# Preventing sexual harassment in the workplace

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**Recent Supreme Court decisions broaden the legal interpretation of sexual harassment.**

A recent search of major news sources disclosed that in one week, 42 articles were published about sexual harassment. A plethora dealt with President Clinton, Monica Lewinsky and Paula Jones, some discussed the U.S. military's efforts to avoid sexual harassment, and one headline claimed, "Sexual Harassment, E-mail Policy Is Not Enough To Limit Employer Legal Liability." These articles, and three recent court cases—one from the Michigan Supreme Court and two from the United States Supreme Court—should serve as a warning to every local, state, federal and public employer: Review and revise your sexual harassment policy. Find out how your managers are managing and your employees are interacting!

Everyone agrees, sexual harassment is undesirable in society. It is considered crude, in bad taste and injurious. Over the last few decades, this concept has escalated from being merely undesirable to being illegal. Title VII of the federal Civil Rights Act of 1964, as amended, states that "all personnel actions affecting employees or applicants for employment...shall be made free from any discrimination based on race, color, religion, sex or national origin."

The 1977 Elliott-Larsen Civil Rights Act defines sexual harassment in the following manner: "Discrimination because of sex includes sexual harassment, which means unwelcome sexual advances, requests for sexual favors, and other verbal or physical conduct or communication of a sexual nature when: i) submission to such conduct or communication is made a term or condition either explicitly or implicitly to obtain employment, ii) submission to or rejection of such conduct or communication by an individual is used as a factor in decisions affecting such individual's employment..., or iii) such conduct or communication has the purpose or effect of substantially interfering with an individual's employment...or creating an intimidating, hostile or offensive employment...environment." (MCL 37.2103(h))

In simple terms, sexual harassment is repeated and unwelcome conduct of a sexual nature. Mutually respectful, non-coercive interaction between individuals and interaction acceptable to both parties is not generally considered sexual harassment.

Since the mid 1980s, the courts have recognized two sexual harassment categories under Title VII: 1) *quid pro quo* harassment, which arises when a person in authority demands sexual favors from a subordinate in exchange for job security or benefits, and 2) hostile work environment harassment, in which co-workers or supervisors engage in persistently inappropriate sexual conduct, creating an intimidating or offensive workplace.

The courts consider a work environment hostile when there is repeated and unwelcome conduct of a sexual nature. This conduct may take the form of any or all of the following four types.

**1. Visual harassment**—Using pictures, cartoons, writings or other means to convey meaningful content of a sexual nature. For in-

**MTA WORKSHOP**

The MTA is sponsoring a half-day workshop, *Hot Issues Forum for Township Officials,* that will discuss the Supreme Court cases reviewed in this article and other recent issues that impact daily township administration. For a list of workshop dates and locations, see Page 9.

stance, certain tool manufacturers distribute calendars that are R- or possibly X-rated. If these calendars are displayed in work areas, they may be considered offensive. Other examples of visuals that may constitute sexual harassment are cartoons with overt sexual themes or explicit photographs that display anatomical parts.

In a recent sexual harassment case in Oakland County, the plaintiff alleged that displaying visuals of a sexual nature were one way her work environment became hostile. As evidence, the plaintiff submitted more than 50 obscene and nearly obscene cartoons that her colleagues and supervisor circulated in the office. The lawsuit was eventually settled for $70,000.

**2. Verbal harassment**—Making comments or telling jokes, poems, limericks or stories that convey meaningful content of a sexual nature or using e-mail, the telephone, letters, recordings or other means to convey these types of messages. For instance, someone who tells off-color jokes or discusses a co-worker's physique may be charged with sexual harassment.

**3. Physical harassment**—Touching a person's private or "bathing suit" areas—breasts, buttocks or genital area—may create a hostile work environment. The courts may also determine that touching other areas including a person's hair, cheeks, back or arms may be considered sexual harassment.

**4. Miscellaneous harassment**—Miscellaneous conduct that could create a hostile work environment includes looking someone up and down or leering at them, especially their private areas or displaying sexual novelties or toys. For instance, in a Wayne County lawsuit involving a female police dispatcher, male police officers brought the genitals of a bear to the station to show the dispatcher. The jury agreed with the plaintiff that this was sexual harassment and awarded her more than $300,000.

