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**Implementation of EEOC Racial/Ethnic Harassment Guidelines**

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# **THE EVOLUTION OF HARASSMENT LAW: FEWER EASY ANSWERS**

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# I. THE EEOC'S PROPOSED GUIDELINES COVERING HARASSMENT BASED UPON RACE, COLOR, RELIGION, GENDER, NATIONAL ORIGIN, AGE, OR DISABILITY

## A. Introduction

New guidelines on harassment have been proposed by the EEOC, and were published in the Federal Register on October 1, 1993 (58 FR 51266). The guidelines are intended to supersede the EEOC's existing Guidelines on Discrimination Because of National Origin, and to consolidate in one place the Commission's position on issues relating to harassment, with one exception. The proposed guidelines are not intended to supersede the existing Guidelines on Discrimination Because of Sex (which include the subject of sexual harassment). So these guidelines expressly would cover gender harassment, but not sexual harassment.

## B. Text

The proposed guidelines read as follows:

### **Sec. 1609.1. Harassment**

(a) Harassment on the basis of race, color, religion, gender, national origin, age, or disability constitutes discrimination in the terms, conditions and privileges of employment and, as such, violates Title VII of the Civil Rights Act of 1964, as amended, 42 U.S.C. §2000e et seq. (Title VII); the Age Discrimination in Employment Act, as amended, 29 U.S.C. §621 et seq. (ADEA); the Americans with Disabilities Act, 42 U.S.C. 101 et seq.; or the Rehabilitation Act of 1973, as amended, 29 U.S.C. §701 et seq., as applicable.

(b)(1) Harassment is verbal or physical conduct that denigrates or shows hostility or aversion toward an individual because of his/her race, color, religion, gender, national origin, age, or disability, or that of his/her relatives, friends, or associates, and that:

(i) has the purpose or effect of creating an intimidating, hostile, or offensive working environment;

(ii) has the purpose or effect of unreasonably interfering with an individual's work performance; or

(iii) Otherwise adversely affects an individual's employment opportunities.

(2) Harassing conduct includes, but is not limited to, the following:

- (i) Epithets, slurs, negative stereotyping, or threatening, intimidating or hostile acts that relate to race, color, religion, gender, national origin, age, or disability and
- (ii) Written or graphic material that denigrates or shows hostility or aversion toward an individual or group because of race, color, religion, gender, national origin, age, or disability and that is placed on walls, bulletin boards, or elsewhere on the employer's premises, or circulated in the workplace.
- (c) The standard for determining whether verbal or physical conduct relating to race, color, religion, gender, national origin, age, or disability is sufficiently severe or pervasive to create a hostile or abusive work environment is whether a reasonable person in the same or similar circumstances would find the conduct intimidating, hostile or abusive. The "reasonable person" standard includes consideration of the perspective of persons of the alleged victim's race, color, religion, gender, national origin, age, or disability. It is not necessary to make an additional showing of psychological harm.
- (d) An employer, employment agency, joint apprenticeship committee, or labor organization (hereinafter collectively referred to as "employer") has an affirmative duty to maintain a working environment free of harassment on any of these bases. Harassing conduct may be challenged even if the complaining employee(s) are not specifically intended targets of the conduct.
- (e) In determining whether the alleged conduct constitutes harassment, the Commission will look at the record as a whole and at the totality of the circumstances, including the nature of the conduct and the context in which it occurred. The determination of the legality of a particular action will be made from the facts, on a case-by-case basis.

## **Sec. 1609.2. Employer Liability for Harassment**

- (a) An employer is liable for its conduct and that of its agents and supervisory employees with respect to workplace harassment on the basis of race, color, religion, gender, national origin, age, or disability:
- (1) Where the employer knew or should have known of the conduct and failed to take immediate and appropriate corrective action; or
  - (2) Regardless of whether the employer knew or should have known of the conduct, where the harassing supervisory employee is acting in an "agency capacity." To determine whether the harassing individual is acting in an "agency capacity," the circumstances of the particular employment relationship and the job functions performed by the harassing individual shall be examined. "Apparent authority" to act on the employer's behalf shall be established where the employer fails to institute an explicit policy against harassment that is clearly and regularly communicated to employees, or fails to establish a reasonably accessible procedure by which victims of harassment can make their complaints known to appropriate officials who are in a position to act on complaints.
- (b) With respect to conduct between co-workers, an employer is responsible for acts of harassment in the workplace that relate to race, color, religion, gender, national origin, age, or disability where the employer or its agents or supervisory

employees knew or should have known of the conduct, and the employer failed to take immediate and appropriate corrective action.

