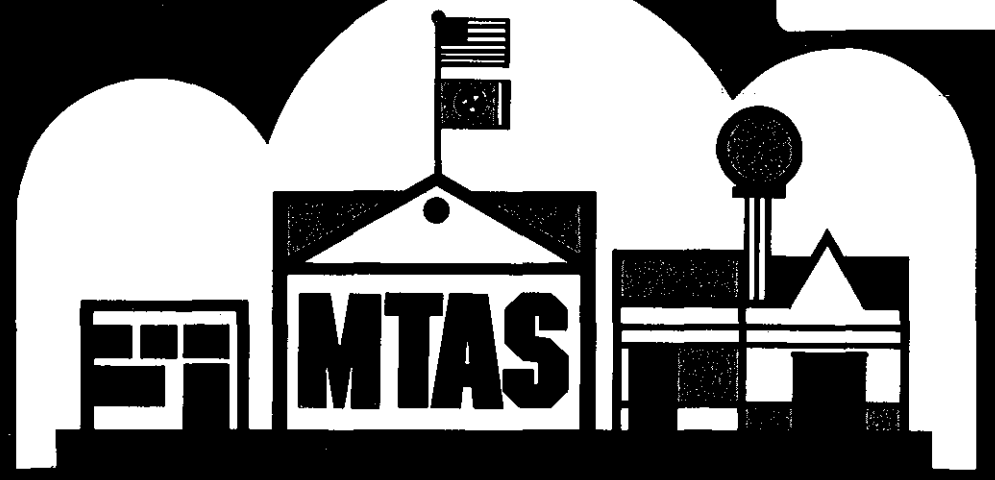
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MUNICIPAL LAW SERIES

FEDERAL COURTS FOLD, SPINDLE AND MUTILATE SEXUAL HARASSMENT

by Sidney D. Hemsley,
Senior Legal Consultant

Report No. 4

April, 1987

MUNICIPAL TECHNICAL ADVISORY SERVICE
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FEDERAL COURTS FOLD, SPINDLE AND MUTILATE SEXUAL HARASSMENT

Does your municipality have a budget surplus? One way to quickly reduce it is to permit sexual harassment in the workplace, or just ignore it like an ostrich with its head in the sand. Either approach will do the job. Once again the federal courts have given employers notice that they will use existing laws, or invent new ones, to find employers liable for sexual harassment they knew was going on, and for sexual harassment they didn't know was going on because they never took the time and trouble to find out. Two recent federal court decisions on sexual harassment, one handed down by the U.S. Supreme Court, make that clear to any employer who is listening.

Let's look closely at those two cases. One of them involves a private employer and the other involves a municipality, but both of them illustrate how easy it is for a municipality to be held liable for sexual harassment under both Title VII of the Civil Rights Act of 1964, and under the Equal Protection Clause of the Fourteenth Amendment to the U.S. Constitution. Don't panic at the sound of Title VII and the Equal Protection Clause. While there is some legal mumbo jumbo involved in both of them, we will try to make it simple and understandable for our purposes. In fact, understanding some of the legal mumbo jumbo helps us to understand that the federal courts aren't leaving many places for employers who permit or ignore sexual harassment to hide. Incidently, we won't even look at sexual harassment cases under Tennessee law because sexual harassment suits have rarely, if ever, been filed under Tennessee law. In fact, the federal courts are where most sexual harassment suits are filed in every state.

Title VII is the main federal law which protects employees against discrimination based on sex, race, color or national origin in virtually every kind of employment decision employers can make, including decisions which affect the "terms, conditions, or priviliges of employment." In the first case we will

consider, the U.S. Supreme Court stretched the language "terms, conditions, or privileges of employment" to make it include sexual harassment. So now sexual harassment is discrimination prohibited by Title VII. The Equal Protection Clause of the Fourteenth Amendment to the U.S. Constitution provides that, among other things, no person shall be denied the "equal protection of the laws." The Equal Protection Clause prohibits sex-based and other forms of discrimination by public (but not private) employers, including municipalities. In the second case we will consider, a U.S. Court of Appeals held that sexual harassment is discrminination which denies women equal protection of the laws. In other words, there is more than one way for a person complaining of sexual harassment to skin a municipality.

We need to discuss an important federal statute in connection with the second case: 42 U.S.C. § 1983, or simply Section 1983. You have no doubt heard about that statute, but let us take some of the mystery out of it because it is the principal federal statute which comes up again and again in cases where a person is suing a state or municipality on the grounds that the state or municipality violated his constitutional rights. Section 1983 is short, but packs a wallop. In essence what is says is that any person deprived of a constitutional right by any state or territory "under color of statute, ordinance, regulation, custom or usage" is entitled to sue the state or territory. The U.S. Supreme Court has held that "state" also means a county and a municipality under Section 1983. Note that Section 1983 does not itself contain any constitutional rights; it merely authorizes a person to sue a state or a municipality, for the violation of his constitutional rights.

Look closely at the language quoted from Section 1983 and you will see that it actually contains two ways a state or municipality can violate a person's constitutional rights:

- Through a formal policy expressed "under color of" a statute, an ordinance, or a regulation,

- Through an informal policy of "custom or usage."

Of the two ways a state or municipality can violate a person's constitutional rights, by far the most important is the latter, custom and usage. In the area of sexual harassment obviously few, if any, states or municipalities have statutes, ordinances, or regulations requiring or permitting sexual harassment. However, as we shall see, some employers and municipalities have a policy of sexual harassment which arises through custom and usage within the meaning of Section 1983.

There are important distinctions between cases brought under Title VII and the Equal Protection Clause with which we ought to have at least a passing familiarity. First, under Title VII of the Civil Rights Act of 1964 the victim of discrimination (sexual harassment or otherwise) is not entitled to compensatory damages, only restoration to his or her job, back pay, and other forms of equitable relief. However, a victim of a constitutional violation is entitled to compensatory damages. Second, the victim of discrimination under Title VII does not have to prove that the employer intended to discriminate, only that discrimination occurred. But a person claiming to be the victim of sexual discrimination in violation of the Equal Protection Clause does have to prove that the employer intended to discriminate. The importance of these distinctions will become apparent to you as we look at the cases, particularly the second one.

We would be foolish if we did not use the two cases to draw some useful conclusions about how to handle sexual harassment in the municipal workplace. With that fact in mind, we will draw from those cases some basic lessons that municipalities can use to head off cases of sexual harassment, then we will use

those lessons to draft some sample sexual harassment policies which can be tailored to Tennessee municipalities.

WHAT YOU DON'T KNOW CAN HURT YOU

It is easy to win a battle but lose the war in the courts. That may be what happened to employers, including municipal governments, in Meritor Savings Bank v. Vinson, 106 S. Ct. 2399 (1986). In that case the U.S. Supreme Court decided that employers are not strictly (automatically) liable for sexual harassment committed by supervisory employees. That sounds like good news, but the Supreme Court also declared that such cases should be decided on "agency principles." If that statement leaves you scratching your head, you are in good company. Most of the sexual harassment legal eagles were hoping that the Supreme Court would use that case to announce some clear principles which would guide lower courts in determining when employers are liable for sexual harassment committed by their supervisory employees. That was not to be, but the Supreme Court did not leave us completely in the dark on that subject. In fact, the Supreme Court seems to have said quite a bit about the liability of employers for sexual harassment in the workplace by all employees.

First, let's go back to sexual harassment committed by supervisors because that was the big issue in Meritor Savings Bank. When are employers liable for sexual harassment committed by supervisory employees? It is a safe bet that even after Meritor Savings Bank employers will in many, if not most, cases be held liable for sexual harassment committed by their supervisors, especially high-ranking ones. Call it strict liability, call it liability on agency principles, a rose by any other name is still a rose. The name of the rose is employer liability. We will hear more about that shortly.

