

***SEX, DRUGS &
ROCK 'N ROLL***

***When An Employee's Personal
Behavior Is An Employer's
Business***

Presented To The TABCC North Texas Chapter

By

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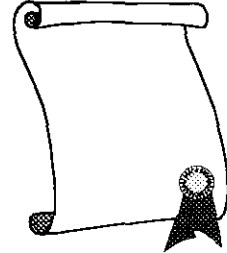
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THE FINE PRINT

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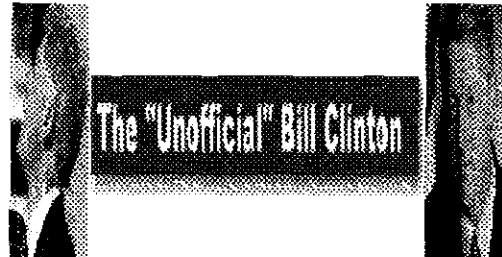
**SEXUAL
HARRASSMENT**

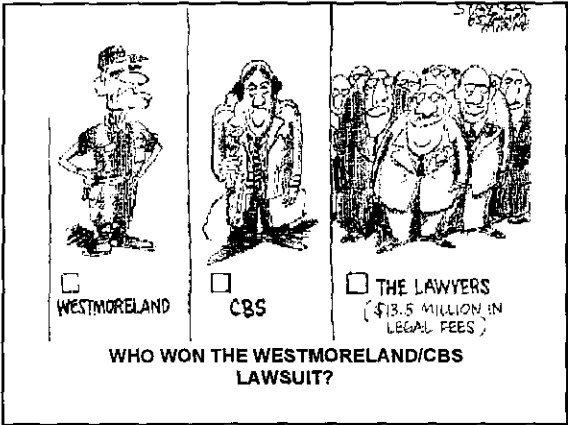
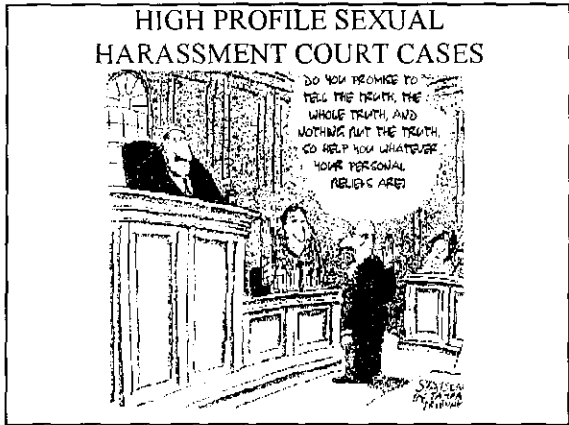
***SEXUAL HARRASSMENT
INCREASINGLY
RISKY FOR BUSINESS***

**DO YOU KNOW THIS
PERSON?**

- HIGHLY VISABLE LEADER
- HEAD OF HUGE CHARITABLE ORGANIZATION
- OCCUPIES POSITION OF SPECIAL TRUST
- ACCUSED OF IMPROPER SEXUAL RELATIONSHIP

ANSWER:





SEXUAL HARASSMENT IS AGAINST THE LAW

TITLE VII - SEX DISCRIMINATION

- PROHIBITS SEX DISCRIMINATION IN EMPLOYMENT
- PROHIBITS SEXUAL HARASSMENT

WHAT IS SEXUAL HARASSMENT?

SEXUAL HARASSMENT IS:

The Legal Perspective

- An Exercise in Power
- Over Another Person

**SEXUAL HARASSMENT IS:
The Legal Perspective**

- Unwelcome Sexual Advances,
- Requests for Sexual Favors, Or
- Other Verbal or Physical Conduct of a Sexual Nature

**CONSTITUTES ILLEGAL
SEXUAL HARASSMENT IF
EITHER:**

- Submission Made Term or Condition of Employment
- Employment Decisions Use Submission or Rejection As Basis for Employment Decisions
- Purpose Or Effect Is to Unreasonably Interfere With Work Performance or Create an Intimidating, Hostile, or Offensive Work Environment

