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[Statement on behalf of the EEOC before Senator Arlen Spector, Sexual Harassment Hearings]

J. Clay Smith Jr.

HEARINGS ON SEXUAL HARASSMENT

BEFORE SENATOR ARLEN SPECTER

August 24, 1981

STATEMENT OF ACTING CHAIRMAN J. CLAY SMITH, JR.

EQUAL EMPLOYMENT OPPORTUNITY COMMISSION

I am J. Clay Smith, Jr., Acting Chairman of the Equal Employment Opportunity Commission.

The Equal Employment Opportunity Commission is a five-member bipartisan Commission having principal responsibility for the administration and enforcement of Federal laws prohibiting discrimination in employment, including Title VII of the Civil Rights Act of 1964, as amended. Since the early days of our existence as an agency, we have recognized that harassment in the workplace, which is based on race, religion, national origin, color, or sex, constitutes a violation of Title VII because it imposes an adverse term or condition of employment on one class of people which is not imposed on any other classes of people. It unfairly handicaps and disadvantages those people against whom it is directed, often making it impossible for them to perform their jobs. While the Commission continues to actively oppose harassment in the workplace on any Title VII basis, I will limit my testimony today to harassment on the basis of sex which takes the form of sexual harassment.

That sexual harassment is widespread is not to be denied. According to Lin Farley, the author of Sexual Shakedown, "In May 1975 the Women's Affairs Section of the Human Affairs Program at Cornell University distributed the first questionnaire ever devoted solely to the topic of sexual harassment... 70 percent

(of the respondents had) personally experienced some form of harassment".1/ In 1976, Redbook magazine published a questionnaire on sexual harassment to which over 9,000 women responded. Of this number, one in ten reported that they had experienced unwanted sexual attentions on the job.2/ Additionally, a statistically significant study conducted by the U.S. Merit Systems Protection Board shows that during the two years prior to the survey, which was done in early 1980, 42 percent of all federally employed women surveyed reported that they were victims of sexual harassment.3/ Also during the late 1970's cases involving sexual harassment were decided in six Federal Circuit Courts and seven additional cases were decided in Federal District Courts.

In addition to this activity in the courts, in 1979 the Subcommittee on Investigations of the House Committee on Post Office and Civil Service held hearings on sexual harassment in the Federal government. These hearings established that sexual harassment was widespread in the Federal government and established the need for guidance from our Commission with respect to this issue. The Commission realized, however, that any guidance which was issued with respect to sexual harassment would necessarily apply equally to all employers covered by Title VII, and we further realized, from the activity in the courts, that both public and private employers were in need of help in understanding and defining their liability for acts of sexual harassment in

the workplace and were in need of help in determining how to mitigate that liability. Therefore, the Commission decided that guidelines should be issued to give employers notice of the guidance and to give them an opportunity to comment along with other members of the public and Federal agencies. Since guidelines are regularly published in the Federal Register for public notice and comment and are also regularly circulated to Federal agencies for comment, this format appeared to be the vehicle which would best serve the interests of all concerned.

On April 11, 1980, the interim guidelines were published in the Federal Register for a 60 day period for public comment. In addition to the comments received from Federal agencies, the Commission received 168 letters in response to this publication. These comments came from persons throughout the public and private sectors. The single most prevalent group of comments took the form of praise for the Commission for publishing guidelines on the issue of sexual harassment and for the content of the guidelines. The Commission was gratified by this high degree of favorable response which the guidelines elicited, recognizing that this was an unusual phenomenon in recent Federal experience.

The Final Guidelines were published in the Federal Register November 10, 1980. I will discuss them now, section-by-section. The first subsection of the guidelines states that sexual harassment is a violation of Title VII and defines sexual harassment as follows:

> Unwelcome sexual advances, requests for sexual favors, and other verbal or physical conduct of a sexual nature constitute sexual harassment when (1) submission to such conduct is made either explicitly or implicitly a term or condition of an individual's employment, (2) submission to or rejection of such conduct by an individual is used as the basis for employment decisions affecting such indiviudal, 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.

A number of persons who responded to the publication of the guidelines suggested that this definition of sexual harassment should be more specific both as a general proposition and as a means for strengthening the guidelines, particularly with regard to §1604.11(a)(3), the section which provides that, "Unwelcome sexual advances, requests for sexual favors, and other verbal or physical conduct of a sexual nature constitute harassment when... 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."

