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**Workplace Harassment by
Law Enforcement and Correctional Supervisors**

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❖ **Introduction**

Protecting employees against workplace harassment is an important obligation of law enforcement and correctional agencies as employers. Harassment is a corrosive element in an agency's functioning, can undermine morale, and unfairly subjects hard-working employees to daily torments that add to the burdens and responsibilities that they have to cope with to effectively do their job. Additionally, as has long been clear, workplace harassment on the basis of sex or race, as well as other protected categories, is illegal and can lead to lawsuits and substantial damage awards.

Harassment is particularly damaging when engaged in by supervisory personnel who wield substantial power over employees' working conditions and assignments and play a key role in performance evaluations, promotions, transfers, discipline, and termination decisions. When a supervisor, who should be helping to protect an employee against harassment, is the harasser, the employee faces an additional dilemma. In the normal chain of command, they would complain to their supervisor about workplace harassment, and they may fear, if they go outside the normal chain of command to complain about workplace harassment by a supervisor, that they will face retaliation for doing so.

It has long been clear that there are circumstances in which an employer can be liable for harassment by a supervisor. In a very important 2013 decision, the U.S. Supreme Court more exactly defined just what a supervisor is, narrowing the circumstances in which an employer will be liable.

This two-part article begins with an examination of that case, followed by a discussion of some of the major forms of sexual harassment. In part 2 next month, racial and other forms of workplace harassment will be discussed, followed by a discussion of some suggestions for agencies to consider. At the end of part 2, there is a listing of some relevant and useful resources and references.

Three prior articles in this journal are relevant to this discussion: [Sexualized and Derogatory Language in the Workplace](#), 2011 (2) AELE Mo. L. J. 201, [Civil Liability for Sexual Harassment of Female Employees By Prisoners](#), 2010 (7) AELE Mo. L. J. 301, and [Retaliatory Personnel Action Part Three—What constitutes employer retaliation?](#), 2009 (11) AELE Mo. L. J. 201. The material in them will not be repeated here.

❖ Supreme Court Defines Supervisor

In harassment lawsuits against an employer under Title VII of the Civil Rights Act of 1964, the employer's liability depends on the status of the harasser. When the harasser is simply one among the victim's ordinary coworkers, the employer can only be liable if it was at least negligent in controlling working conditions. When the harasser is a supervisor, and the harassment results in a "tangible employment action," the employer is strictly liable.

A tangible employment action is defined as a "significant change in employment status." Examples are decisions concerning hiring, firing, failing to promote, reassignment with significantly different responsibilities, or causing a significant change in pay or benefits.

If no such tangible employment action takes place, the employer has the opportunity to escape liability for the supervisor's harassment by asserting an affirmative defense and proving:

1. That the employer took reasonable care to attempt to prevent and correct any harassing behavior, and
2. That the complaining employee unreasonably failed to avail themselves of preventative or corrective opportunities that the employer provided.

In [Vance v. Ball State University](#), #11-556, 2013 U.S. Lexis 4703, an employee working for a university claimed that she was subjected to harassment by another employee who she contended was her supervisor, resulting in a hostile working environment.

She sought to hold her employer directly liable for the other employee's actions. The U.S. Supreme Court held that an employee is classified as a supervisor for purposes of imputed liability under Title VII only in circumstances where he or she is given authority by the employer to take "tangible employment actions" against the alleged victim. In this case, no such empowerment existed, so the other employee was not a supervisor.

The Court emphasized that what was important was the actual underlying power relationships, not whether the harasser was or was not labeled a "supervisor." The term can have a variety of meanings both in everyday usage and legally.

Congress did not use the term "supervisor" in Title VII and accordingly, it is not defined there. For the meaning of what a supervisor is, the guide is relevant court decisions, which have created a "highly structured framework." Earlier relevant U.S. Supreme Court decisions on workplace harassment include [*Burlington Indus. v. Ellerth*](#), #97-569, 524 U.S. 742 (1998); [*Faragher v. City of Boca Raton*](#), #97-282, 524 U.S. 775 (1998); and [*Gebser v. Lago Vista Ind. Sch. Dist.*](#), #96-1866, 524 U.S. 274 (1998).

The sharp line between supervisors and coworkers is that supervisors have authority to take tangible employment actions against the employee. This can ordinarily be determined as a matter of law, rather than a question of fact for a jury or other fact finder. The Court criticized and abandoned a more open-ended approach advocated by the EEOC in an Enforcement Guidance document "which ties supervisor status to the ability to exercise significant direction over another's work."

