SEXUAL (AND OTHER) HARASSMENT:
WHAT IT IS AND HOW TO MINIMIZE LIABILITY

BY

ALAN E. MARKS

Thompson & Knight LLP
98 San Jacinto Blvd., Suite 1900
Austin, Texas 78701
Direct dial: (512) 469-6149
Facsimile: (512) 482-5049
alan.marks@tklaw.com

April 19, 2006
I. Why Talk About It?

First, to foster and maintain sound employee relations. Every employee deserves to be treated with dignity and respect; every employee deserves a safe working environment free from all forms of harassment, hostility, and abuse. Employees who feel respected and safe in their working environment are more productive and less likely to seek alternative employment, thus directly and positively affecting the bottom line. An employer cannot address every problem an employee might bring into the workplace, but it can, and in some cases is legally obligated to, address problems created by the workplace.

Second, to minimize legal liability. Federal and state law prohibit many forms of harassment. What is more, such conduct is lucrative grist for the litigation mill. Preventing such conduct and, if it occurs, promptly and effectively stopping it, may reduce and in some cases eliminate legal liability. In the absence of a strong policy prohibiting unlawful harassment, effective enforcement of the policy, and training to prevent violations of the policy, liability for such conduct can be staggering.

II. The Law

Title VII of the Civil Rights Act of 1964 (“Title VII”) prohibits harassment based on race, color, religion, sex, and national origin. The Texas Commission on Human Rights Act (TCHRA) similarly prohibits such harassment. Other federal statutes such as the Age Discrimination in Employment Act (ADEA), the Americans with Disabilities Act (ADA), and the Family and Medical Leave Act (FMLA) prohibit harassment based on age, disability, and the need for or the taking of leave for serious health conditions. These forms of harassment also may create liability for intentional infliction of emotional distress, invasion of privacy, assault, battery, defamation, and various forms of negligence. These common-law claims also are available to address more generalized workplace harassment, hostility, and abuse even though the conduct is not motivated by sex, race, or the like.

III. What Is Unlawful Harassment (Part One)?

A. The Definition

The EEOC, which is the federal agency charged with enforcing Title VII, defines sexual harassment as *unwelcome sexual advances, requests for sexual favors, and other verbal or physical conduct of a sexual nature* when:

- Submission to such conduct is made either explicitly or implicitly a *term or condition* of an individual's employment (*quid pro quo*), or

- Submission to or rejection of such conduct by an individual is used as the *basis for employment decisions* affecting such individual, (*quid pro quo*), or
Such conduct has the purpose or effect of unreasonably interfering with an individual’s work performance or creating an intimidating, hostile, or offensive working environment.

Courts generally have accepted the EEOC’s definition of sexual harassment.

B. The Theories

1. Quid Pro Quo

The EEOC’s definition encompasses two types of prohibited conduct — quid pro quo and hostile environment. Quid pro quo ("this for that") harassment exists when an employer (in practice any manager or supervisor) makes consent to a demand for sexual favors a condition of employment, continued employment, or a benefit of employment. Crudely put, the quid, sexual favors, is exchanged for the quo, a job, a promotion, a raise, or the like. The threat, though, must be carried out. Otherwise, the case is analyzed as a hostile environment. Hostile-environment sexual harassment exists when an employer (in practice any employee) subjects an (other) employee to a working environment that includes severe or pervasive unwelcome sexual advances, innuendos, requests for sexual favors, or other offensive conduct of a sexual nature. Such conduct need not be linked to a tangible job benefit or economic consequences. An employer’s liability for hostile environment sexual harassment largely depends on whether the harassment culminated in a tangible adverse employment action and whether the harassment was committed by a co-worker (or third party) or a supervisor (or other person with the power to affect the victim’s employment status).

To be unwelcome, the harassment need not be involuntary. In other words, an employee who is the subject of sexual advances need not prove that his or her submission to the advances was involuntary or nonconsensual. It is enough if the advances were unwelcome.

2. Hostile Environment

For hostile-environment sexual harassment to be actionable, the conduct must be severe or pervasive. An employee need not prove that his or her psychological well-being was affected by the harassment. Instead, courts (or juries) look at all the circumstances surrounding the conduct, including:

- whether the conduct was verbal or physical or both;
- whether the conduct was obviously severe or patently hostile;
- how frequently the conduct was repeated;
- whether the conduct was physically threatening or humiliating;
- whether the conduct involved offensive comments; and
whether the conduct unreasonably interfered with the employee’s work performance.

The conduct must be sufficiently severe or pervasive to create an objectively hostile or abusive environment, and the victim must subjectively perceive the environment to be abusive. According to the EEOC, in most situations the employee’s assertion that the conduct was offensive is sufficient proof of the subjective component of this test, and neither the absence of a contemporaneous complaint by the employee nor the active participation in sexually-related conduct by the employee will overcome the employee’s assertion that he or she perceived the environment as offensive.

