

Sex-Bias and Sexual Harassment Investigation Outcomes: Survey Results from U.S. Small Business Owners/Managers

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Abstract

This paper details the results of a survey of small business owners/managers in regard to possible sex-bias in sexual harassment investigations. The respondents indicated that a determination of "guilty" or "not guilty" in sexual harassment investigations can be affected by the sex of the victim and the sex of the investigator (the respondent). The findings of this exploratory study may indicate a sex-bias in interpreting potential sexually-harassing behaviors in the workplace.

Introduction

Since the United States Supreme Court gave recognition to hostile environment claims in its 1986 decision, *Meritor Savings Bank F.S.B. v. Vinson*,¹ sexual harassment has become the fastest growing charge under federal equal employment statutes. As a form of sexual discrimination under Title VII of the Civil Rights Act of 1964, sexual harassment had grown from 1,260 charges in 1986² to 8,234 by 1995.³ Interestingly, sexual harassment did not even exist as an actionable Title VII charge prior to 1976,⁴ but by 1995 it accounted for over 9.0 percent of all charges filed with the Equal Employment Opportunity Commission (EEOC).⁵

One change in the legal environment which has exacerbated both employer and employee concerns over sexual harassment in the workplace has been the enactment of the Civil Rights Act of 1991. This legislation contains provisions for imposing punitive and compensatory damages on employers who can be shown to have intentionally and maliciously violated Title VII.⁶ Title VII is that part of the Civil Rights Act of 1964 governing employment discrimination. The cap on the damage award that can be imposed by a federal court is determined by the size of the employer's business in terms of number of employees. For example, an employer with 200 or fewer employees, but more than 100 could be required to pay up to \$100,000 in damages to each employee filing suit.⁷ Those employers with workforces ranging from 15 to 100 employees would

be exposed to damages not exceeding \$50,000 for each employee whose Title VII rights were violated.⁸ As will be demonstrated later, most instances of sexual harassment would easily satisfy the conditions of being sufficiently malicious and callous to justify such punitive awards.

Obviously, not all small businesses are large enough to be subject to Title VII. As many readers are already aware, Title VII applies only to those private sector employers who have 15 or more employees for each working day in each of 20 or more calendar weeks in the current or preceding calendar year.⁹ This has resulted in many employers with very small workforces (14 employees or less) to conclude that they are not subject to actionable sexual harassment charges under federal civil rights laws. This may be true to a certain extent, but these smaller employers may very well be subject to state sexual harassment laws. More than 30 states have statutes covering workplace sexual harassment in one form or another.¹⁰ Many of these state laws apply to all businesses within their jurisdictions *regardless of size*.¹¹

Even in states without sexual harassment statutes, victims are not precluded from seeking remedies under state tort statutes. A tort, simply stated, is an actionable injury or wrong. Victims have been able to successfully seek punitive and compensatory damages for such torts as wrongful discharge,¹² intentional infliction of emotional distress,¹³ breach of contract,¹⁴ battery,¹⁵ outrageous conduct,¹⁶ and invasion of privacy¹⁷ resulting from sexual harassment in the workplace. The inordinately high damage awards that draw so much popular media attention to sexual harassment suits (like the \$8 million awarded an Alabama worker for hostile environment sexual harassment and constructive discharge) result from state laws and not the federal ones.¹⁸

In our litigious society, employers are increasingly concerned about reducing their exposure to law suits. Since sexual harassment is a growing source of potential litigation, it is reasonable to expect many employers to take precautions in the form of policies and internal investigations to lessen this exposure. After all, it is far better to resolve sexual harassment claims internally rather than to file suit in a state or federal court. Successful internal resolution is far less expensive in terms of legal fees and injury to the firm's reputation than rectifying the dilemma in the courts. It is assumed that in the case of small businesses, the logical party to conduct these internal investigations is the owner/entrepreneur or the manager, if this is a different individual.

