



National Institute of Justice

R e s e a r c h i n A c t i o n

Jeremy Travis, Director

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Highlights

This *Research in Action*, the seventh in a series that examines civil rights laws as they affect the criminal justice community, takes a close look at sexual harassment—a form of sexual discrimination that is in the forefront of the American consciousness. Although the issue of sexual harassment is one that touches all employers, its relevance to law enforcement agencies extends beyond the concerns associated with more traditional settings.

Of note:

- Criminal justice agencies are vulnerable to employee claims of sexual harassment by supervisors or coworkers, and may also be held responsible for the actions of nonemployees and for harassment directed at nonemployees.
- Acquiescence to requests for sexual favors—or even voluntary participation in sexual activity—does not necessarily mean that the favors or activity were welcomed by a sexual harassment claimant.
- Workplace display of sexually explicit material—photos, magazines, or posters—may constitute hostile work environment harassment, even though the private possession, reading, and consensual sharing of such materials is protected under the Constitution.

Civil Rights and Criminal Justice: Primer on Sexual Harassment

by Paula N. Rubin

Sexual harassment is not new, nor are legal remedies against it. It has been recognized for nearly 20 years as a form of sex discrimination under the Civil Rights Act of 1964. However, allegations of improper behavior in the business world and in all branches of government, at Federal, State, and local levels, have become commonplace in today's society. Inevitably, these have resulted in a heightened public awareness about sexual harassment. And, as the Nation's consciousness has risen so has the number of complaints alleging sexual harassment.

How is criminal justice affected by this issue? Obviously, allegations of sexual harassment in the workplace are not confined to the private sector. Police and corrections have their share of claims. Exposure to liability exists not only for the conduct of employees, but in the treatment of inmates, persons in custody or under supervision, and others having reason to interact with criminal justice professionals as well.

The intersection between sexual harassment and criminal justice can best be seen within a legal context. What is sexual harassment? How does this form of discrimination happen in the workplace? Finally, what can agencies do to limit their exposure to liability for claims of sexual harassment and to prevent it from happening within their ranks?

Legal overview

The Civil Rights Act of 1964 (the Act) makes it illegal to discriminate on the basis of race, color, religion, age, national origin, and sex.¹ Title VII of the Act prohibits employers from, among other things, discriminating on the basis of sex with respect to compensation, terms, conditions, or privileges of employment. In addition, another form of sex discrimination is sexual harassment.

Sexual harassment in employment has been defined as unwelcome sexual advances, requests for sexual favors, and other verbal or physical conduct that en-

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Highlights

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- While uncommon, a single severe incident of offending behavior may be sufficient to constitute hostile work environment harassment.
- An agency may investigate and take action where there is evidence of unwelcome conduct even if a complaint has not been filed.
- Failure to investigate promptly and take appropriate remedial action when a sexual harassment complaint has been filed may result in an agency being held liable for damages.
- Prevention—in the form of policy, training, supervision, and discipline—is the best way to avoid sexual harassment in the workplace.

ters into employment decisions and/or conduct that unreasonably interferes with an individual’s work performance or creates an intimidating, hostile, or offensive working environment. This guideline identifies two forms of sexual harassment: (1) quid pro quo harassment; and (2) hostile work environment harassment. In the first type, the harasser demands sexual conduct as a condition for receiving a tangible benefit (note, however, a claimant might acquiesce to the demand, receive the benefit and nevertheless still have a claim²). In the second type, the work environment becomes so offensive as to adversely affect an employee’s job performance.

Quid pro quo harassment. Loosely translated, “quid pro quo” means “something for something.” This type of harassment occurs when an employee is required to choose between submitting to sexual advances or losing a tangible job benefit. An essential aspect of quid pro quo harassment is the harasser’s power to control the employee’s employment benefits. This kind of harassment most often occurs between supervisor and subordinate.

A claim of quid pro quo harassment must meet several criteria:

- The harassment was based on sex.
- The claimant was subjected to unwelcome sexual advances.
- A tangible economic benefit of the job was conditional on the claimant’s submission to the unwelcome sexual advances.

