EEOC’s New Sexual Harassment Guidelines: Civility in the Workplace

Robert W. Martin Jr.*
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Abstract

On November 10, 1980, the Equal Employment Opportunity Commission (EEOC) published an amendment to the Guidelines on Discrimination Because of Sex which stated: “[t]his amendment will re-affirm that sexual harassment is an unlawful employment practice.”

KEYWORDS: sexual, harassment, civility
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INTRODUCTION

On November 10, 1980, the Equal Employment Opportunity Commission (EEOC) published an amendment to the Guidelines on Discrimination Because of Sex which stated: "[t]his amendment will re-affirm that sexual harassment is an unlawful employment practice." It is rare indeed for a federal agency to understate the impact of its guidelines or regulations, but this is such a time. The amendment goes far beyond reaffirming that sexual harassment constitutes an unlawful employment practice; in essence it redefines what conduct constitutes sexual harassment under Title VII of the Civil Rights Act of 1964.

BEFORE THE GUIDELINES

Many federal court decisions have held that sexual harassment is an unlawful employment practice. Generally, those decisions required a plaintiff to establish a prima facie case of sexual harassment by proving:

1) submission to sexual advances of a supervisor was a term or condition of employment;

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* A.B. Hamilton College; J.D. Rutgers-Camden Law School; Chief, Legal Branch, United States Environmental Protection Agency, Region III; formerly Assistant Professor of Law, Florida State University of Law. This article was written by Mr. Martin in his private capacity. No official support or endorsement by the Environmental Protection Agency or any other agency of the federal government is intended or should be inferred.

2) this submission substantially affected plaintiff's employment; and
3) employees of the opposite sex were not affected in the same way by
these actions.4

While the new guidelines do not specifically address the third re-
quirement, there must be evidence of gender-based discrimination in
Title VII suits. If a supervisor makes the same sexual demands of both
male and female employees, i.e., a bisexual supervisor, the supervisor
may not be engaging in an employment practice prohibited by Title
VII.5 But as at least one court observed, the third requirement is gener-
ally read such that it may only be an issue in the case of a bisexual
supervisor:

   It is not necessary to a finding of a Title VII violation that the discrimi-
natory practice depend on a characteristic "peculiar to one of the gen-
ders," or that the discrimination be directed at all members of a
sex . . . . It is only necessary to show that gender is a substantial factor
in the discrimination, and that if the plaintiff "had been a man she
would not have been treated in the same manner."6

In contrast to Title VII's nominal impact on the gender discrimi-
natory element in traditional sex harassment claims, the new guidelines
have a significant impact on the other two elements of the plaintiff's
prima facie case. Prior to the guidelines, Title VII judicial decisions
carry the notion that harassment must be done by a supervisor or an-
other in a position to make sexual advances a "term or condition of
employment." For example, in Fisher v. Flynn,7 the court stated:
"Plaintiff has not alleged a sufficient nexus between her refusal to ac-
cede to the romantic overtures and her termination. She has not alleged
that the department chairman had the authority to terminate her em-
ployment or effectively recommend the same and we cannot so
assume."8

   Moreover, the language, "term or condition of employment,"

1977).
7. 598 F.2d 663 (1st Cir. 1979).
8. Id. at 665.
presents another problem. Conduct which most civilized people would find offensive and actionable may not give rise to a statutory violation unless it is shown to be a "term or condition of employment." For example, in *Bundy v. Jackson*,\(^9\) the plaintiff fared well in terms of promotions, moving through the civil service ranks from a GS-4 in 1970 to a GS-9 in 1976. In its findings of fact, the *Bundy* court noted that two of plaintiff's supervisors had made persistent sexual advances.\(^{10}\) Although the court concluded that "[p]laintiff's allegations with regard to improper sexual advances made to her by other Department employees (recall that both Burton and Gainey were supervisors) are fully proved, . . . [d]efendant did not discriminate in any term or condition of her employment. . . ."\(^{11}\) In other words, the plaintiff lost her case not because she was unable to prove sexual harassment (since the court found that the incidents occurred), but rather because she failed to show any economic detriment. As discussed below, *Bundy*, and its reversal on appeal, is an excellent example of the judicial climate before and after the guidelines.

