, 1979, issue of *Business Week* contained an article dealing with the sexual harassment problem. It reported the results of a survey conducted by the Working Women's Institute of 155 working women from 19 to 61 years of age who were employed in two cities in northern New York. Seventy percent reported that they had been sexually harassed at some time during their careers; 75 percent of those who reported being harassed stated that the action continued even after they ignored it. Eighteen percent said that they reported the activity to their companies and half of them said that absolutely nothing was done about it; one third of those reporting harassment with no favorable results had been retaliated against for complaining by being assigned unpleasant jobs. The article went on to demonstrate that sexual harassment was not limited in its practice to employment in the private sector, but it was well entrenched in public employment as well.

### **Harassment Is Abuse of Power**

Sexual harassment translates itself into something other than sex—into an abuse of power. This is a continuation of the subservient position that women have been relegated to in the work force. Men were the ones in power, the bosses, supervisors, and owners. They could determine who would work and who would get the more difficult jobs; they could determine who would be promoted and who would not. By reason of their position of power, they demanded the bodies of their subordinates as a symbol of power and authority, much in the manner of a feudal lord over his serfs. Women subjected to this treatment had to suffer silently the psychic and psychological guilt and physical injuries resulting from this trauma of harassment; in many instances, when they reached the point where they were unable to cope with the problem, they left their employment

emotionally scarred and depressed. Once again they had been subjected to social and economic injustices because they were women. Those who were compelled by economic necessity to work had to succumb to the harassment and bear the physical and emotional pain incidental to forced compliance.

Sixty-four percent of those United Nations employees surveyed stated that they didn't report their occasions of sexual harassment. One obvious reason was summed up in a written comment: "To whom could I protest? It was my boss who put me in that situation in the first place." Most women realized that it really did not pay to complain because it ultimately would result in a one-to-one confrontation as to credibility, and the man would be believed. She would be labeled as a troublemaker and, in the final analysis, end up the loser.

As far as relief outside the company was concerned, initially only the tort law of the state was available. However, state courts were reluctant to find any liability on the part of the employer for any acts of its employees, especially if they were of the intimate type. Most courts had adopted the view that the amorous pursuits of a man, whether a supervisor or fellow employee, were private matters and did not concern or involve the employer. They reasoned that in no way could the employee's sexual urges be categorized as being expended in the furtherance of the employer's interests and thereby make the employer liable under any theories of *respondent superior*. Therefore, the victim was left with a cause of action solely against her tormentor.

The causes of action which would be available to the victim would have to conform with the requirements of the state where the employee worked and where the act constituting sexual harassment took place. The most obvious would be (1) "assault," which is generally defined as the putting of a person in fear of physical injury; (2) "battery," which would be the infliction of an unwanted touching, no matter how slight; (3) "assault and battery," where both of the above have been committed; and (4) recovery for intentionally inflicted emotional distress.

The possibilities of recovery for emotional distress are dictated by what each state may require in the nature of elements which must be proved in order to constitute an actionable tort. Some states say that there cannot be any recovery for intentionally inflicted emotional distress unless there is some form of an impact inflicted from "without," in addition to the mental suffering. Still others say that the requirement of "impact" is met if there has been some sort of a psychological symptom resulting from the infliction of the emotional distress. The balance of the states say that inasmuch as certain types of conduct can bring about emotional distress, there will be liability imposed upon any actor who elects to engage in such conduct.

### **Lawsuits Cost Money**

Admittedly these courses of action may have been open to a victim of sexual harassment, but lawsuits cost money and lawyers and court costs must be paid. Assuming that the victim could get an attorney to work on a contingency fee basis, she would still have to put up the court costs. Most of the victims are in the lower economic strata, with few spare dollars for court costs. Furthermore, it is a commonly known fact that court dockets throughout the country are congested; it may be months or years before a case will get to be heard, and beyond that it can be appealed. Even when a tort action is brought in a state court, the plaintiff could conceivably recover "punitive damages." If the judgment is collectible, the lawyer's fee will be one-third to one-half the gross amount recovered. Therefore, by the time the witness fees and court costs are paid, the plaintiff will have recovered virtually nothing. With only a small cash recovery, win or lose, the victim would still be the loser.

