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Sexualized and Derogatory Language in the Workplace

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❖ Introduction

The term *sexual harassment* did not come into popular use until the 1970s. In fact, Title VII of the federal Civil Rights Act did not protect women from employment discrimination in the public sector before 1972. ^[1] It was not until 1980 that the EEOC issued guidelines on sex discrimination that included sexual harassment. ^[2]

Military installations, firehouses, jails and police stations were traditionally staffed by males and were often characterized by obscene and vulgar speech. But in the contemporary American workplace, sexual language – like pornography – is unnecessary, unwelcome and offensive.

❖ Policy considerations

For more than 20 years, the IACP has had a Model Policy on *Harassment and Discrimination*. ^[3] It states that employees “shall not make offensive or derogatory comments to any person, either directly or indirectly.”

A “Concepts paper” that accompanies the model policy notes that a police workplace is not always a bastion of civility and a warning sign that may signal a potential for harassment includes an “atmosphere where swearing or sexually oriented language is regularly heard.”

Agencies may prohibit verbal misconduct under a policy section dealing with general duties and conduct; it may also be proscribed in a sexual harassment policy. A few examples:

- “Jokes consisting of derogatory, vulgar, and/or uncomplimentary language of a sexual nature [or] demeaning comments spoken or actions made on account of sex or of a sexual nature.” – Anne Arundel County, MD, Police Dept. Rules and Regulations Manual, No. 717, *Sexual Harassment*.
- “Verbal -- sexual innuendoes, suggestive comments, sexual propositions, or statements about other employees, even outside their presence, of a sexual nature, suggesting or demanding sexual involvement of another employee whether or not such suggestions or demand is accompanied by implicit or explicit threats concerning one’s employment status.” – Schaumburg, IL, Police Dept. Policies and Procedures Manual, Sec. 4, Title 31-80, *Sexual Harassment*.
- “Using coarse, profane, insolent, or discourteous language to a superior officer, fellow member of the Department, or to any citizen.” – Birmingham, AL, Police Dept. Policy Manual, Procedure No. 110-2, *General Offenses and Action*, Sec. 14.

❖ Targeted language

Management has the right and duty to punish language that is obscene, vulgar, rude or discourteous when directed at superiors, coworkers, suspects and citizens.

Courts have distinguished between a one-time outburst and repeated instances of profanity. A federal appellate panel wrote that “an isolated instance of uttering a profanity under compelling circumstances might be excused” but the “repeated use of profanity cannot be excused.” [*Levinsky v. Dept. of Justice*](#), #06-3046, 161 Fed. Appx. 954, 2006 U.S. App. Lexis 1680 (Fed. Cir. 2006).

As with most speech issues, the time, place and circumstances often control the outcome. An arbitrator ruled that management did not have just cause to suspend a police officer for his use of the word *fuck* at a crime scene, even if he violated a rule against using indecent, profane, or harsh language. He wrote that the use of the word with four suspects was not indecent, profane or harsh “because this was the language they understood” and the language “quieted them down.” *City of Hurst and Individual Grievant*, AAA Case #71-390- 00290 -06, 123 LA (BNA) 302 (Moore, 2006).

A four-judge New York appellate panel upheld a 30-day disciplinary suspension of a police sergeant for using the words *hell*, *shit*, and *fuck*, when directing members of the public to leave a subway station. The use of profanity was unnecessary and unwelcome. *Alston v. NYC Transit Auth.*, 588 N.Y.S.2d 419 (A.D. 1992).

In Massachusetts, an appellate court upheld a five-day suspension of a police lieutenant who said to a superior, “Fuck you! Who do you think you’re talking to?” *Boston Police Dept. v. Collins*, #97-P-1844, 48 Mass. App. 408, 721 N.E.2d 928 (2000).

The Alaska Supreme Court upheld the termination of a police sergeant who called female dispatchers at their homes, using lewd language. *Jurgens v. City of North Pole*, #S-11847, 153 P.3d 321, 2007 Alas. Lexis 21.

In Oklahoma, an arbitrator reduced the punishment for making several remarks of a sexual nature from termination to an eight-month suspension. Though offensive, the language did not create a hostile or abusive workplace. *City of Oklahoma City and AFSCME L-2406*, 121 LA (BNA) 1048, FMCS Case #05/01502 (Shieber, 2005).

❖ **Non-targeted language**

EEOC Guidelines define two types of sexual harassment: “quid pro quo” and “hostile environment.”^[4] In 1986 the Supreme Court concluded that both types of sexual harassment are actionable under Title VII of the Civil Rights Act of 1964, 42 U.S. Code § 2000e-2(a), as forms of sex discrimination.^[5] In determining whether harassment is sufficiently severe or pervasive to create a hostile environment, the harasser’s conduct should be evaluated from the objective standpoint of a “reasonable person.”