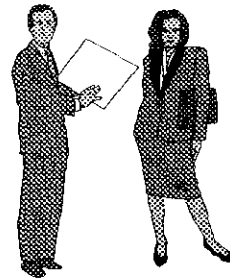
**SEXUAL HARASSMENT:
A WORKING DEFINITION**

**SIX LEVELS OF SEXUAL
HARASSMENT**

**AESTHETIC
APPRECIATION**



**ACTIVE MENTAL
GROPING**



SOCIAL TOUCHING



FOREPLAY HARASSMENT



"Oh my God, Bernie! You're wearing my nylon?"

SEXUAL ABUSE



"First of all, Mr. Hawkins, let's put the gun down...I would guess it's an itchy trigger finger, but I want to take a closer look."

WELCOMENESS IS A DEFENSE ...

- If proven, and
- If jury shares same perspective of welcomeness as the employer

JUDGING WELCOMENESS



JUDGING WELCOMENESS



REMEDIES FOR SEXUAL HARASSMENT

- Reinstatement
- Backpay
- Compensatory Damages
- Punitive Damages
- Attorney's Fees and Costs

Sexual Harassment Victims Often Bring State Tort Causes of Action Against Infliction of Emotional Distress, Assault, Battery, and/or False Imprisonment

CRIMINAL LIABILITY



- Rape
- Assault
- Battery

OTHER LEGAL ISSUES

•Employer Responsible For Actions of Its Employees (Including All Levels of Supervision) and Customers in Workplace Unless It Shows It Took Immediate and Appropriate Corrective Action.

OTHER LEGAL ISSUES

•Where Employment Opportunities Are Granted Because an Employee Submits to Requests for Sexual Favors, the Employer May Be Liable for Unlawful Sex Discrimination Against Other Persons Who Were Qualified for, but Denied, That Employment Opportunity or Benefit

OTHER LEGAL ISSUES

EMPLOYER LIABILITY RELATING TO ACTIONS OF/INVOLVING CONTRACT LABOR, LEASED EMPLOYEES & CUSTOMERS



**SEXUAL
HARASSMENT
VIOLATES COMPANY
POLICY**

**SEXUAL HARASSMENT
ADMINISTRATIVE
COMPLAINT**

Equal Employment Opportunity
Texas Commission on Human Rights

**WHAT EMPLOYERS
MUST DO**

- Define Sexual Harassment
- Establish a Complaint Procedure
- Set a Time Frame for Response
- Establish Disciplinary Actions
- Ensure Confidentiality
- Protect Against Retaliation

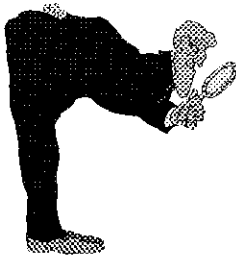
**WHEN A COMPLAINT IS
RECEIVED**



- Investigate
- Take
Appropriate
Action

**INVESTIGATING SEXUAL
HARASSMENT COMPLAINTS**

Step 1:



- Act
Immediately
and
Appropriately

**INVESTIGATING SEXUAL
HARASSMENT COMPLAINTS**

Step 2: Get The Facts.



**Ask The
Complaining
Person**

- Who Harassed You?
- What Did He/She Do?
- What Did He/She Say?
- When Did This Happen?
- Where Were Any Witnesses?
- Has This Happened Before?
- Has This Happened to Others?

INVESTIGATING SEXUAL HARASSMENT COMPLAINTS

Step 2: Get the Facts (Cont.)

- Listen to What the Person Is Telling You
- Avoid Being Judgmental
- Remain Objective
- Be Noncommittal

Remember, You Have Heard Only One Side of the Story.