Further comments by the Supreme Court in that case also warn employers that if they want to reduce their potential liability for sexual harassment committed by all employees they should have sexual harassment policies and complaint procedures which root out cases of sexual harassment rather than simply catching them if they happen to go by.

Another important thing the Supreme Court said was that sexual harassment can still be a violation of Title VII of the Civil Rights Act of 1964, even if:

- The the sexual harassment does not lead to an economic loss by the person complaining of sexual harassment in the workplace; and
- The person complaining of the sexual harassment participated in the sexual conduct which led to the sexual harassment claim.

Finally, as we said earlier, although this case involved sexual harassment of a regular employee by a supervisory employee, much of what the Supreme Court said applies to sexual harassment committed by anyone in the workplace, at least in cases where the sexual harassment is so pervasive and severe that it alters the terms and conditions of employment or creates an abusive working environment.

The Facts of the Case

Sorting all of that out requires us to review the facts of Meritor Savings Bank; actually, the facts in both cases. The facts of the cases are important because they remind us that sexual harassment cases represent real people involved in real (and very expensive) legal battles, and they give us a sharp focus on the issue of who is responsible for sexual harassment in the workplace. Someplace along the way it should strike you that the real people in both cases, and the parties responsible for sexual harassment in the workplace, could be you and your municipality. As you read about this case, remember that what Ms. Vinson accused Mr. Taylor of doing is extremely important to Mr. Taylor's employer because Ms. Vinson wants to hold Mr. Taylor's employer liable for

what she said Mr. Taylor did to her, even though Mr. Taylor's employer says that even if Mr. Taylor did what Ms. Vinson said he did, it didn't know what Mr. Taylor was doing to Ms. Vinson. Whew! If that sounds like a soap opera plot, hang on for a minute and you will get the picture.

In 1974 Sidney Taylor, a vice president and branch manager of what is now Meritor Savings Bank, hired Mechelle Vinson as a teller-trainee. Ms. Vinson worked for Mr. Taylor for four years. During that time she received regular promotions, reaching the rank of assistant branch manager. It was conceded by all the parties that Ms. Vinson received her promotions strictly on the basis of merit. But in 1978 Ms. Vinson told Mr. Taylor that she was going to take an indefinite sick leave. Two months later the bank fired Ms. Vinson for excessive use of sick leave. Ms. Vinson sued both Mr. Taylor and Meritor Savings Bank, alleging that during her entire four years at the bank she had "constantly been subjected to sexual harassment" by Mr. Taylor in violation of Title VII of the Civil Rights Act of 1964. Why did she sue the bank? When the famous bank robber Willie "The Actor" Sutton was asked why he robbed banks, he replied, "That's where the money is."

During a lengthy trial, Ms. Vinson testified that

* Mr. Taylor treated her in a "fatherly way" during her probationary period, but shortly afterwards he invited her to dinner where he suggested they go to a motel for sexual relations. After initially refusing, she submitted to his request out of fear for her job.

* Her submission was followed by repeated demands for further sexual favors, and that over the next four years she had sexual intercourse with Mr. Taylor 40 or 50 times, both during and after business hours.

* Mr. Taylor fondled her in the presence of other employees, followed her into the restroom when she went there alone, and exposed himself to her.

* Mr. Taylor forcibly raped her several times.

* She never complained of Mr. Taylor's sexual harassment to any of Mr. Taylor's supervisors or used the bank's complaint procedure because she was afraid of Mr. Taylor.

Needless to say, both Mr. Taylor and the bank argued that none of Ms. Vinson's accusations were true. Mr. Taylor contended that Ms. Vinson's allegations were in retaliation for a business-related dispute between them. In addition, apparently Mr. Taylor also testified about Ms. Vinson's conduct, including her "dress and personal fantasies." We are left in the dark about that aspect of his testimony. But the bank also took the alternative position that if any sexual harassment was committed by Mr. Taylor, it was unknown to the bank and engaged in without the bank's consent or approval.

The District Court's Decision

The District Court ruled in favor of both Mr. Taylor and the bank. As to the accusations against Mr. Taylor, the Court declared that if there was any sexual relationship between Mr. Taylor and Ms. Vinson, it was a "voluntary one having nothing to do with her continued employment at [the bank] or her advancement or promotion at that institution." The District Court disposed of Ms. Vinson's claim against the bank by declaring that the bank had no notice of the claimed sexual harassment; therefore, it could not be held liable for the alleged actions of Mr. Taylor.

The District Court never actually resolved the questions of whether Mr. Taylor even made sexual advances toward Ms. Vinson, and, if he did, whether the advances were welcome or unwelcome. As we shall see, the Supreme Court thought those questions were important and wanted them answered.

The Court of Appeals' Decision

The Court of Appeals reversed the District Court and found both Mr. Taylor and the bank liable for the alleged sexual harassment.

Addressing Ms. Vinson's claim against Mr. Taylor, the Court of Appeals determined that there are two kinds of sexual harassment: (1) harassment that makes concrete employment benefits dependent upon sexual favors, and (2) sexual

harassment that creates a hostile working environment. In hostile environment sexual harassment cases the loss of economic benefits is not necessary, concluded the Court of Appeals. In other words, Ms. Vinson did not have to show that her job or promotions depended upon her submission to Mr. Taylor's alleged sexual advances, only that the sexual harassment created a hostile, offensive working environment. On the related question of whether Ms. Vinson's participation in the sexual conduct with Mr. Taylor was voluntary, the Court of Appeals concluded that if Mr. Taylor had made Ms. Vinson's toleration of sexual harassment a condition of her employment, the voluntariness of her conduct "had no materiality whatsoever." As to Mr. Taylor's evidence about Ms. Vinson's manner of dress and personal fantasies, such evidence "had no place in this litigation," said the Court of Appeals.

On the second point, the liability of the bank for Mr. Taylor's conduct, the Court of Appeals held that an employer is strictly (automatically) liable for sexual harassment practices of supervisory employees, whether or not the employer knew or should have known about the misconduct. The Court of Appeals reasoned that a supervisor is an agent of his employer for Title VII purposes even if he lacks the authority to hire, fire, or promote, since "the mere existence - or appearance - of a significant degree of influence in vital job decisions gives any supervisor the opportunity to impose on employees."

The Supreme Court's Decision

Economic loss of the victim. The Supreme Court agreed with the Court of Appeals that a person complaining of sexual harassment in the workplace did not have to show an economic loss. Its ruling relied heavily on the Equal Employment Opportunity Commission's Sexual Harassment Guidelines. One of those guidelines, noted the Supreme Court, prohibits sexual harassment where "such conduct has the purposes or effect of unreasonably interfering with an

individual's work performance or creating an intimidating, hostile or offensive working environment." [Citing 29 CFR 1604.11]. That guideline requires no showing of an economic loss, declared the Supreme Court.

Voluntary participation in sexual conduct. The Supreme Court also agreed with the Court of Appeals that a person making a claim of sexual harassment does not have to show that his or her participation in the sexual conduct was involuntary. Asking whether the sexual relationship is voluntary, in the sense that the person complaining of sexual harassment was not forced to participate in the sexual conduct against their will, is not the proper question to ask, said the Supreme Court; rather,

> The correct inquiry is whether respondent by her conduct indicated that the alleged sexual advances were unwelcome, not whether her actual participation in sexual intercourse was voluntary. [Author's emphasis]

But because the conduct of the person complaining of sexual harassment is "obviously relevant" in determining whether the sexual advances were welcome or unwelcome, the District Court was correct in admitting testimony about Ms. Vinson's "sexually provocative speech and dress," announced the Supreme Court.

