Sexual Harassment in the Library: The Law

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Library employees have the right to be free of illegal discrimination on the job under Title VII of the Civil Rights Act of 1964.[1] Discrimination based on sex is prohibited under the Act along with discriminatory employment actions based on race, religion and national origin. One particular type of sex discrimination, sexual harassment, has received much recent attention. All employees should be free of demands for sexual favors from supervisors and should enjoy a work environment that is free of harassing behavior from co-workers. Such standards appeal to most library managers who seek enhanced productivity and oppose harassment not only because it is illegal, but because it interferes with productivity.

While sexual attraction on the job is normal, sexual harassment can interfere with an individual's ability to perform his or her job successfully, may have a detrimental effect on others in the organizations, and ultimately will impact on the effectiveness of the library. A series of court decisions have developed standards concerning an employer's liability for sexual harassment. Although there have been no reported decisions involving sexual harassment in libraries, there is no reason to believe that libraries are immune from sexual harassment. There have been several cases of harassment in government agencies and educational institutions, as well as many in private employment situations. A number of studies have demonstrated the scope of the problem. One of the largest studies was conducted in 1980 by the U.S. Merit Systems Protection Board, which surveyed 23,000 federal workers. Over forty-two percent of women workers and fifteen percent of male workers reported being sexually harassed by their supervisors, co-workers or third parties, such as clients.[2] The study was updated covering 1985-87 with similar results; forty-two percent of female and fourteen percent of male federal employees reported being victimized by sexual harassment. The most interesting factor in the update is that the federal workforce grew by 100,000 females; thus, a considerably larger number of women workers were surveyed.[3]

Title VII of the Civil Rights Act of 1964 is the overall anti-discrimination statute. It governs all employers, including libraries, which employ more than fifteen employees.[4] For Title VII purposes, the parent organization and not just the library is considered the "employer." Thus, it is the entire county government, university or corporation which is the employer; under this standard, virtually every library in the country is covered by Title VII.

The preamble to Title VII states that equality of employment opportunity shall not be abridged on account of race, national origin, religion or sex.[5] Sexual harassment constitutes sex discrimination under the Act. Although there are reported cases of sexual harassment by a female supervisor on a male subordinate,[6] and male on male sexual harassment, the huge majority of cases are male on female harassment.[7] Female on male or homosexual harassment is just as devastating for the employee as the typical male on female situation. However, for purposes of this article it is assumed that harassers are male and victims are female.

Today most individuals agree that employees should not be subjected to demands for sexual favors on the job. Only recently, however, has the U.S. Supreme Court recognized sexual harassment as sex discrimination. It is precisely because of the person's sex that he or she is subjected to such treatment.[8] The key issue for most libraries in a sexual harassment complaint is whether the library as an employer is liable to the employee for the harassing conduct of either supervisors or co-workers.

Conduct that qualifies as sexual harassment may range from offensive sexual innuendos to actual physical assaults, and courts tend to consider a victim's response to such conduct in determining whether the conduct is sexual harassment. In other words, some employees enjoy and participate in sexual banter and jokes while other workers might consider the behavior to be harassing. Although not dispositive of the issue, whether the victim has participated in such workplace banter may be relevant to a court in determining if particular conduct constitutes sexual harassment in a given situation.

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The Equal Employment Opportunity Commission (EEOC) is the federal agency charged with enforcing Title VII's anti-discrimination provisions.[9] The EEOC has promulgated guidelines which define sexual harassment as unwelcome sexual advances, requests for sexual favors and other verbal or physical conduct of a sexual nature occurring under any of three con-

ditions: (a) where submission is either explicitly or implicitly a term or condition of employment, (b) where submission or rejection of the conduct forms the basis for an employment action, or (c) where the conduct has either the purpose or effect of substantially interfering with the individual's work performance or creating an intimidating, hostile or offensive working environment.[10]

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Courts now recognize that there are two separate types of sexual harassment. The first is defined as *quid pro quo* harassment. This is the type of harassment most individuals recognize as discriminatory. *Quid pro quo* harassment occurs whenever a supervisor or other person in authority demands sexual favors from a subordinate. In exchange for granting the favors, the employee receives some employment benefit, such as a raise, a promotion, a favorable performance review, etc. Likewise, employees who deny the request from sexual favors are "punished" by being denied the raise or promotion, or are transferred to a less desirable job or are even fired.[11] *Quid pro quo* has been characterized as sexual blackmail,[12] and most early cases involved *quid pro quo* harassment.