Even though the Courts¹⁹ and the Equal Employment Opportunity Commission (EEOC)²⁰ hold employers responsible for maintaining a harassment-free workforce, employers may limit their liability. If the employer, upon notification, takes immediate and appropriate action that can be reasonably concluded to stop the harassment and preclude its recurrence, its liability for the actions of supervisory personnel or employees is limited.²¹

Unfortunately, in their haste to avoid liability, some employers have failed to conduct *impartial* investigations and have violated the rights of the parties accused of sexual harassment.²² Failure to provide those alleged harassers with adequate due process has its own legal pitfalls. In *Downes v. Federal Aviation Admission*,²³ a federal appeals court ordered an employee reinstated in his position when it was concluded that the allegations for which he was punished would not have constituted actionable sexual harassment. Falsely accused individuals may also bring suit

against their employers on the grounds that the evidence is not substantial or pervasive enough to warrant termination,²⁴ defamation,²⁵ libel,²⁶ wrongful discharge,²⁷ or breach of contract.²⁸ In sexual harassment investigations, as in all investigations, there is an obligation to treat both parties, the accused and the accuser, fairly.²⁹ Hence, flawed investigations exacerbate, rather than alleviate, an employer's legal problems.

One question worthy of consideration when conducting internal investigations is whether the gender of the investigator effects the outcome of the investigation. We know from previous research that women and men do interpret potentially harassing behaviors differently when left to their own standards,³⁰ but is this phenomenon carried over to formal, structured inquests? To date, few studies have investigated whether these sex-biases persist when individual interpretations are supplanted by organizational interpretations.³¹

Purpose

The purpose of this study was to ascertain whether such sex-bias persists when an investigator must frame his or her findings in the context of predetermined organizational constraints. In other words, if an employer developed a set of policies defining what conditions had to be met for behaviors to constitute sexual harassment would these policies override the individual's personal perceptions? Additionally, it was hypothesized that respondents would draw different conclusions in determining actionable sexual harassment based on the sex of the victim and the harasser. Hence, both male and female respondents would be more likely to conclude actionable sexual harassment when a female victim was being harassed by a male harasser than when a male victim was being harassed by a female harasser.

The Survey Questionnaire

In order to explore this research question, a survey questionnaire was developed to measure differences in female and male interpretations of sexually-oriented behavior after being given strict legal guidelines as to what criteria must first be satisfied to constitute actionable sexual harassment. Each questionnaire contained six vignettes describing suspect behaviors. Each vignette was based upon the actual findings of fact from a federal sexual harassment cases.³²

To encompass a range of sexually-harassing behaviors, two of these vignettes involved verbal behaviors which courts determined to be sufficiently severe or pervasive enough to establish actionable sexual harassment. Two other vignettes were based upon verbal behaviors that were judged not to establish an actionable claim. The two remaining vignettes described physical workplace behaviors which were held to be actionable.

The survey questionnaire was administered to the owners, presidents, or CEOs of 500 small businesses randomly generated by Dun & Bradstreet. The surveys were mailed to businesses with fewer than 100 employees (defined as "small businesses" for the purposes of this study). The survey results were then collected, tabulated, and analyzed.

The primary hypothesis examined by this study is that, despite being provided guidance that legally defines actionable sexual harassment (an organizational interpretation), differences in interpretations of sexual workforce behavior will vary between female and male respondents. It was further hypothesized that determinations of actionable harassment will also vary because of the victim's sex. In other words, female and male respondents will be less likely to conclude actionable sexual harassment (a finding of "Guilty" to question #4³³ of each vignette on the questionnaire) in instances when the victim is a male. In order to investigate these hypotheses, the survey questionnaire contained instructions as to how actionable sexual harassment is evaluated. This, in effect, operationalizes the definition of sexual harassment for all respondents in much the same way as a judge would instruct a jury. These instructions conform to the set of four legal proofs which must be satisfied in order for a federal court to determine if actionable sexual harassment has occurred. In establishing a *prima facie* case of *hostile environment* sexual harassment, federal courts have clearly delineated that a complaining party must demonstrate the following:³⁴