### **Title VII Provides Hope**

With the passage of Title VII of the Civil Rights Act of 1964, legal visionaries saw the foundation for the release from oppression of those upon whose backs the yoke of sexual harassment had been forced for many years. Their expectations were further enhanced by the creation of the Equal Employment Opportunity Commission in 1972 to be the enforcement arm of the government in its efforts to guarantee the promises of Title VII to the working people of the country.

Section 703 of Title VII of the Act specifically provides it shall be an unlawful employment practice for an employer (1) "to fail or refuse to hire or to discharge any individual, or otherwise to discriminate against any individual with respect to his compensation, terms, conditions, or privileges of employment, because of such individual's...sex." or (2) "to limit, segregate or classify his employees or applicants for employment in any way which would deprive any individual of employment opportunities or otherwise adversely affect his status as an employee, because of such individual's ...sex." An injured party now had the EEOC to turn to for assistance in seeking relief.

It appeared as if Title VII and "sexual harassment" claims were made for each other. The Act removed many of the objections to proceeding in state courts. Under the Act the courts could order the employer to reinstate the employee with back pay. It could also provide for attorney's fees; therefore, the recovery would inure completely to the victim's benefit. Equally, if not more important, is the fact that the employer could not retaliate against the victim for having brought the action, a protection which was not in existence in the absence of specific legislation, if state court suits



were to be pursued. Section 704 of Title VII specifically states: "It shall be an unlawful employment practice for an employer to discriminate against any of his employees...because (the employee) has opposed any practice made an unlawful employment practice by this Title, or because (the employee) has made a charge, testified, assisted or participated in any manner in an investigation, proceeding or hearing under this Title." But the benefits of Title VII were still to be denied to the sexually abused woman for a little while longer.

Title VII prohibited sex discrimination. The courts, fearing a rash of sexual harassment cases, tried to avoid finding that sexual harassment was a form of sex discrimination. Consequently, the first cases brought into court alleging that sexual harassment constituted sex discrimination under Title VII were unsuccessful. The courts just refused to accept this proposition. They reacted by saying that such sexual harassment was not based upon sex alone, but was based on gender, plus having sexual relations, and therefore was not within the purview of the Act. This became known as the "sex-plus" theory. The court said that the only discriminatory conduct violative of the provisions of Title VII was that based upon gender alone.

The court also indicated that since similar demands could have been made upon a man by a male employer who was bi-sexual, then it cannot be said that sexual harassment is a form of discrimination since the demands could be equally made against both sexes. The thinking then started to swing away from this narrow interpretation to a more realistic one. If it was felt that even though a woman might be able to sexually harass a man, the truth of the matter was that it was the woman who was almost universally subjected to this indecency. Why then should her ability to impose such harassment on a man lessen or minimize the violation of her civil rights when she is subjected to sexual harassment? The courts found that they could no longer find a legitimate excuse for not finding sex discrimination violations of Title VII in instances of sexual harassment; however, they started to deny recovery for failure on the part of the victim for other non-statutorily imposed conditions.

### **Courts Begin To Award Damages**

Eventually, though, the courts not only started to find violations of Title VII, but also began to award damages. As of yet the United States Supreme Court has not ruled on the question, but, by far, the majority of inferior federal courts are now on the victim's side.

In the *Heelan v. Johns Mansville* case (1978), the court stated that once the plaintiff has established a *prima facie* case, it becomes the defendant's obligation to rebut it by affirmatively establishing the absence of discrimination by the clear weight of the evidence. If the defendant alleges that the plaintiff's termination was for

reasons of poor performance, the former must establish this also by a clear weight of the evidence.

After the court had awarded the plaintiff judgment that she had been discriminated against and ordered the defendant to pay her back pay and reinstate her, the plaintiff made an out-of-court settlement with the defendant for a reported \$100,000. It appears that there had been an adjudication of actionable sexual harassment under Title VII. The way had now been paved for a successful suit in a state court for the damages, other than loss of pay, which the plaintiff suffered. Once having received back pay and reinstatement, the plaintiff is almost guaranteed a recovery in state courts for assault, and, in those jurisdictions where it is allowed, damages for "emotional distress," with the possibility of recovering substantial punitive damages as well.

The general feeling is that punitive damages would not be recoverable under Title VII. With this new thinking of the federal courts, there has been increased success in the state courts. Most states have a two or three-year statute of limitations covering torts which could have been committed by a defendant who subjects someone to sexual harassment, whereas the time for filing a complaint under Title VII is within 180 days from the date of the last discriminatory act alleged to have been perpetrated by the defendant. Under this setup, it is often possible to get a decision from at least the lower federal court on a Title VII case before the time expires for bringing an action in the state courts. A favorable finding for the plaintiff would substantially increase her chances of getting a favorable out-of-court settlement of the causes of action available under the state court remedies.