The second type of sexual harassment is called hostile work environment. Whenever a supervisor or co-workers participate in sexual jokes, teasing or more blatantly destructive behavior, the working environment may become so tainted with such behavior that the environment becomes a hostile one for women or a single woman. Submission to such conduct becomes a term or condition of employment if the woman wants to continue working there.[13] The primary difference between hostile work environment and *quid pro quo* claims is that there is no retaliation or adverse employment decision based on the woman's refusal to participate in the conduct or refusal to grant sexual favors. Also, the employer's liability for the two types of sexual harassment claims may differ. In *Meritor Savings Bank v. Vinson*,[14] the U.S. Supreme Court endorsed the definitional portion of the EEOC guidelines including the "offensive or hostile work environment" part of the definition.[15] The Court also endorsed an additional requirement to establish a hostile work environment claim: the offended party must prove that sexual harassment is so severe or pervasive that it alters the conditions of her employment.[16]

Clearly, in most situations, an employer is liable for actions of supervisory personnel. For *quid pro quo* sexual harassment, the EEOC guidelines would make the employer strictly liable regardless of whether the employer specifically prohibited harassing conduct or even knew about it and failed to take immediate and appropriate corrective action.[17] An employee is not required to follow internal grievance procedures; instead, she may file a complaint directly with the EEOC. By utilizing internal grievance proceedings, however, the woman presents an employer with an opportunity to solve the problem internally and at a much lower level than by initiating a Title VII complaint with the EEOC.

The *Meritor* opinion does not go so far as to impose strict liability on employers for hostile work environment situations, but the Court indicates that, in general, agency principles would apply in determining liability.[18] Liability for harassment of an employee by fellow workers was not addressed in *Meritor*; however, the EEOC guidelines suggest that the employer is liable for failure to take immediate and appropriate action if the employer knew or should have known of the co-worker conduct.[19]

Education of all workers is the first step in prevention. The EEOC guidelines emphasize affirmative prevention,[20] and there are many reasons a library should implement a preventive program. First, the chance of harassment occurring is lessened when all employees know the rules. A clear policy and well established procedures reduce the time required for the library manager to learn of the harassment and take corrective action. There also is a significant benefit to victims when they know their rights. Victims are more likely to take self-help measures to prevent recurrences of sexually harassing behavior. Likewise, the likelihood of successful internal resolutions through early intervention are increased. Should the sexual harassment complaint ultimately go to litigation, a good prevention program can help document the employer's record of good faith. This can affect the issue of liability and damages. Finally, work force productivity is enhanced because harassment and its attendant distractions are reduced.[21]

Library employers should take affirmative steps first to educate supervisors about sexual harassment and then to educate staff. Not everyone automatically recognizes the range of conduct that can constitute harassing behavior. Efforts to make all library personnel aware of the problem, to show that such conduct is illegal, and to emphasize that the library will not tolerate such behavior on the part of supervisors or workers are significant parts of any program designed to prevent harassment. To facilitate the process of educating workers, it is useful to focus on the less serious forms of harassment as opposed to the more extreme sexual assaults. Most employees are unlikely to commit serious assaults, but routine occurrences, such as offensive remarks, looks, pictures, pats and touches, are much more common and should be stressed as the cause of most sexual harassment complaints.[22]

In addition to having an education program, it is critical that each library develop a written sexual harassment policy if the parent organization does not have one. Employers have a business interest in regulating this aspect of business conduct. An anti-harassment policy is not an attempt to legislate morality; it focuses on increasing productivity, not spawning expensive litigation or jeopardizing government contracts.[23] The policy itself should state clearly that the library will not tolerate sexual harassment on the part of either supervisors or co-workers. It should specify that anyone affected by harassing behavior has a right to complain to management about the harassment and should indicate how to initiate a complaint. Further, the policy should state that the library will investigate all complaints, and that disciplinary action will be taken against perpetrators for complaints found to be legitimate. Lastly, the sexual harassment policy should be publicized widely within the library.

