

## **SEXUAL HARASSMENT BY NONEMPLOYEES: EMPLOYER LIABILITY FOR CONDUCT OF THIRD PARTIES**

**ROBERT A. SHEARER, J.D.**  
*University of South Alabama, Mobile*

### **ABSTRACT**

Aware of the risk of liability for sexual harassment by supervisors and coworkers, employers have developed programs to educate employees and established processes for handling complaints in the workplace. The Equal Employment Commission's Guidelines, however, set forth other, less obvious forms of sexual harassment for which employers may be liable. Harassment by nonemployees—customers, clients, salespersons, contractors, etc.—has been determined to be a violation under certain circumstances. This article analyzes several cases in which employees have charged sexual harassment by nonemployees and discusses effective employer responses to such complaints.

Although the Equal Employment Opportunity Commission's (EEOC) Guidelines on Sexual Harassment clearly establish grounds for employer liability for workplace harassment of employees by nonemployees, there have been surprisingly few reported cases of that type since the guidelines were adopted in 1980. The apparent vulnerability of many employers to such claims, as well as employee interests in relief from workplace harassment, warrants consideration of this seldom-used provision of the guidelines.

The guidelines state:

An employer may also be responsible for the acts of non-employees, with respect to sexual harassment in the workplace where the employer (or its agent or supervisory employees) knows or should have known of the conduct and fails to take immediate and appropriate corrective action. In reviewing these cases the Commission will consider the extent of the employer's control

and any other legal responsibility which the employer may have with respect to the conduct of such non-employees [1].

Although this responsibility to monitor and alleviate sexual harassment by nonemployees has equal stature in the guidelines, the more commonly recognizable forms of harassment by supervisors and coworkers tend to receive much more attention in employer compliance programs.

### CASES FINDING EMPLOYER LIABLE

A recent federal district court decision in Virginia illustrates one of the more direct examples of this cause of action. In *Magnuson v. Peak Technical Services* [2], Magnuson a twenty-seven-year-old female, was hired by Peak, a corporation that provided employees to client corporations pursuant to service contracts. Through Peak's efforts, she obtained a position as a field marketing specialist with Volkswagen of America. Her employment arrangement called for her to receive her salary and benefits directly from Peak, but her work would relate solely to the marketing and sales of Volkswagen automobiles, with Volkswagen providing direct training and supervision. When Volkswagen established its manufacturer's representative program, she accepted an assignment to a local dealership to provide promotional and technical assistance in automobile sales. Though not technically an employee of the dealership, she participated in all aspects of a sale except the actual processing of documents and paperwork associated with closing a deal.

The harassment of which Magnuson complained was not alleged to have been committed by supervisors or coworkers at either Peak or Volkswagen of America, but rather by Blaylock, the general manager of the dealership. The evidence indicted he harassed her on a regular basis by making lewd and offensive comments of a sexual nature, hired strippers who danced nude at the dealership, propositioned her for sex, and threatened to influence her career prospects through reports to her superiors based on whether or not she acquiesced to his sexual overtures.

Although Magnuson complained of the harassment to her supervisors at both Peak and Volkswagen, neither took corrective measures. In fact, she was told by a female supervisor she should "put up with it for the sake of Volkswagen" [2, at 650, 653].

The harassment conduct by the retailer's manager continued with more vulgar comments about Magnuson's appearance and suggestions she join in sexual activities. Finally, the manager called Magnuson's supervisor at Peak and demanded that she be removed from the dealership. She claimed she was falsely accused of dressing unprofessionally, working insufficient hours, and being a "prima donna" and a "bad apple" [2, at 650, 653]. She was reassigned to other dealerships and subsequently terminated by Peak for not fitting the profile

required by Volkswagen. A Volkswagen agent later told her she was too cute for the position and would experience the same kind of harassment at other dealerships in the male-dominated automotive sales business.

After filing an EEOC complaint, Magnuson sued Peak, Volkswagen, the Fairfax dealership, and Blaylock for violation of Title VII's sex discrimination provisions and added various state law claims [3]. The court refused to grant the defendants' motions for summary judgment on the claims related to sex discrimination and sexual harassment. Initially, the court analyzed the issue of which, if any, of the defendants was an "employer" of the plaintiff for purposes of Title VII liability. The court concluded that Magnuson should be allowed to offer proof at trial of the requisite extent of each defendant's control over the terms and conditions of her employment.

