

## **Sexual Harassment By Customers And Other Third Parties**

While the subject of sexual harassment in the workplace has been frequently discussed in the media, the concern of sexual harassment of employees by third parties such as customers, clients and vendors has not received much media attention. However, a number of recent cases have been brought in the federal courts that has established a potential for liability on the part of employers who allow sexual harassment of its employees, by third parties such as its customers (i.e. residents) and vendor representatives. One of the first courts to address this issue was the district judge in Nevada in *Powell v Las Vegas Hilton*, in which it was stated:

"In the appropriate case, an employer could be liable for the sexual harassment of employees by non-employees including its customers,"

This court reached this conclusion in its interpretation of Title VII of the Civil Rights Act of 1964 and by relying upon the 1986 U.S. Supreme Court case of *Meritor Savings Bank v Vincent* that stated:

"Title VII affords employees the right to work in an environment free from discriminatory intimidation, ridicule, and insult."

The Equal Employment Opportunity Commission (EEOC) has taken the position that an employer is "responsible for the acts of nonemployees where the employer knows or should have known of the conduct". The EEOC Guidelines state that the employer must protect employees with "immediate and appropriate corrective action". Given this background, all companies must confront the question as to how should they deal with this potential problem to avoid legal liability. Essentially, employers must become better informed about this potential issue and take any sexual harassment complaints seriously in order to protect employees from such conduct.

In one of the leading cases in this area, *Robinson v. Jacksonville Shipyards, Inc.*, the court outlined the basic elements that a plaintiff must establish in order to bring a sexual harassment case. First, he or she must have been subjected to sexual advances, requests for sexual favors, or other verbal or physical conduct of a sexual nature. Second, the conduct must have been unwelcome. Thirdly, the conduct was sufficiently severe or persuasive to alter the condition of the victim's employment and create an abusive working environment.

Employers in dealing with this potential problem must protect employees from third-party harassment and in order to do so must know specifically what their employees face in the workplace on a daily basis. Obviously, this is necessary given the EEOC Guidelines that say the employer is responsible for both what they know and what they should have known. The process of consulting with the employees is essential in order for the company-developed plan to be implemented in an effective manner. Some of the concerns in developing such a plan were addressed by the court in the Jacksonville Shipyards case. The court commented that the plan should have been "instituted unilaterally, without consulting or bargaining..." The court also noted that merely posting the plan on the company bulletin board was insufficient as it illustrated the failure of the company to show a true commitment to abolish sexual harassment in the workplace. Moreover, an adequate policy is to be approved and "signed by a top ranking company executive" and "received the widest form of distribution". The plan is to be placed in

## **Sexual Harassment By Customers And Other Third Parties**

company "rule books and distributed to workers directly". Moreover, the company plan "must describe with specificity the behavior that constitutes sexual harassment", and even conduct which doesn't specifically fall within the prohibited conduct should be considered constituting harassment in certain instances. Finally, supervisors are to be trained to recognize what constitutes abusive conduct in violation of the company plan and the supervisors should have authority to attempt to correct the problem promptly.

Some of the other items addressed by the *Jacksonville Shipyards* case concerned the permissible relief that an employee may seek. In this instance, the court rejected the plan by "the naming of only one company representative ... to hear sexual harassment complaints diminished the policy's value". Also, the victim or complaining party must be protected against retaliation from either other company employees or a third-party harasser. The court also discussed the possibility of attempting to encourage confidentiality, but it noted that this may be difficult in many instances. The court also took note of the ongoing monitoring by management, which must exist so as to recognize that the working environment is one which constantly changes and without such monitoring, additional problems and sexual harassment can easily arise and go unaddressed. This author recognizes that sexual harassment is a very difficult issue, but it is one that our industry must deal with directly. It should be noted that sexual harassment complaints have increased dramatically over the last few years and while sexual harassment by customers and vendors has been an overlooked area, an awareness of this conduct in a company-implemented policy to prevent it is especially important at this time.

***By Scott M. Clark, Esq.***

3008 N. 44th Street, Phoenix, AZ 85018

602.957.7877

[sclark@scottclarklaw.com](mailto:sclark@scottclarklaw.com)

<http://www.scottclarklaw.com>

December 1994 / Apartment News