1. The alleged victim belongs to a class or group protected under Title VII. In short, the alleged victim is either female or male. This is generally a given, therefore, it was excluded from our instructions.
2. The alleged victim was subjected to unwelcome sexual harassment. The alleged victim must not, through action or words, have encouraged the harassment. In the survey the instructions were as follows: ***The conduct of a sexual nature must be unwelcomed by the alleged victim. The victim did not invite or solicit the conduct, and regarded it as offensive.***
3. The sexual harassment complained of was based on the alleged victim's sex. In plain English, the victim was harassed because of her sex. That is to say, only a woman could be the victim of a male heterosexual's advances. Equally, only a male could be the object of a male homosexual's advances. The scenarios were so structured to guarantee this condition.
4. The harassment must be "sufficiently *severe* or *pervasive* so as to alter the conditions of the victim's employment and create an abusive work environment." The sexual behavior must be substantial and not an isolated incident. For "severe" this was translated into the following instructions: ***The conduct was severe enough that a single incident would seriously affect the victim's psychological well being and/or cause the victim to dread returning to the workplace. The mere utterance of a sexual epithet which causes offensive feelings in an employee does not necessarily affect seriously the psychological well-being of the employee.*** To cover "pervasiveness" the instructions were: ***The offensive conduct was sufficiently frequent and pervasive to create a work environment so intimidating that the victim would be loathe to go to the workplace or would contemplate quitting the current job to avoid further harassment.***

Note that this conduct must be sustained and nontrivial, it must be persistent.

After receiving these guidelines (decision constraints) respondents were then required to read the aforementioned vignettes. After reading each vignette, the respondents were asked to answer questions in the following sequence:

- (1) Question 1: Did the alleged victim invite or encourage the sexual conduct?
- (2) Question 2: Was the incident sufficiently severe that a single occurrence would have caused the victim serious psychological harm?
- (3) Question 3: Did the sexual conduct occur with enough frequency to establish a pattern of harassment which would create a hostile work environment?
- (4) Question 4: Having previously been given the conditions necessary for a legal determination of sexual harassment, did the respondent find the alleged harasser "Guilty" or "Not Guilty"? A response of "Guilty" is a conclusion that actionable sexual harassment has occurred.
- (5) Question 5: If the incident had *not* resulted in formal legal proceedings but had been part of an in-house investigation, what disciplinary action would the respondent recommend?

Questions 1 through 3 were provided in statement form, and respondents were merely required to check one of seven blocks along a Likert-type scale ranging from "Strongly Agree" to "Strongly Disagree." These would later be coded as 7 through 1 in descending order from "Strongly Agree." Question 4 asked the respondent to merely mark a block for "Guilty" or "Not Guilty," which was later coded 1 or 0, respectively.

To answer Question 5 for each vignette, the respondent had to select one of nine possible disciplinary actions, which were scored as 0 to 8 based upon the increasing severity of each disciplinary action. The disciplinary actions included "No Action," "Verbal Reprimand," "Written Reprimand," "Suspension with Pay," "Suspension without Pay," "Demotion," "Transfer," "Demotion and Transfer," and "Termination."

Demographic data and related information was also gathered on each respondent in order to determine whether responses were correlated with the racial, educational, and age differences among the respondents.

As previously hypothesized, it was expected that, despite having been given a precise legal and structured definition of sexual harassment, there would be a significant difference in the assessment of actionable sexual harassment based on the sex of the victim. In light of the previous research involving "open" definitions of sexual harassment based on individual

interpretations,³⁵ it was felt that requiring the respondents to frame their judgments within the context of more restrictive legal interpretations sexual harassment would reduce the variance in responses.

To measure biases based on the sex of the victim, the questionnaires were divided into three versions. In version 1, the victim and harasser in each vignette were portrayed in their true sex as they appeared in the actual cases from they were drawn. In each of these incidents, the victim was a female and the harasser was a male. In version 2 of the questionnaire, the vignettes are identical to version 1, except the victims in vignettes 1, 3, and 5 were portrayed as males and their harassers as females. The victims are female and the harassers are male in vignettes 2, 4, and 6. Finally, in version 3, the vignettes are the opposite of version 2; here the victims in vignettes 2, 4, and 6 are portrayed as males and the harassers as females, while the victims are females and the harassers are males in vignettes 1, 3, and 5. If responses to the questionnaire were evenly divided among the three versions, then at each comparison two-thirds of the respondents would see the vignettes with female victims and one-third with the victim's and harasser's gender reversed.

