How Workplace Managers Can Protect Against Hostile Environment Claims From Their Female And Male Employees: A Legal Review Of Decisional Law

Nina Compton, (E-mail; ncompton@nmsu.edu), New Mexico State University

ABSTRACT

Sexual harassment can occur in a variety of circumstances within the workplace setting. A review of case law illuminates the circumstances that have been identified as sexual harassment. Sexual harassment is a form of sex discrimination that violates Title VII of the Civil Rights Act of 1964. This paper reviews the decisional law which has recognized various forms of prohibited sexual harassment. The case analysis explores numerous types of "hostile environment" sexual harassment that can occur, including persistent abusive behavior by a victim's supervisor, an agent of the employer, and a co-worker. Moreover, the victim as well the harasser may be a woman or a man. The victim does not have to be of the opposite sex. Under present decisional mandate, the victim must use any employer complaint mechanism or grievance system available in order to prevail in a claim of sexual harassment. The law also mandates that employers need to establish an effective complaint system and stated policy against sexual harassment and take immediate and appropriate action when an employee complains. Employers are encouraged to employ procedures in their stated policies that will tend to prevent claims of sexual harassment. This paper discusses the legal regime of decisional law that governs the responsibility of both the employer and employee in a sexual harassment claim. Methodologies that business managers can employ in order to protect themselves from liability are discussed and proposed in this treatment.

INTRODUCTION

Sexual harassment is a type of employment discrimination consisting of verbal or physical abuse of a sexual nature. People sometimes use the term "sexual harassment" to describe any incident in which one person directs unwanted sexual attention to another person. The law recognized two types of legal sexual harassment. The first, called "quid pro quo" harassment, involves situations in which a person in a position of power, such as a supervisor or teacher, demands sexual favors in exchange for a benefit or threatens the victim with some type of retaliation if the victim does not comply. The second type of sexual harassment is called "hostile environment" harassment, which involves situations in which a person is subjected to sexualized comment or behavior that is so severe that it creates an abusive environment.¹ These cases may involve making sexually charged remarks to the victim, displaying pornography to the victim, groping or inappropriately touching, or sometimes even rape.²

FEDERAL LAW

In 1964, the U.S. Congress passed sweeping civil rights legislation. The primary motivation behind this legislation was to combat discrimination against African Americans. Legislators who sought to defeat the bill added

¹ Aaron; Titus E. *Sexual Harassment in the Workplace, A Guide to the Law and a Research Overview for Employers and Employees*. McFarland & Co. Inc. 1993.

² *Black's Law Dictionary*, Seventh Edition, West Publishing Co., 1999.

an amendment that also prohibited employment discrimination based on sex, and to their surprise, the bill passed with the amendment.³ Title VII of the Civil rights Act of 1964, as amended by the Equal Employment Opportunity Act of 1972, states that it shall be an unlawful employment practice for an employer... 1) to fail or refuse to hire or to discharge any individual, or otherwise to discriminate against any individual, or otherwise to discriminate against any individual with respect to his compensation, terms, conditions, or privileges of employment, because of such individual's race, color, religion, sex or national origin; or 2) to limit, segregate, or classify his employees or applicants for employment in any way which would deprive or tend to deprive any individual of employment opportunities or otherwise adversely affect his status as an employee, because of such an individual's race, color, religion, sex, or national origin.⁴

Any employer engaged in an industry affecting commerce, with at least 15 employees for at least 20 weeks a year, unless expressly excluded, is subject to the prohibitions of the Act. A company with fewer than 15 employees, that is the alter ego of other interest of its own, may also be an employer within the meaning of Title VII.⁵

THE EEOC AND SEXUAL HARASSMENT

The EEOC is the federal administrative agency in charge of enforcing Title VII. It has the authority to investigate, mediate, and prosecute claims of discrimination in employment. In 1980, the EEOC adopted a regulation interpreting Title VII that defined and prohibited sexual harassment in employment. The federal regulations state that harassment on the basis of sex is a violation of Section 703 of Title VII and define sexual harassment as: unwelcome sexual advances, requests for sexual favors, and other verbal or physical conduct of a sexual nature. These behaviors 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 an individual, or (3) such conduct has the purpose or effect of unreasonably interfering with an individual's work performance, or creating an intimidating, hostile, or offensive working environment.⁶

