

The Massachusetts Commission Against Discrimination's Sexual Harassment Guidelines: Blueprint for Proper Behavior in the People's Republic of Massachusetts

by David B. Wilson¹

Introduction

In 1991 when then Governor Bill Clinton offered a subordinate, Paula Jones the opportunity to perform oral sex on him, she refused. She had no more contact with Clinton and was never adversely effected in her job. Jones's subsequent sexual harassment suit was dismissed on the grounds that Jones suffered no adverse action following her refusal to service Arkansas' governor². Clinton may not have faired as well in Massachusetts.

Fast forward to 2003, a supervisor of a Massachusetts employer asks a subordinate out on a date. She refuses the "unwelcome advance" and he politely moves on to other social conquests never retaliating against her for declining his invitation. Does she have a bonafide case for sexual harassment at the MCAD? She may under the MCAD's new Sexual Harassment Guidelines.

Where Does a Gorilla Sleep?

On October 2, 2002, the MCAD issued its Sexual Harassment Guidelines. The Guidelines were initially drafted by a committee consisting of employee and management side attorneys based on their interpretation of Massachusetts law today. Where there were ambiguities in the law, the committee turned over the Guidelines to the MCAD to take a final position in those "gray areas." As "Guidelines" they fall below statutory, common law and regulatory authority, but it would be folly for an employer to ignore them. When before the MCAD these Guidelines are the law, according to its General Counsel Steven S. Locke.

In Massachusetts all claims for discrimination and sexual harassment must first be brought at the MCAD as an administrative prerequisite to filing in state court. The Guidelines do assist the public in understanding sexual harassment law, although some feel that the Guidelines open the gate wider for those who claim discrimination or harassment than current statutory and case law allows. This article explores and comments on the Guidelines which can be found at www.state.ma.us/mcad/shtoc.html.

Definition of Quid Pro Quo Harassment

Under the Guidelines, Quid Pro Quo harassment "occurs when an employee with authority or control over the terms and conditions of another employee's work offers her a work

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² *Jones v. Clinton*, 990 F.Supp. 657 (D.C. ARK.) (1998)

benefit or advantage in exchange for sexual favors or gratification.”³ The Guidelines implicitly suggest that an employer should strongly consider a non-fraternization policy so supervisors understand that a mere “request for a date” is enough to constitute an “unwelcome advance” if the employee can subsequently point to any adverse action. Understanding that a good manager has to counsel and discipline even good employees at times, a manager should not be asking for dates with those whom he supervises. By doing so, he creates potential liability for himself and hampers his ability to manage his direct reports.

Do Not Confuse Welcomeness with Voluntariness

We have used a question on our training quizzes for years that continues to stump audiences:

True or False: It’s not sexual harassment if the behavior is welcome.

Answer: True! But what was once welcome may change and what’s welcome to two men joking in the corner may not be welcome to others that overhear.

The Guidelines also make clear the employers should not confuse what is voluntary with what is welcome. In some situations an employee may only tolerate certain inappropriate conduct to avoid being targeted, to cope in a hostile work environment or because participation is an unspoken condition of employment.⁴ Employers must be wary because the Guidelines expand the concept of welcomeness by drawing a distinction between what is voluntary and what is welcome. So, for example, an employee could voluntarily have sex with her boss and still say it was not welcome. An employee could tell dirty jokes and still say it was unwelcome. An employee can keep silent and later claim it was unwelcome. The Guidelines specifically state “An employee need not communicate her objection to harassing conduct to demonstrate its unwelcomeness”. As drafted, these Guidelines, while attempting to better explain the distinction between voluntary and welcome behavior, may unwittingly create opportunities for abuse by employees.

Hostile Work Environment

The Guidelines state that in order to create a hostile work environment, the conduct must be hostile, intimidating, humiliating or offensive both from an objective and a subjective perspective.⁵ So, for example, whether or not the environment is hostile depends on whether a reasonable person in the complainant’s position would find it offensive and the complainant herself actually finds it offensive.

In determining whether certain behavior is objectively offensive, the Guidelines state that the MCAD looks to whether the conduct is severe or pervasive. Although there have been a few

³ Guidelines, Page 2.

⁴ Guidelines, Page 4-5.