In another pre-guidelines case, the court in *Tomkins v. Public Service Electric & Gas Co.*,\(^{12}\) stated:

we conclude that Title VII is violated when a superior, with the actual or constructive knowledge of the employer, makes sexual advances or demands toward a subordinate employee and conditions that employee's

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10. *Id.* at 830-31.
   On numerous occasions, Burton called her into his office on Monday mornings to talk about her activities over the weekend, asking her if she liked horses. When plaintiff responded that she rode horses, Burton claimed that he had heard that women who rode horses had a tendency to need sexual relief and rode them for that purpose . . . Burton repeated on numerous other occasions that he had other sexual literature which was not of the type one could buy in a bookstore and that plaintiff should come to his apartment to see it . . .

   After Gainey became plaintiff's first line supervisor, he made several advances to her. On one occasion he stated to her, "Sandy, I've been after you for the last two years and you refuse all my attempts . . . You have turned me down and I have been wanting to get you to a motel . . . ."

11. *Id.* at 832. This holding was reversed in a decision that refers to the EEOC guidelines with approval. *Bundy v. Jackson*, 641 F.2d 934 (D.C.D.C. 1981).
12. 568 F.2d 1044 (3d Cir. 1977).
job status—evaluation, continued employment, promotion, or other aspects of career development—on a favorable response to those advances or demands. . . . 18

This view has prevailed in numerous other courts arriving at similar conclusions. 14 The guidelines may change the results.

EEOC GUIDELINES

In contrast to the rule articulated in Tomkins and Bundy, EEOC guidelines expand the protection offered to employees by including harassment caused not only by “agents and supervisory employees,” 15 but also by “fellow employees” 16 and in some cases by non-employees. 17 The “term or condition of employment” requirement is now one of three disjunctive requirements that define sexual harassment actionable under Title VII:

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

13. See Corne v. Bausch & Lomb, Inc., 390 F. Supp. 161, 163 (D. Ariz. 1975): “[T]here is nothing in the Act [Title VII] which could reasonably be construed to have it apply to verbal and physical sexual advances by another employee, even though he be in a supervisory capacity where such complained of acts or conduct had no relationship to the nature of the employment.” See also Heelan v. Johns-Manville Corp., 451 F. Supp. 1382, 1390 (D. Colo. 1978). “[F]requent sexual advances by a supervisor do not form the basis of the Title VII violation that we find to exist. Significantly, termination of the plaintiff’s employment when the advances were rejected is what makes the conduct legally objectionable.”
14. 568 F.2d at 1048-49.
15. 29 C.F.R. § 1604.11(c).
16. Id. at § 1604.11(d).
17. Id. at § 1604.11(e).
While the power of the EEOC guidelines is still uncertain, the stated goal—eliminating an "intimidating, hostile, or offensive work environment"—appears a radical departure from case law. The guidelines also eliminate the absolute necessity of showing the harassment was done by a supervisory employee and that it was a "term or condition of employment." Although the guidelines may break with precedent, they are consistent with the oft-stated view that Title VII is meant to be interpreted broadly. Speaking of the breadth of section 703 of Title VII (one basis of the EEOC guidelines), the court in Rogers v. EEOC said:

[It] evinces a Congressional intention to define discrimination in the broadest possible terms. Congress chose neither to enumerate specific discretionary practices, nor to elucidate in extenso the parameter of such nefarious activities. Rather, it pursued the path of wisdom by being unconstrictive, knowing that constant change is the order of the day and that seemingly reasonable practices of the present can easily become the injustices of the morrow.

Elimination of an Intimidating, Hostile, or Offensive Working Environment

EEOC has gone out of its way to reassure us that the guidelines do not abruptly depart from case law. They stated that "[t]he courts have found sexual harassment both in cases where there is concrete economic detriment to the plaintiff . . . and where unlawful conduct results in creating an unproductive or an offensive working atmo-

18. Id. at § 1604.11(a) (emphasis added).
19. As with most guidelines and regulations promulgated in the Title VII area, the court's view of their persuasiveness seems to depend upon whether the guidelines or regulations agree with the result the court wants to reach. See, e.g., Ablemarle Paper Co. v. Moody, 422 U.S. 405, 451 (1975): EEOC guidelines said to be entitled to "great deference." Compare Espinoza v. Farah Mfg. Co., Inc., 414 U.S. 86, 94 (1973): "deference must have limits where, as here, application of the guidelines would be inconsistent with an obvious congressional intent not to reach the employment practice in question."
20. 454 F.2d 234 (5th Cir. 1971).
21. Id. at 238.
sphere.” EEOC cited *Kyriarzi v. Western Electric Co.* to support the latter portion of this statement. Yet *Kyriarzi* seems an inappropriate case for EEOC to cite in support of its guidelines. Although the court may have found “an unproductive or offensive working atmosphere,” it also found that plaintiff’s job performance ratings were suspect, and that plaintiff “did not receive the salary to which she was entitled.”