(c) An employer may also be responsible for the acts of non-employees with respect to harassment of employees in the workplace related to race, color, religion, gender, national origin, age, or disability where the employer or its agents or supervisory employees knew or should have known of the conduct and failed to take immediate and appropriate corrective action, as feasible. In reviewing these cases, the Commission will consider the extent of the employer's control over non-employees and any other legal responsibility that the employer may have had with respect to the conduct of such non-employees on a case-by-case basis.

(d) Prevention is the best tool for the elimination of harassment. An employer should take all steps necessary to prevent harassment from occurring, including having an explicit policy against harassment that is clearly and regularly communicated to employees, explaining sanctions for harassment, developing methods to sensitize all supervisory and non-supervisory employees on issues of harassment, and informing employees of their right to raise, and the procedures for raising, the issue of harassment under Title VII, the ADEA, the ADA and the Rehabilitation Act. An employer should provide an effective complaint procedure by which employees can make their complaints known to appropriate officials who are in a position to act on them.

[Footnotes omitted]

### C. Comments Received by the EEOC

The comment period with regard to the proposed guidelines expired on November 30, 1993, but the EEOC apparently is still receiving comments filed after that date. The comments received through December 7, 1993 can be briefly summarized as follows:

1. Comments were received by organizations representing management (including the College and University Personnel Association), organizations representing women's issues (e.g., the National Women's Law Center and the American Association of University Women), entities concerned with religious issues (e.g., the Fellowship of Companies for Christ), medical groups (e.g., hospitals and the American Dental Association), advocacy groups

on issues relating to individuals with disabilities (e.g., the Bazelon Center for Mental Health Law), individuals or groups concerned with freedom of speech (e.g., Feminists for Free Expression and some law professors), transportation authorities, and miscellaneous others.

2. A more specific discussion of the comments will be included at the conference presentation. In sum, it would be an understatement to note that there was no consensus among the above commentators regarding the wisdom of the proposed guidelines. Management groups thought that the guidelines were defective in many respects, including that the guidelines did not properly reflect the Supreme Court's decision in *Harris v. Forklift Systems, Inc.* (discussed below), that the word "immediate" in front of the duty to take appropriate action was inconsistent with the obligation to conduct a fair investigation, and that employer liability for actions of agents and non-employees was inadequately defined. Women's groups were concerned in general that the regulations in some respects did not go far enough, and did not make it clear enough that gender harassment and sexual harassment were not mutually exclusive and could be "aggregated." Numerous companies complained that the proposals violated constitutional rights regarding the free exercise of religion. Free speech advocates voiced strong opinions that several aspects of the guidelines were constitutionally defective on First Amendment grounds. Hospitals



and transportation authorities were particularly concerned about liability for the actions of non-employees. Disability advocates opined that the guidelines did not go far enough to recognize harassment based upon paternalism and segregation.

D. Status

At the time this outline was drafted, the proposed guidelines had not yet been finalized. Given the diversity of the comments received, the EEOC may well take significant time to sort out all of the concerns received. The status of the guidelines will be updated at the conference presentation.

II. UPDATE ON HOSTILE (ABUSIVE) ENVIRONMENT HARASSMENT IN THE WORKPLACE -- HARRIS V FORKLIFT SYSTEMS

A. This fall the U.S. Supreme Court had its first case involving workplace sexual harassment since its initial case on the subject in 1986. The case was Harris v. Forklift Systems, \_\_\_ U.S. \_\_\_, 62 LW 4004, 63 FEP Cases 225 (1993).

1. The case involved an allegation of hostile environment sexual harassment caused by a male supervisor to a female subordinate, Harris. The supervisor made comments to Harris in front of other employees such as, "You're a woman, what do you know," and "Let's go to the Holiday Inn to negotiate your raise." He asked Harris and other female employees to retrieve coins from his front pants pocket and threw objects on the ground in front of him and asked them to pick them up, thereafter making comments about their attire. Harris asked him to stop, he promised he

would, but one month later suggested she had promised sexual favors to a customer to get an account. She quit.

