

What is Sexual Harassment and Avoiding it in Fitness Facilities

Avoiding Liability Bulletin – Courtesy CPH Insurance

Sexual harassment is in the news. Allegations of inappropriate and unlawful conduct based upon sexual conduct currently permeate Washington DC, Hollywood and even Main Street USA. Fitness facilities and fitness personnel, including personal trainers and other fitness professionals, are not immune from sexual harassment claims and litigation. As a consequence, fitness professionals need to know what is involved, what kind of conduct is prohibited and how professionals may be able to avoid claims and suits based upon such grounds.

Sexual harassment can take several forms. Mere verbal expressions of unwanted of sexual conduct coupled with some overt action amounting to an unwanted sexual advancement but short of actual physical contact can be an assault as well as sexual harassment under federal and state civil rights laws which protect discrimination. The actual unwanted “sexual” touching of another in this regard can be a battery as well as a violation of state and federal civil rights laws. The posting or display of nude photos or depictions of sex acts or various sexual scenarios, the communication of sexually based jokes, remarks about sex or gender can all be forms of sexual harassment. Promises of hiring, promotion or good employee reviews in exchange for sexual favors can be sexual harassment. In essence, all forms of harassment because of a person’s sex can amount to sexual harassment.

Employees as well as employers can be liable for employee’s sexual harassment of co-workers and even customers. Where these kinds of actions may come up in fitness facilities countless situations. An examination of a few of these scenarios may be helpful in providing information as to what kind of conduct should be avoided by employers and their employees.

In a December 15, 2007 decision from a federal court in Pennsylvania,[\[1\]](#) a hotel guest was assaulted by a massage therapist during a massage session at a spa-gym located in a hotel. The facts were reported as follows:

In 2014, the Loews Philadelphia Hotel contracted with the 12Fit Gym to operate a spa inside the hotel. 12Fit, in turn, hired Jerome McNeill as a massage therapist, but did so without conducting a criminal background check.

Mr. McNeill had a checkered past. In 2007, he was arrested and charged with the alleged rape of a minor. The charges were ultimately withdrawn. In 2013, he was convicted of reckless endangerment for fleeing a police officer on a motorcycle. In 2014, shortly before joining 12Fit, Mr. McNeill was fired from his job as a massage therapist at

Hand & Stone Spa for sexually assaulting a patron, an accusation as to which he was acquitted in late 2016.

Before hiring Mr. McNeill, 12Fit did not verify Mr. McNeill's employment history. Nor did 12Fit contact his prior employer Hand & Stone to inquire into why Mr. McNeill no longer worked there. The extent of 12Fit's research on Mr. McNeill was to note that he had a then-valid Pennsylvania massage license.

On September 14, 2014, Mr. McNeill sexually assaulted Elena Myers Court, a Loews hotel guest, during a massage session. Loews and 12Fit largely ignored Ms. Court's on-site report of what happened. In the weeks that followed, Mr. McNeill sexually assaulted two more women, each of whom reached settlements with Loews.

Based upon the foregoing, the guest in the current case instituted suit against the gym and the hotel. The two defendants moved for summary judgment. The court determined:

Because a reasonable jury could find that the gym should have been on notice of – and, arguably, should have taken action on – the therapist's history of sexual assault, the Court denies summary judgment for the gym except as to claims against the gym's owner. But because the guest has provided no cause of action to hold the hotel liable for the torts of the independent-contractor gym, the Court grants summary judgment for the hotel.

The court also determined that the gym defendant's behavior could lead to punitive damages and that the issue would be resolved by a jury. The court concluded:

(A) The Gym Defendants breached their duty to conduct a reasonable investigation; (B) that breach caused Ms. Court's injuries; and (C) Ms. Court's damages may include punitive damages.

The court also determined that a reasonable jury could find that the gym defendants failed to conduct a reasonable investigation of the employee's history and background and that the plaintiff's claim of negligent retention and supervision, failure to warn and negligent infliction of emotional distress would be determined by a jury.

While the plaintiff also sued the owner of the gym defendant, the court concluded he could not be personally liable for the gym defendant's actions and omissions. The claim against the hotel was determined to be subject to summary judgment since the hotel "had no reason to believe that [the other defendant] would fail to conduct adequate background checks of its employees."

The bottom line for fitness employers is to do a good job to check out prospective employees and then to adequately supervise them on the job. Anything else may expose said facilities and personnel to these kinds of claims.

