COMBATING

SEXUAL HARASSMENT:

A HANDBOOK FOR UNION ACTIVISTS

Fighting sexual harassment is a matter of solidarity - all our brothers and sisters have the right to earn a living with dignity and without harassment because of sex.

TABLE OF CONTENTS

Introduction

The purpose of this handbook is to provide union activists with information to identify and respond to various forms of sexual harassment.

Sexual harassment in the workplace is still a continuing problem for our members. In order to stop such harassment our membership must be aware of their rights and responsibilities and are encouraged to assert their rights in the appropriate forum.

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Legal Prohibitions Against Sexual Harassment

Both federal and state law prohibitions against sex discrimination include a prohibition against sexual harassment. In addition, many municipalities have enacted legislation that makes sexual harassment illegal.

Sexual harassment can occur in a variety of circumstances, including but not limited to the following:

- The victim, as well as the harasser, may be a woman or a man. The victim does not have to be of the opposite sex.
- The harasser can be the victim's supervisor, an agent of the employer, a supervisor in another area, a co-worker, or a non-employee.
- The victim does not have to be the person directly harassed but could be anyone affected by the offensive conduct.
- Unlawful sexual harassment may occur without economic injury to, or discharge of, the victim.
- The harasser's conduct must be unwelcome.

It is helpful for the victim to inform the harasser directly that the conduct is unwelcome and must stop, but this is not a requirement. The victim should use any employer complaint mechanism or grievance system available.

During the Carter Administration, the United States Equal Employment Opportunity Commission (EEOC) issued regulations on the subject of sexual harassment after legal decisions made it clear that sexual harassment is a form of sex discrimination. The regulations provide the most definitive description of sexual harassment and are heavily relied upon by the courts and arbitrators.

The EEOC regulations state:

Harassment on the basis of sex is a violation of Sec. 703 of Title VII. Unwelcome sexual advances, requests for sexual favors, and other verbal or physical conduct of a sexual nature constitute sexual harassment when:

1. Submission to such conduct is made either explicitly or implicitly a term or condition of an individual's employment;

2. Submission to or rejection of such conduct by an individual is used as the basis for employment decisions affecting such individual; or

3. Such conduct has the purpose or effect of unreasonably interfering with an individual's work performance or creating an intimidating, hostile, or offensive working environment.

The EEOC and the courts have articulated two different categories of sexual harassment: quid pro quo sexual harassment and hostile work environment sexual harassment. In order to be able to identify and respond to unlawful sexual harassment, it is important to consider the differences between the two.

Quid pro quo sexual harassment occurs when engaging in or continuing to engage in sexual activity is directly linked to a grant or denial of an economic opportunity such as a promotion, demotion or termination. An example would be a supervisor telling a subordinate that if she agrees to have sexual relations with him, or date him, her promotional opportunities would improve.

In order to establish the presence of a "hostile work environment," it is necessary to demonstrate that certain conduct has the purpose or effect of interfering with someone's work performance or creates an intimidating, hostile, or offensive working environment. An example would be where an employer allows regular

discussions and "joking" regarding sexually related matters, knowing that reasonably-minded employees may be offended by such an atmosphere. Oftentimes, a hostile environment is created by the acts of co-employees. In order for an employer to be responsible in this situation, the employer must have known or should have known that the hostile environment existed.

In determining whether the alleged conduct of an employee constitutes sexual harassment, courts and arbitrators will consider the "totality of circumstances." Therefore, they will look at both the nature of the conduct and its frequency as well as the context in which the alleged incident occurred, including whether the employee complaining participated or consented in the conduct.

The United States Supreme Court has determined that an "objective test" must be applied to determine whether conduct is sufficiently severe to be the basis for a claim of sexual harassment. In other words, just because an employee may be offended by certain conduct does not necessarily demonstrate that sexual harassment has taken place. It must be shown that the offensive behavior was of the kind that a "reasonable person" would find objectively hostile and that the offensive behavior is sufficiently severe or pervasive so as to alter the conditions of the employee's employment. As the U.S. Supreme Court has noted, the laws against sexual harassment are not a "general civility code" intended to curtail "the ordinary tribulations of the workplace such as sporadic use of abusive language, gender related jokes and occasional teasing." The conduct must clearly interfere with one's ability to do his/her job and affect the terms and conditions of employment.