2. The trial court granted summary judgment for the employers saying Harris was not so subjectively offended by her supervisor's conduct that she suffered injury, despite her assertions to the contrary. The court found the conduct did not meet the test described in a Sixth Circuit U.S. Court of Appeals' decision (Rabidue v. Osceola Refining Co., 805 F2d 611 (1986) used to determine if harassment had risen to the level of a hostile work environment: whether the harassment was conduct which would interfere with a reasonable individual's work performance and affect seriously the psychological well-being of a reasonable person under like circumstances.
  3. The Sixth Circuit affirmed the lower court decision in a brief, unpublished decision. Harris appealed to the U.S. Supreme Court.
- B. The U.S. Supreme Court acted very quickly; it handed down its opinion just four weeks after oral argument was heard. Justice O'Connor, writing for a unanimous court, held as follows:
1. An employee does not have to show his/her psychological well-being was seriously affected by the conduct of an alleged harasser to provide hostile environment sexual harassment in the workplace.
  2. The test is whether conduct is severe or pervasive enough that:
    - a. a reasonable person would find it created an objectively hostile or abusive work environment that altered the conditions of the victim's employment, and

- b. the victim perceives that the environment is abusive.
  - i. For example, the Court said, if the workplace is permeated with discriminatory intimidation, ridicule, and insult that is sufficiently severe or pervasive to alter the conditions of the victim's employment, actionable sexual harassment has occurred.
  - ii. The Court also said conduct that alters work conditions includes that which detracts from employees' job performance, discourages employees from remaining on the job, or keeps them from advancing in their careers.
  - iii. Justice Ginsburg, in her concurring opinion, would find the conduct altered work conditions if it made it more difficult to do the job.
- 3. Conduct that is merely offensive is not actionable sexual harassment.  
For example, the mere utterance of an epithet which engenders offensive feelings in an employee is not actionable sexual harassment.
- 4. No one single factor must be present to find actionable abusive or hostile environment sexual harassment. It can only be determined by looking at all the surrounding circumstances. These might include, but are not limited to:
  - a. The frequency of the discriminatory conduct.
  - b. Its severity.
  - c. Whether it is physically threatening or humiliating, or a mere offensive utterance.

- d. Whether it unreasonably interferes with an employee's work performance.
  - e. The effect on the employee's psychological well-being, which is relevant to whether the victim actually found the environment abusive.
5. Any test for determining if there is abusive or hostile environment sexual harassment is not, and by its nature can not be, mathematically precise.
- a. Justice Scalia, in a concurring opinion, complained about this imprecision, saying that it let virtually unguided juries decide whether sex-related conduct engaged in or permitted by an employer is egregious enough to warrant an award of damages.
  - b. However, Justice Scalia went on to say that he knew of no alternative to the course the Court had taken or no test more faithful to the inherently vague statutory language of Title VII.
6. It appears the Court intends for the decision to apply to all forms of harassment prohibited by Title VII, and analogous laws, (race, color, national origin, age, religion or disability) not just sexual harassment.
- C. Impact of the decision
1. The court impliedly rejected the "reasonable woman" standard, used by some courts<sup>1</sup> to determine if sexual harassment has occurred, by stating

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<sup>1</sup>Elison v. Brady, 924 F2d 872, 878-879 (9th Cir 1991); King v Bd of Regents of University of Wisconsin System, 898 F2d 533, 537 (7th Cir 1990); Andrews v Philadelphia, 895 F2d 1469, 1483 (3rd Cir 1990); Bell v Crackin Good Bakers, Inc., 777 F2d 1497, 1503 (11th Cir 1985); Smolsky v Consolidated Rail Corp, 780 F Supp 283, 294 (ED Pa 1991); Robinson v Jacksonville Shipyards, Inc., 760 F2d 1486, 1524 (MD Fla 1991); T L v Toys 'R' Us, Inc., 255 NJ Super 616, 636-639, 605 A2d 1125 (1992).

that a "reasonable person" would have to find the conduct to be hostile or abusive.