INVESTIGATING SEXUAL HARASSMENT COMPLAINTS

- Step 3: Agree on Your Next Step- You May Learn That Individual:

- Wants Nothing Done, but Needed to Talk to Someone

- Wants to Have His or Her Complaint Investigated and Resolved

- Already Filed a Formal Charge With a Government Agency

INVESTIGATING SEXUAL HARASSMENT COMPLAINTS

- Step 4: Investigate Objectivity

- Step 5: Determine a Course of Action

SUGGESTIONS TO ENHANCE DEFENSE

- Review and, If Necessary, Redraft Policies
 - Handbook
 - Application
 - EEO Policy

SUGGESTIONS TO ENHANCE DEFENSE

- Document
 - Counseling
 - Discipline
 - Evaluation
 - Objectives

Note: But Be Careful on Wording Used; Consult with Human Resources

SUGGESTIONS TO ENHANCE DEFENSE

- Handle Complaints Properly
 - Take Seriously
 - Investigate
 - Take Action (Call Human Resources)
- Get Help on Personnel Decisions

SUGGESTIONS TO ENHANCE DEFENSE

- Review of Terminations
 - Designate Fair-Minded Person to Monitor
 - Investigate and Review
 - Be Careful About Termination Reports
 - Conduct Exit Interviews
 - Don't Waste Unemployment Compensation Hearings

THREE MORE POINTS ON DISCIPLINE

- Document
 - Document
 - Document!

SEXUAL HARASSMENT SYMPTOMS

A REAL WORLD PERSPECTIVE:
FOR PREVENTION

WARNING SIGNS



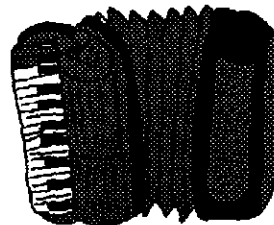
LEATHER PANTS

WARNING SIGNS



CASSEROLES

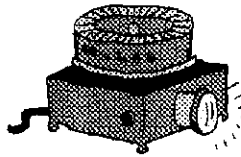
WARNING SIGNS



ACCORDIONS

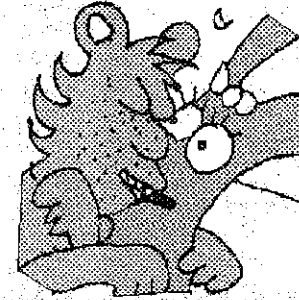
WARNING SIGNS

Invites You
Over To
Examine



VACATION
SLIDE SHOWS

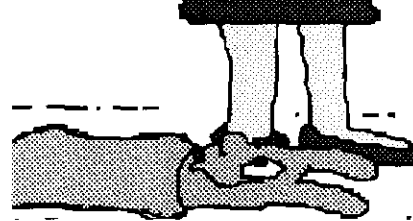
FIRST FRENCH KISS



PLAYING DOCTOR



PRIVACY & DIGNITY ISSUES MATTER



First peer up Teacher's dress while
lying on floor during naptime at nursery
school.

POP QUIZ ON SEXUAL HARASSMENT

**An Employee Is Subjected to
Verbal Abuse of a Sexual
Nature From a Co-Worker.
The Employee Admits She
Was Never Touched in an
Offensive Way.**

Several Employees Have Pictures of Females in Lingerie on the Inside Door of Employee Lockers.

Employer Requires Female Employee to Wear a Very Short Skirt As Part of a Uniform. Can a Dress Code Constitute Sexual Harassment?

Would The Result Differ If The Employee Is A Man Wearing Leather Pants

Two Managers Are Having What Is Clearly a Consensual Romantic Relationship. Any Problems?

What If One of the Employees Supervises the Other and a Third Employee Complains That There Is Preferential Treatment?

Can an Employer Be Held Liable for Making an Honest Mistake (Coming to the Wrong Conclusion) on a Sex Harassment Investigation?

An Employee Complains to the Employer That a Co-Worker Has Sexually Harassed Her. The Employer Tells Her That It Will Investigate the Charge. The Employer Conducts an Investigation During the Following Days and Discovers That the Employee Was Sexually Harassed. The Employer Promptly Reprimands or Disciplines the Harasser.

A Receptionist Is Told “Just Ignore” Suggestive Remarks Made by the Company’s Largest Vendor Because “He’s Harmless.”

The Guys Were Just Joking - She Misunderstood. Is That Harassment?

