

[NLJ Home](#) > [Opinion](#)

MARK FOELY SCANDAL

Acting above the law

Debra S. Katz and Justine Andronici/Special to The National Law Journal

October 9, 2006

The U.S. Congress appears to be competing with the retail and food service industry when it comes to addressing the problem of sexual harassment of teenage employees by adults. In recent years, the Equal Employment Opportunity Commission (EEOC) has seen a marked increase in the number of sexual harassment complaints filed by teens and has initiated a crackdown on sexual harassment of teenagers. The EEOC has brought cases against McDonald's and Burger King franchises, Kmart and other fast food and retail companies, often resulting in large settlements. Young people are particularly vulnerable to sexual harassment on the job because of their typically low status and a lack of awareness about their rights in the workplace. Studies have shown that a startling number of teens face sexual harassment on the job.

A recently completed study by professors Susan Fineran of the University of Southern Maine and James Gruber of the University of Michigan-Dearborn found that 46.8% of female working students had been sexually harassed in the last year. In a previous study, Fineran had found that 35% of high school students who worked part time had experienced sexual harassment on the job.

In several of the teen harassment cases, employers were made aware of the harassment that was occurring, yet failed, like House Speaker Dennis Hastert, R-Ill., to take meaningful steps to stop it. Unfortunately, Hastert's failure to take the legally required steps to protect some of the most vulnerable employees in the Capitol building may have placed the U.S. Congress in the same position as the fast food and retail companies targeted by the EEOC. And the Republican party leadership is correctly facing heightened scrutiny for its moralistic hypocrisy and the politically expedient stance it has taken at the expense of its teenage workforce.

A failure of legal obligations

Much of the attention has focused on whether Hastert shirked his ethical obligations by failing to take action against then-Representative Mark Foley, R-Fla., after learning he had sent an inappropriate e-mail to a congressional page. But it is also important to note that Hastert failed in his legal obligations as well. Hastert claims that when he learned about the inappropriate e-mail to a congressional page, asking for the page's photograph, he didn't take further action because the boy's parents did not want to pursue the matter. While Hastert's sympathy and respect for the parents is understandable, it does not

excuse the speaker's inaction any more than it would a McDonald's supervisor's.

By choosing not to take preventative or corrective action, Hastert chose instead to place himself above the law, and in doing so allowed the harassment to continue unchecked.

More than 40 years ago, Congress passed Title VII of the Civil Rights Act of 1964, which banned discrimination based on gender for employers with 15 or more employees. Twenty years ago, in its landmark case, *Meritor Savings Bank, FSB v. Vinson*, 477 U.S. 57 (1986), the U.S. Supreme Court held that sexual harassment, which includes unwelcome sexual advances and sexualized banter of the type featured in Foley's e-mails, constitutes unlawful sex discrimination.

However, Congress chose not to make itself accountable under this law until 1995-more than 30 years after its initial passage of Title VII-when it passed the Congressional Accountability Act. And judging from Hastert's actions and those of representatives Rodney Alexander, R-La., and Thomas M. Reynolds, R-N.Y., congressional leaders still have no clue as to what legal obligations they have under this law. So let this serve as a primer for Hastert as well as a reality check for those who appear willing to accept his excuses for failing to investigate and correct Foley's misconduct.

Congress is the employer of the congressional pages, who earn \$18,817 per annum, minus a \$400 monthly fee for room and board.

With the passage of the Congressional Accountability Act, Congress became subject to the strictures of Title VII, and is therefore bound to conduct its business as an employer consistent with the requirements of that law.

As the speaker of the House, with both knowledge of the harassment and authority to take corrective action, Hastert was legally obligated under Title VII to investigate and address allegations of sexual harassment by Foley.

This requires more than speaking with the accused, accepting his patently implausible explanation and telling him not to do it again.

In two landmark cases, *Burlington Indus. v. Ellerth*, 524 U.S. 742 (1998), and *Faragher v. City of Boca Raton*, 524 U.S. 775 (1998), the Supreme Court held that under Title VII, an employer must exercise "reasonable care to prevent and correct promptly any sexually harassing behavior" in order to avoid liability for a sexually hostile work environment. Hastert and Congress have clearly failed to meet this standard.

As soon as he became aware that Foley was targeting teenage boys employed by Congress with sexually explicit, inappropriate communications, Hastert was obligated to act-if for no other reason than to protect Congress from the significant liability it might now incur for the outrageous actions of a single member. Perhaps members of Congress need the same type of sexual harassment training required by many companies, in order to ensure their compliance with Title VII. It is truly a sad day when our federal lawmakers blatantly fail, as Hastert did, to protect the minor employees who are launching their careers in the nation's capital.

Debra S. Katz is a partner with Washington-based Katz, Marshall & Banks. Justine Andronici is an associate at the firm. They both specialize in sexual harassment issues.



**SUNTRUST LEGAL
SPECIALTY GROUP***
Meeting the financial
needs of lawyers and
their practices for nearly
two decades.

[LEARN MORE >>](#)


SUNTRUST
Seeing beyond money

SunTrust Bank, Member FDIC.