Although most cases require that the person alleging sexual harassment must report the same to upper management so that they may deal with the problem, there isn't any requirement that the sexually harassed employee exhaust company or union grievance procedures prior to filing a complaint for Title VII violations. However, if there are some viable state procedures available to the party alleging sexual harassment amounting to discrimination because of sex, then the Act does require the plaintiff to exhaust state administrative procedures before proceeding under Title VII. The reason the term "viable" is used is because the courts have held that if there is a state administrative procedure provided for in the state where the alleged acts took place, and the complainant failed to file a complaint with them in a timely manner prior to the expiration of the time within which a complaint could be filed, it would not be necessary for her to file with the state administrative agency because it would be unable to act on it. Therefore, the failure to file a futile complaint would not bar the victim from the protection of Article VII as long as the complaint was filed within the 180 days allowed.

Some of the first cases brought under Title VII dealt with the question of whether or not the sexual harassment inflicted upon a female employee by a supervisor could be considered to be the acts of the "employer" as required to be in violation of the Act. One of the first cases said that although they found acts of sexual harassment by a supervisor, these were not the acts of the employer, and therefore there wasn't any violation of the law. That is how the concept that the employer, or at least someone in a position of higher authority than the offending supervisor, must have had knowledge of the acts of harassment and have done nothing about it in order to turn the acts of the supervisor into acts of the employer in invoking the protection of Title VII.

As the result of cases decided after the Heelan case and guidelines promulgated by the Equal Employment Opportunity Commission, it is no longer required that any of the supervisor's superiors have knowledge of the acts of harassment. Under the amended guidelines adopted by EEOC on September 23, 1980, and published in the Federal Register November 10, 1980, the exposure of the employer has been substantially enlarged. The U.S. Supreme Court has ruled that although the guidelines are not law, they do have the effect of law until the courts rule otherwise. It would therefore be advisable for employers to come into conformity with their requirements in order to avoid costly litigation and damages.

### **Employers Liable for Supervisors**

The guidelines make employers liable for acts of supervisors amounting to sexual harassment, regardless of whether or not the employer knew or should have known about it. They also seek to hold an employer liable for acts of sexual harassment committed by non-supervisory employees and co-workers, if the employer knew or should have known about them and did not do anything to stop them. The guidelines go even further by saying that the employer could also be held responsible for acts of non-employees who commit acts of sexual harassment upon employees in the workplace, "where the employer (or his agents or supervisory employees) knows or should have known of the conduct and fails to take immediate and appropriate corrective action." They further state that harassing conduct may be "verbal" and not necessarily physical in nature, and recognize what may be termed "discrimination by indirect sexual harassment." In the latter circumstance, the rewards showered upon the willing sexual partner will constitute sexual harassment of the party who was denied the employment opportunity or benefit.

The guidelines do, except in cases of sexual harassment by supervisors, provide for protection of the employer from being found in violation of Title VII if the employer takes "immediate and appropriate action" to investigate and correct the problem.

The guidelines further stress sexual harassment and urge employers to adopt affirmative policies providing for the reporting of incidents, the protection of the complaining party, and the disciplining of violators. It is certain that if companies implement procedures for the expeditious and confidential handling of complaints of sexual harassment, the occasions of finding violations of Title VII will be eliminated or at least substantially reduced.

What has emerged from the cases and guidelines seems to be heading toward the conclusion that an employer has an implied contractual duty, as an incident of his contract of employment with his employees, to provide them with a work environment free from sexual harassment. If, in fact, such a contractual obligation is implied in the hiring procedure, then it appears that the employee might even have a state cause of action against the employer for breach of contract if, in fact, the employee is subjected to on-the-job sexual harassment.

Some states have been permitting those who suffer disabling symptoms and effects of sexual harassment to receive the benefits of workmen's compensation; the disability is held to arise out of and within the scope of their employment. Similarly, women who have left their positions as the result of sexual harassment have been held not to have voluntarily terminated their employment conditions. Under the former interpretation of "voluntary termination," they would be denied unemployment compensation benefits, whereas, under the latter, they would be entitled to them because they were "constructively discharged."

