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New Sexual Harassment Rules Openly Defy Reason

By: Ramesh Ponnuru – July 22, 2013

The new federal guidelines for how colleges should handle sexual-harassment cases aren't just unreasonable. They're hostile to reasonableness in principle.

The Justice Department and the Education Department's Office for Civil Rights set forth the rules in a letter they sent in May. The letter was addressed to the University of Montana but says it should serve as "a blueprint for colleges and universities throughout the country."

The letter criticized the university for defining "sexual harassment" too narrowly. The school had disciplined people only for conduct so "severe" and "pervasive" that it created a "hostile environment." Instead, the federal government said, colleges should treat "any unwelcome conduct of a sexual nature," including "verbal" conduct, as harassment. Such conduct, the Office for Civil Rights has explained, runs the gamut from "making sexual propositions" to "spreading sexual rumors."

The university also erred, according to the letter, in saying that conduct qualified as harassment only when "an objectively reasonable person" would find it "offensive." Harassment may occur, then, when someone's conduct triggers even an objectively unreasonable complaint. The federal government has put universities on notice that they need to take any complaint, however little merit it may seem to have, very seriously.

Pre-emptive Discipline

The letter went on to instruct colleges that "taking disciplinary action against the harasser" may be appropriate, and even required, before the investigation into the complaint is finished -- that is, before it is determined that the "harasser" is actually a harasser.

Hans Bader, a former lawyer for the Office for Civil Rights, notes that the federal guidelines for universities go well beyond what courts have said is acceptable policy against sexual harassment. The Supreme Court has taken the old-fashioned view that conduct has to be objectively offensive to count as harassment. Asking someone for a date, Bader points out, could theoretically run afoul of the new standard.

That scenario seems unlikely, because it's hard to see these rules being applied in any consistent and rigorous manner. But the Obama administration is increasing the risk that professors and students who have done nothing that most people would consider outrageous, or even wrong, will be done serious injustices.

And not for the first time. Two years ago, the Education Department told colleges that they should weaken the presumption of innocence for people accused of sexual misconduct, taking action against them even if the evidence of their misconduct is not “clear and convincing.”

In an essay for Commentary, Walter Olson explains that a lot of universities have steadily stripped away the rights of accused harassers in order to comply with the government’s commands. “This is a system in which the opportunity to be told that an investigation against you is going forward, to present evidence on your own behalf, and to seek a definite resolution to put the matter behind you, have effectively been dispensed with,” he writes.

And even when a university finds that an accusation lacks merit, the ordeal isn’t necessarily over: The Office for Civil Rights encourages universities to let the accuser, not just the accused, appeal the decision.

Silencing Speech

After the letter to the University of Montana provoked some criticism, the Office for Civil Rights issued another statement that downplayed how far it intends to go. It claimed it was saying that all unwelcome sexual conduct is harassment, not that it should all be banned. Of course, the original “blueprint” didn’t contain the tiniest hint that it would be OK for universities to allow some of what the office considered harassment. It did include language about eliminating harassment.

We will get a better sense of the administration’s intent from its just-announced investigations of sexual-harassment procedures at Dartmouth College and the University of Southern California. It’s clear, though, that a university that clamps down on campus speech will stay on the safe side of the administration’s murky rules. Even one that adopts the softer version of the administration’s policy will achieve much the same effect. As Olson writes, people will realize that “a certain type of joke or gossip can get them summoned involuntarily into a grievance process of indefinite length and destination” and stay silent.

One danger is that speech that should be allowed will effectively be banned by the federal government. Another is that even when allegations concern things that should be banned, the process will be unfair to accused students and professors who are innocent of them.

No one doubts that some victims of genuine harassment -- and worse -- get treated badly by university administrators. And sometimes “he said, she said” conflicts just don’t generate enough evidence to determine who’s in the right, and real misconduct can therefore go unpunished. But there are also false accusations, misinterpretations, ambiguities. Whatever the solution to the problem is, the system that President Barack Obama’s administration is creating isn’t it.