The liability of the dealership, if determined to be an "employer" of the plaintiff, would rest on whether it had actual or constructive knowledge of the harassing conduct of its employee (Blaylock) and failed to take remedial measures. Because Blaylock obviously was not an employee of either Peak or Volkswagen, however, the liability of those defendants would depend to a great extent on the application of § 1604.11(e) of the EEOC Guidelines.

The court observed that while the guidelines are not binding on a federal court, they are nevertheless entitled to deference. Citing a 1984 EEOC decision [4] in which a restaurant owner was held liable for the sexual harassment of a waitress by a regular customer, the court ruled that Peak and Volkswagen could be held liable for the conduct of Blaylock, a nonemployee, if they 1) knew of the harassment; and 2) failed to take any corrective actions to remedy the situation.

### EEOC ENFORCEMENT OF SECTION (e)

The EEOC case recognized by the *Magnuson* court probably presents a common scenario for this type of sexual harassment liability. The harasser was a frequent customer who knew the owner socially as well. Consequently, the agency reasoned, the employer had some control over the nonemployee. The EEOC suggested the owner could have taken corrective measures following the waitress's complaints by granting the employee's request that she not be required to wait on the customer in the future or by informing the customer that further incidents of harassment would not be tolerated.

In a similar case, the EEOC agreed with several cocktail waitresses who claimed they were subjected to sexual harassment from customers because of the revealing attire they were required to wear. In *Equal Employment Opportunity Commission v. Newtown Inn Associates* [5] the employees charged they were required to flirt and dance provocatively with customers and dress for such theme activities as "Bikini Night" and "Whips and Chains Night" at a Ramada Inn in Virginia. The EEOC determined, also, that the employer had unlawfully retaliated against employees who complained.

## PREGUIDELINES DECISIONS

Although not decided under the 1980 guidelines, a federal district court case in New York involving nonemployee harassment had similar results. In *EEOC v. Sage Realty Corp.* [6] the plaintiff was employed as a lobby attendant in an office building managed by Sage Realty. She was on the payroll of a cleaning company under contract with Sage to provide services in the building.

The plaintiff was required to wear a uniform, usually a jumpsuit, selected and provided by the realty company. As a part of a Bicentennial sales promotion, however, she was outfitted with a sexually provocative red, white, and blue theme costume. Although she complained to Sage that the uniform was too revealing, only minor alterations were made. Consequently, during the two days she wore the uniform in the building lobby, she suffered repeated harassment, including sexual propositions and lewd comments and gestures, from persons in the building.

Too humiliated to do her job, the employee complained unsuccessfully to the building manager. In a letter to her employers, she stated that the uniform required her to be a “sex symbol in a skimpy costume” and made her appear to be a “sex object.” Eventually, she decided to wear her regular jumpsuit uniform instead of the Bicentennial costume.

Aware of her complaints and having taken no steps to remedy the situation, the employer’s agents told the plaintiff to either wear the Bicentennial costume or leave the floor, which would have effectively meant discharge from her job. Ultimately, she did refuse to wear the uniform and was discharged.

The court found the employer demanded she wear the sexually provocative uniform because she was a woman; wearing the costume, moreover, became a condition of her employment. She was fired because she refused to wear it due to the harassment it caused in the performance of her job. Thus, the court ruled, she was discriminated against in violation of Title VII [7].

In deciding that Sage and the cleaning contractor were liable for the sexual harassment the plaintiff was subjected to by members of the public visiting the building, the court rejected the argument that creativity and artistic expression associated with the uniforms were being squelched. Rather, the court said, the issue was whether a female lobby attendant—not a stage performer—could be made to wear an outfit that exposed her to sexual harassment on the job.

The harassers in the case, for the most part, evidently were not employees of either defendant, but rather members of the public and employees of other tenants in the building. Although these events occurred four years before the sexual harassment guidelines were implemented, the court had no difficulty in finding that an employer could be liable if it was aware of the harassment and took no corrective measures. In this case, moreover, the defendants could have easily relieved the plaintiff’s dilemma simply by excusing her from wearing the skimpy costume without risking an uncomfortable confrontation with customers.

