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Workplace Harassment by Law Enforcement and Correctional Supervisors

Part 1 – Sexual Harassment (S*eptember*)
- **Introduction**
- **Supreme Court Defines Supervisor**
- **Quid Pro Quo Sexual Harassment**
- **Hostile Environment Sexual Harassment**
- **Same Sex and Sexual Orientation Harassment**

Part 2 – Racial and Other Forms of Harassment (*This Month*)
- **Racial Harassment**
- **Other Forms of Harassment**
- **Suggestions to Consider**
- **References and Resources**

This is Part 2 of a two-part article. To read Part 1, click here.

❖ Racial Harassment

Rules that define who is a supervisor, for purposes of workplace harassment, were developed by the U.S. Supreme Court in a case alleging racial, rather than sexual harassment. The key aspect is that the superior has the authority to initiate "tangible employment actions" against the alleged victim.

A tangible employment action is one that effects a significant change in "employment status, such as hiring, firing, failing to promote, reassignment with significantly different responsibilities, or a decision causing a significant change in benefits." *Vance v. Ball State University*, #11-556, 133 S.Ct. 2434, 2013 U.S. Lexis 4703.

An employer can be held strictly liable for racial harassment when the harasser is a supervisor. When the harasser is not a supervisor, the employer cannot be held strictly liable, but instead is responsible only if management was negligent in controlling working conditions, allowing the harassment to take place and continue. A federal appeals court concluded that a jury could find that a safety director was harassed by coworkers who used the word "nigger." However, because they were not his supervisors, a summary judgment

for the employer was affirmed. *Hrobowski v. Worthington*, #03-2167, 358 F.3d 473 (7th Cir. 2004).

Racial harassment is when the offensive conduct is based on the race of the victim. The harasser need not be of a different race than the victim, although most often they are. In *Ross v. Douglas Co.*, #00-2688, 234 F.3d 391, 2000 U.S. App. Lexis 31390, 84 FEP Cases (BNA) 791 (8th Cir. 2000), for instance, a federal appeals court upheld a $100,000 verdict for a black officer who was repeatedly called a "nigger" by his black supervisor. The case involved a black corrections supervisor who repeatedly addressed a black subordinate officer as "nigger," or "black boy," and sometimes referred to the officer's wife, who is white, as "whitey." The officer filed a grievance, but the superior continued using racial slurs in addressing him.

After the grievance, he was permanently reassigned to the facility's most stressful area, a control room called the bubble. A coworker later "testified that the assignment was made in retaliation for [his] filing [the] racial discrimination complaint." The officer resigned and sued the county for disparate treatment, retaliation, and hostile work environment. The jury awarded him back pay and $100,000 for emotional damages.

An appellate court affirmed. Noting that in 1998 the U.S. Supreme Court found employer liability in a case of male-on-male sexual harassment, an employer also can be liable for the mistreatment of a black employee by a black supervisor. The use of racial names clearly indicated the treatment was because of his race.

As for the damages, the ex-officer took a lower-paying job without health benefits, and both of the family automobiles were repossessed. "The award of damages was reasonable." See also *U.S. Steel Corp. and Steelworkers L-1014*, 124 LA (BNA) 1021 (Petersen, 2007), in which an arbitrator sustained the termination of a private sector employee that called a coworker a "mother fucking nigger," rejecting the union's argument that since both grievant and her coworker are African-American, no violation of the employer's discriminatory harassment policy occurred.

The fact that a supervisor and subordinate are of different races does not necessarily show that any mistreatment amounts to racial harassment. In *Utomi v. Cook County*, #98C3722, 2001 U.S. Dist. Lexis 12013 (Unpub. N.D.Ill.), a white supervisor's rudeness, abruptness, swearing, and confrontational style were not racial harassment, where the evidence showed that the manager acted disrespectful towards all subordinates, regardless of their race.

In *Hamilton v. Rodgers*, #84-2720, 783 F.2d 1306, 40 FEP Cases 453 (5th Cir. 1986), the widow of a black fire employee was entitled to recover damages against supervisors for continued racial harassment, but the city itself was not liable because the assistant chief,

after becoming aware of the problem, took corrective action. On the other hand, in *DeGrace v. Rumsfeld, Sec'y of Defense*, #79-1221, 614 F.2d 796 (1st Cir. 1980), the employer was found liable for a supervisor's failure to reduce racial harassment. The court held that an AWOL minority firefighter could not be discharged if his absence was provoked by reasonable fears of harm.

Just as sexual harassment of the hostile work environment type need not be directed at a particular individual to be actionable, a racially hostile work environment can be created by general circulation of racist materials or making of racist remarks. In *Ways v. City of Lincoln*, #88-2081, 871 F.2d 750 (8th Cir. 1989), the circulation of photocopied forms entitled "Nigger Application for Employment," and a "Black Intelligence Test" deeply offended a black officer. A jury award of $35,000 was supported by the evidence, a court found.