Libraries may fashion separate complaint and grievance procedures for dealing with sexual harassment or may rely on normal grievance procedures. It is essential, however, to provide for complaint to the personnel department or to an independent person named as the sexual harassment officer should the perpetrator be the employee's immediate supervisor. Many management experts recommend that the normal grievance procedure be used if possible.[24] Disciplinary action

should include a wide array of alternatives ranging from a simple reprimand to more serious actions, such as suspension and termination, determined by the seriousness of the harassing conduct.

Supervisors and workers must know that the library will enforce the policy and will take seriously any complaint raised. Haphazard enforcement can subject the library to breach of contract claims. Further, employers must enforce the policy uniformly at all levels of employment and supervision.[25]

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Ensuring employer and supervisor compliance requires more than promulgating a policy and distributing it only once to employees. The policy must become a part of any employee handbook and must be publicized to employees on a regular basis. Many universities publish their policies each autumn and require departments, divisions, and units to route copies of the policy to all employees on an annual basis. The most important factor in preventing harassment is a strong anti-harassment policy, consistently enforced, coupled with a continuous education effort.

The Supreme Court has recognized the importance of such employer-initiated programs and indicated that employer liability might be lessened if such affirmative steps to stop sexual harassment were undertaken.[26] Not only to comply with the Court's reasoning, but also because it is sound business practice, libraries should develop mechanisms for successfully handling harassment complaints.

It is essential that the library investigate any sexual harassment claims. Not only is a thorough investigation useful to employers in minimizing liability, but it assists gathering information, clarifying the issues, evaluating the incident, making a judgment about the library's response to the claim,[27] and taking appropriate corrective actions. Additionally, the investigation provides support for the sexual harassment policy, and establishes the employer's commitment to the policy and the seriousness with which the library administration views sexual harassment.

Clearly, an investigation must be conducted with sensitivity to both the victim's and the alleged harasser's feelings. Many victims want the investigation to be conducted anonymously, but this is not possible unless several women have complained about the same harassing conduct. It is essential that confidentiality be maintained except for the parties involved and any witnesses questioned. By ensuring confidentiality, the library may insulate itself from any defamation charge an alleged harasser might bring.[28]

After the investigation is complete, the investigator should prepare a written report to the library director. The report should include: (1) a summary of the allegations and the accused's response; (2) a summary of the individuals interviewed and their credibility; (3) a presentation of the findings of fact; (4) discussion of the conclusions about the allegations; and (5) recommendations for remedial or other corrective action.[29]

The desired result of any library's response to sexual harassment primarily should be a clear understanding by the parties that the library opposes and will not tolerate sexual harassment of any kind. A second desired result is an affirmation by the parties that the harassing conduct will not be repeated. Another desired result of any library's response to a claim which is demonstrably groundless is that the offended party's misperception will be dispelled.[30]

The only relief a complainant may seek is an end to the harassment. Frequently, the library manager's disciplinary action against the harasser will be sufficient to stop the behavior. Thus, the harassed worker may seek no further remedy. In the *quid pro quo* situation, however, the victim has already suffered either an adverse employment action or failed to receive benefit to which she was entitled because she refused to accede to the harasser's demands. To make the victim whole again, some remedial action must be taken to restore what she has lost. If she has been terminated or constructively discharged, reinstatement is the appropriate remedy. Offer of reinstatement with restoration of lost benefits frequently is sufficient to avoid litigation. Cash settlements also have been used to avoid litigation.