A later proceeding in *Kyriarzi* more clearly addressed the issue of work environment. There the court stated:

> While it is hardly this Court’s role to penalize mere rudeness, when a party’s deliberate conduct is so extreme that it intentionally interferes with another’s ability to practice a profession or earn a livelihood, the wrongdoer must be punished or deterred. It is clear from the conduct of the individual defendant[s] . . . that they made Kyriarzi’s work environment intolerable.

However, this statement must be read in light of the court’s finding that Kyriarzi had been denied promotions and raises.

EEOC could also have pointed to dicta in *Tomkins v. Public Service Electric & Gas Co.*, a landmark case on sexual harassment. The court there declined to find that sexual harassment, as prohibited by Title VII, can exist where the harassment is not “a term or condition of employment.”

Appellant suggests an alternative theory of liability that, in addition to prohibiting specific discriminatory acts, Title VII mandates that employees be afforded “a work environment free from the psychological harm flowing from an atmosphere of discrimination.” Analogizing to EEOC findings of Title VII violations where employees have been subjected to their supervisors’ racial epithets and ethnic jokes . . . appellant contends that the sexual advances and subsequent retaliatory harassment to which

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24. Id. at 943.
26. Id. at 340.
27. Id. at 336.
28. 568 F.2d 1044 (3d Cir. 1977).
she was subjected created an environment of debilitating sexual intimidation constituting a barrier to her employment opportunities. Because we hold that the facts as alleged constitute a sex based condition of employment in violation of Title VII, we need not pass upon this second theory.²⁸

Although judicial precedent for the guidelines is limited to dicta in two cases, the guidelines are well justified. In an era when the work environment is being scrutinized for physically disabling factors, it should also be scrutinized for psychologically disabling ones. Discrimination is harmful even in the absence of monetary harm. The Rogers court spoke of the effect of ethnic discrimination on the work environment:

[I]t is my belief that employees' psychological as well as economic fringes are statutorily entitled to protection from employer abuse, and that the phrase "terms, conditions, or privileges of employment" in Section 703 [of Title VII] is an expansive concept which sweeps within its protective ambit the practice of creating a working environment charged with ethnic or racial discrimination.³⁰

In Bundy v. Jackson, the court of appeals held that women can "sue to prevent sexual harassment without having to prove that . . . their resistance [to the harassment] caused them to lose tangible job benefits."³¹ Although the court based its decision on Rogers,³² it cited with approval the EEOC guidelines in fashioning relief for the plain-tiff.³³ Thus the guidelines may be less a radical departure from case law than an integrated and logical extension of the judicial precedent.

³⁰. 454 F.2d at 238.
³¹. 641 F.2d at 945.
³². Id.
³³. Id. at 947.
Sexual Harassment and the Employer

An employer may find himself a defendant in a Title VII suit for the acts of his supervisors, acts of his employees, and in some instances the acts of non-employees. "A purely personal, social relationship without discriminatory employment effect" is not prohibited; the guidelines still require a connection between the harassment and the employer before he may be held liable for damages.

Under the guidelines, the employer is strictly liable for sexual harassment done by an agent or supervisor:

Applying general Title VII principles, an employer, employment agency, joint apprenticeship 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 imposition of strict liability for harassment by agents or supervisors is consistent with case law. The court in Miller v. Bank of America held the employer was not immunized by lack of knowledge of the harassment or by company policy against such harassment.

The employer can take steps to limit his liability for sexual harassment done by non-supervisory employees. Prior to promulgation of the guidelines, employers’ liability for sexual harassment was generally limited to liability for behavior of supervisory personnel. The guidelines now state:

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.

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35. 29 C.F.R. § 1604.11(a).
36. Miller v. Bank of America, 600 F.2d 211 (9th Cir. 1979).
37. Id. at 213.
38. 29 C.F.R. § 1604.11(d).
For acts between co-employees, the potential for liability on the part of the employer is less than for acts of supervisors. This may be justified, since an employee probably feels he is exposing himself to less risk in complaining about a fellow employee than in complaining about harassment by a supervisor. Thus the employer is potentially better informed, and better able to remedy the situation. It is also important to note the correlation between the expanded liability of the employer and the expanded definition of sexual harassment. Employers would be well advised to handle sexual harassment between co-employees in a prudent manner.39

Additionally, an employer may be liable for harassment of his employees by non-employees. Although obscure on this point, the guidelines suggest that employer liability might extend, for example, to independent contractors. The guidelines state:

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.40

To this meager guidance, the “supplementary information” issued with the guidelines merely adds that “[s]uch liability will be determined on a case-by-case basis, taking all facts into consideration.”41 Absent a situation where the non-employee is perceived as an employee, subject to normal employee rules, courts may be unlikely to find the employer liable for acts done by such persons.