It is Unlawful for an Employer to Retaliate Against an Employee Who Has Complained of or Opposed Sexual Harassment in the Workplace

Closely related to complaints of sexual harassment are issues of whether an employee has suffered retaliation for complaining or opposing sexual harassment. The anti-discrimination laws explicitly forbid retaliation against any employee because he/she "opposed any practice made unlawful by" the anti-discrimination laws or participated in an investigation of a complaint of discrimination. The anti-retaliation provision is intended to protect an employee against a wide variety of employer conduct that is intended to deter or restrain employees from complaining about unlawful practices and produces injury or harm. To establish that such an injury occurred, a plaintiff "must show that a reasonable employee would have found the challenged [employer] action" significantly adverse so that it would dissuade another employee from making a complaint of discrimination in the future.

For example, where an employee is given a more arduous job than she normally has, even though it is in her job description, it could be found to be retaliation if it would deter a reasonable employee from filing a future complaint of discrimination.

The non-retaliation provisions of the non-discrimination laws even protect those who do not initiate complaints of discrimination, but who are interviewed during investigations of sexual harassment and report acts of sexual harassment that they may have suffered or observed. Thus, a person can "oppose" sexual harassment by responding to someone else's question (such as an employer's investigator) and giving an account of conduct that may constitute sexual harassment.

In summary, the law protects those who oppose sexual harassment as much as it does its victims.

What Your Unit or Local Can do About Sexual Harassment

Sexual harassment continues to be a prevalent problem in both the public sector and private sector. There are a number of things that your local or unit can do to stop sexual harassment on the job:

— If your employer does not have a sexual harassment policy, you can demand that such a policy be created with union input. A policy is now required by State law.

— Once your employer has created a sexual harassment policy, you may want to periodically circulate it so that the membership is aware of its rights and responsibilities.

— You can ensure your employer conducts annual training of all employees, as required by State law.

— You may want to survey the membership to determine the extent of the problem in your local or unit.

— The unit or local may wish to hold training on the issue for the membership.

It is unlawful for a union to discriminate against a bargaining unit employee based on the sex of the represented employee. This means that it is unlawful for bargaining unit employees to be subjected to sexual harassment by union officials, officers or staff. Due to the fact that the union may be subjected to a lawsuit if a represented employee has been sexually harassed by a union representative, it is important that you consider whether your past or present behavior could be construed or misconstrued as sexual harassment. Further, it is important that you investigate and refer all complaints of sexual harassment on the job to the appropriate authority. The Union cannot be a passive observer in the face of complaints of sexual harassment by bargaining unit employees.

Responding to Sexual Harassment

As a union activist, you may encounter sexual harassment in different ways, including:

1. You observe sexual harassment occurring yet no one has complained to you about it;

2. A bargaining unit employee advises that he/she has been subjected to sexual harassment by his/her supervisor and/or co-employee; or

3. A represented employee seeks union representation in a disciplinary case in which he/she is charged with sexual harassment.

When Sexual Harassment Is Occurring But No One Complains

The mere fact that a specific bargaining unit employee has not complained to you about sexual harassment does not mean that you should not intervene if you observe conduct which you believe constitutes sexual harassment. In other words, the union representative cannot "look the other way" in the face of objective evidence of sexual harassment. It is important that an activist contact his/her assigned Labor Relations Specialist (staff) for assistance and guidance in investigating and properly referring all complaints of sexual harassment.

