

Sexual harassment is a pervasive social problem affecting institutions of higher education.

# Sexual Harassment in Higher Education: Institutional Liability

by Arlene Metha

Sexual harassment on college and university campuses is a severe and complex problem. It not only threatens the traditional bonds and relationships between faculty and students and between academic colleagues, it becomes a barrier to individual achievement and institutional productivity. University officials have estimated that as many as 125,000 women experience some type of sexual harassment by instructors each year (Engelmayer, 1983). Dzeich (1983) argues in her book, *The Lecherous Professor*, that the credibility of higher education is damaged by sexual harassment and will be more threatened if sexual harassment isn't curbed.

A heightened awareness of the magnitude and invidiousness of sexual harassment has led to a multiplication of the number of complaints of sexual harassment being filed with academic institutions, with agencies (e.g. Equal Employment Opportunity Commission), and with the courts. Although adjudicating sexual harassment cases is tricky and only a small percentage of the grievances result in any disciplinary action, as a recent article in the *Wall Street Journal* noted, some institutions are cracking down:

Harvard University recently reprimanded its third professor in four years for sexual harassment. San Jose State University fired a professor after five female students accused him of making unwanted sexual advances. And at the University of Michigan, where harassment complaints against professors are up five-fold since 1980, three professors have resigned under duress following harassment grievances. Hillsborough Community College in Florida dumped its presi-

dent after a state ethics commission found that he propositioned women colleagues (Engelmayer, 1983, p. 22).

This article provides a brief discussion of the legal basis for claims of sexual harassment, the extent of the problem in academe, and the institution's responsibility in recognizing and handling complaints of sexual harassment.

## Legal Basis

Both the Equal Employment Opportunity Commission (EEOC) and the courts have recognized sexual harassment as a form of unlawful sex discrimination under Title VII of The Civil Rights Act of 1964. The 1980 EEOC's Guidelines on Discrimination Because of Sex (29 CFR§1604.11) specify that sexual harassment is a violation of Section 703 of Title VII. These guidelines state that unwelcome sexual advances, requests for sexual favors, and other verbal or physical conduct of a sexual nature will be considered sexual harassment when: (1) submission to such conduct is made either explicitly or implicitly a term or condition of employment, (2) submission to or rejection of such conduct is used as the basis for employment decisions affecting the individual, or (3) such conduct has the purpose or effect of substantially interfering with the individual's work performance or creates an intimidating, hostile, or offensive working environment. [29 CFR§1604.11(a) (1980)].

Sexual harassment also has been judged to be a violation of Title IX of the Education Amendments of 1972, which provides that: "no person in the United States shall, on the basis of sex, be excluded from participation in, be denied the benefits of, or be subjected to discrimination under any education program or activity receiving federal financial assistance." If faculty or staff members of educational institutions that receive federal assistance impose or attempt to impose themselves sexually upon students and condition their academic success upon submission to sexual demands, the incident more than likely constitutes discrimination on the basis of sex under Title IX. The rationale for including sexual harassment within the prohibitions of Title IX is that in instances of sexual harassment a student of one gender is required to meet a different condition from that required of a student of another gender to receive the same educational benefit. Thus, discrimination on the basis of sex has taken place (Buek, 1978). Additionally, with the 1982 U.S. Supreme Court decision in *North Haven Board of Education v Bell*, 102 S. Ct. 1922, which extended Title IX coverage to employees, sexual harassment of employees also is prohibited by Title IX. However, since prior to the *North Haven* decision sexual harassment of an employee by an employee in institutions of higher education was not covered by Title IX unless it could be shown to have a discriminating impact on students, few complaints of sexual harassment were filed under Title IX. Title IX does require schools and colleges to provide internal grievance procedures for sexual harassment victims. In the provision of such grievance procedures academic institutions can use the Title IX procedures already in place or, due to the sensitive nature of sexual harassment, may choose to provide special procedures.

Recognizing the seriousness and importance of the problem of sexual harassment, during the past few years several institutions of higher education have initiated studies to examine the extent of sexual harassment on their campuses. They are often surprised by their findings.

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For example, a survey of sexual harassment at the University of Florida (Oshinsky, 1980) found that 20 percent of the graduate women and 17 percent of the undergraduate women experienced some form of "unwanted sexual attention from their instructor(s)." Perhaps even more significant than the actual numbers of students reporting harassment was that 70 percent of the female respondents did not feel free to report incidents of sexual harassment to university officials for fear of reprisal.