In another example of this kind of pervasive harassment, the Sixth Circuit affirmed a jury award of $175,000 in compensatory damages for a black firefighter who was subjected to racial and retaliatory harassment. The plaintiff was assigned to a firehouse that had a "Wall of Hate" with derogatory comments directed at black firefighters. *Jordan v. City of Cleveland*, #04-3389, 464 F.3d 584 (6th Cir. 2006).

While even isolated racial epithets are deplorable, courts have been loath to impose liability on the basis of one isolated remark, even if it is found to be greatly offensive, preferring instead to base liability on a racially hostile workplace environment sufficiently pervasive to adversely impact the harassed employee's work performance. See *Herndon v. City of Everett*, #49406-6-I, 2002 Wash. App. Lexis 2161, 113 Wn. App. 1031 (Unpub.), in which the court rejected a defamation and harassment suit filed against the city by an Asian-American police officer, after his sergeant referred to him as a "little fucking gook" to another officer. The slur was not severe or pervasive, the court concluded.

For a decision to the contrary, see *Taylor v. Metzger*, 706 A.2d 685, 1998 N.J. Lexis 92, 76 FEP Cases (BNA) 58, in which the New Jersey Supreme Court held that a single remark can create a hostile work environment. The sheriff called a black woman officer a "jungle bunny," causing her to suffer severe stress. One factor here was that the racial slur was directed right at the officer and did cause her immediate stress, interfering with her ability to work unimpeded.

❖ Other Forms of Harassment

While sexual and racial or ethnic harassment are the two main forms that workplace harassment takes, clearly there are other actionable forms, including disability or religious

harassment. In *Carnes v. Superior Court of Placer County*, #C045867, 126 Cal. App. 4th 688, 23 Cal**.** Rptr. 3d 915, 2005 Cal. App. Lexis 192 (3rd App. Dist. 2005), for instance, allegations by a disabled court employee, who claimed to have physical and mental impairments, that her superior "interrupted her, criticized her work, spoke to her in a rude and condescending way, yelled at her, got uncomfortably close to her, and behaved angrily toward her" created a triable issue as to whether the behavior created a hostile work environment. A summary judgment for the defendants was therefore reversed.

There may, however, be some categories or statuses that are not currently protected against workplace harassment under existing law nationwide or in a particular jurisdiction. In *Carder v. Continental Airlines*, #10-20105, 636 F.3d 172 (5th Cir. 2011), for instance, the court ruled that military service laws do not protect reservists against harassment. Pilots alleged that airline management created a hostile work environment through "harassing, discriminatory, and degrading comments and conduct relating to and arising out of" their military service. "We decline to infer a cause of action for hostile work environment under USERRA," the court concluded.

There seems to be nothing that would restrict an employer, on the other hand, from adopting an anti-harassment policy that would protect reservists or former members of the military. Existing statutory and case law only establishes the minimum requirements as to who is protected against workplace harassment, and an employer is free to take a more expansive view of the issue. It could easily be argued that those who have served their country through military service are certainly worthy of protection against being harassed on that basis.

In *Sindoni v. Co. of Tioga*, #506921, 2009 NY Slip Op 08126, 67 A.D.3d 1183, 889 N.Y.S.2d 285, 2009 N.Y. App. Div. Lexis 7974 (3rd Dept.), the alleged harassment was evidently aimed against a particular individual rather than on the basis of her membership in some larger group (race, gender, religion, disability, etc.). An appellate court sustained the termination of a county employee who wore a ribbon to demonstrate her membership in the "I Hate Teena Club." Teena was a disliked coworker. The appellant also made threatening and intimidating comments to other coworkers and was apparently known to be vindictive, and the county, for rather obvious reasons, found this confrontational behavior unacceptable and disruptive in the workplace.

❖ Suggestions to Consider

Every department, agency, or facility should have a detailed, written, and well-publicized workplace harassment policy. While there are, of course, particularities to different forms

of harassment, some of which must be directly addressed, most forms of workplace harassment have several things in common. Harassment, whatever its motivation or intent, which can range from bigotry and hatred to expressions of sexual desire, ultimately has the objective effect of making the harassed employee feel uncomfortable and unwelcome in the workplace. It interferes with the ability of employees to do their job. It damages morale. It promotes an unprofessional atmosphere, and often leads to a wide variety of misconduct that runs the gamut from mildly annoying to outright criminal acts and violence.

Employers, managers, and supervisor should make it plain that they have a zero tolerance policy for all forms of workplace harassment, whether based on race, national origin, ethnicity, sex, sexual orientation, religion, or disability.