Survey Results

The survey instrument was mailed to 500 small businesses (1-99 employees) that were randomly selected from the business database maintained by Dun & Bradstreet. Forty-two (42) were returned by the postal service as undeliverable or were returned uncompleted by the respondents because they were lawyers who felt their response might bias the results. Thus, 458 surveys were assumed to be delivered to the small businesses in the sample. Eighty-one (81) usable responses were received, yielding a response rate of 17.7 percent, which is within the typical response rate range for small business survey research.

The 81 respondents included 57 males, 19 females, and five who did not indicate their sex. By age, approximately 53 percent of the respondents were in the range 25-50 years while the remainder were 51 years or older. Ninety-five (95) percent of the respondents reported their race as Caucasian. Forty-two (42) percent of the respondents indicated that they possessed a bachelor's or master's degree.

Each of the respondents was asked the following question "Have you ever been a victim of sexual harassment?" Among the female respondents, approximately 63 percent reported being a victim of sexual harassment at some time in the past. Approximately 11 percent of the male respondents indicated they had been a victim of sexual harassment.

As mentioned earlier, three different versions of the instrument were used in this study. The 500 questionnaires that were initially mailed were evenly divided across versions one (number mailed=133), two (number mailed=133), and three (number mailed=134) of the instrument. The usable responses, by version number, included: 33 version one respondents, 23 version two respondents, and 25 version three respondents. In version one, all six vignettes involved female victims while in version two female victims were involved in three vignettes (2,4,6) and male victims in the other three vignettes (1,3,5). Finally, version three female victims were involved in three vignettes (1,3,5) and male victims in the other three vignettes (2,4,6).

The six cases included three different types of behavior: cases one and five were based on cases involving verbal behavior where the federal court ruled not guilty, cases three and six were based on cases involving verbal behavior where the federal court ruled guilty, and cases two and four were based on cases involving physical behavior where the federal court ruled guilty. Given these case types and the response rates discussed in the preceding paragraph, the number of responses classified by type of behavior in the underlying case are shown in Table 1.

Type of Behavior and sex of plaintiff	Version 1 (n=33)	Version 2 (n=23)	Version 3 (n=25)	Sex Total	Behavior Total
Verbal: not Guilty					162
Female Plaintiff	66	0	50	116	
Male Plaintiff	0	46	0	46	
Verbal: guilty					162
Female Plaintiff	66	23	25	114	
Male Plaintiff	0	23	25	48	
Physical: guilty					162
Female Plaintiff	66	46	0	112	
Male Plaintiff	0	0	50	50	

Table 1. Number of Responses by Type of Behavior

Hypothesis Testing

Based on previous research, a functional model of factors thought to have some influence on the decision of guilt was testing using the General Linear Model (GLM) procedure in the Statistical Analysis System (SAS) program. The functional form of the model includes the type of behavior, the sex of the plaintiff and the sex of the respondent as shown in the following equation:

$$Guilty = f(Behavior_{type} Sex_{victim} Sex_{respondent})$$

For the GLM analysis, the variables Guilty, Sex of Plaintiff, and Sex of Respondent were coded dichotomously. The variable Behavior Type was coded (0,1,2) depending on the nature of the behavior depicted in the case (verbal: not-guilty, verbal: guilty, physical: guilty). The Behavior Type variable was then treated as a classification variable by SAS (a classification variable causes a set of “dummy” or indicator variables to be automatically generated and treated as a group by the GLM procedure).

Observations that did not include responses on all variables of interest for the GLM analysis were not included in the model estimation; thus, the GLM analysis was conducted on 449 observations (out of the total 486 observations -- 6 cases * 81 respondents). The GLM analysis yielded a model F statistic of 59.04 with a p-value of 0.0001. Furthermore, all three independent

variables were found to be significant at the 0.05 level (Behavior: $F=100.09$ ($p=0.001$); Sex of the Respondent: $F=31.31$ ($p=0.0001$); Sex of Plaintiff: $F=4.69$ ($p=0.0309$)). The R-squared value for the GLM model was 0.347.

These regression results lend support to the model hypothesized in this study. However, any attempt to generalize the results beyond the types of respondents and behaviors examined by this study should be undertaken with care.