Metha and Nigg (1980) surveyed Arizona State University and found that the incidence of sexual harassment among female students was 13.3 percent; among female staff, 11.2 percent; and among female faculty, 13.7 percent. The 13 percent of the female student body reporting sexual harassment represented more than 2,300 women. The same report indicated that only 20 percent of the harassed women attempted to lodge a complaint about the incident and less than half of these were satisfied with manner in which their complaints had been handled.

A 1980 *Time* magazine article cited cases at Yale, San Jose State, Berkeley and Harvard and concluded that harassment of female students by male professors was not an uncommon occurrence. The same article, entitled "Fighting Lechery on Campus," reported that 10 percent of the American women with degrees in psychology indicated that they had sexual contact with their professors. This figure rose to 25 percent for women who had earned their degrees within the past two years.

The National Advisory Council on Women's Education Programs, established by Congress to advise and report on matters of sex equity in education, also surveyed several institutions of higher education concerning sexual harassment (Till, 1980). Its findings revealed that institutions typically have handled complaints of sexual harassment through inadequate or inappropriately designed mechanisms. The responses of sexual harassment victims depicted the harasser as a person with a history of similar incidents and with considerable stature, influence, and power on the campus.

At the University of California, Benson and Thomson (1982) surveyed senior women undergraduates to determine the nature and effects of sexual harassment by male instructors at Berkeley. Approximately 20 percent of the women sampled had been sexually harassed by male instructors. Of the harassed students, about one third had experienced verbal advances; 20 percent, physical advances; and 6 percent sexual bribery. Perhaps more important, one in three of the women respondents personally knew another woman student who had been sexually harassed by a male instructor.

A study of sexual harassment of students at Iowa State University (Committee on Women, 1982) found only a small percentage of students reporting sexually harassing experiences such as physical advances, explicit propositions, or sexual bribery. However, 13 percent of the female respondents avoided taking a class from or working with a faculty member whom they knew or had heard made sexual advances to students.

The *Chronicle of Higher Education* (McCain, 1983) recently reported the findings of a survey commissioned by the faculty of Arts and Sciences at Harvard University. According to the study, 32 percent of the tenured female professors, 49 percent of those without tenure, 41 percent of the female graduate students, and 34 percent of the undergraduate women had encountered some form of harassment from someone in authority at least once while at

Harvard. Of those reporting harassment, 15 percent of the graduate students and 12 percent of the undergraduates indicated they had changed their academic programs because of the incidents.

Whitmore (1983) surveyed students, faculty, and staff at the University of California at Davis and found that one in seven women respondents (13.5 percent) had been sexually harassed and one in 100 men respondents (1.1 percent) had been sexually harassed. Among women respondents, 21.4 percent of the staff, 20 percent of the faculty, 16.5 percent of the graduate/professional students, and 7.3 percent of the undergraduates had been sexually harassed during their tenure at UC Davis.

These and other studies illuminate the seriousness of the problem of sexual harassment on college and university campuses. The legal responsibility of the institution in addressing this problem is discussed in the following section.

### **Institutional Liability**

The doctrine of **respondent superior** says that the principal is responsible for the negligent acts of his agents. The extent to which this doctrine can be adapted to impute the sexually harassing actions of employees to employers has been a subject of some dispute. However, since neither Title VII, the EEOC, or state law differentiate between private and public employers, to the extent that courts have said employer liability exists, institutions of higher education are liable in the same manner as private employers. A review of the more important cases in the private section then, should provide some indication of the liability of institutions of higher education.

EEOC Guidelines on Discrimination Because of Sex (29 CFR§1604.11) addresses the question of employer liability. They state that employers are responsible for not only their acts but also those of their supervisory employees or agents, regardless of whether the specific acts of sexual harassment complained of were authorized or even forbidden by the employer and regardless of whether the employer knew or should have known of the acts. However, employers may rebut liability for acts of sexual harassment committed by employees by demonstrating that they took "immediate and appropriate corrective action." [29 CFR§1604.11(d) (1980)]. In addition, the Final Amendment to the Guidelines on Discrimination Because of Sex [29 CFR§1604.11(e) (1980)] refers to the possible liability of employers for acts of non-employees toward employees. Such liability will be determined on a case-by-case basis, considering all the facts, including whether the employer knew or should have known of the conduct, the extent of the employer's control and other legal responsibility with respect to such individuals.

