Sexual Harassment in the Hospitality Industry

and new federal legislation have made this area of law even more dangerous for employers who are not monitoring their work environment.

allows an employee who prevails in a sexual-harassment case to recover damages. The prospect of increased damages may make sexual-harassment claims more worthwhile for victims and attractive to attorneys. [As explained in the preceding article, plaintiffs formerly could be awarded only restitution and would have to bring a separate tort action to recover damages. Torts and other theories of sexual harassment are beyond the scope of this article.—Ed.]

Titus Aaron is the principal of The Legal Research Company, an Albuquerque legal-research firm. Edward “Eddie” Dry, Ph.D., is director of the travel and tourism program at the Robert O. Anderson School and Graduate School of Management at the University of New Mexico.

With these two developments, wise managers will review policies regarding sexual harassment itself and regarding reports and investigation of sexual-harassment allegations. This article reviews cases involving hospitality companies (chiefly hotels) in cases of sexual harassment alleging a hostile work environment. To review the discussion in the previous article, the landmark case in this area is Meritor Savings Bank FSB v. Vinson, which held that a sexually offensive work environment can give rise to liability under the provisions of Title VII.

Other forms of sexual harassment include: quid pro quo harassment and such torts as intentional infliction of emotional distress, assault and battery, and invasion of privacy; see: Rogers v. Louis L'Enfant Plaza Hotel, 526 F. Supp. 523 (D.D.C. 1981).

Discrimination complaints under Title VII are generally begun by the filing of a complaint alleging discrimination with a state agency or the federal Equal Employment Opportunity Commission (EEOC). These administrative agencies must generally have an opportunity to investigate the allegation before a lawsuit can be filed. Depending on its finding, the EEOC may be the plaintiff in the lawsuit, as in the case of the Hacienda Hotel.

The Hacienda Hotel
A federal circuit court heard the EEOC's case against the Hacienda Hotel. In its holding, the court used a three-point test for establishing a claim of a hostile or offen-
The lack of an all-inclusive definition of sexual harassment is problematic for hoteliers who wish to design policies prohibiting specific conduct. The type of conduct that might constitute sexual advances escapes precise definition. Management often finds out after the fact, when a sexual-harassment claim is filed. The lack of an all-inclusive definition of sexual harassment is problematic for hoteliers who wish to design policies prohibiting specific conduct.

The second requirement can also be a problem when individuals exploit their sexuality to get ahead at work and when others welcome an affair at work. At the same time, some people are deeply offended by such conduct. Nevertheless, if an employee states that a given type of behavior is offensive or clearly rebuffs advances, that should be a clue to management that this behavior is beyond the pale.

Intertwined with the requirement that the conduct be unwelcome is the requirement that it be sufficiently severe or pervasive as to alter the conditions of employment. Once again, absent a clear definition of sexual harassment, it is often difficult for management to determine what conduct is severe enough that the hotelier should prohibit it before it becomes pervasive and alters the conditions of employment.

While many sexual-harassment cases seem to fall into a gray area, others are sufficiently outrageous that any reasonable person would agree that the situation constitutes sexual harassment. Hacienda is one such case. The hotel's chief of engineering "repeatedly engaged in vulgarities, made sexual remarks, and requested sexual favors" from employees in the hotel's housekeeping department. The employees' direct supervisor, a woman, witnessed those incidents but, far from rebuking the engineer, laughed and hurled epithets at her employees. The engineer told one housekeeper that he would have her fired if she did not submit to his sexual advances. The federal court of appeals agreed that the employees were "subjected to severe and pervasive sexual harassment that 'seriously tainted' the working environment and altered the terms and conditions of employment."

