



HARASSMENT IN HOTEL CASINOS: Legal Liability, Prevention and Remediation

BY ANN C. MCGINLEY, WILLIAM S. BOYD
PROFESSOR OF LAW, BOYD SCHOOL OF LAW

What is Illegal Harassment?

In 1986, the U.S. Supreme Court held in *Meritor Savings Bank v. Vinson* that sexual harassment constitutes illegal sex discrimination under Title VII of the 1964 Civil Rights Act.¹ *Meritor* identified two types of illegal sexual harassment: *quid pro quo* (conditioning employment and promotions on the provision of sexual services) and *hostile working environment* (sex- or gender-based harassment that alter terms, conditions or privileges of employment). Nevada law also makes it illegal for an employer to harass an applicant or employee because of the individual's sex, sexual orientation, gender identity or expression.²

To prove a hostile working environment, the plaintiff must demonstrate that the behavior:

- Is unwelcome;
- Occurs because of sex or gender of the individual; and
- Is sufficiently severe *or* pervasive to alter the terms, conditions or privileges of employment.³

Common Misperceptions about the Law

Many believe that sex- or gender-based harassment is sexual in nature, perpetrated by a male boss on a female subordinate and occurs because of romantic or sexual desire. While some illegal harassment fits this description, none of these descriptors need be present for illegal harassment to occur. Perpetrators can illegally harass victims of the same sex. Harassing behavior can be sexual, gender-based but not sexual, or sex- or gender-neutral. The harasser can be motivated by sexual desire, animus toward a particular sex in a job (e.g., women lawyers), disapproval of an individual's failure to conform to gender stereotypes (e.g., feminine men, masculine women), and under Nevada law, animus toward an individual because of sexual orientation or gender identity. So long as the behavior occurs because of the sex or gender of the victim, it can be illegal.

Employer Liability

While individual harassers are not liable under civil rights laws, employers of 15 or more employees may be liable for harassment of applicants and employees by supervisors, co-workers, customers, clients and other third parties.⁴

Employer's Liability for Supervisor's Harassment of Subordinate

An employer is *strictly liable* for a supervisor's harassment if there is a *tangible employment action* (a firing, failure to promote, demotion, etc.) that results from the harassment. The classic example is the supervisor who fires an employee for her unwillingness to have sex with him (*quid pro quo*).

If there is no tangible employment action, the employer is *strictly liable* for a hostile work environment created by a supervisor unless the employer proves the affirmative defense that:

- The employer exercised reasonable care to prevent and correct promptly any sexually harassing behavior; and
- The plaintiff employee unreasonably failed to take advantage of any preventive or corrective opportunities provided by the employer or to avoid harm otherwise.⁵

Employer's Liability for Co-Worker, Customer or Third-Party Harassment

An employer is liable for harassment of its employees by co-workers or customers if the employer knew or should have known about the harassment and failed to promptly remedy it. This *negligence* standard can hold an employer liable even if an employee fails to report the harassment.

Special Issues in Nevada's Hotel and Casino Industry

Harassment on the Casino Floor

Hotel casinos face special challenges because they create a fantasy through advertising and costumes that sexy cocktail servers are available to patrons who often drink heavily. This fantasy makes these employees vulnerable to sexual harassment. Moreover, because of the proliferation of cameras on casino floors, hotels should be aware when harassment occurs. An employee's assumption of the risk is not a defense to an employment discrimination claim merely because she willingly wears a skimpy outfit.

These features of hotel casinos should make employer negligence fairly easy to prove; because of the atmosphere, advertising and costuming, combined with cameras

on the casino floors, casino employers should have knowledge or constructive knowledge when harassment occurs. This requires the employer to take action to promptly correct the harassment. In fact, because of the known, unique conditions in casino hotels, aggrieved employees may argue that their employers are negligent if they do not have effective policies to prevent and correct harassment.

Harassment in the Back of the House

Another vulnerability for hotel casino employees is customer harassment of housekeepers. There is currently a movement to provide panic buttons to

housekeepers so they can summon security if they are in danger of being harassed or assaulted.⁶ As these buttons proliferate, an employer may be considered negligent if it fails to provide the buttons to housekeepers and other vulnerable employees.

Informal Research in Las Vegas Casinos

For the past 19 years, I have assigned my employment discrimination law students to create model policies and training programs for sexual harassment. Because good policies require an understanding of the industry, the workers affected by the policies and the law, students interview casino workers to ascertain their knowledge about sexual harassment and their employers' policies. The purpose is educational, and the

interviews are confidential. I never learn the identity of the interviewees or of the hotel casinos where they work.