Exposure to physical harassment, insults, and taunts from customers because of sexually suggestive costumes was the basis for another pre-guidelines Title VII claim by female restaurant employees. In *Marentette v. Michigan Host, Inc.* [8] the provocative uniforms the women (unlike their male coworkers) allegedly were required to wear not only subjected them to harassment from customers, but also were uncomfortable and made them susceptible to colds. The plaintiff further claimed that the restaurant owners were made aware of the harassment but took no corrective action.

Citing *Sage Realty*, the court agreed “. . . that a sexually provocative dress code imposed as a condition of employment which subjects persons to sexual harassment could well violate the true spirit and the literal language of Title VII” [6, at 1665, 1666].

### **RETALIATION FOR PROTESTING HARASSMENT PROHIBITED**

Retaliation against an employee who complains of sexual harassment of a coworker by a nonemployee likewise can be a violation of Title VII. In *Crockwell v. Blackmon-Mooring Steamatic, Inc.* [9] a female employee of a commercial and residential cleaning service was called into a room where supervisors and an insurance adjuster who sent a substantial amount of business to the company were meeting. The adjuster, well-known by company officials for making embarrassing, suggestive comments about women, directed several offensive remarks to the employee.

Upset by these comments, she discussed the matter with the lead worker in her house cleaning crew, Mary Crockwell. To no avail, Crockwell asked management to obtain an apology from the insurance adjuster. She was told that such conduct was a part of the job, and the employee had to either accept it or leave. Later, Crockwell again complained and said it was unfair for management to subject an employee to such treatment in order to keep her job. Within a few hours, Crockwell was fired, allegedly for poor performance and excessive absenteeism.

She had never previously been warned about job performance, and the attendance records submitted to support the second charge were apparently prepared after she had been terminated. Prior to her confrontation over the offensive remarks made to her coworker by the nonemployee, Crockwell had complained about disparity in wages between men and women for certain common jobs.

Crockwell sued for violation of the Equal Pay Act and Title VII, including a claim for retaliation. The court ruled in favor of the plaintiff on all counts.

The retaliation claim was based upon her opposing the employer's conditioning of her coworker's continued employment on her acceptance of sexually offensive treatment by a nonemployee. Specifically regarding the harassment by the non-employee, the court stated:

Conditioning of continued employment on acceptance of suggestive remarks made by a non-employee can violate Title VII. The proof here establishes that such a violation occurred. . . . There was no business reason for the conversation, and [the insurance adjuster's] inclinations were well known to . . . management personnel. After the incident [the supervisor] quickly advised [the employee] that her continued employment was conditioned on cheerful acceptance of such treatment [9, at 1451, 1456, no.5; 10].

### EFFECT OF PROMPT ACTION BY EMPLOYER

As the *Magnuson* decision indicates, Section (e) allows a court to impose liability for nonemployee harassment even when the existence of a direct employment relationship between the employer and alleged harasser is not entirely clear. The guidelines, however, also instruct employers how to avoid liability for such conduct. Both points are illustrated in *Sparks v. Regional Medical Center Board* [11]. The plaintiff was employed as a medical secretary and later as a histotech by a hospital that was owned by the defendant board. After resigning, she sued the hospital, the board, and a doctor, an independent contractor who provided anatomical and clinical pathology services to the hospital and served as director of clinical pathology [12].

Sparks complained of sexual harassment after the doctor angrily confronted her when she reported to work late one day, liberally lacing his reprimand with obscenities. Prior to that time, it was established that the doctor engaged in "horseplay" with the plaintiff, made remarks about her anatomy, and frequently directed sexually oriented remarks toward her in the office. There was substantial evidence, however, that the plaintiff herself invited and participated in much of this activity before the unpleasant confrontation occurred. After receiving a complaint from Sparks, the hospital reassigned her to another position that would limit her contact with the alleged harasser.

The court found no *quid pro quo* harassment [13] because there was no evidence the doctor ever demanded sexual favors from her in exchange for job benefits or made submission to sexual conduct a condition of her employment. Whether the doctor's sexual comments, offensive language, and rough "horseplay" created a hostile environment [14] was less clear to the court. Regardless of whether the conduct itself rose to the level of harassment, the court concluded that the hospital's actions after receiving Sparks' complaint were prompt and appropriate. The hospital quickly investigated her complaint, instructed the doctor to stop the harassment, adjusted the plaintiff's work schedule, took steps to prevent retaliation, and expressly warned the doctor that any future retaliation or harassment would result in the termination of his association with the hospital. The response was effective in stopping both retaliation and future harassment [15].