Defining specific actions that may constitute sexual harassment has made some people fearful to act. For example, a manager may now hesitate to put an arm around a distraught employee to comfort the person for fear that action will be misinterpreted as sexual harassment. Or, a colleague may decide not to compliment a co-worker's new sweater or shirt because it may be misconstrued. The lack of clear guidelines from the Legislature, courts and employers about what constitutes sexual harassment has created an element of the unknown and an insecurity that has changed the dynamics between men and women in the workplace.

**"Townships must have an up-to-date, written sexual harassment policy."**

The fear of retaliation for a wrong or a perceived wrong heightens this paranoia. A disciplined or disgruntled employee seeking revenge has numerous opportunities to give "paybacks," including falsely claiming sexual harassment. Michigan's Whistle Blowers Protection Act allows all employees the "privilege"of making complaints, unless the complaint is made knowingly false (MCL 15.361 *et seq*). In addition, employers must allow anyone accused of sexual harassment a full and fair investigation and an impartial determination regarding all sexual harassment accusations.

## No employers are immune from sexual harassment litigation

All employers including businesses, the military, and local, state and federal governments are liable for sexual harassment charges. The public employer and employee face several areas of liability for sexual harassing behavior. In Michigan, misdemeanor criminal charges may be brought against the perpetrators alleging criminal sexual conduct in the fourth degree (wrongful touching) or felony criminal charges may be brought for ethnic intimidation (assault based on gender).

In the federal courts, the Civil Rights Act penalizes the intentional depravation of civil rights with prison sentences and fines. It may be argued that wrongful touching deprives a person of due process.

Civil action may be brought in Michigan, alleging a violation of the Elliott-Larsen Civil Rights Act (MCL 37.2101 *et seq*), and in federal court, alleging violation of Title VII of the federal Civil Rights Act. Both state and federal courts have a history of awarding plaintiffs up to several million dollars in these types of cases.

It is also important to note that insurance companies typically decline to represent homeowners, public officials and others in sexual harassment cases, claiming that the insurance policies exclude willful and wanton conduct.

## Recent Supreme Court decisions broaden the interpretation of sexual harassment

In 1993, the Michigan Supreme Court held in *Radtke vs. Evertt* (442 Mich 386) that some conduct, such as rape or attempted rape, is so outrageous or egregious that everyone would know the conduct was unwelcome. In these instances, it is not necessary for conduct to be repeated to be considered sexual harassment and can be the basis of a sexual harassment lawsuit.

Until recently, most sexual harassment litigation focused on two issues: determining the truth of the allegations and whether the defendant gave his or her consent for the interaction. ►

In 1998, the Michigan and U.S. Supreme Courts heard three significant cases, redefining the actions that constitute sexual harassment: *Koester* vs. *City of Novi* (Docket No. 105508, June 17, 1998), *Faragher* vs. *City of Boca Raton* (U.S. Supreme Court No. 97-282, June 26, 1998) and *Burlington Industries, Inc.* vs. *Ellerth,* (U.S. Supreme Court No. 97-569, June 26, 1998).

In *Koester*, the Michigan Supreme Court was asked to determine 1) whether the plaintiff has stated a claim under the Michigan Handicappers' Civil Rights Act (MCL 137.1101 *et seq*) and 2) whether comments and harassing conduct relating to a woman's pregnancy can give rise to a claim for sexual harassment as defined by the Elliott-Larsen Civil Rights Act.

The Court held that pregnancy is not a handicap under the HCRA. On the second issue, the plaintiff claimed that she was harassed on the basis of her sex because of her pregnancy. The Court found in favor of the plaintiff, stating that "under the express language of Michigan statute, analogous federal law, and the legislative history of the Michigan Civil Rights Act, we hold that harassment on the basis of a woman's pregnancy is sexual harassment."

The Elliott-Larsen Civil Rights Act provides that "an employer cannot fail or refuse to hire or recruit, discharge or otherwise discriminate against an individual with respect to employment, compensation or a term, condition or privilege of employment, because of...sex..." (MCL 37.2202(1)). In 1978, the Legislature amended the act to add "'sex' includes, but is not limited to, pregnancy" (MCL 37.22201(d)). The act further states, "discrimination because of sex includes sexual harassment" (MCL 37.2103).

This decision broadens the definition of sexual harassment. Townships should revise their sexual harassment policy to include pregnancy, stating that unwelcome and unwanted acts and comments based on pregnancy are strictly prohibited.