Non-targeted language often consists of spontaneous profanity, or remarks directed at outsiders. An example of the former is an outburst accompanying a slip and fall or the recognition of a mistake, e.g., “God dammit, the hell.” An example of the latter is “Fuck all asshole politicians.”

Most women find the use of sexually charged language to be offensive and demeaning, especially the use of the words *bitch*, *cunt*, *cocksucker*, *faggot*, *lesbian*, *pussy*, *whore*, etc. Often the language is not directed at a coworker, or even at a particular person, and is not necessarily directed against only women. Such remarks are intended to amuse or offend everyone.

To have an actionable claim of hostile environment sexual harassment, an employee must prove five elements:

- (1) He or she belongs to a protected group;
- (2) he or she was subject to unwelcome sexual harassment;
- (3) ***the harassment was based upon sex***;
- (4) the harassment affected a term, condition, or privilege of employment; and
- (5) the employer knew or should have known of the harassment and failed to take proper remedial action.

The third requirement is the factor that often causes the most hurdles for plaintiffs. When a sergeant yells profanities to male and female dispatchers, it is heard by both genders. His defense is, since the remarks were heard by males and females alike, the profanity was not directed to women and there was no discriminatory act “because of” their gender. But what if he perennially refers to women callers as *dumb cunts*, and rarely disparages men?

- Courts recognize that sexualized language in the workplace makes it less likely for women will be viewed professionally by their male coworkers. It creates an environment where women are viewed as sexual objects and inferior to men. ^[6]

Some women learned that a lawsuit was unproductive, such as “winning” a verdict of only one dollar. ^[7] The paucity of recoveries prompted the Congress to enact amendments in 1991 to provide compensatory and punitive damages for intentional discrimination. ^[8]

- Although the number of hostile environment claims has risen since 1991, courts have questioned whether uses of the words *bitch*, *slut* or *cunt* are actionable when the remark is not *specifically directed* to the named plaintiff. ^[9] Critics of those rulings have expressed doubt that use of the “N” word in the presence of black coworkers would be excused with similar aplomb.

An additional hurdle facing women who litigate hostile environment claims is a requirement that the conduct is *severe* and *pervasive*. Women are accused of being overly sensitive to casual remarks they hear in the workplace. An agency may respond that women who choose to become police officers, jailers or firefighters are less bothered by non-targeted sexual language than are women in other occupations. One writer responded to that viewpoint:

“Because of the inequality and coercion with which it is so frequently associated in the

minds of women, the appearance of sexuality in an unexpected context or a setting of ostensible equality can be an anguishing experience.” – Kathryn Abrams, 42 Vand. L. Rev. 1183, at 1205 (1989).

The Ninth Circuit has held that men and women have different perspectives, and the tests for severity or pervasiveness should be based on the standard of the reasonable woman. [*Ellison v. Brady*](#), #89-15248, 924 F.2d 872 (9th Cir. 1991). The majority wrote:

“If we only examined whether a reasonable person would engage in allegedly harassing conduct, we would run the risk of reinforcing the prevailing level of discrimination. Harassers could continue to harass merely because a particular discriminatory practice was common, and victims of harassment would have no remedy.

“We therefore prefer to analyze harassment from the victim’s perspective. A complete understanding of the victim’s view requires, among other things, an analysis of the different perspectives of men and women. Conduct that many men consider unobjectionable may offend many women.” 924 F.2d at 878.

Other courts have rejected the reasonable woman test on strong philosophical grounds. The Michigan Supreme Court retorted:

“The belief that women are entitled to a separate legal standard merely reinforces, and perhaps originates from, the stereotypic notion that first justified subordinating women in the workplace. ... Such paternalism degrades women and is repugnant to the very ideals of equality that the act is intended to protect.” ^[10]

Another concern is that management could retaliate against women who raise formal complaints about what a superior views to be excusable behavior.

- In Michigan, two women police officers who complained of gender bias were ordered to submit to psychological evaluations. They were found unfit for duty and were terminated. They sued in federal court for retaliatory treatment. The jury awarded each of them \$2.5 million in lost wages, front pay and compensatory damages. ^[11]

❖ Conclusions

1. Isolated and trivial verbal harassment should be followed by a warning or mandatory counseling; the agency’s response should be documented.

