Date: January 12, 1981

From: Offices of University Counsel & Vice Chancellor for Legal Affairs and Assistant Vice Chancellor for Affirmative Action

Subject: Final Guidelines from the Equal Employment Opportunity Commission (EEOC) Dealing with Sexual Harassment

Enclosed are the final guidelines adopted by the Equal Employment Opportunity Commission on sexual harassment. These guidelines are substantially similar to the interim guidelines issued by the Commission on April 11, 1980. Please refer to the memorandum from Assistant Vice Chancellor Schmidt dated May 12, 1980, which reviewed the interim standards.

The Commission, however, has made a number of revisions in the final guidelines which should be noted:

1. §1604.11(a)(3) -- The Commission has modified a component of the definition of sexual harassment from "conduct substantially interfering with an individual's work performance" to "conduct unreasonably interfering with an individual's work performance". Many commentators on the interim guidelines questioned the meaning of the word "substantially". The Commission has stated that the word "unreasonably" more accurately reflects the intent of the guidelines.

2. §1604.11(d) and (e) -- This provision which defined employer liability concerning acts of persons other than supervisors or agents of the employer has now been separated into two subsections. The new §1604.11(d) governs sexual harassment among fellow employees, and the added §1604.11(e) refers to possible liability of the employer for acts of non-employees towards employees.

3. §1604.11(g) -- The Commission has added a new subsection to the final guidelines with respect to sexual favors. Subsection (g) states that an employer may be held liable for unlawful sex discrimination against persons denied an employment benefit or opportunity where that benefit or opportunity was granted to another individual in exchange for sexual favors.
You should also note subsection (f) of the guidelines which delineates steps to be taken to prevent sexual harassment. This provision is identical to former subsection (e) of the interim guidelines. If you have not already done so appropriate action should be taken to implement preventive measures concerning sexual harassment as suggested by subsection (f). In this regard, the earlier memorandum from Assistant Vice Chancellor Schmidt on the interim guidelines included recommendations and model statements which provide additional guidance.

The final guidelines became effective November 10, 1980. Many questions concerning the extent of an employer's liability as well as what acts constitute sexual harassment remain unanswered under these guidelines. The Commission has stated that further clarification will be provided as it reviews the specific factual situations of allegations of sexual harassment on a case-by-case basis. We will keep you advised of any significant administrative or judicial decisions interpreting these guidelines.

If you have any questions on the final guidelines, please call Dolores Schmidt at (518) 473-1091 or Carolyn Pasley at (518) 473-7591.

Sanford H. Levine
Dolores B. Schmidt

Attachments

cc: Affirmative Action Officers
Personnel Officers

This memorandum addressed to:

Presidents, State-operated campuses
Presidents, Community Colleges

Copies for information only sent to:

Deans, Statutory Colleges
President Neville
Vice Provost Spencer
EQUAL EMPLOYMENT OPPORTUNITY COMMISSION

29 CFR Part 1604

Discrimination Because of Sex Under Title VII of the Civil Rights Act of 1964, as Amended: Adoption of Final Interpretive Guidelines


ACTION: Final Amendment to Guidelines on Discrimination Because of Sex.

SUMMARY: On April 11, 1980, the Equal Employment Opportunity Commission published the Interim Guidelines on sexual harassment as an amendment to the Guidelines on Discrimination Because of Sex. 29 CFR Part 1604.11, 45 FR 25024. This amendment will reaffirm that sexual harassment is an unlawful employment practice. The EEOC received public comments for 60 days subsequent to the date of publication of the Interim Guidelines. As a result of the comments and the analysis of them, these Final Guidelines were drafted.

EFFECTIVE DATE: November 10, 1980.


SUPPLEMENTARY INFORMATION: During the 60-day public comment period which ended on June 10, 1980, the Commission received over 160 letters regarding the Guidelines on sexual harassment. These comments came from all sectors of the public, including employers, private individuals, women's groups, and local, state, and federal government agencies.

The greatest number of comments, including many from employers, were commending the Commission for publishing guidelines on the issue of sexual harassment, as well as for the content of the guidelines.