C. Who Can Be A Victim?

In terms of sexual harassment, courts have long recognized that the prohibition of sex discrimination protects both women and men. That is, men and women can be the victims, as well as the perpetrators, of sexual harassment. In 1998, the United States Supreme Court held that Title VII reaches same-sex sexual harassment, i.e., instances in which the victim and the perpetrator are of the same sex. Same-sex sexual harassment is not limited to instances in which there are explicit or implicit proposals of sexual activity and there is credible evidence that the harasser is homosexual. Harassing conduct, moreover, need not invariably be motivated by sexual desire for it to constitute discrimination on the basis of sex. For example, a female victim might be harassed in such sex-specific and derogatory terms by another woman as to satisfy the requirement that the harassment be because of sex. There is no requirement that there be evidence that the victim is or is perceived to be homosexual for liability to attach. It is entirely possible that a male employee may be subjected by other male co-workers to such crude verbal remarks or physical conduct of a sexual nature that his working environment may fairly be said to be sexually hostile. Similarly, courts have upheld racial harassment claims where both the harasser and the harasssee are of the same race.

IV. When Is An Employer Liable?

A. Quid Pro Quo

Quid pro quo harassment only arises in the context of sexual harassment. By definition quid pro quo sexual harassment can be inflicted only by a supervisor (or perhaps, someone the employee reasonably believed to have supervisory authority). Where the threat (or, presumably, the promised benefit) is carried out, the employer’s liability is strict.

B. Supervisor-Created Hostile Environment

All forms of unlawful harassment (including sexual harassment) can lead to employer liability. First, an employer will be vicariously liable, i.e. liable without fault, when the supervisor’s harassment culminates in a tangible adverse employment action such as a denial of a raise, demotion, or discharge. Second, when the supervisor’s harassment does not culminate in a tangible
adverse employment action, an employer will be vicariously liable subject to the affirmative defense that:

- The employer exercised reasonable care to prevent and correct promptly any unlawfully harassing behavior; and
- The employee unreasonably failed to take advantage of any preventative or corrective opportunities provided by the employer or to otherwise avoid harm.

In general, to satisfy the first prong of the affirmative defense, the employer must show that it had an effective anti-harassment policy and complaint procedure. The second prong of the affirmative defense generally will be satisfied upon a showing that the employee unreasonably failed to use the complaint procedure at all or in a timely manner.

C. Co-Worker (Or Third-Party) Created Hostile Environment

Courts universally have applied a negligence standard of liability in determining when an employer will be held liable for a hostile working environment created by co-workers. An employer is negligent if it knew or should have known of the harassment and failed to stop it. An employer usually can avoid such liability by having an effective anti-harassment policy and complaint procedure, by promptly and effectively investigating complaints of unlawful harassment, and by taking prompt and effective remedial action where appropriate in response to such complaints.

D. Who Is Liable And For How Much?

Although the Supreme Court has not definitively answered the question, most courts hold that there is no individual liability under Title VII. Under the fair employment practices laws of various states including Texas, however, individuals may be held personally liable. Also, an individual may be legally liable for harassing conduct apart from federal or state statutory prohibitions. As noted above, such conduct might constitute intentional infliction of emotional distress, invasion of privacy, assault, battery, defamation, various forms of negligence, or some other common-law wrong for which both employers and individual employees may be held liable.

Employers who are found to have violated Title VII’s prohibition of unlawful harassment may be liable for (i) lost wages and benefits in the past; (ii) reinstatement or lost wages and benefits in the future; (iii) compensatory damages, such as mental anguish; (iv) punitive damages; (v) costs of court; and (vi) attorney’s fees. The sum of compensatory and punitive damages are capped based on an employer’s size — for employers with between 15-100 employees, the cap is $50,000; between 101-200, $100,000; between 201-500, $200,000; and over 500, $300,000. The Texas Commission on Human Rights Act uses the same damage limitations. Liability for common-law claims is essentially limited only by the proof, the jury’s imagination, state-law caps on certain types of damages, and, at least theoretically, constitutional limits on punitive damages.
V. What Constitutes Unlawful Harassment (Part Two)?

A. In General

It is unrealistic, of course, to catalogue all the specific types of conduct that might violate the law. Employees who exercise common sense and respect for the sensibilities of others should not run afoul of the policy. A sense of context and boundaries is essential as well. Conduct that might be appropriate in purely social settings may be entirely inappropriate in the work environment. Employees should not view the workplace as a dating service, comedy club, source of advice for the brokenhearted, or a captive audience to be regaled with sexual exploits, interests, or lack thereof.

It is safe to say, though, that some conduct that should be strictly prohibited by employers’ policies and handbooks and are likely illegal — sexual advances; requests for sexual favors; verbal abuse of a racial or sexual nature; the display, distribution (such as by e-mail), or accessing (such as through the Internet) of racially or sexually-explicit, graphic, suggestive, offensive, or demeaning jokes, photographs, images, books, or magazines; graphic verbal commentaries about an individual’s body or dress; racial or ethnic slurs or epithets; racially or sexually degrading words used to describe an individual; or threats, intimidation, or hostile acts relating to an individual’s sex, race, religion, national origin, age, disability status, citizenship status, military status, or workers’ compensation claim status.