In quid pro quo cases, the harassment consists of “unwelcome sexual advances, requests for sexual favors, and other verbal or physical conduct of a sexual nature.”³ However, there is no requirement

that these requests be *express demands* for sexual favors.⁴ The advances may be implied by the circumstances and actions: for example, inviting a claimant out for drinks or offering the claimant sexually explicit magazines.

A hallmark of a sexual harassment claim, whether it be quid pro quo or hostile work environment harassment, is that the advances are unwelcome. “Unwelcome” means that the person did not invite or solicit the advances. This is determined by an objective standard and not the claimant’s subjective feelings.

On the other hand, acquiescence or even voluntary participation in sexual activity does not mean that the advances were not unwelcome.⁵ One factor to consider is whether the person indicated that the advances were unwelcome notwithstanding acquiescence.

Hostile work environment harassment. Hostile work environment harassment is unwelcome conduct that is so severe or pervasive as to change the conditions of the claimant’s employment and create an intimidating, hostile, or offensive work environment. In the landmark case of *Meritor Savings Bank v. Vinson*,⁶ the U.S. Supreme Court found that a hostile work environment amounts to unlawful sex discrimination even in the absence of the loss of a tangible job benefit.

What distinguishes hostile work environment harassment from quid pro quo harassment? There are several differences. Hostile work environment harassment:

- Does not require an impact on an economic benefit.
- Can involve coworkers or third parties, not just supervisors.
- Is not limited to sexual advances; it

can include hostile or offensive behavior based on the person's sex.

- Can occur even when the conduct is not directed specifically at the claimant but still impacts on his or her ability to perform the job.
- Typically involves a series of incidents rather than one incident (although a single offensive incident may constitute this type of harassment).

Three criteria must be met in a claim of harassment based on a hostile work environment:

- The conduct was unwelcome.
- The conduct was severe, pervasive,

and regarded by the claimant as so hostile or offensive as to alter his or her conditions of employment.

- The conduct was such that a reasonable person would find it hostile or offensive.

Since this form of sexual harassment does not require the unwelcome conduct to involve sexual advances, other actions may give rise to a claim of hostile work environment. Obviously, gender-based actions such as calling the claimant derogatory names (including names referring to body parts or reproductive anatomy) could be actionable depending on the severity and the pervasiveness. Forms of hazing used to

intimidate or dominate the claimant, such as insulting remarks, threats, or negative graffiti, may also constitute this type of harassment. Even actions not directed at a particular claimant may be considered hostile work environment harassment, e.g., the display of sexually explicit materials such as posters, pin-ups, and magazines.

In proving a claim of hostile work environment harassment, courts look at the totality of the circumstances. Severity and pervasiveness are pivotal. The more severe the conduct, the less pervasive it may need to be. Conversely, the more pervasive the conduct, the less severe it may need to be. That is why, although rare in hostile

Areas of concern for criminal justice professionals. Here are some frequently asked questions about sexual harassment:

Q: Is sexual harassment limited to conduct toward women?

A: Obviously not. This form of discrimination is gender based. "Female supervisors who use their power to exact sexual favors from male subordinates similarly are harassing their subordinates on the basis of gender."⁷ Conduct that is motivated by a person's sex may give rise to sexual harassment. Moreover, the offensive conduct does not have to be explicitly sexual to be actionable.

Q: Does a complaint need to be lodged for an agency to investigate and take action?

A: No. The fact that a person fails to complain is not determinative. Agencies may take appropriate action when there is evidence of unwelcome conduct. In one in-

stance, a male police sergeant was suspended for 5 days for making sexually suggestive remarks to a female subordinate even though the woman did not file a complaint. The chief took remedial action by suspending the sergeant. The chief's actions were upheld by the Board of Police Commissioners and a three-judge appellate court.⁸

Q: Do inmates and others held in custody have the right to sue for sexual harassment?

A: Yes, sexual harassment of inmates by prison or jail employees is actionable. The inmate could sue for damages under Federal statute 42 U.S.C. §1983. A lawsuit brought under this law is based on a claim that a governmental entity deprived the individual of a constitutional right. Courts have held that prisoners are entitled to protection under the eighth amendment to be free from sexual harassment at the hands of prison staff.⁹ The plaintiff would need to allege facts demonstrating unlawful conduct in support of the claim.