EXAMPLES OF SEXUAL HARASSMENT INCLUDE:

- Unwelcome sexual advances
- Suggestive or lewd remarks
- Unwanted hugs, touches, kisses
- Requests for sexual favors
- Retaliation for complaining about sexual harassment
- Derogatory or pornographic posters, cartoons or drawings

POSSIBLE STEPS TO TAKE:

- Contact your union representative
- File a complaint with the employer
- Call the NYS Division of Human Rights or the U.S. EEOC
- Document what occurred

Sexual Harassment By A Supervisor

It is important to recognize the extreme emotional pain that can be caused by sexual harassment. Therefore, if you are contacted by a bargaining unit employee who has been subjected to sexual harassment, it is important that you demonstrate both sensitivity and discretion.

If the represented employee has been victimized by his or her non-bargaining unit supervisor, the employee should be advised of the employer's sexual harassment policy and the procedures to be followed under the employer's policy. You should encourage the member to notify the personnel office, either through the union or individually. You should encourage the bargaining unit employee to start preparing a diary or log of any future acts of sexual harassment. Due to your role, you may also want to keep your own records because you may be called as a witness on behalf of the represented employee.

Absent a "tangible employment action," e.g., discharge, demotion, etc., an employer cannot be held liable for sexual harassment by one of its supervisors unless it knew or should have

known that sexual harassment was occurring and failed to take prompt remedial action. By following the procedures in the sexual harassment policy, you can insure that the employer is on notice that sexual harassment has occurred or is occurring and that you are seeking an end to the harassing behavior.

An employer's duty upon learning of sexual harassment is to take "prompt remedial action." This means that the employer must consider the facts and determine the appropriate response. For example, the employer may decide to take disciplinary action against the supervisor. Sexual harassment has been found to be a legitimate basis for discipline. However, due to the status of the supervisor in the hierarchy, the employer may attempt an alternative to discipline: transfer the supervisor or the victim. Many times the employer's response, short of discipline, will be unsatisfactory to the victim. If so, the victim can take legal action against the employer.

Under federal law, a victim of sexual harassment can file a complaint against the employer with the EEOC. A complaint must be filed with the EEOC within 300 days of the discriminatory action.

After the EEOC investigates, a victim of discrimination can sue in federal court against the employer.

In addition, under New York State law a victim of sexual harassment can file a complaint against the employer with the New York State Division of Human Rights ("NYS DHR") or file an action in state court. A complaint must be filed with the NYS DHR within one year. A lawsuit must be filed within three years. However, if a complaint is filed with the NYS DHR, a lawsuit cannot be pursued simultaneously and vice versa. Some municipalities in the State of New York have human rights agencies as well.

As noted, it is unlawful to retaliate against an individual for opposing employment practices that discriminate based on sex, or for filing a discrimination charge, testifying, or participating in any way in

an investigation, proceeding, or litigation under Title VII.

Sexual Harassment by Co-Employees and The Issue of Discipline

Like other forms of misconduct, a charge of sexual harassment can pit one bargaining unit employee against another. Sexual harassment complaints will frequently result in disciplinary charges. It is firmly established that if an employee is found to have sexually harassed a co-employee, the employee will be disciplined. Both the courts and arbitrators have ruled that termination may be an appropriate penalty for sexual harassment. In fact, some courts have ruled that termination is the only appropriate penalty, but again, an examination of the "totality of circumstances" will determine what type of penalty is appropriate.

Examples of employment decisions that may violate Title VII

Title VII prohibits disparate treatment based on sex, which may include treatment based on **sex-based stereotypes**, including those related to domestic or dating violence, sexual assault, or stalking. For example:

- An employer terminates an employee after learning she has been subjected to domestic violence, saying he fears the potential "drama battered women bring to the workplace."

- A hiring manager, believing that only women can be true victims of domestic violence because men should be able to protect themselves, does not select a male applicant when he learns that the applicant obtained a restraining order against a domestic partner or spouse.

- An employer allows a male employee to use unpaid leave for a court appearance in the criminal prosecution of an assault, but does not allow a similarly situated female employee to use equivalent leave to testify in the criminal prosecution of domestic violence she experienced. The employer says that the assault by a stranger is a "real crime," whereas domestic violence is "just a marital problem" and "women think everything is domestic violence."