These comments were carefully considered by the Commission, and after much consideration, the Commission decided that the definition should stand as written, with one word changed for the sake of clarity. This conclusion was based on two factors. First, the Commission has held in its decisions that this definition is applicable in cases of harassment based on national origin, race, and religion, since 1968, 1969, and 1971, respectively 4/, and the courts have also recognized this form of harassment as discriminatory.5/ At this time, the Commission sees no justification for treating harassment based on sex any differently than harassment based on race, religion, color, or national origin, for we agree with the following statement contained in the report of the Senate Committee on Labor and Public Welfare when Title VII was amended by the Equal Employment Opportunity Act of 1972: "... discrimination against women is no less serious than other prohibited forms of discrimination, and...it is to be accorded the same degree of concern given to any type of similarly unlawful conduct."6/ One court recognized this specific form of sexual harassment prior to the issuance of the guidelines7/, and at least two courts have supported the definition since the guidelines were issued.8/

The second factor that played a part in the Commission's determination was the difficulty inherent in framing a specific definition which does not include behavior which is perfectly acceptable social behavior and has no relevance at all to Title VII. This difficulty is due to the fact that the same actions

which, under one set of circumstances, would constitute sexual harassment, might, under another set of circumstances, constitute acceptable social behavior. Also, this is a developing area of the law, and the Commission wanted to give guidance without being so definitive that the guidelines would require amendments with each new development. Rather, as stated in Subsection (b) of the guidelines, the Commission will consider each case alleging sexual harassment on a case-by-case basis and consider such factors as the nature of the alleged sexual advances and the context in which they occurred. This way the Commission will be able to issue and publish fact-specific decisions and further clarify and refine the definition through examples and discussion contained in the decisions.

Since the publication of the final guidelines in November 1980, the Commission has issued five decisions.9/ I have instructed staff to present additional decisions to the Commission for consideration so as to provide additional guidance for the public. These decisions all speak to areas of the guidelines which the Commission considers appropriate for further development or explanation through the kind of discussion that is not possible in a set of guidelines but is necessary to the resolution of an individual charge of discrimination. The Commission feels that well developed, fact-specific decisions are the appropriate vehicles for further refining the definition of sexual harassment.

The guidelines follow the well established common law standard of respondeat superior. That is, they state that an employer is responsible for the acts of its supervisors and agents. This responsibility exists regardless of the existence of circumstances which would be mitigating factors if the person who committed the acts were not a supervisor or an agent, e.g. lack of knowledge of the acts on the part of the employer or publication of a policy prohibiting the acts. This is the standard which the courts have previously applied in all areas of Title VII law. It is true that some courts failed to apply this standard in sexual harassment cases at the outset of the development of this legal issue; however, it should be noted that some courts were initially slow to grant sexual harassment the same legal status as other Title VII issues on any front.

Moreover, some courts did apply the respondeat superior doctrine prior to the issuance of the guidelines. For example, one court stated in 1976, "For, if this (sexual harassment) was a policy or practice of the plaintiff's supervisor, then it was the (employer's) policy or practice, which is prohibited by Title VII."10/

In other early sexual harassment cases the courts concluded that, "...respondeat superior does apply here, where the action complained of was that of a supervisor, authorized to hire, fire, discipline or promote, or at least to participate in

or recommer such actions, even thoug what the supervisor is said to have done violates company policy"11/ and that, "Generally speaking, an employer is chargeable with Title VII violations occasioned by discriminatory practices of supervisory personnel."12/ The comments which dealt with employer liability for acts of supervisors and agents were read in conjunction with court precedent and Commission policy in this and all other areas of Title VII law, and the Commission concluded that there was no justification for distinguishing the issue of sexual harassment from other Title VII issues.

The application of the principle of respondeat superior in Title VII law is far less onerous than in other areas of law, such as tort law, because there are no provisions in Title VII for punitive or compensatory damages, either as money payable to the employee above and beyond that which is actually lost or as fines. This means that where an employer knows of acts of sexual harassment which have been committed by a supervisor or an agent and rectifies the actual results of those actions, a further remedy under Title VII would be unlikely in the administrative process. Clearly, the Commission would not sue for a remedy which has already been granted.

Let me, at this point, go back to the interim guidelines. As originally published, Subsection (d) of the guidelines provided that:

> With respect to persons other than those mentioned in subsection (c) above, (that

> is, supervisors and agents), an employer is responsible for acts of sexual harassment in the workplace where the employer, or its agents or supervisory employees, knows or should have known of the conduct. An employer may rebut apparent liability for such acts by showing that it took immediate and appropriate corrective action.