The level of sexual harassment. While apparently this subject was not an issue in the District Court or the Court of Appeals, the Supreme Court addressed it. Not all workplace sexual harassment will result in liability, only that which is "sufficiently severe or pervasive to alter the conditions of the victim's employment and create an abusive working environment," the Supreme Court declared. Needless to say, the Supreme Court also concluded that the sexual harassment alleged in this case, if proven, more than met that standard.

The employer's liability for the conduct of its supervisor. The Supreme Court and the Court of Appeals parted company on this issue. An employer is not

automatically liable for sexual harassment committed by a supervisor, the Court decided. Then when is an employer liable for sexual harassment committed by a supervisor? "[A]gency principles" should guide courts in answering that question, said the Supreme Court.

The Supreme Court sent this case back to the District Court for the latter to determine whether Mr. Taylor made sexual advances toward Ms. Vinson, and, if sexual advances were made, whether they were unwelcome, and

> whether they were sufficiently pervasive to constitute a condition of employment, or whether they were so pervasive and so long continuing . . . that the employer must have become conscious of them."

Read those four questions again. Carefully. Let us review them because they appear to represent the standard for determining whether an employer is liable for sexual harassment committed by one of its employees. While this case involved sexual harassment alleged to have been committed by a supervisor, it is likely that this standard applies to sexual harassment by all employees:

1. Whether the person who is accused of sexual harassment actually made the sexual advances in question;

2. Whether the sexual advances were unwelcome;

3. Whether the sexual advances were pervasive enough to constitute a condition of employment; or

4. Whether the sexual advances were so pervasive and long continuing that the employer must have become conscious of them.

If the answers to the first three questions are all yes or the answers to questions 1, 2 and 4 are yes, the employer stands a good chance of being stuck with the sexual harassment committed by his employees. Let's kick around that conclusion for a minute. If the answers to the first three questions are all yes, the employer may be liable because submission to sexual harassment is part of the job, so to speak, even if the employer doesn't actually know

about the sexual harassment. If the answers to questions 1, 2 and 4 are yes, the employer is probably liable because employers are generally responsible for the wrongful conduct of their employees of which they have knowledge.

What Did He Know and When Did He Know It?

From what you have read so far, what happens to a municipality's position that it knew nothing about the alleged sexual harassment, and that it certainly never gave its employees permission to engage in sexual harassment? The fact is that under traditional agency principles, the courts have long held employers liable for the conduct of supervisors (and regular employees) about which they actually knew nothing. Meritor Savings Bank teaches us that if the sexual advances in question were either pervasive enough to constitute a condition of employment, or so pervasive and long continuing that the employer must have become conscious of them, the employer is in hot water.

Let's talk for a minute about the business of sexual harassment being so pervasive and long continuing that the employer must have become conscious of it. An employer might be able to show that it actually didn't know about sexual harassment that an employee can also show was prevalant and long-lasting. Remember the ostrich with its head in the sand? Albert Speer, the German Minister of Armaments during World War II, accepted moral responsibility for the use of millions of slave laborers all over Europe to increase German war production, but denies that he knew what went on in the concentration camps in which the Germans were killing millions of people. But the reason he didn't know what went on in them, he conceded, was because he did not want to know, and took great care not to know. He said that a high German official who did know what was going on in the camps told him that he should never visit one because what was going on in them was horrible. That was good enough for Speer; he asked no further questions. Most of us would agree that Albert Speer was at least

partially guilty for what went on in the camps because he should have known what was going on in them, and, armed with that knowledge and given his position, should have done something about it.

That brings us to one of those "agency principles" the Supreme Court was apparently talking about: constructive knowledge. In the context of employer responsibility for the wrongful conduct of its employees, constructive knowledge is what an employer should have known about the wrongful conduct if it had exercised reasonable diligence. Under agency principles, an employer may be held legally liable for the wrongful conduct of its employees about which it had only constructive knowledge. When the Supreme Court speaks of sexual harassment of which an employer "must have become conscious," it is speaking of constructive, as well as actual, knowledge of the sexual harassment.

Could the bank in this case have known about the alleged sexual harassment of Ms. Vinson by Mr. Taylor if it had exercised reasonable diligence? That was one of the questions the Supreme Court told the District Court to answer, but the Supreme Court's criticism of the bank's grievance procedure and policy against discrimination did not give the bank much encouragement on that score:

> [W]e reject petitioner's view that the mere existence of a grievance procedure and a policy against discrimination, coupled with the respondent's failure to invoke that procedure, must insulate petitioner from liability. While those facts are plainly relevant, the situation before us demonstrates why they are not necessarily dispositive. Petitioner's general nondiscrimination policy did not address sexual harassment in particular, and thus did not alert employees to their employer's interest in correcting that form of discrimination. Moreover, the bank's grievance procedure apparently required an employee to complain first to her supervisor, in this case Taylor. Since Taylor was the alleged perpetrator, it is not altogether surprising that respondent failed to invoke the procedure and report her grievance to him. Petitioner's contention that respondent's failure should insulate it from liability might be substantially stronger if its procedures were better calculated to encourage victims of harassment to come forward. [Author's emphasis.]

What you don't know can hurt you. And what you don't know, you better try hard to find out where sexual harassment is concerned.

There are other agency principles the courts routinely use to hold an employer liable for the wrongful conduct of its employees; we merely skimmed the surface of them to explain part of what the Supreme Court said in Meritor Savings Bank. Sometimes the same agency principles can even be used to exonerate an employer for the wrongful conduct of its employees. However, take it on faith that generally agency principles are used to impose liability on employers for the wrongful actions of their employees, not to protect them from such liability. And the higher the rank of an employee, the more likely it is that an employer will be held liable for his actions. From an actual or constructive knowledge standpoint, the closer an employee is to the top of the heap, the greater the likelihood that the employer knows about his conduct. Employers may not technically be automatically liable for sexual harassment committed by their supervisors, but that technicality probably will not protect most employers. As we have seen, employers may also be liable for sexual harassment committed by regular employees.

WHAT YOU DO KNOW CAN HURT YOU TOO

Remember that in Meritor Savings Bank, Ms. Vinson's sexual harassment suit rested on Title VII of the Civil Rights Act of 1964. Most sexual harassment suits are brought under that law. But in Bohen v. City of East Chicago, Indiana, 799 F.2d 1180 (7th Cir. 1986), the U.S. Court of Appeals for the Seventh Circuit recently declared that intentional sexual harassment is also a violation of the Equal Protection Clause of the Fourteenth Amendment to the U.S. Constitution. (In looking at this case we will not review the holding of the U.S. District Court which heard the case as we did in Meritor Savings Bank.)

Hortencia Bohen, a Hispanic woman who worked for over four years as a dispatcher in the City of East Chicago Fire Department, was fired for being a rotten employee. She was, according to the Court of Appeals,

> a chronic complainer, given to obstreperous conduct, personal grievances, and tempermental outbursts of anger directed towards her fellow employees and superiors. She spread rumors about them. She made frequent unsupported accusations against others, including allegations of violent physical abuse. She even brought unfounded criminal charges against superiors. In short, although Bohen was competent at the fundamentals of her job (relaying information regarding fires and dispatching the proper equipment), she was less than a model employee when it came to getting along with fellow workers, especially her superiors.

Sounds like the City of East Chicago not only won that case, but should have gotten a medal for getting rid of an obnoxious troublemaker, doesn't it? And indeed, the Court of Appeals did determine that Ms. Bohen had been fired for good cause, not, as she alleged, because she was a woman, or a Hispanic, or in retaliation for her earlier filing of a complaint of discrimination with the Equal Employment Opportunities Commission. Because she was fired for good cause, Ms. Bohen had not made a case of sexual harassment under Title VII, reasoned the Court of Appeals.