Any attempts to predict where the law with regard to on-the-job sexual harassment is going would be pure conjecture. The only thing that can be certain is that it is a problem which is going to require immediate and thorough action on the part of employers because the legal protection afforded its victims is here to stay. Not only have the ramifications of Title VII been expanded through the courts and the EEOC, but remedies available in the state courts are starting to result in very high damage awards and fines. For example, in *Clark v. World Airways*, No. 77-0771, D.D.C. 1980, there were \$2500 in compensatory damages and \$50,000 in punitive damages. A Michigan court fined a Ford Motor Company foreman \$140,000 in November 1980 because he allegedly promised a female worker easier tasks in exchange for sex. When the Ford Company's motion for a new trial was denied, they indicated that they would not appeal; the total amount of damages, including interest, was \$187,023.

### **Some States Have Laws**

Some states have enacted laws governing the practice of sexual harassment in the workplace. For example, the California FEHC recently issued regulations covering sexual harassment, the

definition of which includes, but is not limited to, (1) verbal harassment, such as epithets, derogatory comments, or slurs; (2) physical harassment, such as assault, impending, or blocking movement, or any physical interference with normal work or movement; (3) visual forms of harassment, such as derogatory posters, cartoons, or drawings; or (4) sexual favors, such as unwanted sexual advances that condition an employment benefit upon an exchange of favors. One other important factor about the FEHC regulations is that, unlike Title VII which does not permit the recovery of punitive damages, they specifically provide that punitive damages are recoverable if the violation of the regulations is found to be particularly deliberate, egregious, or inexcusable.

On a federal level, the Reagan Administration has committed itself to some form of restrictive action on the EEOC guidelines which many business people have complained are too vague and unfair and will cost industry and commerce uncalculable millions. In April of 1981, J. Clay Smity, Jr., chairman of the EEOC, appeared before the Senate Labor Committee, which was investigating whether or not the guidelines were workable and whether the EEOC had acted beyond the scope of its authority in promulgating them. He stated that since the adoption of the guidelines, 130 cases had been sent to the Washington office; of these, 58 cases involved women who were subjected to unwanted and unwelcomed physical contact of a sexual nature, and the others involved demands made to engage in sex, some for promotions or pay raises. Despite the Reagan Administration's position, the EEOC is pressing on in its efforts to give all victims of Title VII violations a ready access to its services. An article in the August 2, 1983, issue of the *Wall Street Journal* reported that the EEOC had announced that commencing August 1, 1983, it would launch an "expanded presence" program by going out on the road and speaking to groups about their Title VII protections, encouraging them to utilize their services. They will even be accepting complaints filed with local post offices in areas where there are no EEOC offices. This determination to ferret out violations will result in a large increase in the number of complaints that they will receive.

### **Industry Takes Action**

Hundreds of corporations, colleges, hospitals, unions, and government agencies are implementing anti-sexual harassment policies, complete with a strong position statement from management prohibiting such harassment and providing plans for reporting such incidents, and a grievance procedure allowing a rapid and equitable resolution of the problem. The plans also demonstrate the strong sanctions which will be imposed upon the violators. An educational process is in order so that there can never be any inference that the employer in any way tolerated or condoned

conduct which could be defined as being sexually harassing. For example, General Motors Company issued its anti-sexual harassment policy in June 1980, two months after the temporary adoption of the predecessors of the present guidelines, and five months before their final adoption. Shortly thereafter, they followed up with a supervisors' training program. General Electric, Bank of America, Ashland Oil, Inc., IBM, Continental Group, Inc., General Telephone & Electronics Corp., the cities of Philadelphia, Los Angeles and New York, and innumerable state and federal agencies have all initiated programs similar to that of General Motors.

The new guidelines state the "employer has an affirmative duty to maintain a workplace free of sexual harassment and intimidation." Those engaged in the hospitality industry are perhaps more vulnerable than most other industries because of the nature of their business. It is important that hotels and restaurants immediately implement policies similar to those described in the National Labor Relations Board Administrative Policy Circular, APC 80-2, 1980. The restaurateur must be on the alert for a maitre d' who expects sexual favors from waitresses he supervises in return for assignment of the best tables, the most profitable hours on the best days, etc. He must be cautious with the uniforms he requires his waitresses to wear; if they are too revealing and suggestive and subject the girls to the abuses and sexual advances of the customers, the company could be flirting with a Title VII complaint. A waitress required to wear a "sexy" uniform by her employer described her experiences: "I cringe every time I recall that red ruffled minidress uniform that I was required to wear to waitress in the cocktail lounges in Detroit's Metropolitan Airport. When hired, new waitresses were warned that they'd be fired on the spot if they were caught pinning (the neckline) closed. The finishing touches—sheer nylons and bright red two-inch-high heels—further cheapened the image."