Q: Should sexually explicit materials, such as posters and magazines be banned from criminal justice facilities to avoid claims of hostile work environment?

A: That depends. A recent Federal court decision in California held as unconstitutional a fire department policy banning sexually oriented magazines in Los Angeles county firehouses as part of its sexual harassment policy.¹⁰ The court found that *private* possession, reading, and consensual sharing of such magazines is protected by the first amendment to the Constitution. A critical element of the court's decision rested on the private nature of the possession and use of such materials. When sexually explicit materials are not private but are public, then their presence may rise to the level of actionable sexual harassment. Examples of public displays of such materials may include: obscene cartoons, sexually oriented pictures in the workplace, sexually oriented drawings or graffiti on pillars and other public places in the workplace.

work environment cases, a single severe incident may still constitute this kind of harassment.¹¹ Severity of conduct may depend on whether the action is physically threatening or degrading, in contrast to offensive language. Pervasiveness is also more likely to be found in cases where there is more than one harasser.

A determining factor in a claim of hostile work environment harassment is that the conduct unreasonably interferes with the claimant's work performance.¹² "Unreasonable interference" means that the offensive conduct made it more difficult for the complainant to do his or her job.

By what standard is hostile work environment determined? Courts will generally use a "reasonable person" standard. That means that a reasonable person's work environment would be affected by the conduct. In addition, a 1991 circuit court decision allowed a female plaintiff to assert a "reasonable woman" standard.¹³ This standard seeks to eliminate the perceptions that a reasonable male might have about what constitutes offensive, unwelcome conduct.

On the other hand, courts have refused to simply consider how the claimant perceived his or her work environment. In other words, Title VII does not serve as "a vehicle for vindicating the petty slights suffered by the hypersensitive."¹⁴

Must the claimant suffer injuries to prevail and, if so, how much? The U.S. Supreme Court offered guidance in the case of *Harris v. Forklift*.¹⁵ To prevail on a claim of hostile work environment harassment, the conduct need not seriously affect an employee's psychological well-being nor cause an in-

jury. The decisive issue is whether the conduct interfered with the claimant's work performance.

Implications for criminal justice

Sexual harassment may impact on criminal justice agencies in two ways. First, claims from employees expose the agency to liability in its capacity as an employer. Second, the agency may also be sued by third parties claiming to have been harassed by persons under the authority or control of the agency. Often these claims are brought under the Civil Rights Act of 1871 (42 U.S.C. Section 1983). Section 1983 imposes liability on any person who, under color of State law, deprives a person of rights guaranteed by Federal law.

Agency liability. The degree to which a criminal justice agency can be held responsible for the actions of its employees depends on the type of harassment complaint filed and the identity of the claimant. Employers have consistently been found strictly liable for quid pro quo harassment by supervisors under their authority.

Strict liability is a legal standard that imposes liability even though the employer had no knowledge of the unlawful conduct. So, for example, if a superior officer makes sexual favors a condition of a subordinate's promotion, the department will be held liable even if it did not know about the superior officer's demands.

On the other hand, criminal justice agencies will not be automatically liable for claims by their employees of hostile work environment harassment. When hostile work environment harassment by a supervisor is alleged, employer liability will turn on such

things as whether the employer had notice of the conduct, the means by which the harassment was committed, whether the claimant had the chance to complain about the conduct, what the employer did in response to any complaint or knowledge of the conduct, and what preventive and remedial measures the employer has taken. Some courts have, however, taken a broader approach to impose liability.¹⁶

When is the agency charged with knowledge of harassing conduct? That is, when will an agency without formal knowledge of the conduct be deemed to know that the offensive conduct exists? When a complaint is filed with someone high enough in the agency to infer notice to the agency; when supervisors see the offending conduct; or when the harassment is so pervasive that the agency should have known it was going on. For example, "pervasive graffiti and pornography can give rise to an inference of knowledge on the part of the employer."¹⁷

Agency liability is not limited to the abuse of power between supervisor and subordinate, nor the actions of co-workers. Inmates, suspects, arrestees, crime victims, and others having interaction with the agency can be involved in this unlawful conduct. In these instances the agency may be liable if the agency, its agents, or supervisory employees knew or should have known of the conduct but failed to take immediate action.

