The Gavel

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A periodic newsletter on legal issues for clients and friends of **David B. Forest, P.C.**
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SEXUAL HARASSMENT

As most employers are aware, they can be liable for the sexual harassment of employees by supervisors or co-workers. What most employers are not aware of is that they **can also be liable for the sexual harassment of their employees by non-employees**, whether it's a customer, other people in the workplace or vendors.

From an employment standpoint, Sexual Harassment is defined in Michigan as "Unwelcome sexual advances, requests for sexual favors, and other verbal or physical conduct or communication of a sexual nature..." in connection with employment. There are two types: *quid pro quo* and hostile environment. A ***quid pro quo* claim** (literally "what for what" in Latin) arises when a tangible job benefit or privilege is conditioned upon an employee's giving in to sexual blackmail. A **hostile environment claim** occurs when the workplace contains unwelcome verbal, visual or physical conduct of a sexual nature which affect the conditions of employment, such that a reasonable person would find it intimidating, hostile, abusive or offensive. Normally this claim involves repeated subjection to the offensive conduct, such as in one case we are currently litigating which involves an allegation that a restaurant manager kept grabbing a waitress' buttocks and making sophomoric comments.

Employers are liable under either claim if the employer (1) knew or should have known that the harassment was occurring, and (2) failed to take immediate, appropriate, corrective action once it became aware.

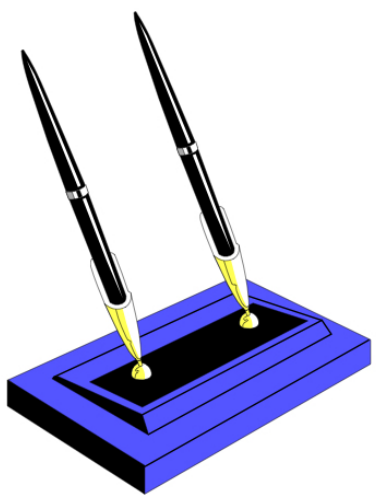
Some of our employer clients have adopted a sexual harassment policy, which informs employees that sexual harassment will not be tolerated, and what an employee should do in the event that she (or he!) feels

sexually harassed. With the policy in place, the employer is shielded from liability until the employee informs the employer of the harassment, at which time the employer must quickly move to fashion a remedy that is reasonably calculated to stop the harassment.

Recent cases have made it clear that the employer can be liable for sexual harassment of its employees even if the harasser is a third party. Some examples: a city councilman making inappropriate comments as to what acts a deputy clerk performed for the mayor to get her job; a delivery company's foot courier's complaints regarding a customer's inappropriate comments and constant harassment; and a doctor's harassment of a nurse practioner at a clinic where the doctor had attending privileges. **In all of these instances, the harassment was brought to the attentions of the employer, which failed to act quickly or appropriately enough to escape liability.**

Thus, the identity and employment status of the harasser is not material; what matters is whether the employer subjected the employee to a hostile environment by allowing the known harassment to continue. Source: Michigan Business Law Journal, Vol XVIII, No. 1.

Residential Construction: Get it in writing!



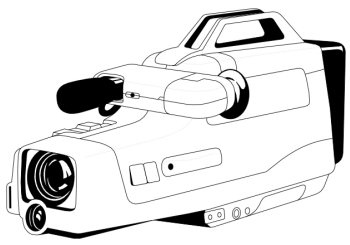
We have been seeing a lot of homeowner-contractor disputes lately, especially regarding **remodeling, and a number of cases are currently being litigated.** The story is usually the same: the contractor and homeowner begin with a written contract (which the law does not necessarily require, but should always be done), and each side looks forward to the successful completion of the project.

Changes are made on most jobs, whether the job is new construction, an addition or remodeling. The changes may be because something doesn't look or work quite right, and it can be either the contractor or the homeowner who suggests the changes. **No matter what**, put the agreed change in writing. To paraphrase Samuel Goldwyn: "A verbal change order isn't worth the paper it's written on."

The change order need not be elaborate, and it doesn't require a rewrite of the whole contract. The writing (called a "change order") is sufficient if clearly describes the change. The parties should also state whether there will be a change in price. If the price is to change, the exact dollar amount should be stated. **Finally, both parties must sign each and every change order.**

As an example: if a homeowner decides to change a paint color in a room, then the writing should describe the change: "RE: Contract dated 5/1/97. Paint in room B-3 - delete Color #243 and substitute Color # 322; Increase in Price: $25.00. signed /s/." **If the parties do not get the changes in writing, there can be (and often are) disputes as to what was or was not changed, why it was changed, and what the effect is on the overall price.** Without the change order, the parties are reduced to a "He said, She said" disagreement without solid proof, and the end result may not be fair.