Men had made so many passes at her and so many degrading comments to her that she came to regard each customer as a potential enemy. She said one day she realized how the abuses she had over the years had deeply affected her and the other waitresses. She said, "The humiliation had become a way of life; we were no longer shocked when customers placed open pornographic magazines on the table and grinned at us, hoping for a response. We began to fear the touching and the grabbing all of the time. We had almost forgotten that we were entitled to respect." The lady was put in touch with a women's group which brought a class action suit alleging sexual harassment under Title VII on behalf of the woman and her 31 sister airport waitresses.

In July 1983, a federal court sitting in Massachusetts held that a Holiday Inn which required its waitresses to wear "hot pants" while waiting on customers was guilty of sexual harassment in

violation of the dictates of Title VII. The judge ordered that the Inn must hire back an employee who quit rather than wear this outfit, as well as an employee who had been fired for refusing to wear it. Hoteliers and restaurateurs must make a conscious effort to educate themselves as to possible areas of harassment so they can take positive steps to protect the employees and themselves.

The potential for sexual harassment in the hotel business is high since staffs are traditionally permeated with women in the most vulnerable classification, low paid, unskilled, easily replaceable job holders who are thrown into an environment which could make them easily exploitable. The combination of the following factors may provide more than temptation for both employees and supervisors: (1) the availability and abundance of low paid, easily replaceable, unskilled women, (2) a pseudo-bedroom environment, and (3) ample time to engage in secret affairs. In addition to these circumstances, consideration must be given to the amorous nature of some guests and non-employees, such as those who provide services or deliver goods and supplies to the hotel.

The new EEOC guidelines impose upon the employer the duty to provide the employee with a workplace free of sexual harassment and intimidation, and the guidelines are unequivocal in stating that this means from any source, not just supervisors and fellow employees. In view of this, the burden is upon the employer to provide that setting or at least be able to convince the EEOC or a court that he did everything reasonably possible to produce such an environment. It is unreasonable for any law or court to require a hotelier to be responsible for every incident of harassment which may arise, especially those involving non-employees; the guidelines and case decisions recognize this. The test has become what the manager or employer has done to eliminate effectively as much as possible of this type of intolerable conduct, and if he did all that reasonably could have been expected of him. This will in a great degree determine future liability in all but supervisory employee cases.

In the latter category, the guidelines and cases seem to indicate that for the purposes of sexual harassment, the acts of the supervisor will be deemed to be the acts of the employer. However, even in those cases, an examination of the hotel's policy with regard to sexual harassment will have a bearing upon the penalties and damages which may be imposed upon the employer for the violation. Another important area that could affect the damages would be what the employer did about it once it came to light. It might reasonably be argued that the failure to impose some sanctions upon the supervisor is tantamount to an acceptance of his actions.

#### **Policy Must Be Developed**

As to individuals other than supervisory employees and non-employees, a firm policy including sanctions imposed upon any

offenders must be developed and circulated. Also included should be a procedure to be followed in making a complaint, a guarantee that there will not be any retaliation against the employee or her witnesses as the result of making the complaint, and an assurance that if charges are borne out, positive disciplinary procedures will be carried out against the offender, regardless of his position in the company or relationship to the employer. One of the most fundamental requisites in the implementation of a program to carry out a policy seeking to end sexual harassment is some form of an educational program to inform all employees about the topic in terms of everyday conduct. Those who have the potential of becoming the sexual harassers should be informed that the crude sex jokes, cartoons, and pictures that are acceptable for the men's locker room at the gym may be very upsetting to the emotional stability of a female co-worker. The program should not be aimed at ruling out all social interplay between male and female employees, but it should be geared to rule out all acts and conduct traditionally reserved for people who enjoy a much closer and more personal relationship than punching in on the same time clock.