Title VII prohibits sexual or sex-based harassment. Harassment may violate Title VII if it is sufficiently frequent or severe to create a hostile work environment, or if it results in a "tangible employment action," such as refusal to hire or promote; firing, or demotion. For example:

- An employee's co-worker sits uncomfortably close to her in meetings, and has made suggestive comments. He waits for her in the dark outside the women's bathroom and in the parking lot outside of work, and blocks her passage in the hallway in a threatening manner. He also repeatedly telephones her after hours, sends personal e-mails, and shows up outside her apartment building at night. She reports these incidents to management and complains that she feels unsafe and afraid working nearby him. In response, management transfers him to another area of the building, but he continues to subject her to sexual advances and stalking. She notifies management but no further action is taken.

- A seasonal farmworker's supervisor learns that she has recently been subject to domestic abuse, and is now living in a shelter. Viewing her as vulnerable, he makes sexual advances, and when she refuses he terminates her.

Title VII prohibits retaliation for protected activity. Protected activity can include actions such as filing a charge of discrimination, complaining to one's employer about job discrimination, requesting accommodation under the EEO laws, participating in an EEO

investigation, or otherwise opposing discrimination. For example:

- An employee files a complaint with her employer's human resources department alleging that she was raped by a prominent company manager while on a business trip. In response, other company managers reassign her to less favorable projects, stop including her in meetings, and tell co-workers not to speak with her.

Union Representative's Role

Union representatives – officers and stewards – are the first people with whom an employee may speak about their experiences with a harasser. This is because the activist is seen as the official representative of the employees and someone who will take the speaker seriously and try to help. **NOTE**: the same union representative should never try to represent both the accuser and the accused. Separate representatives should be obtained for one or the other employee.

Under the law, the union MUST INVESTIGATE a sexual harassment complaint and, where appropriate, advise the employer of the fact of a complaint. Failure to do so may leave the union itself open for a charge of abetting sexual harassment.

Good listening skills are helpful when someone is telling you about their experiences. When the subject of the conversation is sexual harassment, people need to feel relaxed, while at the same time staying focused on the facts of what happened. Good listening requires the listener to:

1. Understand that the experience of being harassed can be very upsetting and, in some instances, traumatic.

2. Be attentive to what the employee is telling you. You should not belittle what he/she is saying or feeling.

3. Encourage the speaker to give as much background and specifics as he/she can. Ask clarifying questions or questions seeking more specifics, where appropriate.

4. Understand what the speaker wants in order to remedy the problem and also what he/she wants from the union. Be clear with the speaker that it may be necessary for the employee to tell the harasser that the employee wants the conduct to stop. This can be difficult when the offending person is in a superior work position or a position of authority.

5. Do not "cross examine" the employee. In other words, do not challenge the employee's account of what occurred by suggesting he/she is not being truthful or is misperceiving what occurred. However, once a more complete investigation is done, it may be necessary to go back to the employee and ask him/her to explain the contradictory information you have learned.

6. Do not ask "leading questions" where you put information into the question and seek only a "yes" or "no" response. An example of a leading question is: "Did he say he wanted to have sex with you?" When you ask leading questions you are not obtaining information from the employee because you are loading up the question with information that you are supplying. Ask simple, open-ended questions, like "what did he say?"; "what did she do?" or "what happened then?" The standard "who, what, where and when" questions are a good place to start.

7. Explain that sexual harassment sometimes is a "power play" and an attempt to dominate another person; it generally has nothing to do with sex or attraction.

8. Be mindful of different cultural values. Race, nationality or ethnic background may inform how either the employee

or the offending person views the events. Understanding this possibility is imperative to assessing the situation and determining the union's position with respect to conflicting requests for representation if the matter is "litigated" in any disciplinary or other employer procedure.

9. If the speaker is unsure of whether to file a complaint, encourage him/her to at least, (1) say "NO" to the offending party, either verbally or in writing, with a notation of the time, place and date; (2) encourage the speaker to talk with co-workers; perhaps others have had a similar experience and there can be support and comfort in not going the complaint route alone; and (3) encourage the speaker to keep a written record of all interactions with the offending party. This way, should the speaker decide later to file a formal complaint, you have insured that he/she is in the best posture to have the complaint taken seriously.