In the light of the above discussion, the employer should take steps to limit his liability. Although both the courts42 and the guidelines impose strict liability on the employer for sexual harassment by a supervisor, the employer should act promptly to minimize liability in situations

39. See text accompanying notes 43-49 infra.
40. Id. at § 1604.11(e).
42. 600 F.2d 211 (9th Cir. 1979).
involving non-supervisory personnel. The following steps are suggested for employers:\(^\text{43}\)

1. Establish and publicize a strong policy against sexual harassment;
2. Establish an internal grievance procedure to handle claims of sexual harassment;
3. Follow up on any information received, or any other reason to believe, that sexual harassment is taking place;
4. Investigate any claims of sexual harassment fully; and
5. If harassment is found, rectify the situation by reprimanding, suspending or dismissing employees who engaged in the sexual harassment.

While not guaranteeing immunity for an employer, these procedures are consistent with the guidelines;\(^\text{44}\) and seem to be a prerequisite for avoiding liability for the acts of co-employees and designated non-employees. Such good-faith programs by the employer may even affect the extent of liability for the acts of supervisory employees.

In the “supplementary information” accompanying the guidelines, EEOC noted that many comments were received in response to the Interim Guidelines. These responses voiced concern that the guidelines covering employer procedures for prevention and reporting programs were “not specific enough.”\(^\text{45}\) The guideline states in pertinent part:

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.\(^\text{46}\)

Replying to the comments received, EEOC clarified its position: it did not intend to provide rules, but intended to encourage each employer to develop an “individualized” program.\(^\text{47}\) The five points above are indeed merely suggestions; the employer must assess his own inter-

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\(^{44}\) 29 C.F.R. § 1604.11(f).


\(^{46}\) 29 C.F.R. § 1604.11(f).

nal bureaucracy in devising procedures to insure that he learns of any sexual harassment at the earliest possible moment and properly resolves any problems quickly. For example, some companies may find it desirable to have rules about socializing between supervisory and non-supervisory personnel. While the EEOC does not attempt to prevent purely social relationships, a particular employer may choose to do so.

Alternatively, it may be prudent for the employer to adapt existing company rules governing other personnel policies, which have proven effective, to handle allegations of sexual harassment. This course of action may better protect the rights of the accused supervisor/employee/non-employee. Since not all claims of sexual harassment are well founded, the reputation of the accused must be reasonably protected. An existing, effective complaint-and-hearing system may already protect the rights of all the parties in that workplace.

The guidelines fail to instruct the employer on disciplining the offending employee beyond suggesting the development of “appropriate sanctions.” 48 As a practical matter, the guidelines may make firing the guilty employee the only “safe” remedy, even though circumstances could otherwise dictate demotion or suspension. Take, for example, the situation where a supervisor is engaged in sexual harassment. If he is demoted to a non-supervisory function, the harassment may continue; and the employer may still be liable under the guidelines. The employer’s failure to fire the offender initially may be construed as a failure to express strong disapproval of sexual harassment. Again EEOC suggested a case-by-case analysis. The appellate court in Bundy suggested an injunction requiring the employer to use warnings and other “appropriate discipline.” 49 It thus appears that the normal array of disciplinary actions, even mere warnings, remains available to the employer, as long as “appropriate.”

There is, however, a great deal to be said for severe punishment of a person guilty of sexual harassment; such conduct has been condoned for too long. As in racial discrimination, strong action may be necessary to achieve results. The 1970’s were to sexual harassment what the 1950’s were to racial discrimination. In the long road ahead, some firings may be necessary to insure progress.

48. 29 C.F.R. § 1604.11(f).
49. 641 F.2d at 947.
The EEOC final guidelines contain a section not found in the interim guidelines; it deals with sexual favoritism. In part it states:

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.\(^{50}\)

If there is a section in the guidelines that stands noble in theory but becomes only empty words in application, this is it. EEOC suggested the potential of the section in its “supplemental information;” \(51\) 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.\(^{51}\) But consider the problems of proof. How does one prove that an employee’s advancement was the result of sexual favors if both the supervisor and the promoted employee say otherwise? Unlike most harassment claims where the parties to the sexual conduct are adversaries, here they are co-defendants, not in an adversary position to each other. The courts may find that cases decided on such potentially unreliable evidence may make the cure worse than the disease.\(^{52}\)

Sexual harassment is prevalent in the workplace. All one has to do is read the newspaper or talk to those involved in personnel disputes to discover the magnitude of the problem. If the guidelines function effectively, what results can we expect in the workplace atmosphere? It will be many years before we can judge their full effect. But if they merely increase public awareness of the problem, they will have a positive effect.