The discipline imposed for a violation should be somewhat commensurate with the seriousness of the activity constituting the harassment. The investigative procedure should be thorough, fair, and impersonal, with the only objective being to arrive at the truth. The complaint procedure should not be allowed to become an instrumentality of harassment for an employee using it as a medium to try to settle an unrelated score with a fellow employee.

#### **Title VII Enforcement Sought**

When employees want to file charges of sexual harassment against employers, they must follow a certain prescribed procedure; should they fail to do so, the complaints could be held up or dismissed. While obviously an employer does not want to encourage employees to call in the EEOC, there should not be any intimidating action to stop them.

In all instances, the state or municipality wherein the alleged acts of sexual harassment took place has some form of legislation dealing with discrimination based on sex. The initial complaint must be filed with the local agency first. The filing must be made within the time period mandated by the state statute or local ordinance. Failure to file in a timely manner will result in a dismissal of the charge. If the employee is not certain whether or not there is a local discrimination agency, he or she should call the area EEOC office.

It is possible to file the original complaint through the mail, but in most instances the victims will personally present themselves at the appropriate office and fill out the necessary forms under the guidance of an agency employee. In the event that there isn't a local or state agency before which to initiate the proceedings, the initial



complaint can be filed directly with the EEOC. The employee must, under these circumstances, file the complaint within 180 days of the date that the conduct took place.

Once a charge has been filed, the employee can file a complaint with the EEOC within 300 days from the date of the commission of conduct or within 30 days after the local agency has determined the proceedings before it, whichever comes later. The EEOC then can do one of two things: (1) communicate with the local agency and agree with it that it will not take jurisdiction over the matter for another 60 days or (2) take jurisdiction over the matter immediately.

Once an employee has notified the EEOC he or she wishes to file a charge, the EEOC will have one of its officers interview the employee and gather as much information about the complaint as possible. This interview could be by telephone or in person. If the latter course is followed, the employee is entitled to have an attorney present. The interviewing officer will assess the complexities of the case and the evidentiary problems presented. However, even if the interviewer feels the case is weak and beset with problems, the employee still has the right to file the charge on a form provided by the EEOC. The charge does not have to be filed by the employee involved; another person or agency can file on behalf of the employee. For that matter, the EEOC itself can initiate the complaint.

Within 10 days after the filing of the charge, the EEOC will give the employer notice that a charge has been filed. The notice usually will not identify the employee filing the complaint. The notification will contain information informing the employer of the date or dates of the complaint of conduct, where it took place, and the circumstances surrounding the incident. The commission then assigns a fact finder to investigate the matter in order to gather facts for a probable cause hearing. This individual will go to the place of employment, meet with the employer or an employer's representative, get the employer's position, and interview witnesses to determine what they have to contribute and whether they will appear at the hearing in person or submit affidavits. If it is the latter, the fact-finder will secure the affidavits as well as assemble any other documentation which will be needed and solicit additional information needed from either the complainant or the employer.

After all the information is collected and the witnesses or their affidavits are assembled, the EEOC officials will hold a "probable cause" hearing to find out whether or not there is a sufficient basis for believing that the charges might be true. At this hearing, representatives of the EEOC try to work out a resolution of the problem and some sort of settlement between the complainant and the employer. From the moment that the EEOC becomes involved in the complaint, the agency tries to work out a settlement between the parties. The commission permits the parties to have their

attorneys or representatives present, but they cannot examine witnesses or address the hearing officers.

If at the hearing the EEOC finds that there is no probable cause to believe the charge, the complaint will be dismissed and the parties will be so notified. If, however, probable cause is found, the EEOC will continue its investigation and make all efforts to get the employer to eliminate the problem on a voluntary basis. The efforts at settlement will continue.

If at any time prior to, during, or after the probable cause hearing the matter is settled, the incident can come to an end with the signing of the settlement agreement which is binding upon all parties and subject to being specifically enforced in the appropriate federal court. The agreement will usually contain a clause whereby all rights to court proceedings, except those relating to specific performance, will be waived.

If there is a finding of probable cause and the EEOC is unable to settle the matter with the employer, the EEOC may, if it so elects, bring a civil suit against the employer in the federal district court for the district where the alleged complaint of conduct took place. Usually, however, the EEOC will defer its right to bring suit and leave it to the complaining party to proceed in the court.