Discussion of Results

Given the support for the model provided by the GLM analysis, further examination of the distributions of responses by type of behavior, sex of the victim, and sex of the respondent are in order. Figures 1, 2, and 3 present a breakdown of the responses to the question “How would you find the accused?” where the two possible responses were guilty and not guilty. In Figure 1, there appears to be a clear difference in the verdict between the male respondents and the female respondents when the victim portrayed in the vignette is female. Nearly two-thirds (62.5 percent) of the female respondents felt the accused was guilty while approximately three-fourths (75.7 percent) of the male respondents felt the accused was not guilty. This pattern, while not as dramatic in all cases, holds across all six behavior/victim sex combinations; in every combination, the percentage of not guilty responses by male respondents is greater than the percentage of not guilty responses by female respondents.

Figures 4, 5, and 6 present the distribution of responses to the question “What disciplinary action would you recommend?” for the six behavior/victim-sex combinations with separate bars for female and male respondents. Each of these figures illustrates somewhat different patterns of recommended punishment by male and female respondents. Figure 6 is particularly interesting when the percentage of respondents recommending “Termination” as a punishment is examined. When the victim in a case involving physical harassment is a female, approximately three-quarters (male: 69.88 percent, female: 73.91 percent) of the responses recommend termination of the accused. However, when the victim in a case involving physical harassment is male, only one-half (50 percent) of the female respondents and less than one-third (30 percent) of the male respondents recommend terminating the accused.

The final figure (Figure 7) contains the distribution of recommended punishment across all cases with separate bars for respondents who felt the accused was guilty and not guilty. There are several interesting observations regarding the distribution of responses; first, in cases where the respondent felt that actionable sexual harassment that would yield a verdict of guilty had occurred, only 45 percent of those who would vote guilty (as members of a jury) reported that “Termination” of employment would be their recommended punishment. This result should be considered in light of the fact that a guilty verdict in a civil case penalties and punitive damages could result in significant loss to the accused and his/her employer.

Implications of Sex-Bias

As previously mentioned, when an employer conducts in-house investigations, it is critical he or she does so in a fair and *impartial* manner that ensure the rights of both parties--the alleged victim and the alleged harasser--are protected.³⁶ The ultimate objective of such an investigation is verifying whether the alleged behavior did occur and whether it was sufficiently severe to constitute sexual harassment.³⁷ This may not be as simple as it initially appears, as this study indicates that at least some behaviors that are potentially sexual harassment may be interpreted differently if the sex of the alleged victim differs from that of the investigator.³⁸ That is to say, that the investigator may conclude in her inquiry that the reported behavior was neither severe nor pervasive enough to constitute sexual harassment if the victim was male, while, *ceteris paribus*, concluding the opposite in instances of female victims. Such investigative biases could lead to allegations that the sex of the investigator prejudiced his or her findings, or that the conclusions drawn in the investigation were in error.

If interpretations of sexual harassment are affected by such sex-bias, then an argument could be made that the gender composition in-house investigative bodies, or external enforcement agencies for that matter, could have a substantial effect on investigation outcomes. There may be an argument for "mixed" investigative boards composed of both males and females.

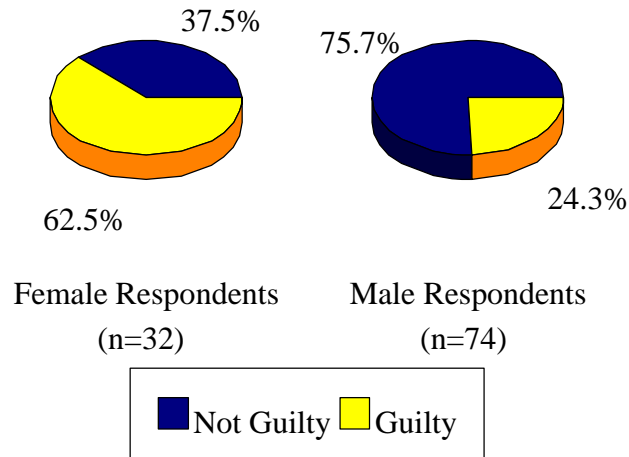
This research would also indicate that regardless of the sex of the investigator, a male victim of sexual harassment is less likely to convince an investigator than a female victim under similar circumstances.

Figure 1.

How Would You Find the Accused?

