



MOUNTAIN BRIEFS...

by Christopher D. McIntire, Esq.

By Lawyers for Non-lawyers

An attorney was interviewing candidates for a legal secretary. He had narrowed his choices to three, and while all were present, he asked all three candidates: "How much is two and two?" The first responded: "Two and two is four." The second responded: "Two and two is 22." The third responded: "Two and

two can be either four or 22." So which one did the attorney hire? The answer: "The one with the shortest skirt."

Which brings us to this week's topic, what is "sexual harassment" and who is liable for it?

There are two types of sexual harassment. The first is "touch-

ing" of a sexual nature. This occurs by acts as overt as fondling, or acts as innocuous as brushing against another's private areas. If this conduct occurs even once, California law has been violated.

Another type of "sexual harassment" is harassment in the form of an offensive environment. This type of "harassment" occurs when the victim is presented with an environment filled with lewd jokes, sexually explicit materials, pin-up calendars, etc. It is also sexual harassment for an individual to be subjected to repeated sexual solicitations.

What has alarmed many of the "good old boys" are cases awarding high amounts of money to victims of sexual harassment where the fellows were just having fun. Jokes about women in general, or a specific woman in particular, their parts, men's desires, etc., can all constitute sexual "harassment" if such conduct would be deemed offensive by a reasonable woman. (I know that many men will doubt the existence of any such "reasonable" woman — just as women will doubt the existence of the "civilized" man.)

But there is no longer such a thing as a free joke. Comments about a woman's body, desires, or even persistent references to a female staff member as a "bimbo" (as one self-proclaimed prominent resident regularly practices) constitutes sexual harassment which gives rise to a very valuable court case.

It is the obligation of a California employer to maintain a work environment free of sexual harass-

ment. This is not a passive duty; a passive duty being an obligation of the employer to *refrain* from committing acts of harassment. The duty is *active*: The employer must take such steps as are necessary to keep a harassment-free environment. Accordingly, an employer is liable for the sexual harassment of an employee, even if the harassing employee is not at the management level.

But employers are not the only ones liable for sexual harassment. Virtually any relationship of confidence or trust can give rise to "sexual harassment" if the appropriate elements are met. Thus, a civil action is warranted for a patient harassed by a doctor; a client harassed by a therapist; a real estate agent harassed by a listing owner; an accountant/banker harassed by a customer; a tenant harassed by a landlord; or a student harassed by a teacher. Virtually any relationship which involves a position of trust or economic power can give rise to a complaint for sexual harassment if the elements of sexual harassment have been met.

The victim of sexual harassment, however, must act promptly. Before a lawyer can file a lawsuit for sexual harassment or discrimination, a complaint must first be made to the California Department of Fair Employment and Housing. There is a DFEH office in San Bernardino and the telephone number is 383-4373. When a man or woman feels victimized by sexual conduct, the first step is to call the number and arrange for an appointment.

Many of the employees of the DFEH are very diligent in their job (some are just bureaucrats — but you get this type of mixture with every governmental agency) and the DFEH usually requires a personal interview prior to filing the complaint. The administrative process has its own rules which are easily explained by the DFEH representatives. However, a complaint to the California Department of Fair Employment and Housing (usually sent to the overlapping federal agency, Equal Employment Opportunity Commission) is a prerequisite to any civil action. If the civil action is filed without a DFEH complaint preceding it, the case must be dismissed.

Our office represents both victims of sexual harassment and assault, and employers who have been accused of sexual harassment and assault. There are means of handling both cases, but those who think they are a victim of such assault, a complaint to the DFEH should be made. There are some employers whose reaction to a DFEH complaint is to threaten an action for slander, and before local attorney Ken Miller ran from the hill, his first response on behalf of an employer accused of sexual harassment was to threaten to sue the victim and the victim's family for slander. A slander case is not warranted, as a complaint to the DFEH is absolutely privileged, which means that no lawsuit can arise from such a report. But what is important for victims of sexual harassment to remember, the very *threat of slander* constitutes the

crime of witness intimidation.

There are, of course, frivolous cases where employees complain of sexual harassment simply to obtain a bigger severance pay; just as there are legitimate cases where victims of sexual harassment go to work with a feeling of dread, despair and hopelessness. To the victims of sexual harassment, I recommend that you make the complaint to the DFEH, where you will understand that this is a society-wide problem. In addition, many perpetrators of sexual harassment simply lack the education and experience to deal with sex in the '90s, and part of the DFEH process is educating an unsophisticated employer on the law of sexual harassment. An employer charged with a frivolous complaint is faced with an economic dilemma. Do you defend the case, incurring costs and risk of losing, or do you pay the ransom? This is a decision that should be made with an experienced lawyer professionally, confidentially, and without emotion.

Of course, some laws regulating sexual relations are a bit overdone. For example, in a small town in Tennessee it is illegal for a girl to telephone a man asking for a date; and in North Carolina, it is illegal for a man to talk to a woman attending an all-women's college while she is on campus. My favorite, however, is a law in Portland, Maine, which provides that tickling a girl under the chin with a feather duster is illegal. Tonight I intend to explore with my wife the reason for such a law!

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