news&trends

Foley scandal spotlights sexual harassment of teens

Investigations by the FBI and the House Committee on Standards of Official Conduct into sexually charged e-mail messages from former Rep.

GREGORY NEMEC

Mark Foley (R-Fla.) to young congressional pages have trained the spotlight on an area of growing concern among employment lawyers: sexual harassment of teen workers.

The U.S. Equal Employment Opportunity Commission (EEOC) reports that between 2001 and 2005, it filed an increasing number of lawsuits—up to 30 a year—on behalf of teenage employees. Of the 108 such suits it filed during those years, about 80 percent concerned sexual harassment, said Lisa Schnall, an attorney adviser to EEOC Chair Naomi Earp.

Sexual harassment appears to be a common experience among teens in the workplace. In a 2001 survey by the American Association of University Women, 83 percent of girls and 79 percent of boys who responded said they had been sexually harassed. More than 25 percent said the harassment occurred often.

Research by Susan Fineran, a professor of social work at the University of Southern Maine, echoes those findings. In a 2002 study of more than 300 high school students working part-time, Fineran found that 35 percent had experienced sexual harassment. Sixty-three percent of those workers were girls.

And a 2005 study by Fineran of several hundred high school girls showed that almost 47 percent of those who worked reported being sexually harassed on the job. For many teen victims, said Fineran, sexual harassment includes assault, attempted rape, and stalking.

Exactly what all these numbers mean is unclear, Fineran said.

"I think we have to be careful whether we say the incidence of teen sexual harassment is increasing," she said. "My hunch is that because of all the sexual harassment training that goes on in high schools and junior highs now, kids are more aware of the term 'sexual harassment' and more aware of their rights and these behaviors not being allowed in school. And I think that allows them to extrapolate to their workplaces."

Paige Fiedler, an attorney in Johnston, Iowa, who handles cases involving teen workers who claim to have been sexually harassed, noted a similar cultural shift.

"Whereas 10 or 20 years ago a teen's mother would have said, 'Let's just quit that job, you shouldn't put up with that,' now they're saying, 'Let's go find a lawyer.'"

Sexual harassment of teens often takes place at an intersection of power, ignorance, and low status, said attorneys who handle these cases.

"Teens are normally employed at lower levels [than adults] and often are supervised by people not much older than themselves," said Fiedler. "When you have 22-year-old men supervising 16- or 17-year-old girls, you can imagine that bad things happen. I've also noticed that several of my teen clients say, 'This is my first job. I assumed that this is how grown-ups acted.'"

Tom Duff, an attorney in Des Moines who has represented girls claiming that they were sexually harassed in fast-food establishments, agreed.

"Frankly, I don't think the perpetrators think there's anything wrong with it," he said. "The teens, because of their age, don't completely appreciate what sexual harassment is or that this is inappropriate behavior—and even if they do, they're reticent to report it because it's often coming from somebody who's older. Even with adult victims, they often think it's the way it is or just put up with it to keep their jobs."

Ann-Marie Ahern, a Cleveland employment lawyer who recently settled a teen sexual harassment case, agreed, noting that the conduct is "even more abhorrent than sexual harassment of adults because of the relative positions of power" of teen workers and their adult supervisors. But she pointed out that damages in these cases are often insubstantial because teen workers often can find alternative employment.

A case handled by Candace Gorman, a plaintiff lawyer in Chicago, illustrates the abuse of power differences between a teen and her adult supervisor. The plaintiff, Jane Doe, was a teen when she worked as an ice cream scooper for an Oberweis Dairy

store. Her 25-year-old supervisor kissed, groped, and hugged her and other teenage girls he supervised. He invited some of them, including Jane Doe, to his apartment and had sex with them.

Doe sued under Title VII of the Civil Rights Act, claiming battery and intentional infliction of emotional distress. A federal judge dismissed her claims, finding that she had engaged in consensual sex with her supervisor and had not exhausted her administrative remedies as required by Title VII. The judge held that Doe's lawyer's refusal to allow her to be interviewed by EEOC staff investigating the claim was evidence of a failure to cooperate with the commission.