- a. This interpretation of the court's opinion position is bolstered by the fact that during oral argument in the case, Justice O'Connor, who wrote the opinion using the term "reasonable person," asked Harris' attorney if the "reasonable woman" standard should be used. The attorney replied that the "reasonable woman" standard has caused confusion among the lower courts, and that the best approach is to examine the conduct from the viewpoint of a person in the plaintiff's position.
- b. Justice Rehnquist during oral argument asked why should it be from the viewpoint of a reasonable woman or victim, rather than that of a reasonable employer as Title VII does not define whose focus is to be considered. Harris' attorney replied that a reasonable victim standard is proper because Title VII is supposed to protect employees. It is possible that Justice O'Connor chose "reasonable person" to get Justice Rehnquist's vote on the case. Justices Scalia and Ginsburg also referred to the viewpoint of the "reasonable person" in writing their opinions.
- c. However, as the specific issue in the case was not which standard was appropriate, some legal scholars argue the question is still open. More litigation on this subject therefore can be expected.
- d. Note, however, that since the "reasonable person" standard is flexible enough to incorporate gender differences as one of the

factors considered in determining if the victim's reaction was reasonable, the impact on sexual harassment law of this portion of the decision should be relatively minor. See, for example, the Michigan Supreme Court's analysis of this precise issue in Radtke v Everett, 442 Mich 368, 390 (1993).

2. Summary judgment will be more difficult to achieve for employers because there is no "bright-line" test they can use to prove that sexual harassment has not occurred. This means more cases will get to trial, presumably before juries. As some surveys show that 70% of jurors in sexual harassment cases already believe that sexual harassment did occur before any evidence is put into the record, this decision reemphasizes the importance of avoiding litigation or mitigating damages by having in place good sexual harassment preventive measures, such as a strong statement condemning sexual harassment, procedures that encourage reporting of complaints and prompt, effective resolution of complaints.
3. "Abusive" environment harassment appears to be the preferred descriptive term to "hostile" or "offensive" environment sexual harassment.
  - a. Justice O'Connor avoided reference to the EEOC's inclusion of "offensive" working environment harassment in its definition of sexual harassment. This may have been deliberately done in anticipation of the First Amendment freedom of speech challenges to the EEOC's definition of harassment, coming up to the Supreme Court from the lower federal courts, i.e., that offensive sexually harassing speech is protected under the First Amendment from

government regulation because free speech outweighs any compelling governmental interest in its regulation.

- b. Employers may wish to substitute or add the term "abusive" to their sexual harassment procedures and policies as it appears to be the term the U.S. Supreme Court prefers.

### III. FACULTY HARASSMENT OF STUDENTS/CONSENSUAL RELATIONS ISSUES

#### A. Introduction

1. Until recent years employers had generally expressed little interest in, and exercised relatively little control over, the private lives of their employees. However, as creative plaintiff's attorneys increasingly pursued a variety of claims against employers, including public employers, there has been ever increasing attention devoted to the question of the extent to which employers may regulate the private relationships and off-duty conduct of their employees.
2. Virtually every individual has an expectation to privacy or to engage in certain activities without employer intrusion or regulation. Such expectations are derived from the Federal Constitution, various state constitutions and privacy statutes, and common law.
3. As noted in O'Neil, The Private Lives of Public Employees, 51 Or.L.Rev.70, 105-106 (1971), courts frequently utilize some or all of the following factors when considering whether governmental regulation of private conduct unreasonably infringes the personal freedoms of public employees:

- a. What is the effect of the regulated conduct, if any, upon the individual's job performance?
  - b. What is the effect, if any, upon the efficiency of the agency?
  - c. What is the effect, if any, on the image of and public confidence in the agency?
  - d. Have other members of the agency or institution been involved?
  - e. How sensitive is the position held?
  - f. Was the behavior recent and is it recurrent?
  - g. What is the probability of repetition?
  - h. How does the transgression relate to the employee's entire record?
  - i. What is the status of the behavior outside of the public sector?
  - j. What less onerous alternatives are available to the agency?
4. As have other employers, colleges and universities have more recently been forced to take an active role in regulating the "private" lives of certain employees, particularly faculty members. Such regulation has become ever more necessary in order to protect institutions from the potential adverse effects, including liability, of sexual harassment actions brought by primarily female college students against male faculty members.
5. Colleges and universities have universally accepted the notion that sexual harassment, whether by professors against students, or by supervisors against employees, is both unlawful and unacceptable from any conceivable policy standpoint. Although the extent to which a university can or should regulate consensual relationships does not enjoy such



widespread consensus, the realities of academia generally dictate a proactive approach.

6. The imbalance of power inherent in even consensual relationships between professors and students or supervisors and subordinates, as well as the practical policy problems which result when a consensual relationship breaks up, or from the alleged discriminatory impact of such a relationship on other students or employees who do not enjoy such preferred status, give rise to important reasons for considering regulation of such conduct.