⁵ Guidelines, Page 5.

cases where courts found the behavior so severe that one instance was enough⁶, these Guidelines expand the definition of objectively offensive from the general requirement that it be severe and pervasive. The Guidelines state, “In some circumstances, a hostile environment may be established based on a single incident, due to its severity, despite the fact that the conduct is not frequent or repetitive”. The Guidelines do not limit the severe incident to just touching, but allow for situations where purely verbal conduct without touching may be severe enough to create a hostile work environment.⁷

The Guidelines expressly state that the Massachusetts Discrimination Statute at M.G.L. c. 151B is not a clean language statute and does not prohibit all use of profane or offensive language. The Guidelines also state that minor isolated conduct does not constitute sexual harassment as “a few isolated remarks over a period of time” are generally insufficient to meet the pervasiveness standard.⁸

The Guidelines track the current case law regarding same sex harassment and sexual harassment outside the workplace.

Employers are Strictly Liable for Harassment by Those With Supervisory Authority

Employers are held strictly liable for actions of their supervisors in Massachusetts.⁹ Therefore, who is a “supervisor” under the law can make a critical legal difference. An employer often defines its supervisors by who gets invited to management meetings. For the MCAD, this definition is generally too narrow. The Guidelines lay out the following factors the MCAD will consider in determining supervisory authority including but not limited to the following:

1. Undertaking or recommending tangible employment decisions affecting an employee;
2. Directing activities, assigning work and controlling work flow;
3. Hiring, firing, promoting, demoting or disciplining;
4. Altering or affecting an employee’s compensation or benefits;
5. Evaluating an employee’s work load;
6. Distributing necessary supplies and tools;
7. Giving directions and verifying and fixing mistakes;
8. Assisting employees in assigning tasks; and
9. Monitoring and evaluating work performance.

Liabilities can also exist where an employee appears to have apparent authority to supervise another employee. For example, the twenty year employee who assigns tasks to others when the boss is out could be considered a “supervisor” under these Guidelines. As a result,

⁶ Gnerre v. MCAD, 402 Mass. 502, 508-509 (1988)

⁷ Guidelines, Page 6.

⁸ Guidelines, Page 6.

⁹ College-Town, Division of Interco, Inc. v. MCAD, 400 Mass. 156, 165-167 (1987).

employers need to be careful about who they allow to exercise supervisory authority as the Guidelines view supervisors in the broadest of terms.

Individual Liability

The Guidelines state that “depending on the size, nature and form of the business, an individual may be so closely identified with the business entity that the individual is personally liable as the employer. This may apply to principals, owners, presidents or partners in a business¹⁰.” This language seems to provide for a “piercing of the corporate veil” in situations where it ordinarily would not be allowed. Those who drafted the Guidelines claim that this section would only apply where the individual and the business were, in fact, the same; however, the breadth of the language is troubling. In two of its own cases the MCAD has found owners of companies individually liable, but the owners themselves were engaged in the illegal conduct.¹¹

Policies, Complaint Procedures and Training

The Guidelines repeat state law requiring employers with six or more employees to adopt a written policy against sexual harassment and disseminate it to all new employees and annually to all employees. The Guidelines also implicitly encourage employers to adopt electronic communications policies in light of harassment through the use of technology. Specifically the Guidelines state:

An employee should specifically prohibit the dissemination of sexually explicit voicemail, e-mail, graphics, downloaded material or websites in the work place and include these prohibitions in their workplace policies.

Finally, while not a requirement of Massachusetts law, the Guidelines encourage employers to conduct education and training for all employees on a regular basis. The message from the Commission is unambiguous:

Employers should also train employees how to recognize and report incidents of sexual harassment. In claims alleging sexual harassment, an employer’s commitment to providing anti-harassment training to its workforce may be a factor in determining liability or the appropriate remedy.¹²

Complaint and Investigation Procedures

¹⁰ Guidelines, Page 10

¹¹ Raffurty v. Keyland Corp., 22 MDLR 125, 127 (2000) and MCAD v. Medical Weight Loss Center, Inc., 23 MDLR 5, 12, (2001)

¹² Guidelines, Page 13-14.

The Guidelines provide suggestions on how to draft an appropriate complaint procedure and how to conduct an appropriate investigation of a sexual harassment complaint, but are advisory in nature rather than mandatory. The Massachusetts Bar Association issued a Guide to Investigating Sexual Harassment Complaints in November 2002. The same subcommittee that drafted that Guide also assisted in drafting the MCAD's Sexual Harassment Guidelines. The Guide can be accessed at www.massbar.org/publications/section_review/article.php?c_id=3666&vt=2.