Several recent cases have provided clarification as to the interpretation and application of these guidelines and Title VII requirements.

In **Continental Can Company, Inc. v State of Minnesota**, 297 N.W. 2d 241 (Minn. 1980) the Minnesota Supreme Court found Continental Can liable because it took **no** action in an instance where the victim of sexual harassment notified her superior of offensive acts but refused to identify her harassers. The court reasoned that if employers have reason to believe that sexual demands are being made on employees and fail to investigate they are giving tacit support to the discrimination in that the absence of sanctions encourages abusive behavior (Nolan, 1982).

In **Bundy v Jackson**, 741 F.2d 934 (D.C. Cir. 1981) the

U.S. Court of Appeals for the District of Columbia addressed not only the question of what constitutes sexual harassment under Title VII, but also the question of employer liability. The court held that sexual harassment, in and of itself, is a violation of the law and is not conditional upon the complaining employee losing any tangible job benefits or being penalized as a result of the discrimination. Prior to this decision it was unclear as to whether objectionable acts, derogatory remarks, and verbal or physical advances are sexual harassment *per se*, or whether it is the adverse employment consequences which make these actions sexual harassment. As to employer liability, the **Bundy** court reiterated the liability of the employer for sexual harassment committed by supervisory personnel when the employer had full notice of the harassment committed by supervisors and did virtually nothing to stop or even investigate the practice.

In higher education, the lead case using Title VII as the legal basis for a sexual harassment complaint is **Stanko v. Trustees of Clark University, et al.** (Worcester Superior Court, No. 82-22184). The case began when Bunster, a Chilean exile and anthropologist who came to this country under the sponsorship of Margaret Mead, in June of 1980 filed a complaint with Clark University claiming she had been subjected to sexual harassment, and retaliation for refusal of sexual favors by her department chair, Sidney Peck. Prior to the filing of the complaint, Bunster had repeatedly complained to university officials who failed to investigate her complaint. A storm of controversy erupted after the filing, with Peck's supporters, and Peck, claiming that the sexual harassment issue was a ruse being used by the university to punish him for his leftist political activities and his labor activities (Peck had been an anti-Vietnam protester and had led the faculty negotiation of salaries the year before which had cost the university \$1 million).

In the fall of 1980 the university's committee on personnel (COP) heard testimony from four other women, including Stanko, another member of the sociology department, all of whom testified to having experienced or witnessed sexually harassing actions by Peck. Testimony was given with the assurance from the university that their names would not be revealed. The committee subsequently concluded that there was "substantial evidence" to support charges against Peck and recommended that the university president draw up charges against Peck. In December the university issued charges against Peck for sexual harassment, moral turpitude, and conduct unfit for a university professor.

What followed was a series of charges and countercharges. In January 1981, Peck filed a complaint with the National Labor Relations Board (NLRB) in which he alleged that the university's investigation of him resulted from his participation in labor activities. Concurrent with or subsequent to the filing of the NLRB complaint, Peck drafted but did not file a multimillion dollar suit naming as defendants Clark University, Bunster and Stanko, as well as the three other women who testified to the COP.

During this same period Stanko and Bunster complained to the university about "the inadequacy of the university's process for the handling of sexual harassment complaints as well as the negative impact on women who bring such complaints and the chilling effect upon other potential complainants." In November, Stanko and Bunster filed discrimination charges against Clark University with the EEOC protesting sexual harassment and sex dis-

crimination, and retaliation against them for making complaints. By March when the university still had not acted, Stanko and Bunster refused to participate in any hearings of Peck, objecting to the procedures being either unclear or unfair and claiming that the institution was still not fully addressing the issue of sexual harassment and sex discrimination.

The next day, Clark University, with the knowledge of Peck's NLRB complaint and threatened civil action, entered into an agreement with Peck. In this agreement the university agreed to drop all charges against Peck, Peck agreed he would not chair any department at Clark, and both parties mutually released one another from liability. The day after having reached an agreement with the university Peck filed a defamation suit for \$23.7 million against Bunster, Stanko, and the other three witnesses (**Sidney M. Peck v. Ximena Bunster, et al.**, Middlesex Superior Court, No. 81-1423). Shortly thereafter Bunster and Stanko brought suit against Peck and Clark University (**Stanko v. Trustees of Clark University, et al.**, Worcester Superior Court, No. 82-22184).