Superior's position. Supervisors must take into account the differences in the way their conduct will be perceived by virtue of their organizational position. A supervisor who is perceived as not taking an employee's complaint seriously may increase the probability of a formal complaint, especially when the employee firmly believes the conduct in question constitutes sexual harassment. A hotelier is generally held liable for sexual harassment when the harassing employee possesses decision-making authority over the individual making the claim. Moreover, the hotel will be generally liable for the actions of non-management employees when managers have knowledge of complaints of sexual harassment by subordinates. In the Hacienda case, the court recognized that the "prevailing trend" in case law addressing a hotelier's liability for sexual harassment arising from a hostile work environment "seems to hold that employers are liable

---

94 THE CORNELL H.R.A. QUARTERLY
for failing to remedy or prevent a hostile or offensive work environment of which management-level employees knew, or in the exercise of reasonable care, could have known. 7 Both the general manager and the executive housekeeper at the Hacienda (who had authority to hire, fire, and discipline employees) had actual knowledge of the sexual harassment, and the hotel’s management should have taken prompt remedial action, but failed to do so.

The Need for Policy
The lack of a policy specifically prohibiting sexual harassment has been considered unfavorably by the courts. 8 At the same time, having a policy prohibiting sexual harassment does not necessarily insulate a hotelier from liability. In the Hacienda case (like Vinson), the company’s policy was that the initial report should be made to a supervisor, who, in the Hacienda case, was at the very least condoning the sexual harassment. Therefore, all sexual-harassment policies should provide alternative methods of reporting incidents, so that the report may be made to someone other than the employee’s immediate superior.

Clearly, a hotelier should have a policy prohibiting sexual harassment, but any such policy must go on to identify precisely what type of conduct is prohibited. Since there is no uniform definition of sexual harassment, a vague policy may be construed by a court as covering conduct far beyond that prohibited by Title VII. 9 Moreover, a vaguely worded policy fails to place would-be harassers on notice of precisely what conduct is prohibited.

Your sexual harassment policy should require employees to report incidents within a specified time period, for three reasons. First, a time limit allows the hotelier to put the alleged harasser on notice that the precise conduct in question is not welcomed by the complainant. That step will reduce the incidence of what might be called “unwitting harassment,” when an employee engages in conduct that he or she does not find offensive but which offends another employee. Second, the time limit puts the hotel’s management on notice regarding what type of conduct a particular employee considers to be harassment, thereby giving management the opportunity to prevent the conduct from continuing long enough to give rise to a civil liability (i.e., a tort). Third and most important, such a policy will enable the hotelier to retain valued employees whose productivity may otherwise decrease or who may resign if the conduct persists. 8

The importance of investigation. A hotelier’s failure to conduct an appropriate investigation into allegations of sexual harassment has also been considered unfavorably by the courts. 8 In Rauh v. Coyne, for instance, the court held the Madison Hotel responsible for the actions of its director of operations. In its decision, the court noted:

There is no indication that other employees whom [the harasser] supervised were contacted; no attempt was made to ascertain whether similar incidents had occurred with other women; and the Madison Hotel did not promulgate a written policy on sexual harassment until after the [current] lawsuit was filed. 10

In examining cases of sexual harassment, David Terpstra and Douglas Baker found that the outcome of charges was related to the presence or absence of witnesses and to whether notice was given to management. 11 When a manager approaches an employee accused of sexual harassment, it is better to discuss specific actions (e.g., words spoken, exact behavior), rather than mentioning the term “sexual harassment.” Such a label can incur angry responses and invite charges of defamation.

The duty to investigate is not only legally required, but it makes good managerial sense. Considering the cost of litigation and the potential for adverse publicity, it is wise to conduct thorough investigations of all allegations of sexual harassment and, in the case of finding that harassment occurred, taking steps to make the employee whole. 12 The costs of permitting sexual harassment go beyond attorneys’ fees and potential legal judgments. The costs in terms of the loss of productivity, sick leave, and turnover are real and substantial. While many hoteliers might continue to deny the existence of sexual harassment, it has been demonstrated that the hospitality industry has a relatively high incidence of harassment compared to other businesses. 13 Consequently, it is clear that hotel managers who do not deal with sexual harassment will most likely face the considerable costs of a harassment suit. CQ