MEMORANDUM OF LAW

DATE: January 15, 1988

TO: John Delotch, Fire Chief
FROM: City Attorney
SUBJECT: Regulation of Sexually Oriented Materials in the Work Place

Your recent memorandum requested our views concerning restrictions on sexually oriented materials at the work site. You are concerned about the presence of Playboy and Penthouse magazines and the viewing of the Playboy Channel and x-rated video at Fire Department work sites. You indicated your intent to prohibit their use or presence throughout the Fire Department because of the adverse effects upon the Department's equal opportunity program and efforts to prevent sexual harassment.

Chief George of your staff verbally provided us with some additional facts that are pertinent to this subject. Magazines such as Playboy or Penthouse purchased by individuals stationed at fire stations sometimes are left casually about in the lounge or common areas or are shared among other requesting firefighters. The television sets and video recorders upon which the videos or Playboy selections are viewed were privately purchased by an employee organization and have been allowed at the work sites under a long standing agreement with management. There are no restrictions on how this equipment may be used. Cable service provided to the work sites does not include unpaid access to the Playboy Channel. Cable subscription to the Playboy Channel or videotape rental is privately paid. Such subscription or rental has not been expressly prohibited in the past.

We understand your concerns to arise from the display or viewing of sexually oriented materials insofar as such may constitute a form of sexual harassment at the work site. The primary concern is at certain fire stations where one or more female firefighters are stationed. There is no evidence that suggests such material has been shown to female firefighters. However, you have determined that it would be impermissible to restrict such display at only selected sites and propose to

restrict this throughout the department, a conclusion with which we concur. Indeed, it is difficult to defend the display of sexually oriented material at an all male work site if management is responsible for taking affirmative steps to avoid or remove a climate for sexual harassment from work sites without regard to gender classification.

We conclude that you may regulate conduct associated with the display of sexually oriented materials at the work site, in distinction to the content of the material, where such display would tend to create a hostile environment rendering the City potentially liable for sexual harassment claims. In keeping with this conclusion, we have attached a proposed text of a regulation which meets constitutional parameters applicable to this subject. Our analysis follows:

There are two issues involving the display of sexually oriented materials at the work site. The first issue is whether such display constitutes or may be deemed to constitute actionable sexual harassment. The second issue is whether prohibiting or restricting such display violates constitutionally protected areas of free speech of employees.

With regard to the first issue, we are not aware of any cases which deal solely with displays of sexually oriented materials at the work site as a form of sexual harassment. Material which pictorially emphasizes the female genitalia or mammaries may be offensive to some employees. The casual display of such pictorial material in distinction to its deliberate display can affront those who neither welcome nor invite such displays and have no choice as to the location of their work site or its environment.

The Supreme Court in Meritor Savings Bank v. Vinson, 477 U.S. , 91 L.Ed.2d 49, 106 S.Ct. 2399 (1986), addressed the employer's responsibility for creating or tolerating a "hostile environment" relative to sexual harassment. "For sexual harassment to be actionable, it must be sufficiently severe or pervasive 'to alter the conditions of the victims employment and create an abusive working environment.'" Meritor, 91 L.Ed.2d at 60. The court then concluded that the inquiry is to be directed to whether the conduct is unwelcome rather than whether a victim acquiesced in it. Ibid. The court offered no guidelines as to the severity or pervasiveness of the required conduct, but held that management had a duty to prevent actionable harassment.

The question of whether the display alone would be actionable sexual harassment pales in significance to the determination you have made and the emphasis you have placed on avoiding sexual harassment in the work site. This is a determination that is clearly within management's responsibility and discretion. Displays that are demeaning towards members of a specific sex are "unwelcome," thus constituting a form of sexual harassment. Management need not await the filing of a sexual harassment complaint before addressing a problem of which it is aware. We

therefore opine that your determination would be legally supportable under the Meritor rationale.

The second issue is whether restricting such displays violates a First Amendment protected right. Since your proposal did not seek to prohibit the possession of certain written materials at the work site, we need not address that issue at any length, other than to observe that an absolute prohibition against the possession of sexually oriented material not rising to the level of pornography constitutes impermissible content matter regulation. Carl v. City of Los Angeles, 61 Cal.App.3d 265, 132 Cal.Rptr. 365 (1976), petition for hearing denied November 12, 1976.

However, the uninvited display of sexually oriented materials at a work site is akin to the public display of such materials in a public right of way. The courts have held that public displays may be regulated in a "time, place, manner" fashion. See, Gluck v. County of Los Angeles, 93 Cal.App.3d 121, 155 Cal.Rptr. 435 (1979), petition for hearing denied August 15, 1979; Young v. American Mini Theatres, 427 U.S. 50, 63, fn. 18, 49 L.Ed.2d 310, 322, 96 S.Ct. 2440 (1976). Gluck allowed municipalities to regulate by ordinance the public display of sexually oriented material in newsracks on the theory that public nudity may affront passersby who do not welcome its dissemination and who have no choice in the matter. San Diego adopted similar regulations in San Diego Municipal Code section 62.0903.

Thus, even though an individual might have a constitutionally protected right to possess or read sexually oriented material, such material may not be displayed in such a manner as to annoy, harass, intimidate or offend another in a duty status or City facility. Gluck, supra at 130. The same principle would apply to the viewing of material on television, either by video tape or cable access programming, as an alternative to prohibiting television sets and video recorders at the work sites. (This latter option is also available to you, although it will require "meet and confer" and may be counterproductive to morale and efficiency.)

This approach leaves it up to the individual viewer as to what will be watched; it prohibits the display of sexually oriented material in such manner as to be offensive to unwilling or unconsenting parties. These principles are set forth in the attached draft regulation which relies on similar provisions found constitutionally permissible in Gluck. We further recommend that you review these proposals with the City Manager for any other policy concerns that may be appropriate.

We close with the observation that notwithstanding the

adoption of a regulation governing this subject, education on the effects of such displays at the work site and development of a sensitivity to the effects will, in the long run, be the most productive.

JOHN W. WITT, City Attorney
By
Rudolf Hradecky
Deputy City Attorney

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Attachment
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