Title VII further prohibits an employer from retaliating against an employee for filing a complaint or assisting others in prosecuting complaints alleging discrimination prohibited by its provisions. The Equal Opportunity Employment Act of 1972 made Title VII applicable to state and local government employees. Title VII was later amended to apply to many employees of the federal government as well.⁷

RECOGNIZING SEXUAL HARASSMENT

Sexual harassment can occur in a wide variety of circumstances and can encompass many variables. Although the most widely recognized fact pattern is that in which a male supervisor sexually harasses a female employee, this form of harassment is not the only one recognized by the EEOC. The Commission's view of sexual harassment includes, but is not limited to, the following considerations:

1. a man as well as a woman may be the victim of sexual harassment, and a woman as well as a man may be the harasser.
2. the harasser does not have to be the victim's supervisor, but may also be an agent of the employer, a supervisory employee who does not supervise the victim, a non-supervisory employee (co-worker), or, in some circumstances, even a non-employee.
3. the victim does not have to be of the opposite sex from the harasser. Since sexual harassment is a form of sex discrimination, the crucial inquiry is whether the harasser treats a member of one sex differently from members of the other sex, and

³ Stein, Laura W. *Sexual Harassment in America*. Greenwood Press, 1999.

⁴ *United States Code Annotated*, 1994 Ed., Title 42 § 2000e et seq., pg 533-565.

⁵ Thomas, Claire Sherman. *Sex Discrimination*, West Publishing Co., 1991.

⁶ 29CFR § 1604.11 (1995).

⁷ 42 U.S.C. 200e-16(a).

4. the victim does not have to be the person at whom the unwelcome sexual conduct is directed. (S)he may also be someone who is affected by such conduct when it is directed toward another person.⁸

Soon after the EEOC issued its regulations defining sexual harassment, the courts began applying these guidelines in holding employers liable for some forms of sexual harassment.⁹

HOSTILE ENVIRONMENT CASES

While the earliest sexual harassment lawsuits involved claims of quid pro quo harassment, it was not until 1981 that the first court recognized that hostile environment harassment, in which the employee may suffer no tangible harm, also constitutes illegal sex discrimination. This was demonstrated in the case of *Bundy v. Jackson*.¹⁰

Appellant Sandra Bundy was at the time she filed her lawsuit, a Vocational Rehabilitation Specialist with the District of Columbia Department of Corrections. Bundy claimed that she was subjected to a psychological and emotional work environment that included sexually stereotyped insults and demeaning propositions, which caused her anxiety and debilitation. Bundy proved that she was the victim of a practice of sexual harassment and discriminatory work environment permitted by her employer. Her rights under Title VII were therefore violated. The U.S. court of Appeals defined hostile environment as any harassment of female employees by male supervisors and employees within any unwelcome sexual advances, requests for sexual favors, or other verbal or physical conduct of a sexual nature when submission to such conduct is explicitly or implicitly a requirement of the individual's employment, or used as a basis for any employment decision concerning that individual, or when such conduct has the purpose or effect of unreasonably interfering with the individual's work performance or creating an intimidating or hostile or offensive work environment."

In 1986, a little more than ten years after the first court decided that sexual harassment in employment was illegal; the Supreme Court took up the issue. The case involved a woman, Mechelle Vinson, who brought a lawsuit against a bank where she lost her job. In *Meritor Savings Bank v. Vinson*,¹¹

Ms. Vinson claims that her male supervisor subjected her to sexual harassment, which included public fondling and sexual demands. She claims to have submitted out of fear that she would otherwise lose her job. The United States Supreme Court held (1) that a plaintiff may establish a violation of Title VII by proving that discrimination based on sex has created a hostile or abusive work environment, without showing an economic effect on the plaintiff's employment; (2) that the fact that sex-related conduct is "voluntary," in the sense that a plaintiff was not forced to participate against her will, is not a defense to a sexual harassment suit under Title VII, as the correct inquiry in such cases is whether the plaintiff had indicated by her conduct that the alleged sexual advances were unwelcome; and (3) that employers are not always automatically liable for sexual harassment of employees by their supervisors.