Property/Personal Damages: Get it in pictures!



As a corollary to "Get it in writing", when you have sustained a personal injury or property damage, **TAKE PICTURES! Not only can a picture be worth a thousand words, but it can also be worth thousands of dollars.** When the injury is to a person, take pictures of the cuts, bruises, scars, etc. Many times, by the time your case gets to an insurance adjuster or to a jury, many of the injuries have healed or at least progressed to the point where no one can appreciate the severity of the original injury. But, a picture taken at the time of the injury helps recreate the past and better illustrates the original injury.

The same holds true with property damage. Not only will the pictures show the extent of the damage prior to any repairs, but the pictures may be helpful to investigators who will try to recreate the scene.

In one recent auto accident case, the insurance company lawyer became convinced that the insured was lying about the accident when we reviewed the pictures of the damaged cars: the pictures showed that the accident could only have happened because of the insured's reckless driving. The case settled quickly thereafter in favor of our client.

It doesn't matter so much whether the pictures are taken by a disposable camera, professional equipment, videotape, etc. -**just get the pictures immediately!**

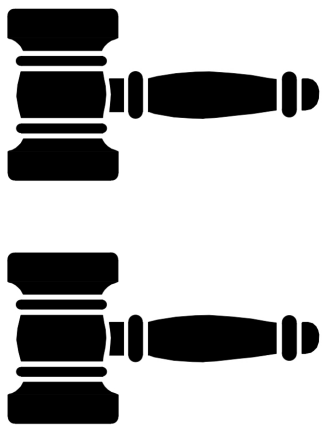
CASE IN POINT:

Publishers Sweepstakes

Almost everyone has seen a special notification from a magazine sweepstakes, declaring "YOU HAVE WON $10 MILLION if you have the winning number", and heard the occasional story of a person who doesn't bother with the fine print and really believes they have won the grand prize.

However, one person who read all of the announcements in their "prize packet" thought that they had caught Publisher's Clearing House [PCH] in a mistake, and sued for the $10 million prize. Almost all of the language in the packet suggested that Plaintiff could win a $10 million prize if he returned the materials by a certain date. However, one portion of the Plaintiff's certificate stated that if the materials were returned by a certain date, plaintiff "wins our TEN MILLION DOLLAR SUPERPRIZE," without stating "and has the winning number." Plaintiff must have figured that he had caught PCH in a mistake, so he purchased a magazine subscription and then called PCH to discover he had not won; he then sued on the theory of breach of contract.

Not surprisingly, **the Federal District Court and 6th Circuit Court of Appeals threw the case out.** The rules of the Sweepstakes were clear, and had the Plaintiff read the entire certificate and all of the other materials, "he would have known (or reasonably should have known) that he was not automatically the winner... These constitute sufficient disclaimers; no reasonable person in [Plaintiff's] position would assume he had won the prize." Workmon v Publishers Clearing House.



REFERRALS

If you have been pleased with the service and professionalism you have received from our office, it would be greatly appreciated if you passed the good word along. **Referrals are always appreciated and encouraged**, and we look forward to the opportunity to serve your associates and friends. If we can not immediately service their needs, we will be happy to **refer them to the appropriate attorney specializing** in their specific area of need.

However, if you have not been pleased, contact us directly!

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DEFAMATION

At some time or another, many people have been the victim of a defamatory comment. Aside from hurt feelings or embarrassment, the injured person may have said (or wanted to say) to the defamer: "I'll see you in Court" or "You'll be hearing from my attorney!". Yet very little often comes of it, almost always because the damages are so hard to prove.

A Defamatory comment is one that is communicated to a third party and injures a reputation, holding a person (or business!) up to scorn, ridicule or contempt. The comment may be spoken (slander) or libel (formerly written, now including all media), though the difference under Michigan law is negligible. In either case, the defamatory statement must be a statement of (false) facts, and not merely a statement of opinion. To call someone a "lousy, no good, yellow bellied, two bit horse thief" is only defamatory if the listener could reasonably believe you are (falsely) accusing someone of being a horse thief - the rest of the statement is just opinion.

Even if defamed, a plaintiff has a hard time proving damages. Certainly economic damages resulting from the defamation can be awarded (e.g. loss of earnings because fired from job due to co-worker's defamation), and if the loss of reputation can be easily translated into economic losses (e.g. loss of credit, or when sales lost because competitor spread falsehoods about you), they can also be compensated. But, damages for hurt feelings are hard to be awarded, and even harder to prove. Generally, only when the defamer acted with malice (in bad faith or with ill will) can the Plaintiff recover for hurt feelings.