### **Right to Sue Letter Needed**

Before the employee can start a suit in the federal district court, he or she must get a "right to sue letter" from the EEOC. The employer has a right to demand such a letter from the EEOC if the EEOC has not settled the matter or started a civil suit within 180 days from the date of the filing of the charge with the commission. Also, even if the EEOC has dismissed the charge, the employee may demand a "right to sue letter" within 180 days from the date of the dismissal of the charge. In either instance, the EEOC must issue the letter. The right of the employee to demand and receive such a letter, even if the EEOC had dismissed the complaint, is the equivalent of affording the individual the right of appeal from an adverse finding by the commission. In effect, this guarantees the employee the right to judicial review of the commission rulings or findings. Once the "right to sue letter" has been issued to the employee, he or she must file suit in the appropriate federal district court within 90 days.

All of these time requirements must be strictly adhered to. No action can be brought before the requisite time has lapsed and no actions may be brought after the specified time period has passed.

Although these procedures have been addressed to a charge of violation of Title VII as the result of sexual harassment, the same procedures would be followed in the filing of charges alleging a violation of any conduct prohibited by Title VII.

### **Victims Have Other Remedies**

All employers and managers should be aware of the fact that filing a complaint with the EEOC is not the only possible remedy available to an employee who has been subjected to actionable sexual harassment. For example, if a hotel has a contract with the federal government to house members of the military or other government employees and the property permits, or fails to adequately take steps to eliminate, acts of sexual harassment, then the government must cancel its contract with the hotel. This action is mandated by Executive Order 11246, as amended, which prohibits sex discrimination in the workplace of any employer having federal contracts. There is a procedure for filing a complaint with the Office of Federal Contract Compliance Programs, a division of the U.S. Department of Labor. The right to file this complaint does not preempt the employee's right to file a complaint with the EEOC, get a right to sue ruling, and proceed into the courts; both are mutual remedies, and an employee can take advantage of the right contained in each remedy.

Also, of course, virtually every state has some sort of legislation which prohibits discriminatory actions by employers against their employees. These legislative acts created agencies with names similar to human rights commissions or anti-discrimination commissions; their purpose is to eliminate all illegal discrimination generally included in the workplace.

There is a prohibition against employees filing complaints with the EEOC until after they have exhausted all state procedures before the state commissions dealing with discrimination. It also has been held that the findings of the state commission can make the matter *res adjudicata* before the EEOC, meaning that if the state commission rules against a complaining employee, the employee cannot then go before the EEOC with the same set of facts. The EEOC will take the position that the finding of facts by the state commission is final and binding upon it so that it cannot entertain the same case again.

However, there is case law to the effect that if an employee's right to proceed before a state commission is barred by the passage of too much time from the date of the occurrence to the date of the attempted filing of the complaint so that the employee cannot exhaust his remedies before the state commission, he is not necessarily barred from EEOC proceedings as long as the time period within which a claim must be filed with the EEOC has not expired.

### **Unemployment Compensation Is Possible**

An employee who terminates his or her employment because of sexual harassment could look into the possibility of collecting unemployment compensation. Some states do permit such payments

in sexual harassment cases. There is a concerted movement underway to get federal legislation to permit this remedy in all states. Although, as a general rule, an employee who voluntarily terminates his or her employment is not entitled to collect unemployment, there are cases which hold that if the employer permits the workplace to become threatening to the health and safety of an employee, that employee is considered to be "constructively discharged" and is thereby considered to have terminated his or her employment for justifiable cause; as such, the individual is entitled to the benefits of unemployment compensation. Once this determination is made, payments made to the employee will be charged against the employer and not the general fund. The filing of a claim with EEOC is not barred because the employee has filed for and is receiving unemployment benefits. If the employee wins before the EEOC, the amount which the employee received in unemployment compensation will be deducted from the award.

If the acts of sexual harassment cause illness, the employee could file a claim under workmen's compensation for the payment of medical expenses and compensation benefits for so long a period as the employee is out of work due to a job-related illness. Just so long as the medical evidence relates the illness to the sexual harassment, a valid claim can be made. Recent cases recognize recovery of weekly benefits for disabling mental illness resulting from emotional stress in work-related incidents.

If an employee should elect to file for workmen's compensation benefits, this act bars the employee in most instances from any other type of recovery for the disability. However, as in the case of unemployment insurance, filing a claim for workmen's compensation does not bar the employee from prosecuting a complaint with the EEOC or any state or local anti-discrimination commission. Also, as in all workmen's compensation cases, if there is a third party liability for the injury, the employee can proceed against the third party in tort. If successful, the employee will have to reimburse the full amount of benefits to the insurance carrier that paid the workmen's compensation benefits.