COURT ALLOWS "PRO –BUSINESS" DEFENSE

In June 1998, the U.S. Supreme Court rendered two decisions relating to sexual harassment in employment: *Burlington Industries, Inc. v. Ellerth*¹² and *Faragher v. City of Boca Raton*.¹³ In *Ellerth*, the issue was whether a plaintiff could establish quid pro quo harassment if her supervisor threatened to retaliate against her if she refused to have sex with him but then failed to carry out that threat, or whether this would constitute hostile environment harassment instead. The Supreme Court held that the labels "quid pro quo" and "hostile environment" have limited

⁸ EEOC Compliance Manual (Bureau of National Affairs, 1982, 1987).

⁹ Aaron, Titus E. *Sexual Harassment in the Workplace, A Guide to the Law and a Research Overview for Employers and Employees*. McFarland & Co. Inc. 1993.

¹⁰ *Bundy v. Jackson*, 641 Federal Reporter 2d 934, 938-47 (D.C. Cir 1981).

¹¹ *Meritor Savings Bank v. Vinson*, 477 U.S. Reports 57 (1986).

¹² *Burlington Industries Inc. v. Ellerth*, 118 Supreme Court Reporter pp. 2257, 2262-75.

¹³ *Faragher v. City of Boca Raton*, 118 Supreme Court Reporter pp. 2275, 2280-86, 2290-94.

utility. Instead, the important question is whether the plaintiff suffered any tangible harm, such as being denied a raise or being demoted.

The Court stated that an employee who refuses the unwelcome and threatening sexual advances of a supervisor, yet suffers no adverse and tangible job consequences, can recover against an employer without showing that the employer's negligent or otherwise at fault for the supervisor's actions. Thus, an employer is subject to vicarious liability to a victimized employee for an actionable hostile environment created by a supervisor with immediate, or successively higher, authority over the employee, but may, when no tangible employment action is taken, raise an affirmative defense to liability or damages. This defense comprises the two necessary elements that the employer exercised reasonable care to prevent and correct promptly any sexually harassing behavior, and the plaintiff employee unreasonably failed to take advantage of any preventive or corrective opportunities provided by the employer or to avoid harm.

The *Faragher* case reiterated and applied the principles set forth in *Ellerth* with regard to when employers can be held responsible for harassment by supervisors, even if there is no tangible harm. However, not all of the Justices agreed on this decision. Justices Thomas and Scalia dissented in both cases, arguing that the majority's rule created too much liability for employers. They argued that employers should be liable only if the plaintiff establishes that the employer was negligent in permitting the supervisor's conduct to occur.

The *Ellerth* and *Faragher* cases helped clear up the standards for employer liability for sexual harassment by supervisors. However, they still leave important questions unanswered. Most significantly, the requirement that an employer take reasonable care to prevent, and redress harassment remains murky. An employer would be well advised to have an anti-harassment policy that is communicated to its employees. Although the Court obscurely states that an employer will not necessarily lose if it does not have such a formal policy. But it remains unclear what such a policy must provide and how often and in what form it must be communicated to the employees.¹⁴

WHAT DOES AN EMPLOYEE DO IF SEXUALLY HARASSED?

As in all Title VII racial or sexual discrimination suits, a plaintiff alleging sexual harassment in violation of Title VII must exhaust all the available remedies before bringing suit. The complainant must file an administrative complaint with the EEOC. If the Commission does not act on the claim within 180 days, it will send the complainant a letter stating that the complainant may bring a Title VII suit against the respondent. The complainant then has 90 days, subject to tolling for equitable reasons to file the suit. The filing requirements, however, is not jurisdictional, and is subject to equitable tolling.

Courts are generally guided but are not bound, by guidelines promulgated by the EEOC. Similarly, opinions interpreting Title VII are often considered by courts interpreting similar state statutes where a proper arbitration agreement exists.¹⁵

EMPLOYER'S RESPONSIBILITIES

Employers have a duty to enact policies and training programs designed to combat sexual harassment, to promptly investigate allegations of sexual harassment, and to take prompt disciplinary action where an investigation reveals that harassment has occurred. When investigating any allegation of sexual harassment, the employer needs to remember that the EEOC looks at the entire record inclusive of the circumstances that document the nature of the sexual advance and the context in which the alleged incidents occurred. A determination of the allegations is made from the facts on a case-by-case basis. In view of this circumstance, employers are encouraged to have an administrative system in place for purposes of documenting every phase of the sexual harassment claim procedure. Moreover, adequate training of personnel supervisors should be instituted to ensure that they have the skills to maintain detailed records of employee complaints. Employers are encouraged to keep a calendar of evidential

¹⁴ Stein, Laura W. *Sexual Harassment in America*, Greenwood Press, 1999.