The second highest number of comments specifically referred to § 1604.11(c) which defines employer liability with respect to acts of supervisors and agents. Many commentors, especially employers, expressed the view that the liability of employers under this section is too broad and unsupported by case law. However, the strict liability imposed in § 1604.11(c) is in keeping with the general standard of employer liability with respect to agents and supervisory employees. Similarly, the Commission and the courts have held for years that an employer is liable if a supervisor or an agent violates the Title VII, regardless of knowledge or any other mitigating factor. Anderson v. Methodist Evangelical Hospital, Inc., 3 EPD 32822 (D.C. Ky. 1971), aff'd 464 F.2d 723, 4 EPD 37901 (6th Cir. 1972); Commission Decision No. 71-969, CCH EEOC Decisions (1973) ¶8193; Commission Decision No. 71-1442, CCH EEOC Decisions (1973) ¶8218.

Further, under the case law, the issue is not whether the employer knew of a supervisor or agent's sexual harassment, but whether it is reasonable to hold the employer liable for acts that are within his control. If the employer had knowledge of sexual harassment, he was required to do something about it in order to fulfill his duties as an employer. Miller v. Bank of America, 600 F.2d 211, 20 EPD ¶30,088 (9th Cir. 1979). In keeping with this standard, the Commission, after full consideration of the comments and the accompanying concerns, will let § 1604.11(c) stand as it is now worded.

A number of people asked the Commission to clarify the use of the term "agent" in § 1604.11(c). "Agent" is used in the same way here as it is used in § 703(b) of Title VII where "agent" is included in the definition of "employer." A large number of comments referred to § 1604.11(a) in which the Commission defines sexual harassment. These comments generally suggested that the section is too vague and needs more clarification. More specifically, the comments referred to subsection (3) of § 1604.11(a) as presenting the most troublesome definition of what constitutes sexual harassment. The Commission has considered these comments and has decided that subsection (3) is a necessary part of the definition of sexual harassment. The courts have found sexual harassment in both instances where concrete economic detriment to the plaintiff, Heelan v. Johns-Manville Corp., 451 F.Supp. 1382, 16 EPD ¶32830 (D. Colo. 1978), Barnes v. Costie, 561 F.2d 983, 14 EPD ¶7755 (D.C. Cir. 1977), Garber v. Saxon Business Products, 552 F.2d 1032, 14 EPD ¶7307 (4th Cir. 1977), and where unlawful conduct results in creating an unproductive or offensive working atmosphere, Vujic v. Western Electric Co., 461 F.Supp. 894, 18 EPD ¶8700 (D.N.J. 1978). For analogous cases with respect to racial harassment see Rogers v. EEOC, 454 F.2d 234, 4 EPD ¶7597 (5th Cir. 1971); EEOC v. Murphy Motor Freight Lines, Inc., 488 F.Supp. 3, 22 EPD ¶30,688 (D.C. Minn. 1980).

The word "substantially" in § 1604.11(a)(3) has been changed to "unreasonably." Many commentors raised questions as to the meaning of the word "substantially." The word "unreasonably" more accurately states the intent of the Commission and was therefore substituted to clarify that intent.

It should be emphasized that the appropriate course for further clarification and guidance on the meaning of § 604.11(a)(3) is through future Commission decisions which will deal with specific fact situations. Since sexual harassment allegations are reviewed on a case-by-case basis, any further questions will be answered through Commission decisions which will be fact specific.

A fair number of comments were received on § 1604.11(d) which defined employer liability with respect to acts of persons other than supervisors or agents. Again, as in § 1604.11(c), the traditional Title VII concept prevails regarding employer liability with respect to those people other than agents and supervisory employees. Many commentors asked the Commission to clarify the meaning of "others." As a result, § 1604.11(d) has been separated into two subsections. The new § 1604.11(d) refers to sexual harassment among fellow employees and the liability of an employer in such a situation.

The new § 1604.11(e) refers to the possible liability of employers for acts of non-employees towards employees. Such liability will be determined on a case-by-case basis, taking all facts into consideration, including whether the employer knew or should have known of the conduct, the extent of the employer's control and other legal responsibility with respect to such individuals.