Type of Behavior: Verbal (not guilty according to federal court)

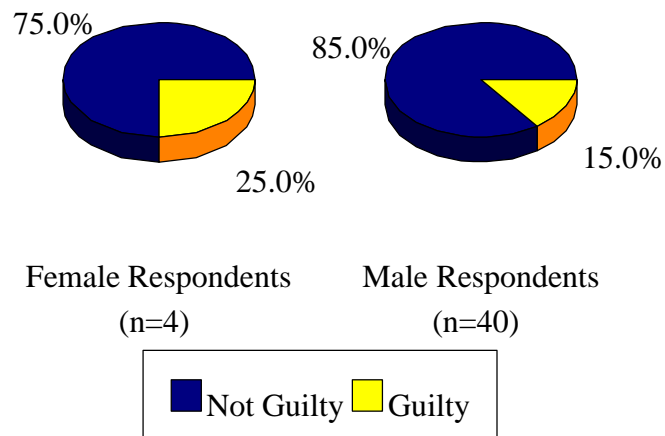
Type of Victim: Female



How Would You Find the Accused?

Type of Behavior: Verbal (not guilty according to federal court)

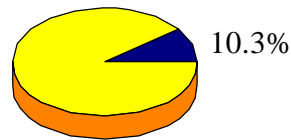
Type of Victim: Male



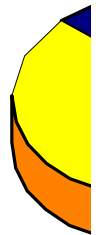
How Would You Find the Accused?

Type of Behavior: Verbal (guilty according to federal court)

Type of Victim: Female



89.7%



61.8%

Female Respondents

Male

(n=29)

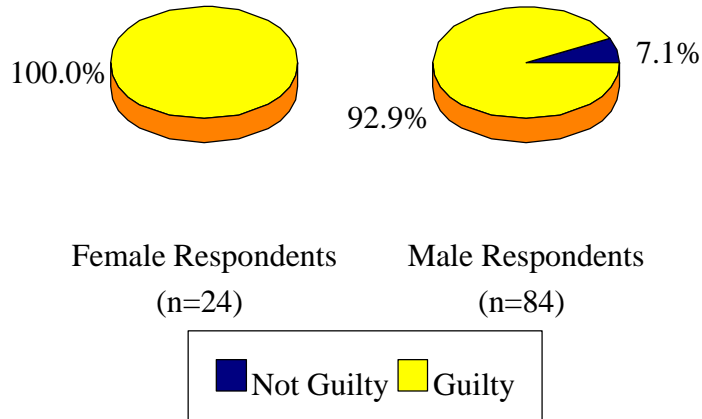


Figure 3.

How Would You Find the Accused?

Type of Behavior: Physical (guilty according to federal court)

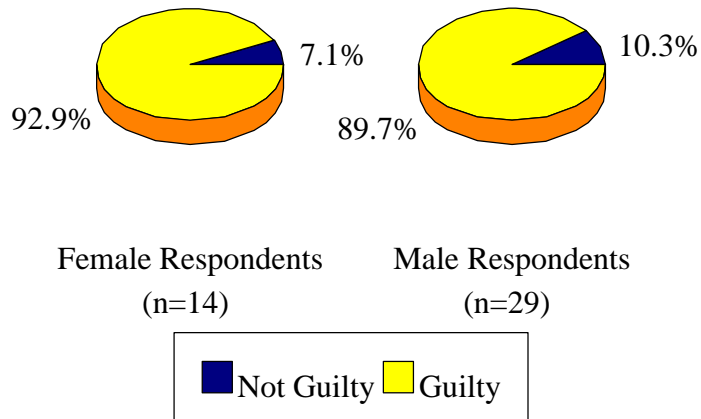
Type of Victim: Female



How Would You Find the Accused?