What Remedy Does a Discharged Employee Have If He Believes That He Was Wrongfully Punished Because He Did Not in Fact Commit Sexual Harassment?

An Employee Believes That She Has Been Sexually Harassed by a Co-Worker. You Believe That the Co-Worker Did Not Intend to Harass the Employee. Can Sexual Harassment Occur Without Intent?

It is harmless to verbally “give someone a hard time” on the job as long as you are only joking.

**Kidding around and horseplay
as harassment ...**

**Kidding around and horseplay
as harassment ...**

**Consider what grandma would
say ...**

She is likely to be on the jury

**Since they can't exercise power
over another, non-supervisory
employees cannot be guilty of
sexual harassment.**

**If a non-supervisory employee
engages in activity that
another employee finds
offensive, it is sexual
harassment only if the
intention is to make a sexual
overture.**

**There is little that supervisors
can do to prevent sexual
harassment in the workplace.**

**Take corrective action where
known or observed**

**Waiting to investigate a
complaint of sexual harassment is
a good policy because it:**

**1) allows the complainant to
calm down; and**

**2) allows the accused party to
voluntarily correct his or her
behavior.**

If an investigation yields evidence of harassment; immediate action should be taken to correct the situation.

If an organization has a written policy against harassment, it cannot be held liable for the actions of its employees?

Can an affair between a manager and a subordinate that is entirely welcome subject the employer to liability?

Can an organization be held responsible for sexual harassment by one of its supervisors if the complaining employee never told a management official of the conduct?

Are sexual advances made outside of the office considered in determining whether harassment has occurred?

**PERSONNEL POLICY/PROCEDURE
SUBJECT: POLICY
AGAINST UNLAWFUL
HARASSMENT**

COMPANY POLICY SHOULD

- **Prohibit unlawful harassment of job applicants, employees, and customers based on:**
 - Race
 - Color
 - Sex
 - Religion
 - National origin
 - Age
 - Citizenship status, or
 - Disability

COMPANY POLICY SHOULD

- **Specify Violation of Policy will result in disciplinary action, up to and including termination of employment**

COMPANY POLICY SHOULD

- **Define Harassment To Include:**
 - Slurs
 - Jokes
 - Other verbal, graphic, or physical conduct

COMPANY POLICY SHOULD

- **Expressly Prohibit unwelcome verbal or physical conduct of a sexual nature when submission to the conduct is explicit or implicit term or condition of employment or is used as a basis for making employment decisions**

COMPANY POLICY SHOULD

- **Prohibit unwelcome verbal or physical conduct non-sexual conduct that denigrates or shows hostility based on gender if purpose or effect of substantially interfering with an individual's work performance, or creating an intimidating, hostile, or offensive work environment**

COMPANY POLICY SHOULD
PROVIDE RELEVANT
EXAMPLES

COMPANY POLICY SHOULD
ESTABLISH WELL DEFINED
COMPLAINT PROCEDURE
WITH CENTRALIZED
REPORTING

COMPANY POLICY SHOULD
PROHIBIT RETALIATION

COMPANY MUST ENFORCE
COMPANY SEXUAL
HARASSMENT POLICY

**YOUR EMPLOYEE'S
PRIVATE LIFE BECOMES
YOUR BUSINESS MANY
OTHER WAYS BESIDES
SEXUAL HARASSMENT**

OTHER EXAMPLES

Workplace Theft, Fraud, Etc.