## IMPACT OF TYPE OF WORKPLACE

Certain types of businesses present greater challenges for compliance with Section (e) than others. A 1991 case involving a dealer in a Las Vegas casino illustrates the kind of atmosphere that is rife with possibilities of violation. In *Powell v. Las Vegas Hilton Corp.* [16] the plaintiff complained she was discharged in retaliation for complaining of sexual harassment from customers. She alleged several specific incidents, some involving remarks about her body and some involving what she believed to be excessive staring. On the first few occasions, she reported the conduct to a supervisor. Later, however, she confronted a customer herself, allegedly using profanity in chastising him. The employer claimed she was terminated mainly for rudeness to customers.

Citing the guidelines and the limited line of cases, including *Sage Realty* and *Marentette*, the court refused the hotel's motion for summary judgment on the sexual harassment count. Because Title VII creates the right to work in an environment free from sexual intimidation and ridicule, the court stated, in an appropriate case an employer could be liable for the sexual harassment of employees by customers. Whether the alleged conduct of customers, if proved, was unwelcomed and sufficiently severe or pervasive to create a hostile working environment was within the province of a jury to decide, the court ruled.

The court underscored the point that the focus should be on the perspective of the *victim*, not on whether *men* would find the conduct and language objectionable. The hotel argued unsuccessfully that in determining the severity of the alleged harassment, the court should take into consideration the "fun" atmosphere of the casino, where customers sometimes drink too much, lose too much money, and make inappropriate comments. Dismissing the remarks allegedly made to the dealer as harmless compliments, the court reasoned, would trivialize the effects of sexual harassment on reasonable women, endorse the *status quo*, and, ironically, make the harassing atmosphere of the casino a defense in itself [16].

Merely having a policy against sexual harassment, the court stated, did not insulate the hotel from liability. Whether the employer knew or should have known of the harassment and took immediate corrective action would be a question for the jury [16].

## ANALYSIS AND RECOMMENDATIONS

Section (e) of the sexual harassment guidelines, together with ample case law precedent, leave no doubt that employers face potential liability for unwelcomed sexual advances and other conduct on the part of nonemployees that creates a hostile working environment. The guidelines also tacitly recognize that employers usually exert far less control over the conduct of customers and other

nonemployees than they do over the words and deeds of supervisors and coworkers. Consequently, the EEOC should consider the extent to which an employer can realistically influence the conduct of a nonemployee under particular circumstances.

Some employers, such as the restaurant owner in the EEOC decision cited in *Magnuson*, [2] may know the offenders well enough to squelch their offensive behavior. In both *Magnuson* [2] and *Sparks* [11], the employer of the harassment victim was in a position to exert economic pressure on the offending nonemployee through contractual relationships other than that of employer-employee. By analogy, an employer would be in a position—albeit uncomfortable for some, no doubt—to take corrective measures against harassment of employees by such outsiders as salespersons and clients.

More often, however, the employer probably does not personally know the harassing nonemployee. A more difficult challenge for the employer arises, therefore, when the nonemployee is simply one of many anonymous customers in the restaurant, bar, casino, or the like. In *Sage Realty* [6], *Newtown Inn Associations* [5], *Marentette* [8], and *Powell* [16], the employees charged harassment from many different customers, and all were in positions in workplaces such as bars and casinos, where provocative outfits may be the norm and, perhaps, a primary reason many customers patronize the establishment. In these situations, based on the *Powell* decision [16], it appears that the finder of fact will have to determine whether the activity complained of is sufficiently severe and pervasive to constitute a hostile working environment. It would be unlikely under this reasoning that occasionally suggestive remarks would be considered harassment in such settings, especially if the employer implements a procedure for communicating to customers that further such conduct will not be tolerated.

In response to awareness in recent years of the more common charges of sexual harassment by supervisors and coworkers, many employers have established effective procedures for receiving and investigating complaints. Charges of harassment by nonemployees should be taken seriously, as well, and processed in the same fashion. And, as with other types of sexual harassment, immediate corrective measures are the best strategy for dealing with complaints of harassment by nonemployees.