B. Examples Of Conduct To Avoid

- The Close Talker
- Mr. Touchy-Feely
- An Anatomy Lesson
- Dear Abby/The Matchmaker
- Ms. Lonely Heart
- The Single Guy
- Auditioning For The Improv
- That’s Entertainment!
C. Some Myths About Sexual (and Other) Harassment

- “It can’t be sexual harassment if I’m not attracted to her.”
- “If it’s not sexual, it’s ok.”
- “If she laughs, she must think it’s funny.”
- “Just say no.”
- “If she says ‘yes,’ it’s not harassment.”
- “The ‘one-bite’ rule”
- “Look at the way she dresses”
- “What’s good for the goose . . . The equal-employment-opportunity harasser”
- “I was just blowing off steam.”
- “Guys can’t be sexually harassed.”
- “Off-premises conduct is off-limits.”
- “It looked consensual to me.”
- “I don’t supervise them, so it’s not my problem.”
- “She asked me to keep it confidential.”
- “If it’s he said/she said, there’s nothing I can do about it.”

VI. What Should (Can) an Employer Do to Minimize Its Liability?
A. Anti-Harassment Policies

From an employer’s perspective, the most effective and cost-efficient method of avoiding liability for workplace harassment is providing preventative and corrective opportunities in a written non-harassment policy. The employer should make sure the policy is widely distributed and available to all employees. For example, the employer should include the policy in its employee handbook, post it in places where employees can easily refer to it (e.g., on public bulletin boards), and even distribute it in memoranda or letters. The employer should also discuss the policy during employee orientations and may consider discussing it during in-house seminars and education programs. Finally, the employer should make its employees sign an acknowledgment that they have received the policy and will abide by it. The employer should also keep the acknowledgment in the employees’ personnel files.

To be effective, a workplace harassment policy should contain several elements. In general, the policy should:

- State that the employer is committed to providing a workplace free from harassment based on race, color, sex, sexual orientation, religion, national origin, age, citizenship status, disability status, membership or application for membership in a uniformed service, or participation in protected activity as defined by law;
- State that the employer does not permit or condone workplace harassment of employees by managers, supervisors, or coworkers;
- Define sexual harassment in accordance with the EEOC’s definition, Title VII, and the TCHRA;
- Describe the type of behavior that might be considered offensive or violate the anti-harassment policy;
- Clearly describe the complaint procedure for reporting violations;
- Allow an employee to report any complaint of harassment through multiple channels and to employer representatives other than immediate supervisors;
- State that any employee who makes a complaint of harassment will not be subject to an adverse employment action because of the complaint;
State that any employee who receives a complaint of harassment must report it to the designated employer representative responsible for conducting investigations;

State that the employer will promptly and thoroughly investigate all complaints to determine whether improper conduct has occurred, and that the employer will maintain the confidentiality of all complaints to the extent possible while allowing the employer to conduct a full and fair investigation; and

State that any employee found to have violated the policy will be subject to appropriate discipline, up to and including termination of employment.

B. Investigations

Employers should promptly respond to all complaints of workplace harassment. Employers should also investigate all complaints of workplace harassment where appropriate and create appropriate documentation. Finally, employers should consider consulting legal counsel throughout the investigative process. A properly conducted investigation will yield benefits if there are subsequent legal proceedings.

C. Remedial Action

Finally, employers should take prompt and appropriate remedial action against any individuals who have violated anti-harassment policies. Although the appropriate discipline will differ based on the facts and circumstances, the remedial action must be designed to immediately end any inappropriate conduct.

VII. What Steps Should Employees Take If They Are Harassed?

A. Internal Complaints

Victims of workplace harassment should directly inform the harasser that the conduct is unwelcome and must stop. This is true especially when the harasser may be under the impression that the conduct at issue may be welcomed. If confronting the harasser directly does not work or is not feasible, the victim should closely adhere to his or her employer’s internal complaint procedure.

B. Administrative Charges

Administrative charges of workplace harassment may be filed with the EEOC or the Texas Commission on Human Rights (TCHR), or both. A charge of discrimination must be filed with the EEOC within 300 days of the alleged harassment to pursue a claim under Title VII. A charge of
discrimination must be filed with the TCHR within 180 days of the alleged harassment to pursue a claim under the TCHRA.

C. Civil Lawsuits

After the EEOC investigates a charge of workplace harassment, it will issue a dismissal and notice of right to sue, which gives the victim 90 days to file a civil lawsuit under Title VII. Likewise, the TCHR will issue a dismissal and notice of right to file a civil action, which gives the victim 60 days to file suit under the TCHRA. Failure to file suit within the statutory periods may result in the loss of a victim’s ability to pursue a civil lawsuit for workplace harassment.