On appeal, the Seventh Circuit reversed. Judge Richard Posner, writing for the court, noted that one of Doe's lawyer's prevented the interview because he was concerned it would upset his client. The court found that the plaintiff had not acted in bad faith and had, in fact, exhausted her administrative remedies. (*Doe v. Oberweis Dairy*, 456 F.3d 704 (7th Cir. 2006).)

The court went on to note that Doe's supervisor had committed statutory rape, which she could not have consented to by law: "Because her consent to have sex with [the supervisor] was, as a matter of law, ineffectual, this is a case of a worker subjected to nonconsensual sex by a supervisor . . . during, as well as arising from, the employment relation. That is a sufficiently strong case of workplace sexual harassment to withstand summary judgment."

Although it reinstated the case, the Seventh Circuit ordered Doe to turn over her psychological records to the defendant. Gorman said she will appeal on that issue. The defendants are also appealing the decision.

Some lawsuits claim that teens who report sexual harassment at work face retaliation by coworkers. An Iowa case Fiedler is handling alleges repeated sexual assaults on a 16-year-old girl at a KFC/Taco Bell restaurant by a 27-year-old male coworker. When the girl complained to her manager, her coworkers allegedly retaliated against her by shunning her. After she again voiced concern with the manager, she was fired. The girl and her parents are seeking damages for lost wages and emotional distress under Title VII and the Iowa Civil Rights Act. (*Claussen v. Star Group*, No. 06-16 (S.D. Iowa filed May 18, 2006).)

In another Iowa case, handled by Des Moines attorney Duff, a 16-year-old girl alleges that she was sexually assaulted while working at a grocery store. She claims that her direct supervisor, a man in his 40s, exposed himself to her and tried to force her to kiss him.

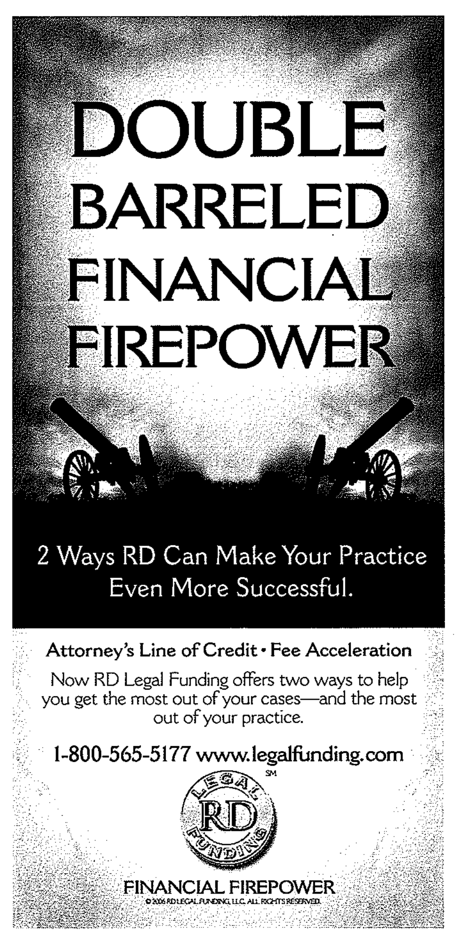
After the girl complained to other supervisors, the man was forced to leave his job. Although some female workers at the store had allegedly reported similar incidents with the same man, according to the complaint, other employees allegedly did not believe the girl's account and retaliated against her by isolating her. The complaint alleges violations of an Iowa sex discrimination statute and asks for damages for emotional distress and lost wages. (*Dorman v. Hy-Vee, Inc.*, No. LACV066233 (Iowa, Johnson Co. Dist. filed Sept. 28, 2005).)