Should the victim file suit under Title VII, the remedies available are back pay, reinstatement, and restoration of lost benefits.[31] There are no punitive damages under Title VII. Should she also file charges under state law, she may be eligible for monetary damages to compensate for any psychological injury. Punitive damages to deter future sexual harassment may be available.[32]

Hostile work environment claims seek to address non-economic injuries. Thus, victims claiming hostile work environment under Title VII are eligible only for injunctive relief, i.e., an order to stop the harassing behavior and reinstate the employee or restore other lost benefits.[33]

Consensual sexual relationships between co-workers certainly occur and have resulted in sexual harassment complaints when the relationship soured. Courts have not been hospitable to complaints arising from previously sexual relationships, especially if one party wants to end the affair while the other desires it to continue. Because of the problems amorous relationships on the job can cause, an employer's anti-harassment policy should deal with consensual relationships as well.

There are many types of consensual sexual relationships: (1) the female employee consents to the relationship because she fears retaliation if she says no, (2) she acceded to sexual demands because she believes it is the only way to get ahead, (3) she consents at first and later changes her mind, and (4) the employee is a willing participant, but the relationship sours. In *Meritor*, the Supreme Court indicated that a victim who consented to the relationship was not automatically excluded from relief.[34] Clearly, problems of proof are more difficult in consensual relationship cases.

Consensual relationships cause difficulties for other workers who are aware of the situation. Perceptions of favoritism can be extremely detrimental to morale, and such perceptions are hard to correct. It can be argued that a hostile work environment is created for other workers who are made to feel uncomfortable by any public manifestation of the amorous relationship or simple familiarity in the business setting.[35] Whether a third party has grounds to complain about payoffs to another employee who is involved in a sexual relationship with a supervisor is somewhat unclear. Some courts have allowed

non-victims injured by favoritism to sue successfully. Such courts tend to allow a cause of action in any case in which sex was a substantial factor in an employment decision.[36] Other courts have found there is no gender connection, since unsuccessful candidates for a promotion might be of either sex. To these courts, there is no causal connection between the plaintiff's gender and the employment disadvantage.[37]

Although many sexual harassment issues have not yet been resolved by the courts, sexual harassment clearly is a violation of federal law for which a library may be liable. Ensuring a harassment free workplace not only benefits library productivity, but also helps insulate the library from liability. Education of both supervisors and employees as well as development, publication, and enforcement of a sound, written sexual harassment policy are critical.

References

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4. 42 U.S.C. § 2000e-2(a) (1988).
5. *Id.* at 2000e-2(a) (1).
6. *See Heubschen v. Department of Health and Social Servs.*, 716 F.2d 1167 (7th Cir. 1983).
7. *See Joyner v. AAA Cooper Transp.*, 36 E.P.D. (CCH) ¶ 35, 167 (D. Ala. 1985).
8. *See Meritor Savings Bank v. Vinson*, 477 U.S. 57, 64 (1986).
9. 42 U.S.C. § 2000e-4 (1988).
10. 20 C.F.R. § 1604.11(a) (1980).
11. *Meritor*, 477 U.S. at 64-65.
12. Note, "The Aftermath of *Meritor*: A Search for Standards in the Law of Sexual Harassment," 98 *Yale L.J.* 1717, 1718 (1989) [hereinafter "Aftermath"].
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16. *Id.* at 67, *quoting Henson v. City of Dundee*, 682 F.2d 897, 904 (11th Cir. 1982).
17. 29 C.F.R. § 1604.11(c) (1980).
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28. *Id.* at 552.
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30. Kandel, *supra* note 21, at 451.
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36. *Id.* at 848, *citing King v. Palmer*, 778 F.2d 878, 880 (D.C. Cir. 1986).
37. *Id.* at 849, *citing DeCintio v. Westchester County Medical Center*, 807 F.2d 304, 307-08 (2d Cir. 1986).