But you know the city didn't win this case or we wouldn't be talking about it. Remember the distinction we drew between cases brought under Title VII and cases brought under the Equal Protection Clause? Ms. Bohen was dismissed for good cause so she isn't entitled to restoration of her job, back pay and other equitable remedies. That is all she can get under Title VII. But if Ms. Bohen is the victim of sexual harassment, how is the Court of Appeals going to help her? By turning to the U.S. Constitution. If Ms. Bohen can make a case of intentional discrimination, she is entitled to damages for the

violation of her constitutional rights. Now let's see if Ms. Bohen can make a claim of intentional discrimination.

Ms. Bohen, as thoroughly obnoxious as she apparently was, was the victim of equally obnoxious sexual harassment. In fact, before she took the dispatcher's job, Ms. Bohen was warned by the fire chief that firefighters were "kind of nasty" and would "try anything." Then the fire chief put the burden on Ms. Bohen to handle the sexual harassment by telling her not to socialize with the men, not enter the apparatus room, and that she must "cover herself from head to toe."

The abuse Ms. Bohen endured would make a sailor blush, but it is cataloged here, in the langauage of the Court of Appeals, because it represents treatment that almost anyone would agree is sexual harassment. On her first night on the job (she worked the graveyard shift) Ms. Bohen took a short nap. She awoke to find the senior dispatcher's hands pressed against her crotch. The same dispatcher, who later became the Head Dispatcher and Bohen's immediate supervisor, constantly talked to her exclusively about sexual activities, including his preferred sexual positions and about Ms. Bohen's participation in his sexual daydreams. But the senior dipatcher's conduct was not limited to verbal exercises. He also would rub his pelvis against her rear when she stood and would spread his legs in such a manner that he was always touching her when she sat. He also forced her to leave the door open when she used the bathroom.

Ms. Bohen endured similar conduct from other firefighters. They made her the constant target of obscene comments, including descriptions of their sexual fantasies in which she was the object. One captain told her that being forcibly raped in a nearby plant arrangement would improve her disposition. Her "cool reception" to the the firefighters' frequent invitations to engage in deviate sexual activities was met by implications that she was a lesbian.

Ms. Bohen made numerous complaints about the sexual harassment to her superiors, but nothing was ever done. The Fire Department did not even have a written policy against sexual harassment until after Ms. Bohen was fired.

Ms. Bohen was not the sole target of similar conduct by male firefighters, only their favorite target. Other female dispatchers endured the same kind of conduct, some of it worse than what Bohen endured.

Ms. Bohen's Constitutional Claim

Although Bohen's Title VII complaint was dismissed, she had also sued under Section 1983 on the grounds that the sexual harassment to which she was subjected was sexual discrimination in violation of her constitutional right of equal protection of the laws. The Court of Appeals agreed with her. The core of any equal protection case is intentional discrimination, but intentional discrimination in sexual harassment cases can be shown by the "conscious failure of the employer to protect its employees from sexual harassment by other employees," declared the Court of Appeals. Ms. Bohen had been warned by the fire chief that she would be the victim of of sexual harassment, was the victim of sexual harassment, had complained repeatedly and unsuccessfully about the harassment, and there was no written policy against sexual harassment. It was not necessary that other women also be the victim of sexual harassment to show that the harassment was intentional discrimination, but "[e]vidence of a pattern or practice of discrimination, however, is of course strong evidence supporting a plaintiff's claim that she herself has been the victim of discrimination," concluded the Court of Appeals. It is difficult to think of a better case than this one of intentional discrimination based on those standards.

The legal basis for the Court of Appeal's decision in this case is that female employees were being subjected to abusive conditions to which male

employees were not subjected! The difference in treatment constituted discrimination. And the discrimination didn't just happen without anybody really meaning for it to happen; women were intentionally subjected to abusive conditions to which men were not subjected. That doesn't mean that the City of East Chicago told the female dispatchers in the fire department "Ok, part of your job is to take daily sexual harassment between the hours of 11:00 P.M. and 7:00 A.M. the next day." What it means is that high-ranking city officials knew women dispatchers in the fire department were subject to sexual harassment, and did nothing to protect them. Worse than that, the same city officials put the burden on the women dispatchers to protect themselves.

The City is Liable for the Sexual Harassment

Keep in mind that Bohen sued the City of East Chicago, not the individual members of the fire department who sexually harassed her. Why? The city has more money than do the firemen. The Court of Appeals had no trouble finding the city liable for the sexual harassment committed by its employees. Under Section 1983, a municipality may be held liable for the unconstitutional actions of its employees if those actions represent the policy or custom of the municipality. The Court of Appeals pointed out several ways the practices of employees become the policy or custom of a municipality. Read them carefully.

1. A single act of a sufficiently high-ranking policy maker is sufficient to establish an entity's policy or custom.

2. A policy or custom may also be established by proving that the conduct complained of is a 'well-settled. . . practice. . . even though such a custom has not received formal approval through the body's decision-making channels.'

3. Practices of state [including municipal] officials could be so permanent and well-settled as to constitute a 'custom or usage' with the force of law.

4. An entity may be liable even for 'informal actions, if they reflect a general policy, custom or pattern of official conduct which even tacitly encourages conduct depriving citizens of their constitutionally-protected rights.'

From there the Court of Appeals concluded that the City of East Chicago was liable for the sexual harassment committed by its employees because

> . . . individual acts of harassment were engaged in by supervisory personnel in the course of their supervisory duties. Other management officials responsible for working conditions 'knew the general picture if not the details' of the pattern of sexual harassment. . . Complaints by the victims of sexual harassment were addressed superficially if at all, and the department had no policy against sexual harassment. In sum, sexual harassment was the general on-going, and accepted practice at the East Chicago Fire Department, and high-ranking supervisory, and management officials responsible for working conditions at the department knew of, tolerated, and participated in the harassment. This satisfies § 1983's requirement that the actions complained of be the policy or custom of the state entity. [Author's emphasis]

Do not tolerate the sexual harassment of any employee, even rotten ones. It is hazardous to your municipality's health if the employee can show that your municipality had a policy or custom of sexual harassment. Keep in mind that a policy or custom of sexual harassment was shown in this case, in part, by the knowledge and participation of supervisory personnel in the sexual harassment and the lack of a written policy against sexual harassment.

ALL ROADS LEAD TO ROME

As you can see, the federal courts can get to essentially the same place in a sexual harassment case under both Title VII and the U.S. Constitution. Once sexual harassment is shown, the only question is whether the victim is entitled to job restoration, back pay and other equitable relief under Title VII, or damages under the U.S. Constitution through Section 1983. Showing an intention to discriminate is crucial to winning a sexual harassment suit under the U.S.

Constitution, while no intention to discriminate need be shown in a sexual harassment suit brought under Title VII. But think back over everything you have read, then ask yourself whether making a case of sexual harassment against an employer would be all that difficult to do, under either Title VII or the Equal Protection Clause. You are right, making a case would not be that difficult where sexual harassment in the workplace exists to any significant degree, even in cases where it does not reach the level we saw in Meritor Savings Bank and Bohen, especially where the sexual harassment is committed or tolerated by supervisory employees.

WHAT ABOUT SEXUAL HARASSMENT COMMITTED BY ELECTED OFFICIALS?