The aggregated interview results have been informative. Of the approximately 400 casino employees interviewed over the past 19 years, most cannot define sex- or gender-based harassment, do not remember if they were trained about harassment and are unaware of their employers' policies, including reporting methods. Many describe behaviors by co-workers and customers that would satisfy the courts' definition of sex- or gender-based harassment. Few have reported the behavior to their employers because of their misunderstanding of the employers' policies, embarrassment or fear of retaliation. When they do report harassment by customers, employees say that their supervisors ignore their reports or move the employees away (sometimes causing lost tips) rather than addressing the customers' behavior with the customers. Moreover, many of the sexual harassment policies do not cover customer harassment of employees.

continued on page 10



HARASSMENT IN HOTEL CASINOS

Solutions

Before creating new policies, lawyers representing casinos should find out whether their current policies are effective. Employee sampling is an effective means of learning this information. Casino hotels should create anti-harassment policies and annually train their managers and employees on the policies. Trainings should take place in person, if possible. Policies should give examples of what behaviors constitute illegal harassment.



Casino hotels' definition of illegal harassment should be as broad as the law is, but they should create policies that specifically address customer harassment of employees and respond to casino employees' vulnerability. The policies should explain how harassed employees should report the harassment, and employees should have various reporting options, including supervisors, the Human Resources department or other personnel, as well as an anonymous hotline. Policies should guarantee a confidential investigation to the extent possible and a prompt remedial response; they should state clearly that there will be no retaliation for reporting. Bystanders should be trained to report the harassment or address it directly with the harasser and the victim. Supervisors and floor managers should deal with

harassment by customers immediately and should report harassment that they observe or hear about; their annual reviews should include an evaluation of their response to harassing behaviors.⁷

These steps will go a long way toward proving the affirmative defense to a charge of supervisor harassment of an employee and will also be relevant in defending against a claim that an employer acted negligently when harassment by coworkers or customers occurs. But even more important, leadership in hotel casinos is key to setting the tone, making clear that it will treat its employees with dignity, and that harassment and discrimination will not be tolerated. **NL**

1. Meritor Savings Bank v. Vinson, 477 U.S. 57 (1986); 42 U.S.C. Sec. 2000e, et seq.
2. Nev. Rev. Stat. Ann. 613.330 (1). Title VII does not explicitly prohibit discrimination based on sexual orientation or gender identity, but the circuits are split about whether Title VII forbids sexual orientation and gender identity discrimination. The issue is currently before the Supreme Court. See Zarda v. Altitude Express, Inc., 883 F.3d 100 (2d Cir. 2018) (en banc), petition for cert. filed, 86 U.S.L.W. 3620 (U.S. May 29, 2018) (No. 17-1623) (sexual orientation); EEOC v. R.G. & G.R. Harris Funeral Homes, Inc., 884 F.3d 560 (6th Cir. 2018), petition for cert. filed, 87 U.S.L.W. 3042 (U.S. July 24, 2018) (No. 18-107) (gender identity). It is illegal under Title VII to discriminate against a person because of gender or gender expression (failure to conform to stereotypes expected of the individual's sex). See Price Waterhouse v. Hopkins, 490 U.S. 228 (1989).
3. Harris v. Forklift Systems, Inc., 510 U.S. 17 (1993).

4. In Nevada, all entities with gaming licenses, even those with fewer than 15 employees may be required to have harassment policies, training, and investigations and to report valid claims annually. See Nevada Gaming Control Board's Proposed Amendment to Nevada Gaming Commission Regulation 5, <https://gaming.nv.gov/modules/showdocument.aspx?documentid=14021> (Nov. 5, 2018); Proposed Minimum Standards Checklist, <https://gaming.nv.gov/modules/showdocument.aspx?documentid=14023> (Nov. 5, 2018); Additional Amendments to Minimum Standards Checklist Based on Resort Association Comments, <https://gaming.nv.gov/modules/showdocument.aspx?documentid=14055> (Nov. 13, 2018). The Nevada Gaming Commission has yet to approve or reject these proposals. See Richard N. Velotta, *Gaming Commission to Wait on Harassment Regulations*, Las Vegas Rev.-J., Nov. 16, 2018, at 11B, available at <https://www.reviewjournal.com/business/casinos-gaming/sexual-harassment-prevention-rules-for-las-vegas-casinos-delayed-1528308/> (Nov. 15, 2018).
5. Faragher v. City of Boca Raton, 524 U.S. 775 (1998); Burlington Industries, Inc. v. Ellerth, 524 U.S. 742 (1998).
6. Seema Mody, *Hotels are arming workers with panic buttons to combat harassment*, <https://www.cnbc.com/2018/09/06/major-hotels-arm-workers-with-panic-buttons-to-fight-harassment.html>.
7. Policies are not very effective in preventing harassment, but employers should adopt best practices recommended by the Equal Employment Opportunity Commission. See Report: EEOC Select Task Force on the Study of Harassment in the Workplace (June 2016), https://www.eeoc.gov/eeoc/task_force/harassment/report.cfm.



ANN C. MCGINLEY is a William S. Boyd Professor of Law at UNLV, Boyd School of Law. Co-Director of Boyd's Workplace Law Program, McGinley has published extensively and has presented her work at major universities in the U.S. and abroad. She serves on Nevada's Task Force on Sexual Harassment and Discrimination Law and Policy.