This approach, the Court noted, does not leave employees unprotected against harassment by coworkers who "possess some authority to assign daily tasks," such as those who may be in command of a particular operation, but do not have the delegated power to hire, fire, promote, etc. In those cases, however, the victim of the harassment will have to show, to hold the employer liable, that it was negligent in permitting the harassment to occur. The jury can also be told that the degree and nature of any authority exercised by a harasser is an important consideration in determining whether negligence existed.

The Court noted that the narrower definition of supervisor that it was adopting accounted for the fact that many modern employers have abandoned a hierarchical management structure in favor of giving employees overlapping authority with regards to work assignments.

While the Court's decision came in the context of a racial harassment lawsuit, the reasoning and the definition of supervisor would apply equally in other cases for workplace harassment under Title VII on the basis of sex, religion, or other protected categories.

❖ Quid Pro Quo Sexual Harassment

Sexual harassment violates Title VII. [*Meritor Savings Bank v. Vinson*](#), #84-1970, 477 U.S. 57 (1986). Not all conduct of a sexual nature in the workplace is prohibited, but rather unwelcome sexual conduct that is a term or condition of employment. *Vinson* established that both “quid pro quo” and “hostile environment” are unlawful as a form of sex discrimination.

A particularly pernicious form of workplace sexual harassment is quid pro quo sexual harassment, where sexual acts and favors are demanded or expected, either expressly or implicitly, in exchange for continued employment, promotion, good performance evaluations, pay increases, favorable work assignments, or other tangible benefits that employees should ordinarily receive for doing a good job. It appears to be less common in the law enforcement context, at least in terms of reported cases, which is not to say that it does not occur. Quid pro quo harassment occurs when submission to or rejection of unwanted sexual conduct by an individual is used as the basis for employment decisions affecting the individual.

One thing should be clear: the fact that a subordinate gives in to a supervisor’s sexual demands does not somehow magically transform unwanted quid pro quo sexual harassment into a “voluntary” romantic relationship, given the power relationships involved.

In [*Crutcher-Sanchez v. County of Dakota*](#), #11-2898, 687 F.3d 979 (8th Cir. 2012), for instance, a female former corrections officer sued her supervisor at the jail, the chief deputy, for sexual harassment. The chief deputy allegedly began pursuing her sexually on and off the job, and they had sex approximately ten times, with some of the sex occurring in county vehicles while driving back from transport trips. She admitted that it had been voluntary, except to the extent she protested the first time. He later allegedly instructed a subordinate to fire her after he accused her of having sex with a friend of hers.

The chief deputy was not entitled to qualified immunity on the sexual harassment claim. Voluntary sexual activity may be “unwelcome harassment.” The court found that it was clearly established that a “supervisor’s attempt to have sex with a subordinate violates the subordinate’s civil rights.” The case was couched in terms of a sexually hostile working environment, rather than explicitly a quid pro quo arrangement, although initially the plaintiff also raised such a claim.

In [*Fraser v. Wash. State Dep’t of Corr.*](#), #11-5273, 2012 U.S. Dist. Lexis 41036 (W.D. Wash.), a female corrections officer claimed that she was fired for spurning the romantic advances of another correctional officer. The court granted summary judgment for the

defendants on her quid pro quo sexual harassment claim, finding that she had not shown that her harasser was her supervisor, since he did not have authority to demand obedience from her, to control her work assignments or schedule, and did not have authority to hire, fire, or take other employment action against her. The court also found that, even if he were her supervisor, she had failed to show that he “explicitly conditioned her employment, a job benefit, or the absence of a job detriment on her acceptance of his sexual overtures.”

Similarly, in [*Duncan v. County of Dakota*](#), #11–2467, 687 F.3d 955 (8th Cir. 2012), a female former corrections officer failed to show that her supervisor, the jail administrator, had subjected her to hostile environment sexual harassment or engaged in “widespread sexual favoritism.” He had never asked her to go out with him or have sex with him. She failed to identify any opportunities or benefits the supervisor denied her, or that a promotion available to her instead went to another employee who had a sexual relationship with the supervisor.

Indeed, she herself chose not to apply for a promotion because she feared damage to her reputation. Further, the supervisor’s conduct was not physically threatening or humiliating and did not unreasonably interfere with her work performance. The supervisor was therefore entitled to qualified immunity from her claims.

❖ Hostile Environment Sexual Harassment

In [*Meritor Savings Bank v. Vinson*](#), #84-1970, 477 U.S. 57 (1986), in rejecting an employer’s contention that Title VII prohibits only discrimination that causes “economic” or “tangible” injury, the U.S. Supreme Court found that the law gives employees the right to work in an environment free from discriminatory intimidation, ridicule, and insult whether based on sex, race, religion, or national origin.