2. In the case of repeated or more serious verbal harassment, disciplinary action should be more severe.
3. Some agencies allow offending employees to avoid the financial consequences of a disciplinary suspension by attending remedial training or counseling while “on the clock.” The Los Angeles Sheriff’s Dept. has instituted a highly-acclaimed program called *Education-based discipline*.^[12]

EEOC guidelines provide that sexual harassment violates Title VII where the offensive conduct creates an *intimidating, hostile, or offensive environment* or where it unreasonably interferes with work performance.^[13] However, responsible public safety managers should not tolerate **any** workplace behavior that is offensive or demeaning to women or minorities, even if the language or conduct does not rise to the threshold where a federal lawsuit can be successfully prosecuted.

There also is the possibility that the legal threshold will be lowered between the time the conduct occurred and a civil trial takes place. Moreover, parallel remedies under state statutes may be pursued, which could penalize conduct not rising to the level needed to assert a federal claim.

❖ **Notes:**

1. The Civil Rights Act of 1964 [42 U.S. Code § 2000e-2] did not apply to state and local governments until the Equal Employment Opportunity Act of 1972 [P.L. 92–261]. Sexual harassment directed at males, because of their sex, also is unlawful. [*Oncale v. Sundowner Offshore Services*](#), #96-568, 523 U.S. 75 (1998).
2. 45 Fed. Reg. 74677 (Nov. 10, 1980) codified at [29 C.F.R. § 1604.11](#).
3. [IACP Model Policy No. 9](#), Jun. 1990; revised Jan. 2002.
4. EEOC Policy Guidance: [Current Issues of Sexual Harassment](#), #N-915-050 (1990).
5. [Meritor Savings Bank v. Vinson](#), #84-1979, 477 U.S. 57, 106 S.Ct. 2399 (1986).
6. [Petrosino v. Bell Atlantic](#), 385 F.3d 210 at 222 (2d Cir. 2004); [Jenson v. Eveleth Taconite Co.](#), 824 F.Supp. 847 at 886 (D. Minn. 1993).
7. [Robinson v. Jacksonville Shipyards, Inc.](#), 86-927-Civ-J-12, 760 F.Supp. 1486, 1991 U.S. Dist. Lexis 4678, 57 FEP Cases (BNA) 971 (M.D. Fla. 1991).
8. The [Civil Rights Act of 1991](#), P.L. 102-166.

9. *Kriss v. Sprint Comm. Co.*, 58 F.3d 1276, at 1281 (8th Cir. 1995) [*bitch*]; [Wieland v. Dept. of Transp.](#), #3:98cv0648, 98 F.Supp.2d 1010, at 1019 (N.D. Ind. 2000) [*slut*]; [Lyle v. Warner Brothers](#), #S125171, 38 Cal.4th 264, 132 P.3d 211, at 228 (Cal. 2006). [*cunt*].
10. [Radtko v. Everett](#), #92-582, 442 Mich. 368, 501 N.W.2d 155, at 167 (Mich. 1993).
11. [Denhof v. City of Grand Rapids](#), #1:02-cv-275 (W.D. Mich.).
12. [A New Era for the Discipline Process: Education-Based Discipline](#) (2009).
13. [29 C.F.R. §1604.11\(a\)\(3\)](#).

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3. Article, A Different Voicing of Unwelcomeness: Relational Reasoning and Sexual Harassment, Margaret Moore Jackson, 81 N. Dak. L. Rev. 739 (2005).
4. Article, Sexual Harassment and Disparate Impact: Should Non-Targeted Workplace Sexual Conduct Be Actionable Under Title VII? Kelly Cahill Timmons, 81 Neb. L. Rev. 101 (2003).
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8. Article, *Hooters*: Should there be an Assumption of Risk Defense to Some Hostile Environment Sexual Harassment Claims? 48 Vand. L. Rev. 1107 (1995).
9. Article, Using Agency Principles for Guidance in Finding Employer Liability for a Supervisor's Hostile Work Environment Sexual Harassment, G. A. Staszewski, 48 Vand. L. Rev. 1057 (1995).
10. Comment, Freedom of Speech and Workplace Harassment, Eugene Volokh, 39 UCLA L. Rev. 1791 (1992).

11. Article, Gender Discrimination and the Transformation of Workplace Norms, Kathryn Abrams, 42 Vand. L. Rev. 1183 (1989).
12. Article, Sexual Harassment and Title VII: EEOC Guidelines, Conditions Litigation, and the United States Supreme Court, Jan C. Leventer, 10 Cap. U. L. Rev. 481 (1980-1981).
13. Book, Sexual Harassment of Working Women, Catharine MacKinnon, Yale Univ. Press, ISBN 0-300-02298-0 (1979).

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