The comments we received showed that we needed to clarify what we meant by our reference to "persons other than," and so we rewrote Subsection (d) and limited it to cover liability for sexual harassment by co-workers. We retained the provision that sets out the requirement for actual or constructive knowledge on the part of employer and the provision for a defense which consists of a showing that the employer took immediate and appropriate corrective action when it discovered the violation. Then we added a new Subsection (e) to cover actions by persons who do not work for the employer, e.g., persons who regularly come to repair equipment or make deliveries at an employer's facility and harass an employee while they are on the employer's premises. We also retained the requirement in this subsection that employers have knowledge before liability can vest and retained the provision for a defense consisting of a showing of immediate and appropriate corrective action. In addition, we expanded the provisions of the original subsection to state that, "in reviewing

these cases the Commission will consider the extent of the employer's control and any other legal responsibility which the employer might have with respect to such non-employees." Clearly, control is a given in the case of an employee, but is not necessarily present in the case of a non-employee and must be established in order to establish a violation. However, where both knowledge and control do exist on the part of the employer, there is an obligation under Title VII for the employer to maintain an atmosphere that is free of sexual harassment, so that members of one sex are not required to work under different and less advantageous terms and conditions of employment than members of the other sex.

In connection with these two subsections, some commentors were concerned with what constitutes "appropriate corrective action." If the action is "corrective," that is, if it in fact eliminates the illegal behavior, then it is appropriate; however, actions which result in the elimination of the illegal behavior in one workplace might not have the same result in another workplace. Since appropriateness will have to be determined on a case-by-case basis, we did not make any changes in the original language.

Subsection (f of the guidelines provid that:

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

This subsection contains the major thrust of the guidelines, that is "Prevention is the best tool for the elimination of sexual harassment." The suggestions offered in this subsection give employers assistance in preventing an invidious form of discrimination that inflicts substantial psychological damage to its victims, in addition to the monetary damage that it inflicts. It is most important when considering the issue of sexual harassment that we bear this psychological damage in mind and recognize that, while it is difficult to remedy, it can, in many cases, be prevented. 13/

Some commentors requested greater specificity with respect to the examples of preventative action which an employer might take. The Commission decided that it would not go beyond making the suggestions which were already set out in the guidelines. We do not want to require that employers take previously determined steps to prevent sexual harassment because the Commission feels

that each workplace is unique, and steps which might be effective in one workplace might fail in another. The cost factor was also considered. An extensive formalized training program might be effective and appropriate in a large corporation, but a less expensive, informal means of communicating the employer's concerns to management and the employees might be more efficient and effective in a small business. I have also made both the Commissioners and staff available, within budget constraints, to speak to trade associations and other employer and employee groups to give further examples and to discuss ideas which members of the groups have for preventing sexual harassment.

Several people who submitted written comments and a large number of members of the public who telephoned the Commission asked whether employees who are denied an employment benefit are covered by the guidelines when the benefit is received by a person who is granting sexual favors to their mutual supervisor. While we realize that this does not state a case of sexual harassment, since we assume that the employee who received the benefit is granting the sexual favors willingly and has not been coerced into the relationship, it is obviously related to that issue in the minds of the public. Therefore, the Commission decided to add a new subsection, Subsection (g), to the guidelines to alert employers that this related issue is also covered by Title VII. This does not mean, and we did not state, that this necessarily presents a violation of Title VII. It merely means that the charge is cognizable under Title VII and, if brought to the Commission, will be decided under that statute.

It is important to understand that this provision affords protection for persons who are not involved in the situation but who, nevertheless, are adversely affected by the sexual conduct of others. Thus, it creates a balance of protection for all persons in the workplace.

One criticism of the guidelines which was raised by a limited number of commentors during the formal comment period but which has been raised frequently since the guidelines became final is that they will cause an influx of frivolous charges at EEOC. All charges that are filed in our field offices which involve the issue of sexual harassment are investigated in the field and then sent in to Headquarters for a decision on the merits by the Commission. In April of this year I instructed staff to read through all of the case files which were in Headquarters and to give me a sense of the contents of those case files. The following is the result of their reading.

At that time there were 130 sexual harassment charges in Headquarters. Of these, 118 contained corroborative evidence that substantiated part, if not all, of the Charging Party's allegations. The evidence came in the forms of admissions by Respondent, statements of people who witnessed the sexual advances, statements of others subjected to the same or similar conduct as Charging Party, and other statements of corroboration.

These cases, which are decided on the merits, cover a wide range of activity as demonstrated by the following: fifty-eight of these charges involved unwelcome physical contact of a sexual nature, such as the touching of a person's buttocks or hugging or kissing; seventy-seven involved demands for a person to engage in a sexual act and the promise of a favorable employment decision if the demand is met or the threat of a negative action if the demand is not met; and twenty-six involved the use of vulgar language of a sexual nature, calling a person sexually derogatory names, making sexually derogatory comments about one sex, or displaying sexually explicit pictures, photographs, or cartoons.