¹⁵ 135 ALR Fed 307.

recordation of the dates and substantive content of the alleged victim's communications to the employer and a detailed summary of the supervisors' verbal or procedural responses, together with a timetable for same.

The importance for the employer is to avoid the appearance of impropriety by actively and soberly responding to the complaints of employees. Employers should be aware that their actions may have occasion to be reviewed at a later date for the purposes of a lawsuit being filed. Employers need to be armed with enough detailed information to enable them to give trustworthy and provable testimony in the event of a formal investigation or court case. It is paramount that the employers take corrective action when the employer knew or should have known about the alleged harassment. It is essential that the employer have a stated policy against sexual harassment. Moreover, employers should establish an effective complaint or grievance process that is effectively communicated to the employees. The response of the employer should be an immediate and appropriate action in good faith when an employee complains.

According to the EEOC, "Prevention is the best tool for the elimination of sexual harassment." Thus, the EEOC has announced that employers "should take all steps necessary to prevent harassment from occurring, such as affirmatively raising the subject, expressing strong disapproval of the subject, developing appropriate sanctions, informing employees of their right to rise and how to raise the issue under Title VII, and developing methods to sensitize all concerned."¹⁶ Although, it should be stated that even if an employer takes steps to prevent sexual harassment, that alone does not necessarily prevent a finding of liability, although it is one factor.¹⁷

Many companies believe that employee education can prevent or at least greatly curb offensive employee discrimination prohibited by Title VII of the Civil Rights Act of 1964 and other civil rights statutes. This belief, widely held, and rarely questioned has spawned a multibillion dollar sexual harassment and diversity training industry staffed by consultants, management attorneys and human resource professionals who offer programs aimed at litigation prevention. While a lot of money is being made by trainers and spent by employers, there is no empirical support that fosters employee tolerance and greatly alters workplace culture. In 1998, the Supreme Court¹⁸ elevated the common corporate practice of anti-discrimination training to the level of an affirmative defense in sexual harassment case and a mechanism for limiting damages in discrimination cases where punitive damages are sought. However, there is no reason to believe that an educational approach to discrimination deterrence can succeed in eliminating discrimination. Social scientists are disturbed by a lack of empirical research on the effects of anti-discrimination training and caution against the endorsement of these programs. Brief training efforts may not affect employee attitudes of actions in the least and may have possible negative effects.

Susan Bisom-Rapp, author of *An Ounce of Prevention is a Poor Substitute for a Pound of Cure*¹⁹ believes seminars may only be symbolic gestures by employers in providing diversity and sexual harassment training, no matter how well intentioned, are poor substitutes for searching inquiry into the particulars of a given workplace. The courts must determine whether the environment in which a plaintiff worked was actually discriminatory. Sexual harassment training was initially undertaken by employers in an attempt to evidence fair treatment in the face of ambiguities about the law. In sexual harassment suits, training is frequently cited as evidence that an employer acted reasonably to prevent harassment. Moreover, sexual harassment training undertaken subsequent to an investigation of an employee complaint is typically viewed as prompt remedial response enabling an employer to avoid liability.

Some might view the scarcity of program outcome research as favorable. Elizabeth O'Hare Grundmann points out that the lack of information is potentially dangerous.²⁰ Even when preventive programs are adopted with good intentions they still may have negative effects. For example, a seminar that indicated that sexual harassment is an underreported phenomenon may give some employees the message that they won't get caught. Another example is

¹⁶ 29 CFR 1604.11 (f) 1990.

¹⁷ 29 CFR 1604.11 (b) 1990.

¹⁸ *Doldstad v. American Dental Ass'n*, 527 U.S. 526, 545 (1999).

¹⁹ Bisom-Rapp, Susan. *An Ounce of Prevention is a Poor Substitute for a Pound of Cure: Confronting the Developing Jurisprudence of Education and Prevention in Employment discrimination Law*. *Berkeley J. Employment and Law*. L. 1. 2001.

²⁰ Elizabeth O'Hare Grundmann et al., *The Prevention of Sexual Harassment, In Sexual Harassment Theory, Research and Treatment* 175, 182 (William O'Donohue ed., 1997).

that by providing training, managers think that “something is being done” and lulls then into a false sense of security. Grundmann also believes that organizations who adopt anti-discrimination training do so only for one reason: litigation prevention. The purpose of such programs should be to have “a significant impact on an important social problem” by increasing knowledge about harassment, eliminating inappropriate behavior and changing the attitudes of those who may be inclined to harass others.