Drug, Alcohol, and Other Safety Issues

Background Checks

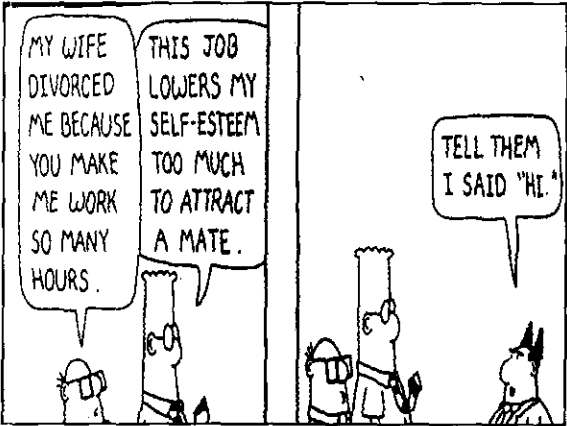
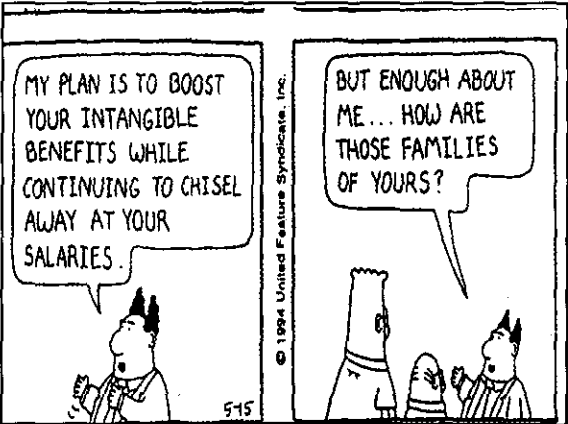
Employment Discrimination Laws

Drug & Alcohol Policies

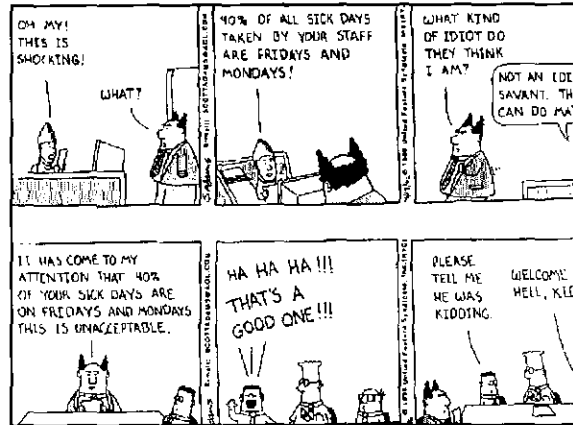
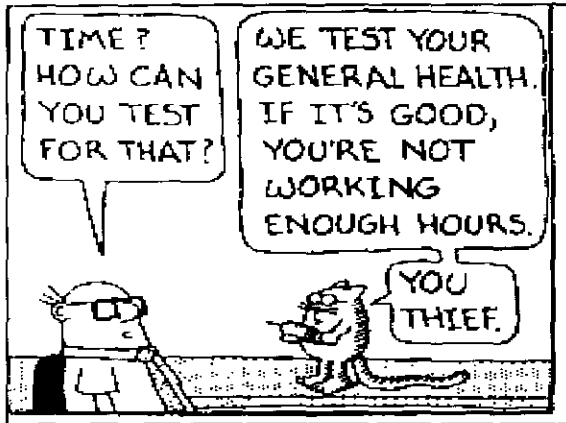
**EMPLOYEE BACKGROUND
CHECKS**

PRIVATE VS. WORK LIFE
THE THEORY VS. REALITY

**THE "FAMILY-FRIENDLY"
EMPLOYER**
Sensitivity to Private Needs As
Employee Benefit



**H.R. POLICY
ENFORCEMENT**
Investigation of Private Arena To
Enforce Employment or
Employee Benefit Plan Rules



GOVERNMENTAL MANDATES

- Marriage
 - Joint & Survivor Annuity & Other Beneficiary Issues
 - Dependent Benefit Enrollment
 - 125 Plan Family Status Changes
 - Initial Notice of HIPAA & COBRA
 - Family Leave

GOVERNMENTAL MANDATES

- Children
 - Family Leave
 - Dependent Benefit Eligibility
 - Child & Dependent Care Issues
 - Child Support Orders and QMCSOs
 - Change In Family Status
 - COBRA & HIPAA

GOVERNMENTAL MANDATES

- Divorce
 - Performance
 - Workplace Violence
 - COBRA
 - QDROs
 - EAP
 - Performance
 - Lost Time
 - Childcare Changes

GOVERNMENTAL MANDATES

- Child Custody & Child Support
 - QMCSOs
 - New Hire Data Bank Report
 - Dependent Care Expense Reimbursement

