

TITLE 77
LEGISLATIVE RULE
HUMAN RIGHTS COMMISSION

SERIES 4
SEXUAL HARASSMENT

§77-4-1. General.

1.1. Scope. -- The following legislative regulations of the West Virginia Human Rights Act (HRA), W. Va. Code §5-11-1 et seq., set forth guidelines for interpreting the Act's prohibition against discrimination on the basis of sex by means of sexual harassment and are intended to assist all persons in understanding their rights, obligations, and duties under the law in regard to this aspect of the HRA.

1.2. Authority. -- W. Va. Code §5-11-8(h) and §29A-3-1 et seq. They are based on the decision of the West Virginia Supreme Court of Appeals in *Westmoreland Coal Co. v. Human Rights Commission*, __ W. Va. __, 382 S.E.2d 562 (1989), which held that sexual harassment is a form of discrimination prohibited by the West Virginia Human Rights Act and decisions of the federal courts.

1.3. Filing Date. -- April 29, 1992

1.4. Effective Date. -- April 29, 1992

§77-4-2. Sexual Harassment Prohibited.

2.1. When it occurs in the workplace, harassment on the basis of sex is a violation of W. Va. Code §5-11-9(a)(1). The HRA affords employees the right to work in an environment free from discriminatory intimidation, ridicule, or insult.

2.2. Unwelcome sexual advances, requests for sexual favors, and other verbal or physical conduct of a sexual nature constitute sexual harassment when:

2.2.1. Submission to or rejection of such conduct is made either explicitly or implicitly a term or condition of an individual's employment or is exchanged for job benefits;

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

2.2.3. 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.

2.3. In determining whether alleged conduct constitutes sexual harassment, the Commission will look at the record as a whole and at the totality of the circumstances, such as the nature of the sexual advances and the context in which the alleged incidents occurred. The determination of the legality of a particular action will be made from the facts, on a case-by-case basis, but in all cases the harassment complained of must be sufficiently severe or pervasive.

2.4. In determining whether alleged sexual harassment in a particular case is sufficiently severe or pervasive, the Commission will consider:

2.4.1. Whether it involved unwelcome physical touching;

2.4.2. Whether it involved verbal abuse of an offensive or threatening nature;

2.4.3. Whether it involved unwelcome and consistent sexual innuendo or physical contact; and

2.4.4. The frequency of the unwelcome and offensive encounters.

2.4.5. A person who has been harassed on an isolated basis may offer evidence of harassment suffered by other employees as proof that the harassment was pervasive or severe.

2.5. Harassment is not necessarily confined to unwanted sexual conduct. Hostile or physically aggressive behavior may also constitute sexual harassment, as long as the disparate treatment is based on gender.

§77-4-3. Employer Liability for Sexual Harassment.

3.1. An employer, employment agency, joint apprenticeship committee or labor organization (hereinafter collectively referred to as "employer") is responsible for its acts and those of its officers, agents and supervisory employees with respect to sexual harassment regardless of whether the specific acts complained of were authorized or even forbidden by the employer and regardless of whether the employer knew or reasonably should have known of their occurrence, except that the employer is not responsible if the officer, agent or supervisory employee was acting outside the scope of his employment. The Commission will examine the circumstances of the particular employment relationship and the job functions performed by the individual in determining whether an individual acted as an officer, or in either a supervisory or agency capacity, and acted within or outside of the scope of his employment.

3.2. With respect to conduct between fellow employees, an employer is responsible for acts of sexual harassment in the workplace where the employer (or its agents or supervisory

employees) knew or reasonably should have known of such conduct, or expressly or impliedly authorized or ratified such conduct. As a defense an employer may show that it took timely and appropriate corrective action regarding such conduct.

3.3. An employer may also be responsible for the acts of non-employees, with respect to sexual harassment of employees in the workplace, where the employer (or its agents or supervisory employees) knew or should have reasonably known of the conduct and failed to take timely and appropriate corrective action. In reviewing these cases the Commission will consider the extent of the employer's control and any other legal responsibility which the employer may have with respect to the conduct of such non-employees.

3.4. Where employment opportunities or benefits are granted because of an individual's submission to the employer's sexual advances or requests for sexual favors, the employer may be held liable for unlawful sex discrimination against other persons who were qualified for but denied that employment opportunity or benefit.

3.5. Employers are encouraged to take all steps necessary to prevent sexual harassment from occurring. Appropriate preventative steps include, but are not limited to, affirmatively expressing strong disapproval of sexual harassment, developing and implementing appropriate sanctions, informing employees of their right to be free from harassment and the appropriate steps to take if harassment occurs, and developing methods to sensitize all employees regarding appropriate behavior in the workplace.

§77-4-4. Public and Housing Accommodations.

4.1. This rule may be applied to any action involving an owner, lessee, proprietor, manager, superintendent, agent, broker, or employee of any place of public accommodations, as defined by W. Va. Code §5-11-3(j), or of any housing accommodation, as defined by W. Va. Code §5-11-3(k).

4.2. The concepts of duty and liability set forth in this series may be applied to instances of sexual harassment occurring in a place of public accommodations or involving the sale, rental, lease, assignment, sublease, or use of any housing accommodation.