Apparently sexual harassment complaints against elected officials are not common. However, what would be the prospect of a municipality avoiding liability under either Title VII or the Equal Protection Clause if the sexual harassment was committed by an elected official? Probably about the same as a Russian Army private trying to get out of K.P. Elected officials are probably ultimate supervisors and policy-makers whether the court is deciding the question of municipal liability on agency principles or on the basis of municipal custom and practice. A particular problem many municipalities might face in this area is the lack of effective sanctions to discipline their own elected officials. Generally, the broad range of sanctions which most municipalities can impose upon their employees for misconduct of various kinds, cannot be imposed upon elected officials. Where effective municipal sanctions against elected offials do not exist, that fact is probably an additional invitation to the courts to hold the municipality liable for sexual harassment where an elected official is the villian. We have seen that the federal courts will even invent a remedy for sexual harassment if one doesn't exist.

LESSONS TO BE LEARNED

1. A person complaining of "hostile environment" sexual harassment under Title VII, does not have to prove an economic loss arising from the sexual harassment; that is, that the person lost a job, did not get the promotion, etc.

Right here is a good place to point out what kinds of conduct are sexual harassment. For Title VII purposes, according to the Equal Employment Opportunities Commission's Guidelines on Sexual Harassment "unwelcome sexual advances, requests for sexual favors and other verbal or physical conduct of a sexual nature" constitutes sexual harassment when:

> a. Submission to such conduct is made either explicitly or implicitly a term or condition of employment;
>
> b. Submission to or rejection of such conduct by an individual is used as the basis for decisions affecting such individual; and
>
> c. 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." (Section 1604.11) [Author's emphasis]

The same basic general definitions probably apply to sexual harassment cases brought on any grounds even if they are not specifically cited.

But let us be more specific in defining what conduct can constitute sexual harassment for both Title VII and Equal Protection purposes. One of the problems in doing so is that what is sexual harassment to one person is merely wholesome humor to another. Probably everyone would agree that sexual assault, making a job or promotion dependent upon having sexual relations with the boss, or being subjected to unwanted grabs and pats is sexual harassment, but move beyond those forms of conduct to off-color jokes and comments about appearance, and there would be less agreement. What sexual harassment is sometimes depends upon whether one is dishing out or taking the conduct in question. For that reason, no definition of sexual harassment will satisfy everyone. But that

reason alone is precisely why a definition is required--to establish standards of conduct which apply to every employee regardless of their individual perceptions about sexual harassment.

Here are two simple, but good definitions that address most of the forms of conduct often described as sexual harassment:

- Sexual harassment is unwelcome conduct in the form of pinching, grabbing, patting, propositioning; making either explicit or implied job threats or promises in return for submission to sexual favors; making inappropriate sex-oriented comments on appearance, including dress or physical features; telling embarrassing sex-oriented stories; displaying sexually explicit or pornographic material, whether printed, written or drawn; or sexual assaults on the job by supervisors, fellow employees, or on occasion, non-employees -- any of which unwelcome conduct affects employment decisions, makes the job environment hostile, distracting, or unreasonably interferes with work performance.

- Sexual harassment is behavior with sexual content or overtones that is unwelcome and personally offensive. It can consist of sexually oriented "kidding" or jokes, physical contact such as patting, pinching or purposely rubbing up against another person's body, demands or requests for sexual favors tied to promises of better treatment or threats concerning employment, discriminating against an employee for refusing to "give in" to demands or requests for sexual favors, or rewarding or granting favors to one who submits to demands or requests for sexual favors.

2. The focus in sexual harassment cases under Title VII will be on whether the sexual conduct complained of was unwelcome, not whether the person complaining of sexual harassment voluntarily participated in the conduct or went along with it. Think about that standard for a minute and you will see that all employees should be very careful in their speech and "body language," because they may be unwelcome even if the audience at whom they are directed appears to voluntarily go along with them or does not object to them. That goes for sexual conduct toward fellow workers off as well as on the job if it creates an offensive or hostile working environment on the job.

3. In theory, employers will not be held automatically liable for sexual harassment by supervisors under Title VII. However, a municipality may be held liable under Title VII for sexual harassment that it neither permitted nor knew about, but should have known about and stopped if it had exercised diligence. In any event, the result of courts applying agency principles to cases involving sexual harassment by supervisors will probably still be the same in most cases: employer liability. In addition, municipalities may also be liable for sexual harassment committed by regular personnel if the harassment is bad enough or has gone on long enough to give the municipality either actual or constructive knowledge of it.

In that connection, do not relax because the Supreme Court said that for sexual harassment to be actionable under Title VII, it has to be sufficiently severe or pervasive to alter the conditions of the victim's employment and create an abusive working environment. In fact, that standard is a land mine waiting for an employer to step on it. It is an invitation to both supervisors and regular employees to assume that a little bit of sexual harassment is okay. The problem is that recent sexual harassment cases suggest that the line between okay and not okay is easy to cross. In addition, if the person complaining of sexual harassment in the workplace can show that the sexual harassment crossed the line, it is a short, easy step for a court to find that it was a term or condition of employment, or that the employer had actual or constructive knowledge of the harassment, or that it was intentional harassment within the meaning of the Equal Protection Clause of the Fourteenth Amendment.

4. A municipality is liable under Section 1983 for intentional sexual harassment committed by its employees in violation of the Equal Protection

Clause of the Fourteenth Amendment to the U.S. Constitution, if the municipality has a policy or custom of sexual harassment. A policy or custom can be shown by the conscious failure of the municipality to protect its employees from sexual harassment. The failure of high-ranking supervisors who know that sexual harassment is occurring to do anything to stop the harassment is good evidence of a conscious failure of the municipality to protect its employees from sexual harassment.

5. An important key in sexual harassment cases under both Title VII and the Equal Protection Clause is supervision. If supervisors are participating in the sexual harassment, don't know that it is going on when they should know, or permit it to go on when they know it exists, the municipality will be held liable for the sexual harassment, especially if the supervisors are high-ranking supervisors.

6. To minimize the possibility of being held liable for sexual harassment committed by all their personnel, including supervisors, under both Title VII and the Equal Protection Clause, municipalities should issue and widely publicize a written policy specifically against sexual harassment in the workplace. Make sure the policy clearly:

- Defines sexual harassment in broad enough language to cover the forms of conduct that are generally recognized to be sexual harassment, yet is specific enough to give employees notice of prohibited forms of conduct.

- Prohibits sexual harassment by regular and supervisory employees, including elected officials.

- Contains a complaint procedure which permits an employee to go around and above a supervisor against whom the employee wants to make a complaint of sexual harassment.

- Emphatically encourages employees with a complaint of sexual harassment to come forward with the complaint.

It would be a good practice to require all employees and supervisors to sign a statement that they have read and understand the written policy against sexual harassment of employees in the workplace, and keep a copy of the signed policy in its records. A good place for this statement to appear is at the conclusion of the written policy itself.

Appendices A and B contain sample sexual harassment policies and complaint procedures for mayor-aldermanic and city manager forms of government, respectively. They can be modified to fit the special requirements of particular municipalities, and municipalities with other forms of government.

7. Regularly train both supervisors and employees in the contents of the written policy prohibiting sexual harassment in the workplace, and keep a record of the training and the attendance of each supervisor and employee. The training of supervisors in particular should emphasize the high potential for liability for supervisors' conduct being transferred to the municipality.

8. Prohibit a policy or custom of sexual harassment of employees by supervisory or regular employees. Remember that a written prohibition against sexual harassment is no good if policy or custom permits what the written policy prohibits. In other words, make sure that what you prohibit in writing, you prohibit in practice.

9. Discipline supervisors and employees who engage in sexual harassment in the workplace. Keep a record of the conduct complained of, and the discipline dispensed. However, be careful to insure that the complaint of sexual harassment is thoroughly investigated and that the person against whom the complaint is lodged is guilty of sexual harassment. The supervisor or employee against whom a complaint of sexual harassment has been made has rights too.