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Robert A. Shearer, on the faculty of the University of South Alabama since 1986, is a member of the Florida and Virginia Bars. After receiving his J.D. degree from Stetson University College of Law in 1981, he practiced labor and employment law in Tampa, Florida. A certified mediator and former university administrator, he specializes in employment law, education law, and alternative dispute resolution and has published several articles in professional and academic



dispute resolution and has published several articles in professional and academic journals in those fields. He is active in corporate and educational training and consulting.

## ENDNOTES

1. 29 C.F.R. § 1604.11(c).
2. *Magnuson v. Peak Technical Services*, 60 FEP Cases 650 (E.D.Va. 1992).
3. The plaintiff's five-count amended complaint charged all four defendants with (1) Title VII violations for sexual harassment, discriminatory discharge, and retaliation; (2) wrongful discharge in violation of public policy; and (3) breach of contract by Peak and Volkswagen of America; (4) tortious interference with employment contract by Fairfax Volkswagen and its agent, Blaylock.
4. *EEOC Dec.*, 84-3, 34 FEP Cases 1887 (1984).
5. *Equal Employment Opportunity Commission v. Newtown Inn Associates*, 647 F. Supp. 957, 42 FEP Cases 480 (E.D.Va. 1986).
6. *EEOC v. Sage Realty Corp.*, 507 F. Supp. 599, 24 FEP Cases 1521 (S.D.N.Y. 1981).
7. § 703(a), Civil Rights Act of 1964, 42 U.S.C. § 2000e-2(a), providing: "It shall be an unlawful employment practice for an employer—(1) . . . to discharge . . . or otherwise discriminate against any individual with respect to . . . terms, conditions, . . . of employment, because of such individual's . . . sex . . ."
8. *Marentette v. Michigan Host, Inc.*, 506 F. Supp. 909, 24 FEP Cases 1665 (E.D.Mich. 1980).
9. *Crockwell v. Blackmon-Mooring Steamatic, Inc.*, 43 FEP Cases 1451 (W.D.Tenn. 1985).
10. The sexual harassment claims in *Marentette* were dismissed as moot after the employer switched to a more modest uniform; back pay, the only form of monetary compensatory relief then available under Title VII, was not requested.
11. *Sparks v. Regional Medical Center Board*, 793 F. Supp. 735 (N.D.Ala. 1992).
12. The plaintiff claimed she was constructively discharged because the doctor's harassment and attempts to retaliate against her for bringing charges made it unreasonable to remain on the job.
13. *Quid pro quo* sexual harassment occurs "when (1) submission to [sexual] conduct is made either explicitly or implicitly a term or condition of an individual's employment, [or] (2) submission to or rejection of such conduct by an individual is used as the basis for employment decisions affecting such individual, . . ." 29 C.F.R. § 1604.11(a). Both the guidelines and judicial decisions impose "strict liability" on employers for *quid pro quo* harassment by supervisory employees. 29 C.F.R. § 1604.11(c); *Henson v. City of Dundee*, 682 F.2d 897, 910 (11th Cir. 1982).
14. Hostile environment sexual harassment involves conduct that unreasonably interferes with an individual's job performance or creates an intimidating, hostile, or offensive working environment. *Meritor Savings Bank, FSB v. Vinson*, 477 U.S. 57, 65, 91 L.Ed.2d 49, 106 S.Ct. 2399 (1986). Employer liability in hostile environment cases is not based on strict liability, but rather whether the corporate employer knew or should have known of the harassment. *Steele v. Offshore Shipbuilding, Inc.*, 867 F.2d 1311, 1316 (11th Cir. 1989).

15. The court ruled, also, that the plaintiff had not been constructively discharged because she was offered reasonable reassignments.
16. *Powell v. Las Vegas Hilton Corp.*, No. CV-S-9-359 -PMP (RJJ), 1992 U.S. Dist. LEXIS 21061 (D.C.Nev. 1992).

Direct reprint requests to:

Robert A. Shearer, J.D.  
Associate Professor of Management  
College of Business and Management Studies  
University of South Alabama  
Mobile, AL 36688