B. The Naragon, Korf, and Bougher Decisions

1. In Naragon v Wharton, 737 F2d 1403 (5th Cir 1984), the plaintiff, a female graduate assistant, sued three Louisiana state University administrators because she felt her failure to be given any teaching responsibilities was due to a consensual sexual relationship she had previously engaged in with a freshman female student.

The plaintiff's primary reason for her claim and appeal was that she believed the university's actions were based on the fact that the relationship was homosexual. Her claims were based on constitutional equal protection, privacy, and freedom of association grounds. Finding that the homosexual feature of the relationship was not a motivating factor in the university's employment decision, the court denied the claim. The university considered intimacy between a teacher and a student a breach of professional ethics by the teacher, and the court accepted this basis for

the decision. The district court had found that the actions taken against the plaintiff were acceptable because they were based on the university's legitimate view that intimate relationships between students and teachers are unprofessional and likely to be detrimental to the students and the university.

2. In Korf v Ball State University, 726 F2d 1222 (7th Cir 1984), a tenured professor was dismissed for sexual harassment after a number of students complained. The professor defended in part on the ground that at least one of the relationships had been consensual. The court upheld the discharge, supporting the university's substantial reliance on the AAUP Statement of Professional Ethics and the University's interpretation of the statement. The AAUP statement reads, in pertinent part, as follows:

As a teacher, the professor encourages the free pursuit of learning in his students. He holds before them the best scholarly standards of his discipline. He demonstrates respect for the student as an individual and adheres to his proper role as intellectual guide and counselor. He makes every reasonable effort to foster honest academic conduct and to assure that his evaluation of his students reflects their true merits. He respects the confidential nature of the relationship between professor and student. He avoids any exploitation of students for his private advantage and acknowledges significant assistance from them. He protects their academic freedom. (emphasis in court decision).

Using this statement, the Faculty Hearing Committee found the relationships exploitive, and disregarded the consent defense because of the professor/student relationship. The court accepted the university's reasons for its actions.

3. In Bougher v University of Pittsburgh, 713 F Supp 139 (WD Pa 1989) aff'd, 882 F2d 74 (3rd Cir 1989), a student had a consensual relationship with a professor from 1976 to 1983. She was over 21 when the relationship started and did not take a class from the professor after 1976. The professor did not deny her any academic benefits. The relationship "went sour" after she called him at home. She brought an action against the university and the professor under Title IX. In retrospect, the student claimed the relationship had been unwelcome and "violative".

The trial court refused to expand the definition of "unwelcome" to mean "it used to be welcome but now it is not." It then examined Title IX's history and found that it was modeled after Title VI, not Title VII, and that therefore the hostile environment workplace regulations adopted by the EEOC to implement Title VII could not be relied upon to create a cause of action under Title IX in a non-workplace situation.

The trial court said it would permit a quid pro quo type action to be brought under Title IX because Title IX is to prevent gender discrimination in a federal program's distribution of benefits on the basis of impermissible criteria. As hostile environment sexual harassment is not covered by Title IX, the trial court also rejected the student's contention that the University had violated the law by failing to adopt a grievance procedure to handle that type of claim.

On appeal, the Third Circuit affirmed the judgment of the trial court but declined to adopt its reasoning in toto. The appellate court found it unnecessary to reach the question of whether evidence of a hostile environment is sufficient to sustain a claim of sexual discrimination in education in violation of Title IX because it found that claim barred by the applicable statute of limitations.

C. Related Cases Not Involving Colleges or Universities

1. Keppler v Hinsdale Township High School District 86, 715 F Supp 862 (ND Ill 1989). Two employees entered into a consensual sexual relationship which then ended. The male employee, who did not directly supervise the female employee but who did evaluate her work, pressed the woman to resume the relationship on several occasions. She declined. He never threatened her with retaliation for her refusal, but thereafter gave her negative evaluations which eventually resulted in her termination. She alleged sex discrimination under Title VII.

Assuming that the male employee acted as a supervisor, the court nevertheless found no sex discrimination. The court said that a supervisor who has engaged in "consensual copulation" with an employee may not thereafter demand it as a condition of retaining job benefits, but if a supervisor does not make it conditional, there is a presumption that the supervisor acted not on the basis of gender but on the basis of a failed interpersonal relationship. The court said that an employee who chooses to become involved in an intimate affair with a supervisor removed an

element of her employment relationship from the workplace, and, in the realm of private affairs, people have a right to react to rejection, jealousy and other emotions. The court recognized the male employee bore a grudge against the female employee but said his acts were because of her former intimate place in his life, not because of her sex.

