

# legal lines

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## Sex & the LAW

by Marshall Susler

We thought that title would get your attention. Cases involving sex or gender or gender orientation are headline news. Paula Jones' sexual harassment suit against President Clinton, for example, is already

of historical importance, and it hasn't even begun.

The subject is broad including homosexual and lesbian rights, obtaining mortgage loans, Aids, equal pay, harassment, rape, and on and on. We cannot cover the subject in one short article, but we can try to distinguish among three hot topics, namely: sexual discrimination, sexual harassment, and sexual abuse.

**Sexual discrimination** is discrimination on account of one's gender. We hear of it mainly in employment situations, and women primarily are the victims.

Historically men have been regarded as the breadwinners of the family and women the homemakers. That view has been changing since at least World War II, probably before, and now all states and the federal government have statutes making discrimination on account of sex unlawful civil rights violations. There are now female police officers, firefighters, a few coal miners, a lot of lawyers, and doctors. Women are performing tasks that formerly were reserved for men. Men have also benefited. There are more male nurses and airline flight attendants, for example, occupations formerly thought of as primarily for women.

But that is barely a scratch on the surface of sexual discrimination. There is still discrimination in pay; in attaining managerial positions — such as becoming a CEO of a corporation or a partner in a large law firm, or sometimes just being promoted to foreman or supervisor; in obtaining mortgage loans and other extensions of credit. As women become more involved in business and as men look into occupations dominated by women, more and more subtle discrimination is being revealed.

**Sexual harassment**, although sometimes treated separately by statute, is a form of

sexual discrimination. Here again, the victims are primarily female, but there are cases where men have been the victims. The law recognizes two primary forms of sexual harassment, quid pro quo and hostile environment.

In the quid pro quo (something for something) form of sexual harassment an employee's supervisor offers some employment benefit (such as a raise, a promotion, or not getting fired) in exchange for sexual favors.

In the hostile environment form of sexual harassment the working environment is such that it is unpleasant and stressful. The hostile environment can be displays of unclad women (or men), comments with sexual connotations, or having pornographic materials around, come-ons by co-workers and the like.

The law now regards any unwelcome sexual advance or speech, including conduct, in the workplace as constituting sexual harassment. The courts are struggling to define what may be unwelcome to a reasonable person. The law takes the position that people in the workplace are there to work. Sexual contacts are not for the workplace but for after hours, and when men and women finally realize that and act upon it, the incidents of sexual harassment will, undoubtedly, decrease significantly. However, since we are told men are from Mars and women are from Venus, it may be a cold day on Venus before realization sets in.

The remedies for sexual discrimination and sexual harassment are civil in nature. The courts may issue an order prohibiting further discriminatory action (an injunction). If the order is violated, the employer, or other enjoined person who violates the order, may be held in contempt of court and fined or imprisoned. The person discriminated against has a cause of action for money damages, which may include pay lost, expenses incurred as a result of the discrimination, compensation for mental and emotional damages, and payment of his or her attorney's fees.

**Sexual abuse** unlike sexual discrimination and sexual harassment is criminal in nature and subjects the wrongdoer to a fine and imprisonment. Sexual abuse covers a wide range of sexual offenses

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## Granny Gets a Pardon ...or Does She?

Partner Dan Moore reports that the premier topic at the National Academy of Elder Law Attorneys (NAELA) he attended in Nashville in November was Section 4734 of the Balanced Budget Act of 1997 (BBA). This had been Congress' way of "fixing" what it had done to Granny (or Grandpa) by Section 217 of the Kennedy/Kassebaum Bill effective last January 1st.

Old Section 217 made it a federal crime (punishable by a fine of up to \$10,000.00 or up to 1 year in prison - or both) for Granny to make gift transfers of her assets to loved ones if that resulted in a period of ineligibility for Medicaid benefits for Granny. Congress, in the BBA, said "Oh we're sorry, Granny, we didn't mean to do that to you. We meant to do it to your lawyer for advising you to do it."

Congress now thinks it has smoothed the waters with that large and powerful senior constituency, but has it? Just as everyone is entitled to the advice and counsel of lawyers and accountants (and yes accountants or any other advisors are put in the same prison ship with the lawyers by new Section 4734) in attempts to minimize the impact of income and estate taxes, shouldn't Granny be able to consult these same people in attempts to conserve her funds through equally legal means?

Section 4734 is not really going to have its impact on the lawyers (Congress creates plenty of other work for us!). By gagging Granny's lawyer, she is going to be deprived of the competent, ethical legal advice she may need. Now she doesn't go to jail, but she may become unnecessarily impoverished by inability to obtain the advice she needs.

The New York State Bar Association felt so strongly about this injustice that it has voted to pay for and participate in a court constitutional challenge of the new law. In another action, the American Civil Liberties Union has agreed to act as NAELA's lawyer in prosecuting a court challenge.

Some people believe Granny shouldn't be able to make any elective disposition of her assets; that she should just have to spend it all on long term care in a nursing home when, through no fault of hers that medicine has been able to identify, she gets Alzheimers. This is not the way we treat other catastrophic illness coverage (many of which are practically self-inflicted through imprudent lifestyles), and it shouldn't be the way we treat essential long term care either.

Send us your thoughts on this subject - anonymously, if you prefer. We'll report on the responses in a later issue of Legal Lines. Better yet; write your congressmen and senators about what you think of Section 4734.

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from aggravated criminal sexual assault, a Class X felony carrying a mandatory term of imprisonment, to criminal sexual abuse, a Class A misdemeanor. These offenses include what we formerly referred to as rape (sexual penetration with use of force or threat of force) and statutory rape (sexual intercourse with a child under the age of 13 or with a person unable to understand the act) to any sexual act by use of force or threat of force.

Although sexual abuse is generally a crime, the victim may have a civil action for money damages against the wrongdoer for the assault and battery and emotional distress. Recently the Appellate Court for our district upheld a worker's compensation award for a worker who was forced by her supervisor to perform sexual acts at work.

We have barely scratched the surface of the topic, "Sex and the Law." Besides the matters we have touched on in this article, which seem to be so popular with the media, there are many other matters we have not mentioned and which the legal system is just beginning to deal with, such as artificial insemination, surrogate mothers, ownerships of frozen eggs and sperm, same sex marriages and divorces. In the future we will have to deal with non-sexual reproduction, or cloning, and who knows what else.

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