In another sexual harassment type case from Missouri:[\[ii\]](#)

Plaintiff alleged in his complaint that “Blast Fitness Group owns and operates health club facilities under the trade name Blast Fitness” and that the corporate Defendants “were doing business jointly and in concert with each other as ‘Blast Fitness,’ which is a health club located [on Dorsett Road, Maryland Heights, Missouri, where the] unlawful employment acts took place.” (Doc. No. 3 at ¶¶ 6, 11.) Thompson was the regional manager of a region that included that facility.

Plaintiff alleges the following in his complaint, which the Court accepts as true for the purposes of the motion under consideration: On February 10 or 11, 2013, he signed a gym membership with “Defendants” at their health club on Dorsett Road, and was asked by the general manager of the facility, if he still wanted a job pursuant to an employment application he had completed in 2012. Plaintiff interviewed for the position on February 12, 2013, and was offered the job “on the spot” by Thompson. The next day, Thompson called Plaintiff and told him to “bring his paperwork in,” which Plaintiff did “immediately.” On February 21, 2013, after not hearing about his start date, Plaintiff texted Thompson to try to get a start date for his employment with “Defendants.” Thompson asked him some sexually explicit questions and when Plaintiff told Thompson he needed a job, Thompson told Plaintiff that he would get the job only in return for sexual favors.

Plaintiff did not accede, but rather on February 27, 2013, filed a charge of sexual harassment and retaliation with the Missouri Human Rights Commission and the Equal Employment Opportunity Commission. Plaintiff listed the discriminating employer as “Blast Fitness” on Dorsett Road. (Doc. No. 11-2.) Upon receipt of a right-to-sue letter, Plaintiff filed the present action claiming in Count I, sexual harassment in violation of the Missouri Human Right Act (“MHRA”). He alleges that all Defendants “failed to prevent and/or stop the sexual harassment of Plaintiff.” In Count II Plaintiff asserts a hostile work environment claim under the MHRA against all Defendants. On October 5, 2015, the Clerk of Court entered default against the four Defendants named above.

Since no answer was filed, the plaintiff sought judgment against the defendants in the amount of \$1 million in actual damages and \$1.5 million in punitive damages. While the court determined that a hearing was required to assess actual damages, it noted, “when a supervisor requires sexual favors as a quid pro quo for job benefits, the supervisor, by definition, acts as the company subjecting the company to liability.” However, because the plaintiff was never hired, a hostile work environment claim separate from the quid pro quo claim failed. Although the court determined that no hostile work environment claim could stand separate from the quid pro quo claim, fitness personnel and facilities should clearly avoid any innuendos as to what may be at stake when hiring, promoting, making pay raises or providing good employee evaluations, etc. in consideration of the provision of sexual favors. Liability in quid pro quo cases against other employees, supervisors and employers may be likely if explicit requests are made based upon such grounds or even if such favors are implicitly solicited.

Hostile work environment claims based upon unwanted sexual comments/actions can also expose employers and offending employees to potential damages. In a case from a federal court in Pennsylvania,^[ii] for example, comments about sexual organs, intercourse, copulation and oral sex made between a supervisor and a male personal trainer employee served as a basis for a hostile work environment action by the personal trainer against the employer which survived a motion to dismiss.

Quite simply all of these forms of sexual harassment can be avoided by the adoption of clear employee policies prohibiting such employee actions together with proper training and supervision of employees. Fitness facilities and personnel need to use such techniques to manage their potential liability and avoid conduct which may amount to sexual harassment.

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Adapted from a Declaration of Principles of the American Bar Association and Committee of Publishers and Associations

^[i] Court v Loews Philadelphia Hotel, Inc., Civil Action No. 16-4848, United States District Court, E.D. Pennsylvania, December 15, 2017.

^[ii] Waller v Blast Fitness Group, LLC, No. 4:15CV00586 AGF, United States District Court, E.D. Missouri, Eastern Division, June 10, 2016.

^[iii] See, Rachuna v Best Fitness Corp., Civil Action No. 1:13-CV-365, United States District Court, W.D., Pennsylvania, May 5, 2014.

[1] Court v Loews Philadelphia Hotel, Inc., Civil Action No. 16-4848, United States District Court, E.D. Pennsylvania, December 15, 2017.

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