2. DeCintio v Westchester County Medical, 807 F2d 304 (2d Cir 1986). A hospital administrator added a special requirement to a job description, effectively ensuring that his lover, a woman, would get the job instead of six otherwise qualified male staff members. The six men sued the hospital based on alleged sex discrimination.

The issue in the case was whether "sex" discrimination encompasses disparate treatment based not on one's gender, but on a romantic relationship between the person in authority and the person preferentially hired. The court found the answer to this question to be "no," because to say "yes" would be expanding the meaning of "sex" beyond membership in a class delineated by gender, to include "sexual liaisons" and "sexual attractions". The court held that voluntary romantic relationships cannot form the basis of a sex discrimination suit under Title VII.

3. Miller v Aluminum Company of America, 679 F Supp 495 (WD Pa 1988), aff'd 856 F2d 184. A female former employee sued based on sex discrimination because another female employee who was conducting an affair with the plant manager was retained when the plaintiff was

discharged. The court held that preferential treatment on the basis of a consensual romantic relationship between a supervisor and an employee is not gender-based discrimination. This is because any male co-worker would be at the same disadvantage as the plaintiff.

4. Freeman v Continental Technical Services, Inc., 710 F Supp 328 (ND Ga 1988). A female employee had carried on a consensual sexual relationship with her boss. When she became pregnant and announced her decision to keep the child, she was discharged. Plaintiff sued for sex discrimination under Title VII. However, the court followed DeCintio, saying that the proscribed differentiation under Title VII must be based on a person's sex, not on his or her sexual affiliations. The plaintiff was not discharged because she was a woman, but because of her sexual relationship with her boss, and its consequences.
5. King v Palmer, 778 F2d 878 (DC Cir 1986). King is often cited for the proposition that an adversely affected employee does have a Title VII case for sex discrimination when the reason for the adverse action is an intimate relationship between the person in authority and another employee. In this case, a non-promoted female sued because a position was given to another female employee who was engaged in an intimate relationship with the Chief Medical Officer.

The parties in this case agreed that the plaintiff's allegations presented a cause of action under statutes prohibiting sex discrimination in employment. thus, the court held that "unlawful sex discrimination occurs

whenever sex is for no legitimate reason a substantial factor in the discrimination." The thing to keep in mind about this case, however, is that because no party challenged the application of Title VII on appeal, the court did not consider the issue of whether or not Title VII affords a claim for relief for sex-based discrimination to a woman who alleges that she was denied a promotion in favor of another woman who had a sexual relationship with their supervisor.

D. A Proactive Approach

The dangers associated with consensual sexual relations (defending a lengthy lawsuit, even if you prevail, should not necessarily be considered winning), have encouraged many colleges and universities to take a proactive stance with regard to such relationships. Usually included as part of a sexual harassment policy, many colleges and universities have implemented policies similar to the following examples adopted by three large universities:

**Example 1**

University policy strongly discourages consenting romantic or sexual relationships between members of the University community when one person has power or authority over the other. Student respect for and trust in faculty and other staff greatly restrict their freedom to reject sexual advances. The power of faculty and other staff to give or withhold rewards such as praise, grades and recommendations further limits the extent to which a sexual relationship between faculty or staff and student can be considered consensual. There are similar problems with an apparently consenting relationship between supervisor and employee. Even if a subordinate student or employee does not appear to object to participation in a sexual relationship, this does not mean that the individual welcomes the relationship. Moreover, a third party may claim that the participant in a consenting relationship received preferential treatment and may file a complaint of sex discrimination against the faculty member or supervisor. Sexual relationships that may result in complaints of sexual harassment or sexual favoritism and that create a conflict of interest include, for example, those between:

- a faculty member and student who is enrolled in the faculty member's course, who is enrolled in a program for which a course taught by the faculty member is a requirement, who is an advisee of the faculty member, or whose academic work is being supervised by the faculty member;
- A faculty or staff member and a student if the faculty or staff member is in a position to evaluate or otherwise influence the student's education, employment, housing, or participation in athletics or any other University activity (staff members include, for example, graduate assistants, administrators, coaches, advisors, program directors, counselors, health center staff, and residential life staff);
- an employee and that person's supervisor; a department chair and a faculty member in the same department; an administrator and a faculty or staff member in a department under that administrator's direction;
- a tenured faculty member and an untenured faculty member if the tenured person participates in peer recommendations about the untenured person.