Making sure that the complaint of sexual harassment is founded before disciplinary action is taken puts an enormous burden on the employer in some cases. It is not always easy to determine whether certain sexual relationships are unwelcome, including those which may be going on after work hours but which affect the working environment. A particular problem in that regard is that a sexual relationship which was welcome yesterday, may not be welcome today.

When disciplinary action is taken, make sure "the punishment fits the crime." Discipline can range from a verbal reprimand to dismissal, depending upon the nature of the sexual harassment. In all cases insure that the disciplinary procedures called for in the municipality's charter, ordinances, resolutions or other regulations, are followed.

Needless to say, an employer walks a tightrope in some cases where balancing the rights of the person doing the complaining and the person against whom the complaint is made is a close question.

Do not hesitate to consult an attorney.

APPENDIX A

SAMPLE SEXUAL HARASSMENT POLICY FOR MUNICIPALITIES WITH A MAYOR-ALDERMANIC FORM OF GOVERNMENT

SEXUAL HARASSMENT POLICY*

[Important Note: This sample policy reflects general considerations which should go into drafting a policy against sexual harassment. The sexual harassment policy for a particular municipality should take into consideration the municipality's type of government, who in the municipality has the authority to supervise and discipline employees, the employee chain of command, and which employees would do a good job of receiving and investigating complaints of sexual harassment. Those considerations, and others peculiar to individual municipalities, are important for making sure that the sexual harassment policy conforms to the personnel system in the municipality and that the policy works when a complaint of sexual harassment is made. This policy is written as if the city had a mayor-aldermanic form of government in which the mayor has limited disciplinary authority, a common form of government in Tennessee. The policy can be modified to reflect the wants and needs of particular municipalities, including those with other forms of government].

SEXUAL HARASSMENT IS ABSOLUTELY PROHIBITED

The sexual harassment of any employee of the City of _____ by any other employee or non-employee is demeaning to both the victim of the harassment and to the city. It can result in high turnover, absenteeism, low morale, and an uncomfortable work environment. Some forms of sexual harassment, including certain kinds of unwelcome physical contact, may also be criminal offenses. The city will not tolerate the sexual harassment of any of its employees, and will take immediate, positive steps to stop it when it occurs.

SEXUAL HARASSMENT IS ILLEGAL AND EXPENSIVE

Sexual harassment is a violation of Title VII of the Civil Rights Act of 1964. In some cases it has been found to be a violation of the victim's U.S. Constitutional rights. In some states it has been held to be a violation of state statutory and common law. Successful sexual harassment suits are common and almost always result in money being awarded the victim no matter what legal grounds exist for the suit. Even in sexual harassment suits in which municipalities are successful, the costs of defense are extremely high.

It is not the purpose of this policy to outline the legal grounds for sexual harassment complaints and suits in Tennessee. It is sufficient to say that legal grounds exist in every state in both federal and state courts, and that sexual harassment suits are costly whether they are won or lost.

*The masculine gender is used in this policy only for grammatical clarity and convenience.

WHAT IS SEXUAL HARASSMENT

- Sexual harassment is unwelcome conduct in the form of pinching, grabbing, patting, propositioning; making either explicit or implied job threats or promises in return for submission to sexual favors; making inappropriate sex-oriented comments on appearance, including dress or physical features; telling embarrassing sex-oriented stories; displaying sexually explicit or pornographic material, no matter how it is displayed; or sexual assaults on the job by supervisors, fellow employees, or on occasion, non-employees-- when any of such of the foregoing unwelcome conduct affects employment decisions, makes the job environment hostile, distracting, or unreasonably interferes with work performance.

  [alternatively, the following or some other suitable definition]

- Sexual harassment is behavior with sexual content or overtones that is unwelcome and personally offensive. It can consist of sexually oriented "kidding" or jokes; physical contact such as patting, pinching or purposely rubbing up against another person's body; demands or requests for sexual favors tied to promises of better treatment or threats concerning employment; discriminating against an employee for refusing to "give in" to demands or requests for sexual favors; or rewarding or granting favors to one who submits to demands or requests for sexual favors.

The definition of sexual harassment includes conduct directed by men toward women, conduct directed by men toward men, conduct directed by women toward men, and conduct by women toward women.

COVERAGE AND DISTRIBUTION OF POLICY

This sexual harassment policy applies to all officers and employees of the City of _____, including, but not limited to, full and part-time employees, elected officials, permanent and temporary employees, employees covered or exempted from personnel rules or regulations, and employees working under contract for the city.

This policy will be distributed to all officials and employees of the city. Every official and employee will be required to acknowledge his or her receipt of this policy in writing. A copy of that acknowledgement shall be kept on permanent file in the city. Department heads and supervisors shall also be responsible for insuring that all employees under their direction are familiar with this policy.

MAKING SEXUAL HARASSMENT COMPLAINTS

Any employee who feels he or she is being subjected to sexual harassment should immediately contact one of the persons below with whom the employee feels the most comfortable. Complaints may be made orally or in writing to:

1. The employee's immediate supervisor.

2. The employee's department head.

3. The city's equal employment opportunity officer.

4. The city recorder.

5. The mayor.

Employees have the right to circumvent the employee chain of command in selecting which person to whom to make a complaint of sexual harassment.

Regardless of to which of the above persons the employee makes a complaint of sexual harassment, the employee should be prepared to provide the following information:

- Official's or employee's name, department and position title.
- The name of the person or persons committing the sexual harassment, including their title/s, if known.
- The specific nature of the sexual harassment, how long it has gone on, and any employment action (demotion, failure to promote, dismissal, refusal to hire, transfer, etc.) taken against you as a result of the harassment, or any other threats made against you as a result of the harassment.
- Witnesses to the harassment.
- Whether you have previously reported such harassment and, if so, when and to whom.

REPORTING AND INVESTIGATION OF SEXUAL HARASSMENT COMPLAINTS

Against Employees

The city recorder is the person designated by the city to be the investigator of complaints of sexual harassment against employees. In the event the sexual harassment complaint is against the city recorder, the investigator shall be a municipal employee appointed by the mayor.

When an allegation of sexual harassment is made by any employee, the person to whom the complaint is made shall immediately prepare a report of the complaint according to the preceding section and submit it to the city recorder, or in the event the sexual harassment complaint is against the city recorder, to the mayor.

The investigator shall make and keep a written record of the investigation, including notes of verbal responses made to the investigator by the person complaining of sexual harassment, witnesses interviewed during the investigation, the person against whom the complaint of sexual harassment was made, and any other person contacted by the investigator in connection with the investigation. The notes shall be made at the time the verbal interview is in progress.

When the investigator receives a complaint of sexual harassment, he or she shall immediately:

- Obtain a written statement from the person complaining of sexual harassment which includes a comprehensive report of the nature of the sexual harassment complained of, and the times, dates, and places where the sexual harassment occurred. The investigator shall verbally question the person complaining of sexual harassment about any information in the written statement which is not clear or needs amplification.

- Obtain written statements from witnesses which include a comprehensive report of the nature of the conduct witnessed, and the times, dates, and places where the conduct occurred, and the conduct of the person complaining of sexual harassment toward the person against whom the complaint of sexual harassment was made. The investigator shall verbally question witnesses about any information in their written statements which is not clear or needs amplification.

- Obtain a written statement from the person against whom the complaint of sexual harassment has been made. The investigator shall verbally question the person against whom the complaint of sexual harassment has been made about any information in the written statement which is not clear or needs amplification.

- Prepare a report of the investigation, which includes the written statement of the person complaining of sexual harassment, the written statements of witnesses, the written statement of the person against whom the complaint of sexual harassment was made, and all the investigator's notes connected to the investigation, and submit the report to the mayor.

Against an Elected Official

Complaints of sexual harassment against elected officials shall be investigated by a city employee appointed by the board of mayor and aldermen.