Possibilities for Informal Resolution

The union may be able to head off problems by conducting some informal programs aimed at educating and sensitizing employees to the issues surrounding sexual harassment. Some examples include:

1. Advising employees that tolerating or engaging in sexual harassment is not a union value and undermines what we are about.

2. Encouraging employees to communicate with the union and to not solely rely on management.

3. Providing a "support group" opportunity for employees to come together to discuss their experiences and even develop an action plan, if the problem turns out to be a particular supervisor or co-worker.

4. Providing training for particular activists to handle sexual harassment problems among bargaining unit employees. Some should be trained to work with the complaining party and others should be trained to work with the harasser, particularly when disciplinary action is imminent. Where both the complainant and the alleged harasser are in the unit, the union must assign different representatives to each employee.

5. Considering establishing an informal dispute resolution mechanism whereby the complainant and the alleged harasser can meet with a neutral third party who is trained in bringing people together to work out their differences and develop an ability to work together in a respectful manner.

Sometimes the Union Must Take a Stand

Unions are best equipped to fight sexual harassment in the work place when they have a comprehensive program in place.

Such a program should include the following:

1. An anti-sexual harassment policy.

2. An education program delivered regularly to all employees explaining that allowing any form of discrimination, including sexual harassment, to exist in the work place subverts union solidarity.

3. A periodic membership survey assessing the extent of employees' experiences involving sexually harassing conduct.

4. Negotiated anti-sexual harassment policy in collective bargaining agreement, including procedures for handling any complaints and schedule of discipline for offenders.

5. Holding employer accountable to have its anti-sexual harassment policy and training in place and presented annually to all employees, regardless of job title or work location.

6. A union handbook setting forth the laws and procedures for filing formal complaints with outside agencies.

SAMPLE SEXUAL HARASSMENT SURVEY LOCALS AND UNITS CAN USE TO GAUGE WHETHER THEY HAVE A PROBLEM

1. I am
   ____ Female
   ____ Male
   ____ Non binary

2. Do you believe you have ever been the victim of sexual harassment?
   ____ Yes
   ____ No

   If No, PLEASE GO TO QUESTION 12.

3. If Yes, did the sexual harassment occur?
   ____ on your present job
   ____ on a previous job with the state (city, county)
   ____ on a previous job with a different employer

4. When did it occur?
   ____ I am currently experiencing a sexual harassment problem
   ____ less than 2 years ago
   ____ more than 2 years ago

5. Who was (were) the harasser(s)?
   ____ my immediate supervisor
   ____ higher management official(s)
   ____ union official
   ____ my co-workers
   ____ clients, vendors or other non-employees

6. What was the nature of the harassment?
(Check all that apply)

____ unwelcome sexual relations
____ unwelcome physical contact (e.g. touching, pinching)
____ graphic commentary on your body
____ harassing phone calls
____ propositions of a sexual nature
____ sexually suggestive objects displayed in the work place
____ other: _____
_____
_____

7. Were any threats or insinuations made that your failure to submit to the harassment would adversely affect your employment?

____ Yes
____ No

8. Did you have adverse action taken against you because you refused to submit to the harassment?

If yes – check all that apply

____ denied promotion
____ denied salary adjustment
____ reprimand
____ poor performance evaluation
____ involuntary transfer
____ discharge
____ other
____ No

9. What did you do about the harassment?

____ nothing
____ informally resolved the problem by talking to the harasser
____ complained to management
____ filed a grievance through the union
____ filed discrimination charges with the Federal Equal Employment Opportunity Commission or State Fair Employment Practices Agency
____ consulted an attorney and filed a lawsuit

10. If you approached the union for assistance, did you find the union helpful?

____ Yes
____ No

11. What was the outcome of your effort to stop the harassment?

_____
_____
_____
_____

12. Do you have any opinions to share about how the union can more effectively respond to problems of sexual harassment?

_____
_____
_____
_____

NOTES

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