If a complaint is filed. An essential part of limiting an agency's liability for sexual harassment is the action it takes when a complaint is filed or, in cases where there is no complaint, when the agency knows or should have known of the offensive conduct. The

worst thing an agency can do is nothing. A Federal jury in Los Angeles awarded \$3.9 million to two female police officers who alleged that male co-workers sexually harassed them and their supervisors ignored their complaints.¹⁸ Conversely, an employer's prompt and appropriate response to complaints can limit its liability.¹⁹

A failure to take prompt, remedial action can result in an agency being held liable for an award of damages. These may include back pay (limited to 2 years prior to the filing of an EEOC charge), front pay, and compensatory damages. Punitive damages, while recoverable by employees in the private sector, are *not* available to governmental employees.

Here are some steps to take when a complaint is filed:

- **Act immediately.** Take every complaint seriously. Do not assume that the problem will work itself out or go away on its own. A delay in taking action might be viewed as tacit approval of the conduct.
- **Investigate and act on every complaint.** This includes even those claims where victims minimize the incident(s). Often victims of sexual harassment are embarrassed or ashamed of the incident and may be reluctant to talk about it. The person responsible for handling sexual harassment complaints should conduct a thorough investigation or cause one to be conducted. Anyone and everyone involved in the incident(s) should be interviewed. Interviews should endeavor to answer *who, what, where, how, and when*. They should be conducted in private and their contents kept confidential.

- **Keep accurate records of the investigation.** It is a good idea to document all phases of the investigation from receipt of the complaint through any remedial action taken. These records may be valuable evidence of measures taken by the agency.
- **Ensure that there is no retaliation against the complainant.**

Preventing sexual harassment

No matter how flawless the investigation or how quickly and fairly a complaint is handled by the agency, prevention is still the best approach to sexual harassment. Criminal justice agencies should consider building their prevention programs around four areas: policy, training, supervision, and discipline.

Policy. Every criminal justice agency should have a policy that clearly states that the agency prohibits any type of sexual harassment. However, having such a policy is not enough; it must be communicated to all employees and consistently and fairly enforced. To the extent practical, agencies should consider posting the policy for a period of time in employee work areas, locker rooms, or break rooms. Thereafter, copies should be kept in accessible locations. In addition, the policy should be included in any employee handbooks.

At a minimum, any sexual harassment policy should include:

- A statement that the criminal justice agency will not tolerate sexual harassment.
- A definition of sexual harassment, including examples of quid pro quo and hostile work environment harassment.

- A statement advising employees of the agency's grievance procedure and requiring employees to immediately report incidents.
- A statement that complaints will be taken seriously and investigated immediately.
- A statement of the penalty for violating the policy.
- A statement that all employees are to treat each other professionally and respectfully.

Training. Having a policy and talking about sexual harassment in a vacuum is often not enough. Criminal justice agencies should consider putting these ideas into a context to ensure that employees understand what sexual harassment is. Conducting sexual harassment training is an effective way to communicate the agency's policy.

Training should:

- Identify and describe forms of sexual harassment and give examples.
- Outline the agency's grievance procedure, explain how to use it, and discuss the importance of doing so.
- Discuss the penalty for violating the policy.
- Emphasize the need for a workplace free of harassment, offensive conduct, intimidation, or other forms of discrimination.

Supervision. A policy against sexual harassment is only as good as the supervisors who enforce it. For that reason, supervisors should be taught how to build and maintain a professional work environment. Training should cover such matters as:

- How to spot sexual harassment.

- How to investigate complaints including proper documentation.
- What to do about observed sexual harassment, even when no complaint has been filed.
- How to keep the work environment as professional and nonhostile as possible.

Discipline. The agency's grievance procedure should be clearly delineated and communicated to all employees. In addition, to ensure that this grievance procedure is credible, it should be strictly and promptly followed. This is especially important since courts look at the action taken by employers in determining liability. When violations occur, proper disciplinary action should follow. Consider the following measures:

- Informing employees in advance of conduct that may result in immediate dismissal or in disciplinary action; in the latter case, describe the penalties involved.
- Following up on an incident, after an interval of time, to make sure the problem has not returned.
- Counseling all parties, and training (or retraining) all employees in cases where harassment has been alleged but cannot be determined.
- Repeating assurances that sexual harassment will not be tolerated.