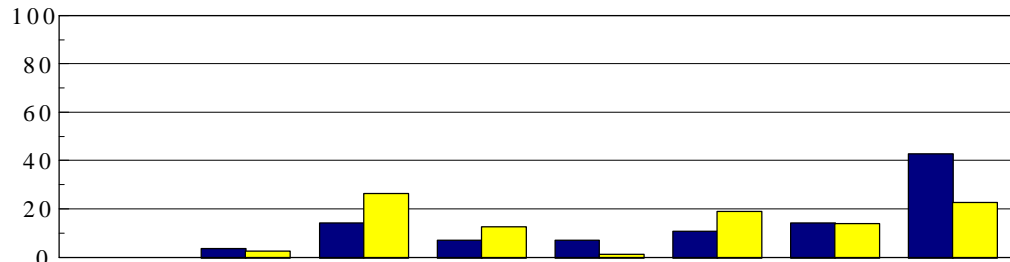
Type of Behavior: Physical (guilty according to federal court)

Type of Victim: Male



What Disciplinary Action Would You Recommend:
 Type of Behavior: Verbal (guilty according to federal court)
 Type of Victim: Female

of Respondents



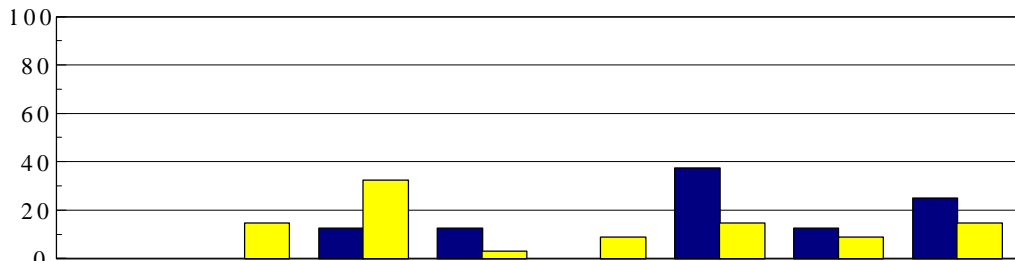
	NO	VB	WR	SN	DE	XF	DT	TM
= 28)	0.00	3.57	14.29	7.14	7.14	10.71	14.29	42.86
= 79)	0.00	2.53	26.58	12.66	1.27	18.99	13.92	22.78

- =No action
- VB =Verbal reprimand
- WR =Written reprimand
- SN =Suspension without pay
- DM =Demotion
- XF =Transfer
- DT =Demotion & Transfer
- TM =Termination

NO

What Disciplinary Action Would You Recommend?
 Type of Behavior: Verbal (guilty according to federal court)
 Type of Victim: Male

f Respondents



	NO	VB	WR	SN	DE	XF	DT	TM
= 8)	0.00	0.00	12.50	12.50	0.00	37.50	12.50	25.00
= 34)	0.00	14.71	32.35	2.94	8.82	14.71	8.82	14.71

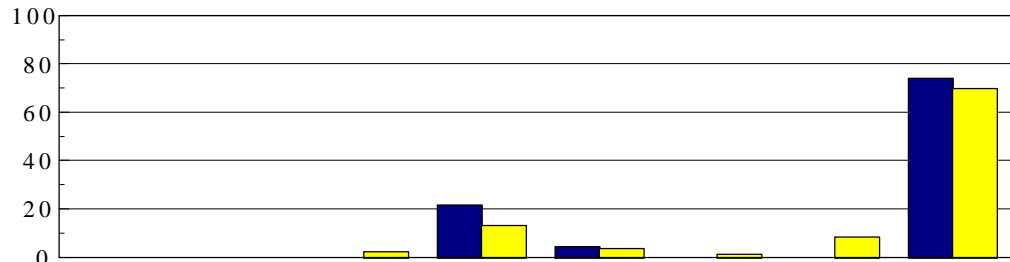
- NO =No action
- VB =Verbal reprimand
- WR =Written reprimand
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- XF =Transfer
- DT =Demotion & Transfer
- TM =Termination

What Disciplinary Action Would You Recommend:

Type of Behavior: Physical (guilty according to federal court)

Type of Victim: Female

of Respondents



	NO	VB	WR	SN	DE	XF	DT	TM
n = 23	0.00	0.00	0.00	21.74	4.35	0.00	0.00	73.91
n = 83	0.00	0.00	2.41	13.25	3.61	1.30	8.43	69.88

- =No action
- VB =Verbal reprimand
- WR =Written reprimand
- SN =Suspension without pay
- DM =Demotion
- XF =Transfer
- DT =Demotion & Transfer
- TM =Termination