If a faculty or staff member becomes sexually or romantically involved with a subordinate student or employee, the faculty or staff member must remove himself or herself from any decisions affecting the other person as soon as practicable in order to avoid a conflict of interest and the potential for sexual harassment or sexual favoritism. The faculty or staff member should speak with his or her supervisor about appropriate ways to transfer such responsibilities.

### **Example 2**

Because the relationship between teacher and student is central to the academic mission of the University, it is essential to establish that the standard of expected conduct in that relationship goes beyond the proscription against sexual harassment as defined in the University's policy. No non-academic or personal ties should be allowed to interfere with the academic integrity of the teacher-student relation. With respect to sexual relations in particular, what might appear to be consensual, even to the parties involved, may in fact not be so. On this basis, any sexual relations between any teacher and a student of that teacher are inappropriate. This category includes relations between a graduate student and an undergraduate when the graduate student has some supervisory academic responsibility for the undergraduate. In addition, it includes relations between an administrator, coach, adviser, program director, counselor, or residential staff member who has supervisory responsibility for that student. Although the University does not have the means to enforce an absolute prohibition against such relations, the University deems them to be unethical. In order to discourage such relations, in acting on complaints that come to the University's attention it will be presumed that any complaint of sexual harassment by a student against an individual is valid if sexual relations have occurred



between them while the individual was teaching or otherwise has supervisory responsibility for the student. The presumption might be overcome, but the difficulties in doing so would be substantial. In short, any teacher or person in a supervisory capacity enters at peril into sexual relations with a student.

### Example 3

As a matter of sound judgment and professional ethics (see section on professional ethics, pages \_\_\_\_\_), faculty members have a responsibility to avoid any apparent or actual conflict between their professional responsibilities and personal interests in terms of their dealings or relationships with students. It is the responsibility of faculty members to avoid being placed in a position of authority -- by virtue of their specific teaching, research, or administrative assignments -- over their spouses or other immediate family members who are students at the University. It is also the responsibility of faculty members to avoid sexual relationships with or making sexual overtures to students over whom they are in a position of authority by virtue of their specific teaching, research, or administrative assignments.<sup>2</sup> These professional constraints derive from AAUP ethical standards and the University's policy prohibiting conflict of interests, in order to ensure that the evaluation of students is conducted fairly and without any perception of favoritism or bias. Perhaps less obvious, but equally compelling, is the interest in avoiding potential harm to students as well as the liability that could occur, for example, if facts regarding a sexual relationship or sexual overture are demonstrated that support a legal claim of sexual harassment by either party (see policy on sexual harassment, pages \_\_\_) . . . .

Failure to abide by the conflict of interest principles described above can have serious consequences. Violations of the employment-based restrictions contained in the State Conflict of Interests Act may lead to civil -- and if willful, criminal -- penalties, as well as termination from state employment. Breaches of professional ethics standards, e.g., an abuse of the faculty member's authority over students, may also prompt disciplinary action. Moreover, serious misconduct associated with sexual harassment raises the risk, under federal law and state policy, of personal responsibility in terms of both litigation defense and liability exposure.

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<sup>2</sup>In this context, the term "faculty members" broadly includes all full-time and part-time University personnel who hold positions on the academic and general faculty, as well as all graduate teaching assistants, graders, and coaches.

#### IV. UPDATE ON STUDENT-TO-STUDENT HARASSMENT

- A. Courts are beginning to explore the issue of secondary schools' liability for student-to-student harassment under Title IX of the Higher Education Amendments of 1972.
1. Although no cases involving colleges and universities are yet reported, Title IX applies to them as well. Consequently, the possibility exists that an attempt to find institutional liability for post-secondary incidents of student-to-student harassment exists. An examination of these cases and their theories is therefore prudent.
  2. The cases rely on the U.S. Supreme Court decision in Franklin v Gwinnett Co. Public Schools, 112 SCt 1028 (1992) which says that school districts are liable for money damages when they fail to take prompt corrective action on allegations of teacher-to-student sexual harassment.
  3. The cases try to use Title VII liability theories to find liability under Title IX.
  4. The only case in which a court has issued any ruling is Doe v Petaluma City School District, C930123, 1993 WL 359872 (ND Ca 1993).
    - a. The case involved a junior high school girl who was subjected to two years of comments and bathroom graffiti by her fellow students, male and female, that she had a hot dog in her pants and had sex with hot dogs. She also received comments such that she was a "hot dog bitch," "slut" and "hoe" from girls trying to get her to fight.