A number of people also raised the question of what an "appropriate action" might be under § 1604.11(d). What is considered to be "appropriate" will be in the context of specific cases through Commission decisions.

Section 1604.11(a) of the Interim Guidelines, which sets out suggestions for programs to be developed by employers to prevent sexual harassment, now becomes § 1604.11(f). The Commission has received many comments which state that this section is not specific enough. The Commission has decided that the provisions of this section should illustrate several kinds of action which might be appropriate, depending on the employer's circumstances. The emphasis is on preventing sexual harassment, and § 1604.11(f) intends only to offer illustrative suggestions with respect to possible components of a prevention program. Since each workplace requires its own individualized program to prevent sexual harassment, the specific steps to be included in the program should be developed by each employer.

Several commentors raised the question of whether a third party who was denied an employment benefit would have a charge cognizable under Title VII where the benefit was received...
by a person who was granting sexual favors to their mutual supervisor. Even though the Commission does not consider this to be an issue of sexual harassment in the strict sense, the Commission does recognize it as a related issue which would be governed by general Title VII principles. Subsection [g] has been added to recognize this as a Title VII issue.

After carefully considering the numerous comments it received, the TOC made the above changes to the interim Guidelines and, at its meeting of September 23, 1980, adopted them as the Final Guidelines on sexual harassment, subject to formal interagency coordination. Formal interagency coordination has been completed, and none of the affected agencies had additional comments. Therefore, these Guidelines become final as adopted at the Commission meeting of September 23, 1980.

Signed at Washington, D.C., this 3rd day of November 1980.

Eleanor Holmes Norton
Chair, Equal Employment Opportunity Commission.

Accordingly, 29 CFR Chapter XIV, Part 1604 is amended by adding § 1604.11 to read as follows:

PART 1604—GUIDELINES ON DISCRIMINATION BECAUSE OF SEX

§ 1604.11 Sexual harassment.

(a) Harassment on the basis of sex is a violation of Sec. 703 of Title VII. Unwelcome sexual advances, requests for sexual favors, and other verbal or physical conduct of a sexual nature constitute sexual harassment when (1) submission to such conduct is made either explicitly or implicitly a term or condition of an individual's employment, (2) submission to or rejection of such conduct by an individual is used as the basis for employment decisions affecting such individual, or (3) such conduct has the purpose or effect of unreasonably interfering with an individual's work performance or creating an intimidating, hostile, or offensive working environment.

(b) In determining whether alleged conduct constitutes sexual harassment, the Commission will look at the record as a whole and at the totality of the circumstances, such as the nature of the sexual advances and the context in which the alleged incidents occurred. The determination of the legality of a particular action will be made from the facts, on a case by case basis.

(c) Applying general Title VII principles, an employer, employment agency, joint apprenticehip committee or labor organization (hereinafter collectively referred to as "employer") is responsible for its acts and those of its agents and supervisory employees with respect to sexual harassment regardless of whether the specific acts complained of were authorized or even forbidden by the employer and regardless of whether the employer knew or should have known of their occurrence. The Commission will examine the circumstances of the particular employment relationship and the job functions performed by the individual in determining whether an individual acts in either a supervisory or agency capacity.

(d) With respect to conduct between fellow employees, an employer is responsible for acts of sexual harassment in the workplace where the employer (or its agents or supervisory employees) knows or should have known of the conduct, unless it can show that it took immediate and appropriate corrective action.

(e) An employer may also be responsible for the acts of non-employees, with respect to sexual harassment of employees in the workplace, where the employer (or its agents 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.

(f) Prevention is the best tool for the elimination of sexual harassment. An employer should take all steps necessary to prevent sexual harassment from occurring, such as affirmatively raising the subject, expressing strong disapproval, developing appropriate sanctions, informing employees of their right to raise and how to raise the issue of harassment under Title VII, and developing methods to sensitize all concerned.

(g) Other related practices: Where employment opportunities or benefits are granted because of an individual's submission to the employer's sexual advances or requests for sexual favors, the employer may be held liable for unlawful sex discrimination against other persons who were qualified for but denied that employment opportunity or benefit.

The principles involved here continue to apply to race, color, religion or national origin.