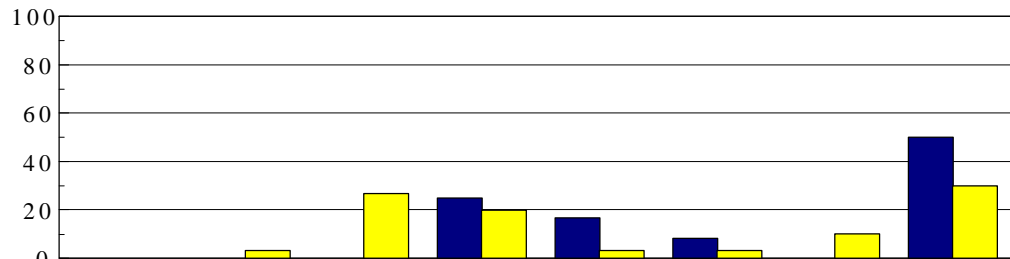
NO

What Disciplinary Action Would You Recommend?

Type of Behavior: Physical (guilty according to federal court)

Type of Victim: Male

of Respondents



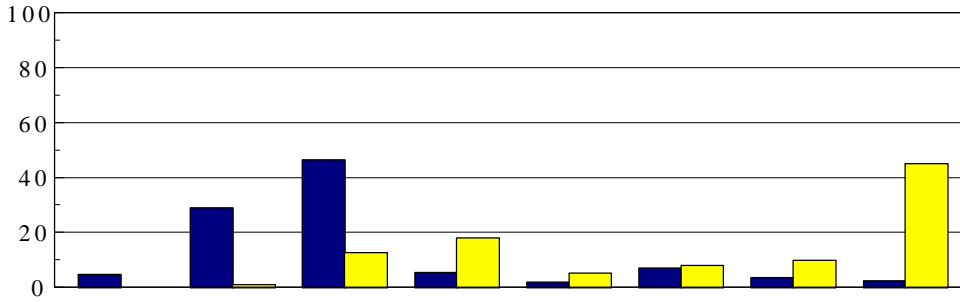
	NO	VB	WR	SN	DE	XF	DT	TM
n = 12	0.00	0.00	0.00	25.00	16.67	8.33	0.00	50.00
n = 30	0.00	3.33	26.67	20.00	3.33	3.33	10.00	30.00

- NO =No action
- VB =Verbal reprimand
- WR =Written reprimand
- SN =Suspension without pay
- DM =Demotion
- XF =Transfer
- DT =Demotion & Transfer
- TM =Termination

What Disciplinary Action would You Recommend:

All Cases

Percent of Respondents



	NO	VB	WR	SN	DE	XF	DT	TM
(n= 170)	4.71	28.82	46.47	5.29	1.76	6.88	3.53	2.35
(n= 300)	0.00	1.00	12.67	18.00	5.00	8.00	9.67	45.00

NO =No action

VB =Verbal reprimand

WR =Written reprimand

SN =Suspension without pay

DM =Demotion

XF =Transfer

DT =Demotion & Transfer

TM =Termination

where

NOTES

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32. The cases used for this purpose were: *Ellison v. Brady*, 924 F.2d 872 (9th Cir. 1991); *Jones v. Wesco Investments*, 846 F.2d 1154 (8th Cir. 1988); *Keziah v.*

W.M. Brown & Son, 51 FEP Cases 129 (W.D.N.C. 1988); *Slate v. Kingsdown*, 46 FEP Cases 1495 (M.D.N.C. 1987); *Jones v. Flagship International*, 793 F.2d 714 (5th Cir. 1986); and *Downes v. Federal Aviation Administration*, 775 F.2d 288 (Fed. Cir. 1985).

33. To avoid confusion in the text, all references to questions in the vignettes are in Arabic numbers (1, 2, 3, 1. 1. *etc.*) and references to the vignettes themselves are in Roman numerals (I, II, III, *etc.*).
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38. *See, Andrews v. City of Philadelphia*, 895 F.2d 1469 (3d Cir. 1990); *King v. Board of Regents of University of Wisconsin System*, 898 F.2d 533 (7th Cir. 1990); *Lipsett v. University of Puerto Rico*, 864 F.2d 881 (1st Cir.1988); *Yates v. Avco Corporation*, 819 F.2d 630 (6th Cir. 1987).