The student complained weekly about these comments and actions to her guidance counselor. Her parents individually complained to the counselor as well many times over this time period. The counselor did not refer the complaints on to the school's Title IX coordinator because he didn't "feel it was important." For the majority of the two years the counselor told the student that he could do nothing because the other students were exercising their first amendment rights of free speech. He also told the student that he could do nothing about the girls' comments because girls could not sexually harass other girls. He told the student's father that "boys will be boys."

Eventually, when the student's parents complained to other school administrators, three students were suspended for two days for making comments and one for slapping the student. After these suspensions another girl approached the student and tried to get her to fight. The student's parents withdrew her from school and eventually enrolled her in a private girls' school.

The parents brought suit on the student's behalf against the school district, the school, the school's principal and the guidance counselor for \$1 million in damages. The suit alleged violations of Title IX, as well as violations of 42 USC §1983 and California civil rights statutes.

The defendants moved to dismiss the case, among other reasons, because Title IX does not prohibit hostile environment harassment, and, if it did, the student had not shown the requisite intent on the part of the defendants to discriminate against her for damages to be awarded against them.

b. The federal district court held:

- 1) Title IX does prohibit hostile environment harassment by a teacher to a student as Franklin itself appears to be a hostile environment case and because the U.S. Supreme Court in North Haven Bd of Educ. v Bell, 456 US 512, 521, 102 SCt 1912, 1918 (1982) said Title IX should be accorded "a sweep as broad as its language."
- 2) The implication of the Supreme Court's opinion in Franklin is that a school district is only liable for money damages for intentional acts of discrimination. Its liability for hostile environment harassment by a teacher to a student stems from respondent superior liability, that is, because its agent (the teacher) intentionally discriminated against the student. There is no monetary liability under Title IX for negligent acts, i.e., the school district's failure to stop harassment despite its knowledge of it.

- 3) Agency principles are inapplicable to the relationship between a school district and its students.
- 4) No damages can be obtained under Title IX merely for a school district's failure to take appropriate action in response to complaints of student-to-student sexual harassment. Rather, the school district must be found to have intentionally discriminated against the plaintiff student on the basis of sex.
- 5) The school's failure to take appropriate action, as alleged by the student, could be circumstantial evidence of intent to discriminate against her.
- 6) The student's complaint was dismissed with leave to amend to plead facts consistent with the above theory of liability.
- 7) The court further held that no §1983 claim was stated because there is no special relationship between schools and students which would impose a constitutionally required affirmative duty on schools to prevent peer student harassment.

B. The other cases involving similar fact situations that have not yet had rulings are:

1. Rowinsky v Bryan Independent School District, H-93-3578 (SD Tx); J.W. v Bryan Independent School District, (SD Tx): Three junior high school

girls claim they were subjected to genital groping and obscenities by fellow students. One girl claims she spent five weeks in a mental institution as a result. They seek \$1.5 million in damages.

2. Mennone v Gordon, 392CV-467 (D Ct): A high school girl claims her school district failed to deal adequately with a teenage boy who allegedly groped and threatened to rape her in front of a teacher.

C. It can be expected that there will be further litigation in these types of cases as plaintiff attorneys will continue to attempt to impose the Title VII standard of liability for employers (who are liable if they know or should have known of abusive work environment harassment) on educational institutions in Title IX student-to-student harassment cases.

D. The Antioch Policy: Does It Help Limit Liability?

1. Although parts of the policy (copy attached) are controversial, i.e., the need to ask each and every time for clear verbal consent before moving to a higher level of sexual intimacy, the policy helps to limit institutional liability for student-to-student harassment by:

- a. Setting out definitions of sexual assault, sexual imposition and sexual harassment.
- b. Describing what remedies will be prescribed for each of the above described conduct.
- c. Telling students to whom to report violations of the policy.
- d. Providing prompt investigation of reported incidents.
- e. Providing an established mechanism for prompt hearings of complaints.

- f. Establishing a systematic educational program for new and continuing students, as well as employees and faculty.

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