The investigator shall investigate the complaint against an elected official in the same manner as is outlined in this policy for the investigation of complaints against employees. However, upon the completion of the investigation, the investigator shall submit the report of the investigation to the board of mayor and aldermen.

ACTION ON COMPLAINTS OF SEXUAL HARASSMENT

Against an Employee

Upon receipt of a report of the investigation of a complaint of sexual harassment against an employee, the mayor shall immediately review the report. If the mayor determines that the report is not complete in some respect, he may question the person complaining of sexual harassment, the person against whom the complaint of sexual harassment has been made, witnesses to the conduct in question or any other person who may have knowledge about the conduct in question. The mayor shall also keep written records of his investigation in the same manner prescribed for the investigator. However, if the mayor feels the investigation report is adequate he may make a determination of whether sexual harassment occurred, based on the report.

Based upon the report, and his own investigation, where one is made, the mayor shall, within a reasonable time, determine whether the conduct of the person against whom a complaint of sexual harassment has been made constitutes sexual harassment. In making that determination, the mayor shall look at the record as a whole and at the totality of circumstances, including the nature of the conduct in question, the context in which the conduct, if any, occurred, and the conduct of the person complaining of sexual harassment. The determination of whether sexual harassment occurred will be made on a case-by-case basis.

If the mayor determines that the complaint of sexual harassment is founded, he shall take immediate and appropriate disciplinary action against the employee guilty of sexual harassment, consistent with his authority under the municipal charter, ordinances or rules governing his authority to discipline employees. If the mayor feels that disciplinary action stronger than he is authorized to impose by the charter, ordinances, resolutions or rules governing employee discipline is warranted, he shall make that determination known to the board of mayor and aldermen, together with the report of the investigation. If the board of mayor and aldermen determines that the complaint of sexual harassment was founded, it may discipline the employee consistent with its authority under the municipal charter, ordinances, resolutions or rules governing employee discipline.

The disciplinary action shall be consistent with the nature and severity of the offense, the rank of the employee, and any other factors the board of mayor and aldermen believe relate to fair and efficient administration of the city, including, but not limited to, the effect of the offense on employee morale and public perception of the offense, and the light in which it casts the city. The disciplinary action may include demotion, suspension, dismissal, warning or reprimand. A determination of the level of disciplinary action shall also be made on a case-by-case basis.

A written record of disciplinary action taken shall be kept, including verbal reprimands.

In all events, an employee found guilty of sexual harassment shall be warned not to retaliate in any way against the person making the complaint of sexual harassment, witnesses or any other person connected with the investigation of the complaint of sexual harassment.

In cases where the sexual harassment is committed by a non-employee against a city employee in the workplace, the mayor shall take whatever lawful action against the non-employee is necessary to bring the sexual harassment to an immediate end.

Against an Elected Official

The board of mayor and aldermen may discipline an elected official in whatever manner it deems appropriate, consistent with its authority under state law, the municipal charter, ordinances, resolutions or other rules governing discipline of elected officials.

OBLIGATION OF EMPLOYEES

Employees are not only encouraged to report instances of sexual harassment, they are obligated to report instances of sexual harassment. Sexual harassment exposes the city to liability, and a part of each employee's job is to reduce the city's exposure to liability.

Employees are obligated to cooperate in every investigation of sexual harassment. The obligation includes, but is not necessarily limited to, coming forward with evidence, both favorable and unfavorable, to a person accused of sexual harassment, fully and truthfully making a written report or verbally answering questions when required to do so by an investigator during the course of an investigation of sexual harassment.

Employees are also obligated to refrain from making bad faith accusations of sexual harassment.

Disciplinary action may also be taken against any employee who fails to report instances of sexual harassment, or who fails or refuses to cooperate in the investigation of a complaint of sexual harassment, or who files a complaint of sexual harassment in bad faith.

OPEN RECORDS

The Tennessee Open Records Law at Tennessee Code Annotated, Section 10-7-503 through 10-7-506 probably applies to the records in sexual harassment cases, as it does to virtually all other municipal records. In other words, complaints and reports of sexual harassment, including the investigative report, probably cannot be kept confidential, perhaps not even during the investigation. However, the value of written records in sexual harassment cases, as in most other cases where an investigation occurs from which disciplinary action against an employee might arise, requires that a written record of the investigation be kept to help insure justice and efficient municipal administration.

APPENDIX B

SAMPLE SEXUAL HARASSMENT POLICY FOR MUNICIPALITIES WITH THE CITY MANAGER FORM OF GOVERNMENT

SEXUAL HARASSMENT POLICY*

[Important Note: This sample policy reflects general considerations which should go into drafting a policy against sexual harassment. The sexual harassment policy for a particular municipality should take into consideration the municipality's type of government, who in the municipality has the authority to supervise and discipline employees, the employee chain of command, and which employees would do a good job of receiving and investigating complaints of sexual harassment. Those considerations, and others peculiar to individual municipalities, are important for making sure that the sexual harassment policy conforms to the personnel system in the municipality and that the policy works when a complaint of sexual harassment is made. This policy is written as if the city had a city manager form of government in which the city manager has broad disciplinary authority. The policy can be modified to fit the needs and wants of particular municipalities, including those with other forms of government.]

SEXUAL HARASSMENT IS ABOLUTELY PROHIBITED

The sexual harassment of any employee of the City of _____ by any other employee or non-employee is demeaning to both the victim of the harassment and to the city. It can result in high turnover, absenteeism, low morale, and uncomfortable work environment. Some forms of sexual harassment, including certain kinds of unwelcome physical contact, may also be criminal offenses. The city will not tolerate the sexual harassment of any of its employees, and will take immediate, positive steps to stop it when it occurs.

SEXUAL HARASSMENT IS ILLEGAL AND EXPENSIVE

Sexual harassment is a violation of Title VII of the Civil Rights Act of 1964. In some cases it has been found to be a violation of the victim's U.S. Constitutional rights. In some states it has been held to be a violation of state statutory and common law. Successful sexual harassment suits are common and almost always result in money being awarded the victim no matter what legal grounds exist for the suit. Even in sexual harassment suits in which municipalities are successful, the costs of defense are extremely high.

It is not the purpose of this policy to outline the legal grounds for sexual harassment complaints and suits in Tennessee. It is sufficient to say that legal grounds exist in every state in both federal and state courts, and that sexual harassment suits are costly whether they are won or lost.

WHAT IS SEXUAL HARASSMENT

- Sexual harassment is unwelcome conduct in the form of pinching, grabbing, patting, propositioning; making either explicit or implied job threats or promises in return for submission to

* The masculine gender is used in this policy only for grammatical clarity and convenience.

sexual favors; making inappropriate sex-oriented comments on appearance, including dress or physical features; telling embarrassing sex-oriented stories; displaying sexually explicit or pornographic material, no matter how it is displayed; or sexual assaults on the job by supervisors, fellow employees, or on occasion, non-employees -- when any of the foregoing unwelcome conduct affects employment decisions, makes the job environment hostile, distracting, or unreasonably interferes with work performance.

[alternatively, the following or some other suitable definition]

- Sexual harassment is behavior with sexual content or overtones that is unwelcome and personally offensive. It can consist of sexually oriented "kidding" or jokes; physical contact such as patting, pinching or purposely rubbing up against another person's body; demands or requests for sexual favors tied to promises of better treatment or threats concerning employment; discriminating against an employee for refusing to "give in" to demands or requests for sexual favors; or rewarding or granting favors to one who submits to demands or requests for sexual favors.

The definition of sexual harassment includes conduct directed by men toward women, conduct directed by men toward men, conduct directed by women toward men, and conduct by women toward women.