It stated that a sexually hostile or abusive environment is an arbitrary barrier to sexual equality in the workplace making a person “run a gauntlet of sexual abuse” in return for the privilege of being allowed to work and make a living. Such harassment must, however, be “sufficiently severe or pervasive ‘to alter the conditions of [the victim’s] employment and create an abusive working environment.’”

Hostile environment sexual harassment has resulted in substantial damage awards. In [*Passananti v. Cook County*](#), #11-1182, 689 F.3d 655 (7th Cir. 2012), for example, a county was liable for \$70,000 to a female employee who claimed that the director of its jail program, who was her supervisor, subjected her to sexual harassment, including repeatedly calling her his “bitch” and other gender-based remarks and epithets. Such verbal harassment can meet the test for “severe or pervasive harassment.”

In another case, a female Illinois State Police sergeant, who alleged that she was sexually harassed by her supervisor and then received negative performance ratings and inferior work assignments after she complained, won a jury verdict of \$146,000. [*Storey v. Ill. State Police*](#), #05CV-4011, verdict (S.D. Ill. 2006); facts discussed in a [ruling](#) at 2005 U.S. Dist. Lexis 17304 (S.D. Ill.), other rulings at 2006 U.S. Dist. Lexis 8127 and 57970.

And, in *Anderson v. Reno*, #97-0747, settlement rptd. at 38 (1887) G.E.R.R. (BNA) 1284 (N.D. Cal.); prior decision at [*Anderson v. Reno*](#), #98-16458, 190 F.3d 930, 1999 U.S. App. Lexis 21387, 80 FEP Cases (BNA) 1663 (9th Cir. 1999), the FBI paid a settlement of \$150,000 plus attorneys' fees to woman agent who complained of sexually-oriented teasing, harassment, and ridicule that was not only condoned by, but participated in, by her supervisors.

- See also AELE's [Sexual Harassment Verdicts & Settlements](#) case digest.

Not every isolated remark by a supervisor having possible sexual overtones, however, will constitute actionable sexual harassment. See [*Sword-Frakes v. City of N. Las Vegas*](#), #2:04-CV-01718, 2006 U.S. Dist. Lexis 69524 (D. Nev.), for example, holding that a routine police uniform inspection regime was not a sexually hostile activity, even if a supervisor commented about a female officer's tight fitting clothes. That aspect of the case on the sexual harassment claim was affirmed in [*Sword-Frakes v. City of N. Las Vegas*](#), 267 Fed. Appx. 634, 2008 U.S. App. Lexis 3992 (9th Cir.).

In [*Valenti v. City of Chicago*](#), #01 C 8581, 2004 U.S. Dist. Lexis 2779, 93 Fair Empl. Prac. Cas. (BNA) 689 (N.D. Ill. 2004), a federal court found that a supervisor's remarks were severe and pervasive enough to refuse to dismiss a woman police officer's suit. Although she presented no direct proof of a discriminatory motive, the court found that the circumstantial evidence of her supervisor's discriminatory intent was sufficient to defeat the city's summary judgment motion.

She alleged that her supervisor berated and belittled women repeatedly and voiced a belief that women should not be police officers. A jury could find that the supervisor transferred women who challenged his authority or made their lives so miserable that they sought to leave.

Among other things, he called her into his office and described what he called "every man's" sexual fantasy to her, providing a graphic description of a sexual relationship involving a man and two women. He concluded his lewd remarks by telling her that if she were not married, they "would be dating."

While the department had a zero tolerance policy for sexual harassment, as is often the case in similar situations, she did not immediately complain about her supervisor's behavior because she was afraid that he might retaliate against her.

❖ Same Sex and Sexual Orientation Harassment

In recent years, there have been a number of cases in which courts have addressed same sex sexual harassment issues, or sexual harassment based on someone's sexual orientation.

In [*Redd v. New York State Division of Parole*](#), #10-1410, 678 F.3d 166 (2nd Cir. 2012), the court ruled that a female employee of the state parole department stated a viable claim for hostile environment sexual harassment by alleging that a female supervisor repeatedly touched her breasts, and that these touches were homosexual advances.

A jury could permissibly find that this conduct was humiliating and that the actions were not incidental or minor, but rather intentional and repeated. There were factual issues to be resolved about the sufficiency of the employee's complaints about this conduct which were relevant to the issue of the employer's liability.

A California appeals court affirmed a \$1.9 million verdict awarded to a gay employee at a California correctional facility because of pervasive harassment by coworkers. His immediate supervisor had called him a "motherfuckin' faggot" and a "homo." [*Hope v. Calif. Youth Auth.*](#), #B171593, 134 Cal. App. 4th 577, 36 Cal. Rptr. 3d 154 (2005).

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