The case was finally resolved when, in April 1982, Bunster, Stanko and Peck entered into a settlement which compromised the disputed claims and counterclaims. The parties affirmed that "employees and students should have the right under Massachusetts and federal law to engage in concerted action to improve their condition of work, including the elimination of sexual harassment and/or other discrimination, and that this right includes and should include the right to talk with other employees and students, to discuss conditions of their work or study, and to request that these conditions be changed." The parties to the settlement agreement also concurred that "the failure of the Clark University administration to implement and utilize a coherent, fair and prompt grievance procedure in order to resolve the complaints and denials of sexual harassment in this case was detrimental to all parties and resulted in an unnecessary escalation of the conflicts among them."

The implications to be drawn from this case are very important in that the events at Clark University provide a disturbing picture of what can result if institutions of higher education truncate their legal procedures and provide legal protection for some parties and not for others (Field, 1981). Clark University was eventually named by both parties in ensuing complaints. Since this case was never litigated, we are left without a specific answer to what institutional liability will be found in such instances. However, since the failure of Clark to not only provide grievance procedures but to fairly and promptly address complaints was apparently so blatant that the aggrieved parties took care to so attest in their settlement agreement, it would seem to illustrate the necessity for institutions to adopt adequate grievance procedures to protect themselves from such allegations and any attendant liability.

Employer liability under Title IX allegations of sexual harassment is less clear. It could be argued that the recipient institution would be liable for discrimination in the program regardless of whether or not it was itself the perpetrator. However, because of the personal nature of sexual harassment as a discriminatory act, a stronger position might be that for such a violation to constitute discrimination, it must be based upon actual knowledge by the institution as evidenced by a policy, lack of policy or failure to act upon the complaint (Buek, 1978).

The only suit thus far to challenge sexual harassment of students under Title IX is **Alexander v. Yale University**, 459 F. Supp. 1(D. Conn. 1977). Six plaintiffs suing individually as well as a class, claimed a violation of Title IX by Yale University because of alleged incidents of sexual harassment against female students by male faculty and staff of the institution. The plaintiffs (five present and former female students and one male professor) charged Yale with condoning continued sexual harassment, and argued that the institution's "failure to combat sexual harassment of female students and its refusal to institute mechanisms and procedures to address complaints and make investigations of such harassment interferes with the educational process and denies equal opportunity in education" (459 F. Supp. 2).

The district court refused to accept the class action suit and dismissed five of the original six plaintiffs for various reasons. However, it did rule that one of the plaintiffs, a female student who allegedly received a poor grade in her major field due to her rejection of a male professor's sexual demands, was entitled to bring private action under Title IX. The plaintiff further alleged that she had complained promptly to the university but was not accorded a mechanism to deal with her charge of sexual harassment. The court addressed the question of institutional liability by stating that an institution which fails to respond to complaints "may sensibly be held responsible for condoning or ratifying the employee's invidiously discriminatory conduct" (459 F. Supp. 4). However, at trial the district court found in favor of Yale University, ruling that the plaintiff was not adversely affected by a lack of a grievance mechanism to deal with sexual harassment and that the original claim of sexual harassment could not be substantiated. On appeal to the Second Circuit, the decision of the lower court was upheld. The appeals court also noted that Yale University had instituted a grievance mechanism and procedures to address complaints since the original complaint was filed. The court also found some of the complaints moot in that the complainants had already graduated from Yale (**Alexander v. Yale University**, 631 F.2d 178, 2d Cir. 1980).

### Conclusions

Sexual harassment is a pervasive social problem affecting institutions of higher education. Although the several studies of sexual harassment in academe are not agreed as to the exact extent of the problem, they do agree that it is widespread and that it seriously affects the climate of learning.

The past few years have witnessed a growing number of cases being litigated in the private sector under Title VII. As a result of this litigation a new body of law has

evolved that has served to further clarify what constitutes sexual harassment and the institution's liability for the acts of its employees. This case law suggests an increasing institutional responsibility. However, not only are employees of institutions of higher learning covered by Title VII, but more recently, by Title IX. It is anticipated that with the extension of Title IX coverage to employees, more sexual harassment complaints will be filed under Title IX. As they are litigated the issues surrounding institutional responsibilities and liabilities will hopefully be resolved.

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