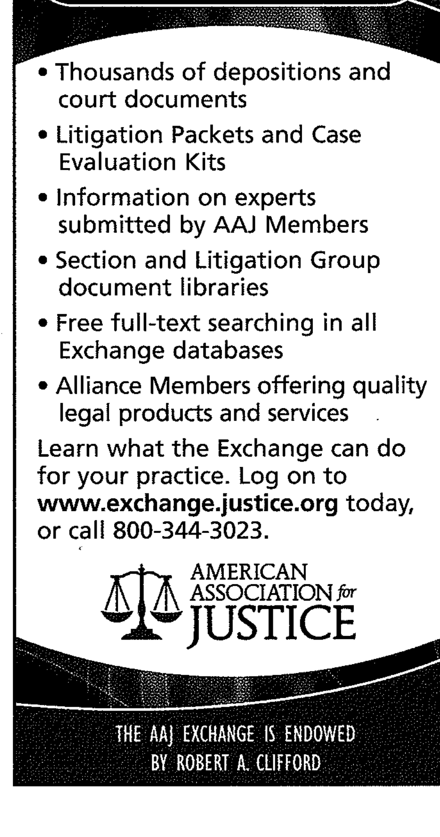
Stay private or go public?

Almost all teen worker sexual harassment cases settle confidentially, and that presents its own problems, said Ahern.

"On the one hand, you have to serve your client, who can benefit from a settlement; but on the other hand, there is a value to the public being aware of the allegations being made and resolved," Ahern said.

The EEOC has a policy against private settlements, said Judy Keenan, an EEOC attorney in New York. "Since we act in the public interest, it's important for the public to know the work





that we're doing. It also educates them on what employee rights are as well as employer responsibilities," she said.

Even when they have strong cases, many teen victims are reluctant to enter the spotlight.

"It's harder for young girls than adults to have the courage to go to trial," said Fiedler. "They have so much going on in their lives. If I start the case when they're 16, by the time they're ready to go to trial, they're high school seniors. What girl is going to want to go to trial her senior year in high school or freshman year in college? They're going to want to put it behind them."

In some places, that reluctance has legal ramifications.

"If you're 16 and get in a car accident, in Iowa your statute of limitations is tolled until you're 18," said Duff. "If you are a victim of sexual harassment when you're 16, you'd better file in the 180-day requirement. There is no provision that allows for tolling for people of minority age. We've tried to get judges to recognize equitable tolling, because there's no statute that gives them authority to do it."

Meanwhile, back in Washington, the Foley investigations continue. Debra Katz, a D.C. employment lawyer, said the pages' rights are protected by the Congressional Accountability Act of 1995, which applies federal employment laws—such as Title VII—to Congress.

Although it's not yet clear whether Foley violated any criminal laws, "what's clear is that the [congressional] leadership had a duty to ensure that the environment was harassment-free, and included in that is the duty to take prompt preventative and corrective action to ensure there is no sexual harassment in the environment. It's an ongoing obligation" of all employers, Katz said.

"What this means is not only having strong zero-tolerance policies, but also educating workers about their rights," she said. "This means more than just hanging up a poster in the kitchen that no one sees. It really means educating workers in a language that they can understand about what their rights are in the event that they are subjected to this kind of conduct." ■

—Valerie Jablow

Sixth Circuit waives *Feres* doctrine for prenatal injuries

The Sixth Circuit has allowed a lawsuit against a U.S. Navy doctor to go forward, ruling that the case is not barred by the so-called *Feres* doctrine, which limits government liability under the Federal Tort Claims Act (FTCA). The decision clears the way for a case alleging that the doctor's improper prenatal care led to birth defects in a servicewoman's child. (*Brown v. United States*, 462 F.3d 609 (6th Cir. 2006).)

"The effect of this ruling could be enormous," said Jamal Alsaffar, an Austin, Texas, lawyer who represented the plaintiff. "This has really changed what has been happening over the past 50 years."

In 2000, Deborah Brown, who was on active duty with the Navy, began preconception counseling with the military medical service. A doctor prescribed prenatal vitamins containing folic acid, which is taken by women to prevent neural tube defects in developing fetuses.

Two months later, Captain Leland Mills, who was the senior medical officer at the clinic Deborah attended, told her to discontinue taking the vitamins. Deborah became pregnant a month later, at which point Mills told her to resume taking the folic acid supplements.

The lawsuit brought by Brown's husband, Timothy, claims that Mills's recommendation to resume the vitamins came too late: When the Browns' daughter Melody was born, the infant was diagnosed with spina bifida and related neurological problems. Timothy Brown sued Mills on Melody's behalf, claiming that the doctor's negligence caused her injuries.

The FTCA allows people injured by a government actor to seek legal redress. In 1950, the U.S. Supreme Court

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