According to legal experts, evidence of training efforts may be relevant to the issue of punitive damages. Educational efforts may bear upon whether “the employer’s good-faith efforts to prevent discrimination in the workplace” prohibit the imposition of vicarious liability for punitive relief.²¹

CONCLUSION

A sexual harassment charge undermines an organization’s genuine efforts to establish a fair, professional and respectful workplace. The courts provide an enormous bonus for any employer that investigates and address complaints. Clearly, a stated policy prohibiting sexual harassment in the work place is the corner stone of a successful strategy to reduce liability. The courts have mandated that a policy must provide several choices for a victim to lodge his or her grievances. Moreover, an employer must show that employees have knowledge of and understand both the policy and its procedures. Once the employer can prove that (1) it has a policy, (2) it provided an appropriate mechanism for reporting offensive incidents, and (3) the employees knew and understood the policy, then the employer can use the second affirmative defense. The second affirmative defense recognizes that an employee who has not properly used the stated grievance procedure has failed thereby to meet the legal requirement to inform the employer about the wrongful incident.

After a report has been made alleging sexual harassment, the employer must promptly act to investigate and remedy any violations in accordance with the procedures it has adopted. Failure to do so will undermine the protection of the affirmative defense and put the victim in a much stronger position legally. The effectiveness of a policy is paramount for courts to consider in determining whether employers are meeting their duty to exercise reasonable care to prevent and remedy sexual harassment. Legal parameters are clear for employers who have adopted a policy. An employer who has made certain that employees are duly informed of the stated policy is in a strong defensive position should a complaint be made. The courts have accepted employee’s signatures as a matter of proof of awareness, as well as posted signs in the work place.

Courts have been flexible in approving different types of policies adopted by employers. Moreover, courts differ on the necessary elements of a legally sufficient policy. However, most do require the following:

1. a description of the prohibited conduct
2. a list of individuals to whom complaints should be made
3. a bypass mechanism procedure to ensure that no victim will have to complain to the harasser
4. a grievance procedure calculated to bring out complaints

Additional procedures that may advantage the employer include a separate clause in the policy that promises confidentiality. Another example of clauses that support an employer’s claim of reasonable preventative efforts include language in the stated policy that prohibit retaliation against the alleged victim for airing the claim of harassment. Most court rulings have agreed that an effective policy should include: a definition of sexual harassment; a complaint procedure that is clear, easily pursued and offers at least two ways to initiate an investigation; a description of the consequences for a finding of sexual harassment. It should be noted that employers have taken it upon themselves to become more creative toward taking additional preventative measures beyond those expressly stated in the policy. These measures include monitoring employee e-mail for certain types of language or images, and providing individualized training programs to further advantage both employees and employers regarding the law of

²¹ Bisom-Rapp, Susan. An Ounce of Prevention is a Poor Substitute for a Pound of Cure: Confronting the Developing Jurisprudence of Education and Prevention in Employment discrimination Law. *Berkeley J. Employment and Law*. L. 1. 2001.

sexual harassment. Although these measures are now not required by the EEOC, they are weighed in the employer's favor in the event of a claim.

The exact response procedures that need to be taken are clearly reserved to the employer's discretion. Beyond the minimal aforementioned requirements of the grievance and response to complaint procedures, the courts have tolerated varied compliant measures of employers. Given the problem associated with legal adequacy of stated grievance procedures and internal investigations by the employer, businesses have looked to other ways to avoid high damage awards based on sexual harassment. Some employers have begun to offer or require alternative dispute resolution in place of both internal investigations within their workplace, and administrative or judicial proceedings. A rise in both voluntary and mandatory use of mediation and alternative dispute resolution to resolve sexual harassment complaints is inevitable.

Employers now have a strong set of defenses to claims of sexual harassment: an effective policy and an effective response to a complaint. Although the lower courts are still learning the new framework, the federal appellate courts have fashioned a number of guide lines that offer real instruction to employers and employees alike. Clearly, it is in the employer's best interest to detect and correct inappropriate behavior in the workplace. Good faith efforts to do so are now being legally rewarded.