A good workplace harassment policy will have the following features:

1. It will broadly prohibit all forms of workplace harassment, regardless of what protected categories are involved.
2. It will specifically encourage those who feel that they have been subjected to harassment to file a complaint. Both initial threshold informal complaint procedures can be spelled out to attempt to nip things in the bud, as well as more formal complaint procedures for the most serious problems. The more formal complaint process should be mandatory for use for subsequent or ongoing offenses in which the informal process has not resolved the problem.
3. There must be avenues to bypass the normal chain of command for those instances in which the harasser is a supervisor, manager, or other superior.
4. Because members of law enforcement, correctional personnel, and fire departments do work that necessarily involves contact with the public, the policy should address those interactions too, and recognize that employees may be subject to harassment in the workplace by persons who are not co-workers, but are independent contractors, complainants, witnesses, vendors, connected with funding agencies (including members of political bodies), and prisoners or detainees. The employer should anticipate having to respond to harassment involving such non-employees, whether it is a member of the public harassing an employee or an employee harassing a member of the public.
5. When it comes to sexual harassment, the policy should cover both hostile environment sexual harassment, such as arises from inappropriate sexual remarks, jokes, pornographic materials, etc. in the workplace, as well as quid pro quo sexual harassment in which sexual favors are sought as the explicit or implicit price of choice assignments, good performance reviews, promotion, raises, or other

desirable employment conditions, or rejection of sexual advances results in retaliation.

6. The harassment policy should be gender neutral and cover same sex sexual harassment as well as harassment on the basis of sexual orientation or gender identity.
7. The policy must protect those who complain against retaliation for doing so, as well as those who serve as witnesses or otherwise cooperate with investigations of complaints.
8. Employees should receive a written copy of the policy and have some training in regard to it.
9. The policy should be periodically reviewed by top management and legal counsel to make sure that it complies with current law and is also working properly in practice.
10. Confidentiality should be guaranteed to the extent feasible during an investigation. Every complaint should be investigated, and a definite conclusion and resolution arrived at.
11. Supervisory personnel should be held accountable for the misconduct of an employee which is known or should have been known, unless immediate and appropriate corrective action has been taken.
12. Progressive disciplinary procedures, up to and including termination of employment, should be used against the harasser and/or appropriate supervisory personnel.

❖ Resources

The following are some useful resources related to the subject of this article.

- City of Portland Policy Against Harassment.
- Employee Harassment – Nonsexual. AELE Case Summaries
- Employee Harassment Sexual Orientation, AELE Case Summaries
- Harassment and Discrimination in the Workplace. Kenosha Police Department.
- Harassment in the Workplace. Orlando Police Department.
- Harassment Policy. Boston Police Department.
- IACP Model Policy, Harassment and Discrimination (Jan. 2002).

- IACP Training Key #546, Harassment and Discrimination in the Workplace (2002 Update).
- Racial Harassment. AELE Case Summaries.
- Sexual Harassment - In General AELE Case Summaries
- Sexual Harassment - Retaliation AELE Case Summaries
- Sexual Harassment - Same Gender AELE Case Summaries
- Sexual Harassment - Suits by the Person Accused AELE Case Summaries
- Sexual Harassment - By Inmates in Correctional Facilities AELE Case Summaries
- Sexual Harassment - Suits Against the Union AELE Case Summaries
- Sexual Harassment - Verdicts, Settlements & Indemnity AELE Case Summaries
- Sexual Harassment Policy. U.S. Department of State.

❖ **Prior Relevant Monthly Law Journal Articles**

- Civil Liability for Sexual Harassment of Female Employees by Prisoners, 2010 (7) AELE Mo. L. J. 301.
- Retaliatory Personnel Action Part Three—What constitutes employer retaliation?, 2009 (11) AELE Mo. L.J. 201.
- Sexualized and Derogatory Language in the Workplace, 2011 (2) AELE Mo. L. J. 201.

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- "The Economics and Law of Sexual Harassment in the Workplace," by Kaushik Basu, 17 Journal of Economic Perspectives No. 3, pages 141-157 (Summer 2003).
- "The Sanitized Workplace," by Vicki Schultz, 112 Yale L.J. 2061 (2003).
- "Employer Defenses to Sexual Harassment Claims," 6 (1) Duke Univ. Journ. of Gender Law & Policy 27 (Spring, 1999).
- "Past sexual conduct in sexual harassment cases," 75 (1) Chicago-Kent Law Rev. (1999). http://cklawreview.com/

- "Sexual harassment in California law enforcement: a survey of women police officers," 30 (4) J. Calif. Law Enf. 82-87 (1997) http://www.cpoa.org/
- What Speech Does "Hostile Work Environment" Harassment Law Restrict? Eugene Volokh, 85 Geo. L.J. 627 (1997).
- Hope A. Comisky Esq., "Beware of the alleged harasser - lawsuits by those accused of sexual harassment," 12 (2) The Labor Lawyer (ABA) 277-290.

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