Statute of Limitations

On August 7, 2002 Massachusetts General Laws c. 151B §5 was amended extending the time period to file a charge of discrimination or harassment from 6 months to 300 days for claims beginning after November 5, 2002.¹³

The filing requirements are interpreted broadly, and the time period does not run if, pursuant to a contract, an employee follows a company grievance procedure within 300 days of the conduct complained of and files a complaint within 300 days of the outcome of the proceedings. Additionally, the statute of limitations is not a bar if the employee agrees to mediate the dispute under c. 151B and files the complaint within 21 days after the mediation concludes.¹⁴

The Continuing Violation Doctrine

The Guidelines do an excellent job of explaining the validity of claims when the conduct complained of is of a continuing nature. This doctrine recognizes that one incident standing alone may not be enough to create a hostile work environment, but when viewed cumulatively shows a pattern of treatment in violation of the law. If one instance of sexually harassing conduct falls within the limitations period, there is a relation to earlier conduct that falls outside the limitations period and the delay in filing the charge is not unreasonable, a claim for a "serial" violation may exist¹⁵.

Constructive Discharge

Employers often find the doctrine of constructive discharge confusing. An employer frequently concludes that because an employee resigned from the job that the employer has no liability. The Guidelines carefully explain constructive discharge (i.e. a resignation from the job where a reasonable person in that position would feel compelled to resign).

The Guidelines stress that whether a discharge is constructive is a fact specific inquiry, as employees subjected to sexual harassment must first pursue alternatives to quitting if they exist. For example, if the employer has no human resources department or no policy designating how to pursue a complaint, it may be unreasonable to expect the employee to file an internal

¹³ For all claims arising before November 5, 2002, the six month statute of limitations applies.

¹⁴ See 804 CMR §1.01(2)

¹⁵ Guidelines, Page 22.

complaint. On the other hand, the Guidelines make clear that in some situations the reasonable action may be to tell the offending party that the behavior is unwelcome and that it should stop.¹⁶

The Guidelines make clear that employers can avoid many constructive discharge claims by having an internal complaint system that responds to complaints, timely and appropriately.

Retaliation

Retaliation claims are on the rise in Massachusetts. The Guidelines define retaliation: (a) where an employee engages in protected activity, (b) the employer knows about it, (c) takes action adverse to the employee, and (d) there is a relationship between the adverse activity and the protected activity. Protected activity includes, but is not limited to:

- speaking to someone at the MCAD, EEOC or other civil rights or law enforcement agency, or to an attorney about the possibility of filing a claim of discrimination against the employer;
- filing a complaint at the MCAD or EEOC against the employer;
- filing a complaint in court;
- talking to an MCAD or EEOC investigator about another employee's charge of discrimination against the employer;
- testifying as a witness concerning a claim of harassment against the employer;
- complaining to management or filing an internal complaint of harassment;
- asking a supervisor or co-worker to stop engaging in harassing conduct;
- cooperating with an internal investigation of a sexual harassment complaint; or
- meeting with co-workers to discuss how to stop sexual harassment in the workplace.

Interestingly, a claimant need not prevail on her sexual harassment claim to state a bonafide retaliation claim. Claimant only need show that she “reasonably and in good faith believed that the employer was engaged in wrongful discrimination and that she acted reasonably in response to her belief”.¹⁷ This standard becomes tricky for employers where the employer believes the claim is frivolous and the employee is bringing it to protect herself from performance discipline or to garner a financial settlement.

¹⁶ Guidelines, Page 25.

¹⁷ Guidelines, Page 26.

Frivolous Claims

The Guidelines state that the employer has a right to appropriately discipline an employee who makes false or bad faith claims of sexual harassment and the MCAD itself can impose civil or criminal penalties¹⁸. Employers must be wary of disciplining an employee for a seemingly frivolous claim. If the employee “reasonably and in good faith believed the employer was engaged in wrongful discrimination”, but further inquiry shows that to be untrue, an employer would be liable for retaliation if it disciplined the complainant.

Conclusion

The MCAD’s Sexual Harassment Guidelines are the Commission’s description of sexual harassment law in Massachusetts today. Although this commentator believes the Guidelines expand the scope of what is sexual harassment beyond the current common law, employers must recognize that all roads first point to the MCAD when it comes to claims of discrimination. The gorilla sleeps anywhere she wants. Acknowledging that, the Guidelines are a helpful blueprint for proper behavior in the workplace.

¹⁸ M.G.L. c. 151B §8.