Conclusion

Sexual harassment is as common to the field of criminal justice as to any other area of American enterprise, and the laws regarding how it should be regarded and dealt with apply to crimi-

nal justice agencies as much as to private sector workplaces. Awareness of the law and the consequences for disregarding it should guide criminal justice managers in effectively carrying out their responsibilities and avoiding liabilities for the agencies they administer.

Notes

¹ 42 U.S.C. 2000-2(a)(1).

² *Kariban v. Columbia University*, 14 F.3d 773 (2nd Cir. 1994).

³ EEOC Guideline §1604.11(a).

⁴ See: *Nichols v. Frank* 22, 9th Cir., December 12, 1994.

⁵ See: *Kariban v. Columbia*.

⁶ 477 U.S. 57, 40 FEP Cases 1822 (1986).

⁷ Lindemann, Barbara and David D. Kadue, *Primer on Sexual Harassment*, Bureau of National Affairs, Inc., Washington, D.C., 1992, p. 32 citing *Hubebschen v. Department of Health and Human Services*, 716 F.2D 1167, 32 FEP Cases 1582 (7th Cir. 1983).

⁸ *State ex rel. Rice v. Bishop*, 858 S.W. 2d 734 (Mo.App. 1993) as reported in *Fire & Police Personnel Reporter*, January 1994, p. 12.

⁹ *Battle v. Seago*, 431 S.E.2d 148 (Ga. App. 1993); *McKenzie v. State of Wis. Department of Corrections*, 762 F. Supp. 255 (E.D. Wis. 1991); case later dismissed as frivolous.

¹⁰ *Johnson v. Los Angeles County Fire Department*, DC C Calif., CV 93-7589, October 28, 1994.

¹¹ *Huitt v. Market Street Hotel Corp.*,

62 FEP 539 (D.Kan. 1993).

¹² EEOC Guidelines §1604.11(a)(3).

¹³ *Ellison v. Brady*, 924 F.2d. 872, 54 FEP Cases 1346, republished as amended, 55 FEP Cases 111 (9th Cir. 1991); See also: *Jensen v. Eveleth Taconite Co.*, 824 F. Supp. 847 (D. Minn. 1993).

¹⁴ *Zabkowitz v. West Bend Co.*, 589 F. Supp. 780, 784, 35 EPD Par. 34, 766 (E.D. Wis. 1984).

¹⁵ 114 S.Ct. 367 (1993).

¹⁶ See: *Kariban v. Columbia*.

¹⁷ *Primer on Sexual Harassment*, p. 59.

¹⁸ *Clerkin v. City of Long Beach; Allison v. City of Long Beach*, U.S. Dist. Ct. (CD Cal. 1991) as reported in *Fire and Police Reporter*, November 1991, p. 170.

¹⁹ *Beardsley v. Isom*, 828 F. Supp. 397 (E.D. Va. 1993); aff'd *Beardsley v. Webb*, 30 F.3d 524 (4th Cir. 1994).

Paula N. Rubin, a lawyer, is a visiting fellow at the National Institute of Justice, coordinating NIJ's initiative to research, develop, and deliver publications and training for the criminal justice system on the Americans With Disabilities Act as well as other civil rights and human-resources management issues.

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McDonald, Douglas, C., Ph.D and Michele Teitelbaum, Ph.D., *Managing Mentally Ill Offenders in the Community: Milwaukee's Community Support Program*, NIJ Program Focus, March 1994, NCJ 145330.

Rubin, Paula N., *Civil Rights and Criminal Justice: Employment Discrimination Overview*, Research in Action, June 1995, NCJ 154278.

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Rubin, Paula N., *The Americans With Disabilities Act and Criminal Justice: Hiring New Employees*, Research in Action, August 1994, NCJ 147479.

Rubin, Paula N., *The Americans With Disabilities Act and Criminal Justice: An Overview*, NIJ Research in Action, September 1993, NCJ 142960.

Rubin, Paula N. and Susan W. McCampbell, *The Americans With Disabilities Act and Criminal Justice: Providing Inmate Services*, Research in Action, July 1994, NCJ 148139.

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