GOVERNMENTAL MANDATES

- **Criminal Behavior**
Employment in Particular Position Legally Prohibited

- Employment "Imprudent"

- Employment Risk For Sentencing Guidelines or Other Legal Risks

PRUDENT PLAN ADMINISTRATION

- Enrollment Eligibility

- Change In Family Status

- Benefit Eligibility

- Plan Design Mandates

- Coordination of Benefits

USE & PROTECTION OF INFORMATION CRITICAL

Information Leaks and Misuse Risks

EMPLOYEE'S ANTICIPATE ABUSE



CONFIDENTIALITY REQUIREMENTS

- **Medical/Health Info.**
HIPAA
ADA
Drug Treatment
State Laws and Ethical Rules
Contractual

HIPAA PROHIBITION

- **Federal Crime for Any Person To Knowingly**
- Use or Cause to Be Used a Unique Health Identifier

- **Obtain Individually Identifiable Health Information Relating to an Individual**

- **Disclose Individually Identifiable Health Information to Another Person**

HIPAA CRIMINAL SANCTIONS

- Generally:
 - Fine of \leq \$50,000, and/Or
 - Imprisonment of \leq 1 Year
- False Pretenses, Fine \leq \$100,000, \leq 5 Years Imprisonment, or Both
- Commercial Advantage, Person Gain, or Malicious Harm, Fine \leq \$250,000, \leq 10 Years, or Both.

ADA CONFIDENTIALITY

- Medical Records Confidential
- Disclose Only Where Permitted Exceptions
- Keep In Separate Files

OTHER CONFIDENTIALITY REQUIREMENTS

- ERISA
- Tax Code
- Social Security Act
- Drug Treatment Records
- State Law

OTHER LIABILITY THEORIES

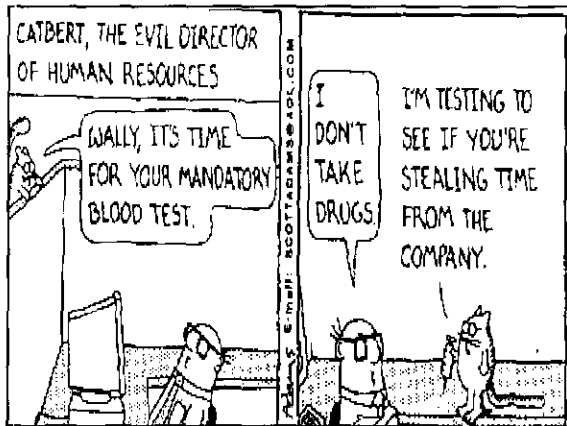
- Invasion of Privacy
 - Intrusion On Seclusion Of Private Affairs,
 - Disclosure of Embarrassing Private Facts
 - Appropriation of Name/Likeness
 - Place In False Light (Not Recognized In Texas)

OTHER LIABILITY THEORIES

- Defamation
- Intentional Infliction of Emotional Distress
- Breach of Contract
- Proof of Other Discrimination or Other Bad Acts

PROTECT CONFIDENTIAL INFORMATION AGAINST

- Misuse
- Wrongful Disclosure



PRACTICAL POINTERS - COLLECTION

- Collect Only What's Legal & Via Legal Means
- Collect Only What You Need
- Collect Through Established Protocols
- Least Obtrusive Manner
- Avoid Overpromising Confidentiality

PRACTICAL POINTERS - COLLECTION

- Protect What You Collect - Restrict Access
- Policy & Practical Safeguards To Prevent & Monitor Misuse
- Credential & Monitor Persons With Access
- Contractual Protections From Vendors

PRACTICAL POINTERS - USE

- Review & Update Practices For New Rules and Precedent
- Use Only As Legally Permitted
- Disclose Cautiously
- Don't Overestimate Conditional Privilege Exception

PRACTICAL POINTERS - USE

- Use For Purpose Collected
- Avoid Using Plan Data For Employment Purposes
- Follow Protocols For Data & Information Exchange
- "Your Mother" Offensiveness Test

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