Assuming that a published policy and complaint procedure is in place, the organization must be prepared to investigate a claim promptly. Time is of the essence in this situation because the results of an investigation may later compromise an essential component of the employer's defense of prompt corrective action in the event of a legal suit.

At the beginning of an investigation, the organization should take steps to separate the victim from the alleged harasser pending the investigation. This may provide comfort to the employee and any witnesses to the alleged incident. It should also serve to alleviate concerns about the potential for the alleged harasser to tamper with evidence or pressure co-workers.

Company personnel or an outside counsel or investigator are all possible candidates to lead an investigation. Candidates who will be perceived as the most impartial and fair to the employees should be considered ideal investigators. Once an investigator has been selected, a confidential and separate file should be made comprised of the company sexual harassment policy and complaint procedure, together with relevant documents from personnel files and any material e-mails or other correspondence related to the investigation. The company is responsible for this file and for preserving any evidence collected or used in the investigation process. A key component of the investigation is the collection of interviews of the complaining employee, the accused employee and other witnesses to pertinent facts. An organization's investigator should conduct the interviews with a third person present to take notes in a location away from normal business activities. If such a third person is not available, a tape recorder can be used to document the interview.

Once the interview is complete, the investigator must transcribe testimony, notes and impressions taken during an interview. At the end of the interview process, the organization must reach a conclusion about the strength of the allegations and determine an appropriate response. If it is concluded that sexual harassment or any form of inappropriate conduct did occur, the employer must promptly take disciplinary action. Such action could include an oral or written warning, a transfer or reassignment, monetary penalty, a demotion, a reduction in wages or a discharge. This may also include informing law enforcement personnel. In the event the employer genuinely concludes that no inappropriate conduct occurred warranting discipline, the investigative process will serve as a clear message to employees about the strong policy of intolerance against sexual harassment. This serious and good faith response by the organization will serve as a deterrent to future incidences of wrongdoing.

PROPOSED FUTURE DIRECTION FOR SEXUAL HARASSMENT

In this paper, it has been argued that a hostile work environment discriminates, not only through overt hiring or firing, but by interfering with performance, undermining confidence, and increasing workplace stress. While some argue that sexual harassment is an expression of natural attraction, the law recognizes that sexual harassment results

from one person exercising power over another. As this paper demonstrates, the legal regime for sexual harassment cases has made the liability turn, in part, on the adequacy of an employer's corrective measures. However, the effectiveness of these measures might be better reinforced by a legal standard that focuses on the success for prevention of workplace harassment, rather than on the adequacy of the employer compliance procedures. The question that remains as yet unanswered is whether or not the compliance and grievance procedures mandated by the law and implemented by employers actually work.²² Sexual harassment continues to persist despite many years of attempts to eliminate it. Notwithstanding the increased legal requirements that are aimed at governing workplace harassment, the incidence of sexual harassment has not realized a resulting decline. If the future is to realize a decline in the actual problem of sexual harassment, legal strategies that are likely to prevent harassment must be developed. American jurisprudence is challenged to reevaluate the legal system that has emphasized compliance with procedural rules and policies at the expense of seeking new directions for prevention.

Law makers will need to address the task of studying social science literature that addresses the causes of sexual harassment in order to be able to mandate future measures that may actually result in a reduction of sexual harassment. For the courts to be able to effectuate harassment prevention, the legal mechanisms must go further than to mandate employers to take preventative steps.²³ There needs to be a correlation between the prevention and the likelihood of success. Success is dependent on the law being able to establish a framework that is focused upon outcomes rather than compliance. The law is challenged to change the workplace culture in which harassment exists. It must strive to incorporate employer incentives that induce changes in the behavior of one person exercising power over another. There have been numerous studies that focus on characteristics and conduct of individuals who historically have emerged as those engaging in workplace harassment. The study of models of behavior may aid in identifying individuals who are likely to engage in harassment, and may give employers an understanding as to what is motivating their conduct and willingness to abuse. This could bear on the issue of employer liability in the future.

²² *Harvard Women's Law Journal*, vol. 26, Spring 2003, "The Culture of Compliance: The Final Triumph of Form Over Substance in Sexual Harassment Law"; Joanna L. Grossman.

²³ *University of Massachusetts Law and Society Review*, vol. 39, 2005, Law in the workplace: Idle Rights: Employees' Rights Consciousness and the Construction of Sexual Harassment Policies; Anna-Maria Marshall.