COVERAGE AND DISTRIBUTION OF POLICY

This sexual harassment policy applies to all officers and employees of the City of _____, including, but not limited to, full and part-time employees, elected officials, permanent and temporary employees, employees covered or exempted from personnel rules or regulations, and employees working under contract for the city.

This policy will be distributed to all employees of the city. Every employee will be required to acknowledge his or her receipt of this policy in writing. A copy of that acknowledgement shall be kept on permanent file in the city. Department heads and supervisors shall also be responsible for insuring that all employees under their direction are familiar with this policy.

MAKING SEXUAL HARASSMENT COMPLAINTS

Any employee who feels he or she is being subjected to sexual harassment should immediately contact one of the persons below with whom the employee feels the most comfortable. Complaints may be made orally or in writing to:

1. The employee's immediate supervisor.

2. The employee's department head.

3. The city's equal employment opportunity officer.

4. The city manager.

5. The mayor.

Employees have the right to circumvent the employee chain of command in selecting which person to whom to make a complaint of sexual harassment.

Regardless of to which of the above persons the employee makes a complaint of sexual harassment, the employee should be prepared to provide the following information:

- Employee's name, department and position title.

- The name of the person or persons committing the sexual harassment, including their title/s, if known.

- The specific nature of the sexual harassment, how long it has gone on, and any employment action (demotion, failure to promote, dismissal, refusal to hire, transfer, etc.) taken against you as a result of the harassment, or any other threats made against you as a result of the harassment.

- Witnesses to the harassment.

- Whether you have previously reported such harassment and, if so, when and to whom.

REPORTING AND INVESTIGATION OF SEXUAL HARASSMENT COMPLAINTS

Against An Employee, Including the City Manager

The city manager is the person designated by the city to be the investigator of complaints of sexual harassment. The city manager may delegate the investigation to another city employee at his discretion. In the event the sexual harassment complaint is against the city manager, the investigator shall be a municipal employee appointed by the mayor.

When an allegation of sexual harassment is made by any employee, the person to whom the complaint is made shall immediately prepare a report of the complaint according to the preceding section and submit it to the city manager, or in the event the sexual harassment complaint is against the city manager, to the mayor.

The investigator shall make and keep a written record of the investigation, including notes of verbal responses made to the investigator by the person complaining of sexual harassment, witnesses interviewed during the investigation, the person against whom the complaint of sexual harassment was made, and any other person contacted by the investigator in connection with the investigation. The notes shall be made at the time the verbal interview is in progress.

When the investigator receives a complaint of sexual harassment, he or she shall immediately:

- Obtain a written statement from the person complaining of sexual harassment which includes a comprehensive report of the nature of the sexual harassment complained of, and the times, dates, and places where the sexual harassment occurred. The investigator shall verbally question the person complaining of sexual harassment about any information in the written statement which is not clear or needs amplification.

- Obtain written statements from witnesses which include a comprehensive report of the nature of the conduct witnessed, and the times, dates, and places where the conduct occurred, and the conduct of the person complaining of sexual harassment toward the person against whom the complaint of sexual harassment was made. The investigator shall verbally question witnesses about any information in their written statements which is not clear or needs amplification.

- Obtain a written statement from the person against whom the complaint of sexual harassment has been made. The investigator shall verbally question the person against whom the complaint of sexual harassment has been made about any information in the written statement which is not clear or needs amplification.

- Prepare a report of the investigation, which includes the written statement of the person complaining of sexual harassment, the written statements of witnesses, the written statement of the person against whom the complaint of sexual harassment was made, and all the investigator's notes connected to the investigation, and submit the report to the mayor.

Against An Elected Official

Complaints against an elected official shall be investigated by a city employee appointed by the city commission. The investigator shall investigate a complaint of sexual harassment against an elected official in the same manner as outlined in this policy for the investigation of complaints against city employees. However, upon the completion of the investigation, the investigator shall submit the report of his investigation to the city commission.

ACTION ON COMPLAINTS OF SEXUAL HARASSMENT

Against All Employees Except the City Manager

Upon receipt of a report of the investigation of a complaint of sexual harassment, the city manager shall immediately review the report. If the city manager determines that the report is not complete in some respect, he may question the person complaining of sexual harassment, the person against whom the complaint of sexual harassment has been made, witnesses to the conduct in question or any other person who may have knowledge about the conduct in question. However, if the city manager feels the investigation report is adequate, he may make a determination of whether or not sexual harassment occurred, based on the report.

Based upon the report the city manager shall, within a reasonable time, determine whether the conduct of the person against whom a complaint of sexual harassment has been made constitutes sexual harassment. In making that determination, the city manager shall look at the record as a whole and at the totality of circumstances, including the nature of the conduct in question, the context in which the conduct, if any, occurred, and the conduct of the person complaining of sexual harassment. The determination of whether sexual harassment occurred will be made on a case-by-case basis.

If the city manager determines that the complaint of sexual harassment is founded, he shall take immediate and appropriate disciplinary action against the employee guilty of sexual harassment, consistent with his authority under the municipal charter, ordinances, rules or regulations pertaining to employee discipline.

The disciplinary action shall be consistent with the nature and severity of the offense, the rank of the employee, and any other factors the city manager believes relate to fair and efficient administration of the city, including, but not limited to, the effect of the offense on employee morale, public perception of the offense, and the light in which it casts the city. The disciplinary action may include demotion, suspension, dismissal, warning or reprimand. A determination of the level of disciplinary action shall also be made on a case-by-case basis.

A written record of disciplinary action taken shall be kept, including verbal reprimands.

In all events, an employee found guilty of sexual harassment shall be warned not to retaliate in any way against the person making the complaint of sexual harassment, witnesses or any other person connected with the investigation of the complaint of sexual harassment.

Against The City Manager

Upon receipt of a report on the investigation of a complaint of sexual harassment against the city manager, the mayor shall present the report to the city commission. If the city commission determines that the complaint of sexual harassment is founded, it may discipline the city manager consistent with its authority under the municipal charter, ordinances, resolutions or rules governing discipline of the city manager.

Against An Elected Official

The city commission may discipline an elected official in whatever manner it deems appropriate, consistent with its authority under state law, the municipal charter, ordinances, resolutions or other rules governing discipline of elected officials.

Sexual Harassment Committed by Non-employees

In cases of sexual harassment committed by a non-employee against a city employee in the workplace, the city manager shall take all lawful steps to insure that the sexual harassment is brought to an immediate end.

OBLIGATION OF EMPLOYEES

Employees are not only encouraged to report instances of sexual harassment, they are obligated to report instances of sexual harassment. Sexual harassment exposes the city to liability, and a part of each employee's job is to reduce the city's exposure to liability.

Employees are obligated to cooperate in every investigation of sexual harassment, including, but not necessarily limited to, coming forward with evidence, both favorable and unfavorable, to a person accused of sexual harassment, fully and truthfully making a written report or verbally answering questions when required to do so by an investigator during the course of an investigation of sexual harassment.

Employees are also obligated to refrain from filing bad faith complaints of sexual harassment.

Disciplinary action may also be taken against any employee who fails to report instances of sexual harassment, or who fails or refuses to cooperate in the investigation of a complaint of sexual harassment, or who files a complaint of sexual harassment in bad faith.

OPEN RECORDS

The Tennessee Open Records Law at Tennessee Code Annotated, Section 10-7-503 through 10-7-506 probably applies to the records in sexual harassment cases, as it does to virtually all other municipal records. In other words, complaints and reports of sexual harassment, including the investigative report, probably cannot be kept confidential, perhaps not even during the investigation. However, the value of written records in sexual harassment cases, as in most other cases where an investigation occurs from which disciplinary action against an employee might arise, requires that a written record of the investigation be kept to help insure justice and efficient municipal administration.

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