There are those who will argue that what the guidelines define as sexual harassment is not “harassment” but rather part of human nature—part of the interpersonal relationships that are bound to occur in a workplace environment. In Corne v. Bausch & Lomb, Inc.\(^{53}\) for example, the court said that even assuming the allegations of verbal and

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50. Id. at § 1604.11(g).
52. Id. at 25,024.
physical sexual advances by another employee were true, absent a showing that the employer somehow benefitted from such harassment, employer liability would not be found. 54

It would be ludicrous to hold that the sort of activity involved here was contemplated by the Act [Title VII] because to do so would mean that if the conduct complained of was directed equally to males there would be no basis for suit. Also, an outgrowth of holding such activity to be actionable under Title VII would be a potential federal lawsuit every time any employee made amorous or sexually oriented advances towards another. The only sure way an employer could avoid such charges would be to have employees who were asexual. 55

Such views will not be changed easily. Some employers will view the guidelines as yet another federal intrusion into their lives. The weight courts give the guidelines is the most important factor in predicting their long-term effects. Empirical evaluations of changes in the workplace atmosphere will eventually yield answers to our questions.

BEYOND THE GUIDELINES

As expected, definitions of "sexual harassment" vary widely in state laws. Wisconsin, for example, has a very narrow definition, which in the words of one commentator "only reaches the most flagrant types of sexual harassment." 56 He also noted that California has gone a bit further and that Washington "has thrown by far the broadest net." 57

The EEOC guidelines will probably serve as a starting point for state legislatures and administrative agencies attempting to curb sexual harassment. For example, during the 1980 Florida legislative session, Rep. Helen Gordon Davis (D-Tampa) introduced a bill which, after

54. Id. at 162-63.
55. Id. at 163-64.
56. Wis. Stat. Ann. § 111.32(5)(g)4 (West 1980) which reads: "For any employer, labor organization, licensing agency or person to make hiring, employment, admission, licensure, compensation, promotion or job assignments contingent upon a person's consent to sexual contact or sexual intercourse as defined in s. 940.225(5)."
58. Id.
committee substitutions, tracked the approach and language of the interim EEOC guidelines. The bill passed in the Florida House of Representatives, but died when the Florida Senate Commerce Committee refused to hear it. The 1981 legislative session also concluded without progress in this matter.

While a statutory amendment to include sexual harassment within the meaning of "discrimination on the basis of sex" now found in Florida Statutes Ch. 23, part IX, is a preferable solution, it is not the only solution. A Florida court could find the broad approach taken by EEOC controlling in a case before it. Even with no amendments to Title VII, and before the EEOC guidelines, actions against sexual harassment brought in federal court were successful. The problem with waiting for state courts to deal with sexual harassment, rather than pressing for a legislative solution, is that they might be reluctant to follow the EEOC guidelines that vary from prior federal decisions.

Should Florida adopt the language and approach taken by EEOC? The answer would seem to be yes, unless Florida can improve on EEOC’s language or approach. Perhaps more thought should be given to the section concerning “sexual favoritism.” This section is weakly worded, but may be acceptable if given the proper gloss by the courts. As there are no other glaring deficiencies in the guidelines, they make an acceptable model; there is no point in reinventing the wheel. If federal courts speak to the guidelines before state legislators consider the language, those rulings could also be taken into account.

CONCLUSION

The Occupational Safety and Health Administration and the Environmental Protection Agency do not have a monopoly on improving the “atmosphere” in the workplace. With its guidelines on sexual harassment, EEOC takes a large step toward making us aware that sexual harassment is a serious and persistent problem. Although courts had been reluctant to find actionable harassment absent some monetary or similar detriment to the plaintiff, EEOC recognizes that harassment

59. FLA. H.B. 331 (1980); FLA. C.S./H.B. 331, S.B. 332 (1980) (was to be codified in FLA. STAT. §§ 23.162(9) and (10).
60. See, e.g., Fisher v. Flynn, 598 F.2d 663 (1st Cir. 1979).
61. 29 C.F.R. § 1604.11(g).
victims suffer other less tangible damages. The *Bundy* court has seen fit to view sexual harassment as comparable to racial harassment, damaging even in the absence of monetary loss. That court pointed to the guidelines with approval. One can hope this is the trend for the future.