### Employer is liable for supervisor's hostile behavior

In *Faragher* vs. *City of Boca Raton*, after resigning as a lifeguard from the City of Boca Raton, the petitioner brought action against the city and her immediate supervisors for nominal damages and other relief, alleging, among other things, that the supervisors had created a "sexually hostile atmosphere" by repeatedly subjecting her and other female lifeguards to "uninvited and offensive touching," making lewd remarks and speaking of women in offensive terms, and that this action constituted discrimination violating Title VII of the Civil Rights Act.

> **"The courts consider a work environment hostile when there is repeated and unwelcome conduct."**

The U.S. District Court held that the city could be held liable for the harassment of its supervisory employees because the harassment was pervasive enough to support an inference that the city had "knowledge, or constructive knowledge" of it. The District Court stated that the supervisors were acting as the city's agents when they committed the harassing acts. The U.S. Court of Appeals disagreed, saying that the supervisors were not acting within the scope of their employment, and the city could not be held liable for negligence in failing to prevent the harassment.

On June 26, 1998, the U.S. Supreme Court agreed with the District Court stating that "the degree of hostility in the work environment rose to the actionable level and was attributable to the supervisors. It is clear that these supervisors were

granted virtually unchecked authority over their subordinates and that Faragher and her colleagues were completely isolated from the city's higher management." The Supreme Court ruled that the city could not be found to have exercised reasonable care to prevent the supervisors' harassing conduct.

In light of this decision, if a court finds that a township employee was sexually harassed, the township will also be held liable unless it can show that it had a viable sexual harassment policy in place and that the policy was rigorously enforced. These actions are considered to be an affirmative defense against sexual harassment and show the reasonableness of an employer's efforts to prohibit sexual harassment in the workplace. In its defense, a township may claim that the victim was actually a willing participant or that filing a lawsuit was unreasonable because the victim did not first file a complaint with the township.

### Behavior can be sexual harassment without causing economic harm

In *Burlington Industries vs. Ellerth*, the plaintiff alleged that she was sexually harassed by her senior manager's repeated boorish and offensive remarks and gestures. Although she refused his advances, she received a promotion. She later left the job and sued the company for sexual harassment. The plaintiff argued that no economic harm was necessary for an employer to be liable for sexual harassment. The company claimed that employers are only responsible if an employee suffers job-related harm for not submitting to a manager's advances or threats.

On June 28, 1998, the U.S. Supreme Court found in favor of the plaintiff, stating that "under Title VII, an employee who refuses the unwelcome and threatening sexual advances of a supervisor, yet suffers no adverse, tangible job consequences, may recover against the employer without showing the employer is negligent or otherwise at fault for the supervisor's actions, but the employer may assert an affirmative defense."

**"Would you like to have someone treat your spouse, child or significant other in this manner?"**

In this case, the Supreme Court's message is that employees only have to prove that they were subjected to sexual harassment, not that they suffered any loss of employment, overtime, compensation, promotion or other tangible benefit. This ruling will likely increase the volume of sexual harassment cases. Again, employers may assert affirmative defense by showing that they took reasonable action to prevent sexual harassment.

### What can townships do?

These court cases clearly indicate that it is crucial for employers to have an affirmative defense against sexual harassment claims. This means townships must have an up-to-date, written sexual harassment policy that clearly states that unwelcome and unwanted acts and comments based on sexual issues, including pregnancy, are strictly prohibited. Townships should have their attorney review the current policy and revise it as necessary. Examples of current township sexual harassment policies can be obtained by calling MTA Membership Information Assistant Robin Reed at (517) 321-6467, ext. 242.

In addition to establishing a viable sexual harassment policy, the policy must be distributed and rigorously enforced. Townships should make sure every employee receives a copy of the policy. It is a good idea to have employees sign a statement acknowledging that they have received and read the policy. These signed statements should be kept in each employee's personnel file and can serve as proof of a township's reasonable action to prohibit sexual harassment in the work environment.

Townships should also have an established procedure for handling sexual harassment claims. These grievance provisions should be clearly explained in an employee policy manual.

If township board members are not sure what behaviors or items are sexually offensive, ask the following questions: "Would you like to have someone treat your spouse, child or significant other in this manner?" Or, "Would you like to see film of this conduct broadcast on the 11 o'clock news?" Or, "Would you hang this picture or display this item in your living room?" Usually this quick "reality check" helps to put the situation in perspective.

Townships may want to consider providing awareness and sensitivity training to all officials and employees. Offering this type of training can provide a stronger affirmative defense.

Finally, as a township official, setting the example of proper behavior will be the best technique for creating a healthy work environment.❖

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