From another point of analysis, seventy-one of the charges were brought by women who were fired; twenty-six were brought by women who resigned when the unwelcomed sexual activity became intolerable; nineteen were brought by women who either were given less desirable work assignments, had their number of hours of work reduced, or were transfered to a different work shift; seven were brought by women who were denied a promotion; and seven were brought by women who were subjected to sexual activity which interfered with their work performance or created an offensive working environment.

In the 118 charges which were corroborated, the acts of sexual harassment were perpetrated by supervisors or other management officials in 106 cases and by coworkers in 12 cases.

In conclusion, sexual harassment in the workplace is not a figment of the imagination. It is a real problem. The sexual harassment guidelines are designed to assist employers in their understanding of this sensitive public issue and to guide them in developing management training programs for their companies, and the Federal government.

Thank you.

FOOTNOTES

1/ Lin Farley, Sexual Shakedown: The Sexual Harassment of Women on the Job. (New York: Warner Books, 1980), pp. 39 & 40.

2/ Sexual Shakedown, Ibid., p. 40.

3/ Sexual Harassment in the Federal Government (Part II): Hearings before the Subcomm. on Investigations of the House Comm. on Post Office and Civil Service, 96th Cong., 2nd Sess. 5 (1980)(Statement of Ruth T. Prokop).

4/ Commission Decisions No. YSF 9-061, CCH EEOC Decisions (1973) ¶6013; YSF 9-108, CCH EEOC Decisions (1973) ¶6030; 70-61, CCH EEOC Decisions (1973) ¶6059; 71-969, CCH EEOC Decisions (1973) ¶6193; 71-1442, CCH EEOC Decisions (1973) ¶6216; 71-2344, CCH EEOC Decisions (1973) ¶6257; 72-1561 CCH EEOC Decisions (1973) ¶6354; 74-25, CCH Employment Practices Guide ¶6400; and 76-09, CCH Employment Practices Guide ¶6604; all pertaining to racial harassment.

Commission Decisions No. 71-685 (unpublished); 71-764 (unpublished); 72-1114, CCH EEOC Decisions (1973) ¶6347; and 76-98, CCH Employment Practices Guide ¶6674; all pertaining to religious harassment.

Commission Decisions No. CL-68-12-431/EU, CCH EEOC Decisions (1973) ¶6085; 70-683, CCH EEOC Decisions (1973) ¶6145; 71-813,

Footnotes (Continued)

(unpublished); 71-1874 CCH EEOC Decisions (1973) ¶6387; and 76-41, CCH Employment Practices Guide ¶6632; all pertaining to national origin harassment.

5/ Rogers v. Equal Employment Opportunity Commission, 454 F.2d 234, 4 EPD ¶7597 (5th Cir. 1971), cert. den'd. 406 U.S. 957, 4 EPD ¶7838 (1972) (race). Compston v. Borden, Inc., 424 F. Supp. 157 (S.D. Ohio 1976) (religion).

6/ S. Rep. No. 92-415, 92 Cong., 1st Sess. 7 (1971).

7/ Kyriazi v. Western Electric Co., 461 F. Supp. 894, 18 EPD ¶8700 (D.N.J. 1978).

8/ Bundy v. Jackson, ____ F.2d ____, ____ EPD ¶____, 24 FEP Cases 1155 (D.C. Cir. 1981); and Equal Employment Opportunity Commission v. Sage Realty Corp., ____ F. Supp. ____, 25 EPD ¶31,529 (S.D.N.Y. 1981).

9/ Commission Decisions No. 81-16, CCH Employment Practices Guide ¶6756; 81-17, CCH Employment Practices Guide ¶6757; 81-18, CCH Employment Practices Guide ¶6758; 81-23 (unpublished); and 81-27 (unpublished).

10/ Williams v. Saxbe, 413 F. Supp. 654, 11 EPD ¶10,840 at page 7526. (D.D.C. 1976), rev'd and remanded on other grounds sub nom. Williams v. Bell, 587 F.2d 1240, 17 EPD ¶8605 (D.C. Cir. 1978), decided on remand sub nom. Williams v. Civiletti; 487 F. Supp. 1387, 23 EPD ¶30,916 (D.D.C. 1980).

11/ Miller v. Bank of America, 600 F.2d 211, 213, 20 EPD ¶30,086 at page 11,481 (9th Cir. 1979).

12/ Barnes v. Costle, 561 F.2d 983, 14 EPD ¶7755, at page 5701 (D.C. Cir. 1977).

13/ See also, Sexual Harassment in the Federal Government, Hearings before the Subcommittee on Investigations of the House Committee on Post Office and Civil Service, 96th Cong. 2d Sess. 91 (1979). (Statement of Eleanor Holmes Norton).