A person subjected to sexual harassment might bring a civil action against the person who committed the sexually offensive act or his employer or both. Many states provide legal remedies in tort against those who are guilty of such conduct. If the conduct subjected the victim to mental and emotional duress, most states allow a suit for the intentional infliction of this distress and allow damages for the mental suffering, duress, medical, or any other expenses, lost wages, and, in some cases, even punitive damages.

If the harassing conduct interferes with a contractual employment relationship, a suit will be for breach of contract. Even in this type of action, some states allow recovery for emotional distress, loss of the benefits of the contract, expenses incurred in finding other

employment, pensions, union seniority, etc., and, if the victim cannot find another job, the full wages and benefits due under the breached contract. The civil actions can result in very substantial damages in some cases.

If the acts of sexual harassment include touching the victim, no matter how slightly, or if the perpetrator of the act put the victim in fear of imminent physical harm, the victim can add to the civil suit claims for assault and battery or simple assault or battery, depending on whether or not there was contact.

There is a possibility of filing a criminal complaint against the perpetrator of the sexual harassment. An assault consists of putting one in fear of imminent injury by having the ability to inflict the injury. A battery is any contact that is not wanted or consented to, no matter how slightly; combining the two constitutes an assault and battery.

There is a growing school of thought that if a woman or man submits to another under the threat of economic pressure, the threat makes the sexual act non-voluntary; the result is involuntary carnal knowledge, which equals rape. Studies of female victims of sexual harassment indicate that they go through the identical mental turmoil and have to make the same psychological adjustments as do the victims of physical rape.

Another possible basis for criminal prosecution would be extortion where the sexual favors of the victim are exacted as tribute in order to preserve the employment relationship. It is no different than asking for money or being harmed; the only difference is that in the first instance the tribute is flesh, where in the second instance it is money.

### **Liability Can Be Minimized**

Employers are urged to establish model programs which not only advise victims what they should do if subjected to sexual harassment, but also strongly emphasize the disciplinary action which will be taken against perpetrators, no matter what position the perpetrator may occupy with the company.

The victim should be instructed that he or she should immediately notify the employer or whoever is designated to receive such complaints under the program. The guilty supervisor or co-worker must be severely disciplined. While it is true that the type of discipline imposed should be commensurate with the severity of the act or acts of harassment, the differences in disciplinary procedures applied should never be governed by the position of the perpetrator with the company or his or her relationship to the employer. Uniform discipline should be applied to all for the same infraction. If anything, supervisors should be more severely punished because of two reasons: (1) that their misconduct imposes indefensible liability on the employer, and (2) that they are supervisors and

should be more concerned with protecting the employer and promoting employee harmony.

Employees should be assured that if they ever should become victims of sexual harassment and report it, they will not be subjected to retaliatory action.

If the perpetrator of the act or acts constituting sexual harassment is a customer or purveyor, then the employer or supervising employee must immediately take steps to halt the act.

If the offender is a guest in the employer's hotel or a patron in the employer's restaurant, the employer or supervisor should immediately step in to stop the harassing conduct. While employers or supervisors should at all times keep their composure and act in a dignified, respectful manner, they should be firm and insistent that the objectionable conduct cease. If the offender persists, then the employer or supervisor should ask the guest or patron to leave. While these solutions may be rather severe, failure to take action results in the employer being liable for a violation of Title VII.

Above all, the employer is mandated by the guidelines to immediately undertake an investigation of all complaints of sexual harassment. It will be of no value to an employer's defense on a Title VII charge to say that the complaint was investigated in due course. If it turns out that the complaint was false and motivated by ulterior motives on the part of the complaining employee, then the imposition of disciplinary proceedings against the party making the false accusation should be permissible.

If, however, upon investigation it is determined that there was no actual sexual harassment, but that the complaining employee honestly believed that the conduct complained of was such, then the employee should be counseled, but not be disciplined for sincerely, but erroneously, making the complaint.

Above all, immediate action is necessary in investigating any complaint of sexual harassment, no matter how it may appear to be at first discussion. Appropriate immediate action should be taken against any perpetrators if the complaint is borne out.

Ultimately, employers should educate customers, guests, and patrons that employees should be accorded the same respect as any other individual.