Looking for Love in All the Wrong Places

[The following is the first installment in a two-part series examining sexual harassment in the American workplace.]

For many years, sexual harassment in the workplace was a taboo topic of discussion. It was generally understood that corporations were controlled by men who sometimes managed their offices like locker rooms. Off-color jokes, crude remarks, and even physical contact were simply part of the daily reality. Women had little alternative but to suffer the indignity in silence or bear the whistleblower's shame.

Sexual harassment was made an illegal workplace practice by Title VII of the Civil Rights Act of 1964. Though promising on paper, the intended protection was slow to arrive. *Williams v. Saxbe*, the first federal court case to interpret Title VII, was decided in 1976. Despite the regularity with which women claimed to experience harassment, the *status quo* continued throughout the 1970s and 1980s.

In the Summer of 1991, the situation changed dramatically because of an unlikely set of circumstances. Clarence Thomas, an African-American federal judge, was nominated as an Associate Justice of the United States Supreme Court. During his confirmation hearings before the Senate, allegations were raised that Thomas had sexually harassed University of Oklahoma Law Professor Anita Hill while Hill worked for Thomas at the Equal Employment Opportunity Commission ("EEOC"). Hill claimed that Thomas repeatedly raised the topic of pornography with his subordinate. Under oath, Thomas was asked if he had ever spoken with Hill about a pubic hair in his Coke, or if she was familiar with an adult film actor named "Long Dong Silver."

Thomas was greatly embarrassed by these allegations which he maintained were unfounded. He termed the process "an electronic lynching," a powerful term which evoked recollection of a troubled time in American history during which Blacks were hung by their necks from trees. Although Thomas was ultimately confirmed by a partisan vote, the debate emboldened women to report misconduct in the workplace. In the five years which immediately followed, the EEOC reported that claims of sexual harassment doubled from 6,127 in 1991 to 15,342 in 1996.

As the 1990s drew to a close, another American institution – Wall Street – became the subject of public scrutiny for its alleged treatment of female professionals. Two of the nation's largest securities brokerage houses, Salomon Smith Barney and Merrill Lynch, were named as defendants in class action law suits. The "Boom Boom Room," a party room in the basement of Salomon's Garden City, New York office, became emblematic of the systemic abuse of women. Excessive drinking, strippers and crude innuendo were the daily reality. Women were given nicknames based upon their perceived personalities or sexual talents. Some in the securities industry attempted to dismiss the seriousness of the conduct by rationalizing that the women earned annual compensation up to US$1,000,00.00. They argued that by allowing a woman to be "one of the boys," they were actually being inclusive, rather than discriminatory. Nonetheless, the brokerage firms paid out millions of dollars to obtain confidentiality agreements

in settlement of thousands of claims. And the public was reminded that sexual harassment had not been purged from the workplace.

Not all workplace sexual harassment captures headlines. In most instances, workers are subjected to conditions or conduct that makes them feel uncomfortable. Consider the following three scenarios: (1) A male boss rubs his female employee's shoulders while telling her how beautiful she is; (2) a colleague posts a magazine centerfold above her desk depicting a woman wearing a bikini; (3) a female repeatedly asks her male co-worker for a date. Which, if any, of the above examples constitutes sexual harassment in the workplace?

To the surprise of many, the answer is "it depends." Classically, sexual harassment is defined as "unwelcome contact or conduct of a sexual nature that adversely affects the workplace." The key term is "unwelcome." If an employee does not find the contact or conduct offensive, there is no harassment. Perhaps still more remarkable is the fact that a woman can sexually harass a man; a woman can sexually harass another woman; and a man can sexually harass another man. Federal law provides equal protection to all workers.

While reprehensible in all forms, studies have shown that women suffer the most dramatic response to sexual harassment. According to the National Council for Research on Women, female victims of sexual harassment are 9 times more likely than men to quit their jobs, 5 times more likely to transfer out of an uncomfortable situation and 3 times more likely to be fired because of the offensive conduct.

Sexual harassment may take one of two forms: *quid pro quo* or hostile work environment. Literally "this for that," *quid pro quo* is found in those situations where an employee is asked – expressly or by suggestion - to provide sexual favors in exchange for a promotion or to preserve her or his job. The claim remains valid even if the worker consents to having relations with the offending party. Furthermore, the claimant need only *reasonably perceive* the imposition of such condition on their employment.

Hostile workplace discrimination, by contrast, is the more common form. It exists where conditions on the job make an employee feel uncomfortable. For example, "water cooler" talk about last night's sexual conquests is inappropriate. Allowing an employee to engage in explicit telephone conversations or instant messaging during working hours is also proscribed. The presence of pornographic materials or lewd personal affects on an employee's desk or within their cubicle can also create a hostile work environment for others.

It is the employer's responsibility to provide a non-offensive workplace for all. The manager or supervisor must be vigilant in policing the office or job site. "Willful blindness" – the act of pretending not to notice employees conduct or conditions within the workplace – is not a valid defense. Even if the superior does not directly engage in the harassment, she or he must prevent their subordinates from doing so. The best employers are those which maintain a formal policy to prevent sexual harassment, reinforce awareness through regularly scheduled training and keep documentation of such training.

But what happens when even the most pro-active measures are inadequate to deter a harasser? Next week, we examine how to file a claim for sexual harassment.

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