

Unlawful Harassment

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Unlawful Harassment

- Title VII and VFEPA
- EEOC and Attorney's General's office will investigate upon complaint
- Employer must have policy consistent with State law
- There are two kinds of unlawful harassment: Quid pro quo and Hostile environment harassment
- Litigation can lead to award of financial, emotional and punitive damages

Harassment Claims in Court

- Media attention
- Impact on work relationships
- Discipline for harassers
- Financial impact of litigation
- Distraction caused by litigation
- Personal liability exposure

Quid Pro Quo

- Tangible employment action taken
- To punish or reward sexual conduct
- By a supervisor
- Strict liability for employer
- Supervisor is determined by input in performance evaluations or any adverse or positive impact on tangible employment benefit (so, who is a supervisor?)

Who is a supervisor?

- Someone who may undertake or recommend a tangible employment action
- If it is an employee who recommends, the recommendation must be given substantial weight by the final decision maker

Tangible employment action

- Impacts the terms and conditions of employment
- Typically requires a corporate action that will be documented
- Usually the decision is subject to review at a higher level of supervision
- Usually it inflicts direct economic harm
- Usually it can only be caused by a supervisor

Are these things tangible?

- Hiring, firing and promotion
- Undesirable work assignments
- Change in benefits
- Change in job title
- Ignored by the boss
- Move to a worse office space

Extension of Quid Pro Quo to Harassment claims

- Constructive Discharge claims can be quid pro quo claims
- Constructive discharge means that the employee has no reasonable course available except to resign
- Where the employer fails to act such that the employee must quit to make it stop, it is quid pro quo

Hostile Environment Harassment

- There is “legal” harassment and illegal harassment in the workplace.
- Legal harassment is all behavior that annoys or upsets that does not meet the technical definition of harassment
- Do not confuse the two. This is almost never unlawful: “My boss is mean to me and I don’t like it.”
- Legal harassment can be unprofessional

Unlawful Harassment/Hostile Environment

There are three essential elements to the unlawful behavior

1. The behavior was **unwelcome** to the complainant
2. The behavior was based upon some **protected characteristic**
3. The harassment was **pervasive and severe**

Prompt Investigation

- You have a policy that mandates your actions and identifies the procedures
- This is not HHB!
- Your investigators should respond “promptly”
- The accused most likely goes on paid leave
- Never send the victim home (retaliation concerns)

Unwelcome

- Manifesting behavior that demonstrates the Plaintiff did not like the conduct
- Or, the employee did not solicit or incite the harassment and the employee regarded it as undesirable or offensive
- Failure to complain or delayed complaints do not prove that the harassment was welcome where the victim may fear retaliation (the courts will examine the general environment at work)

When is it Welcomed?

Analysis:

Was there a contemporaneous complaint or protest?

Did the victim communicate that the conduct was not wanted?

Was there a reasonable fear of repercussions if a complaint was made?

How has the employer responded to past complaints?

Unwelcome Hypothetical

Jane likes to wear form fitting skirts to work, with a low cut blouse. She seems to enjoy the attention and has been overheard describing sexual matters to her female and male friends. She is one hot ticket! Joe is new and starts to make comments to her that seem like what other people are doing. Unwelcome?

Investigation Issues on Unwelcome

1. What was the overall work environment like?
2. How did the victim behave with the accused and other employees?
3. What objection was raised?
4. Was a complaint made promptly? If not, why not?
5. Who did the victim tell and when?
6. What was the victim's demeanor at the time?

What is unwelcome?

- “stop it”
- Turn and walk away
- Suffering in silence
- Giving as good as you get
- It was fine until it wasn't

Based on Protected Characteristic

- Race, religion, ethnicity, gender (including pregnancy), disability, age (over 18 years old), sexual orientation, gender identity, genetic information are protected characteristics
- Criminal history, judgment, marital status, work performance and some personality traits may not be.

Special “because of” issues

- Using female body parts as part of speech may be sufficient
- Behaving in a way that is generally demeaning to a gender is sufficient
- “I hate her because she is a b_____.” Is that because of gender?
- Can men harass other men?

Is this based on a protected characteristic

Fran the custodian knows that Jose is from Portugal. She likes to joke around that he is an African American because he has an afro and is swarthy. Jose tells her to stop it, but she thinks it is way too funny and keeps it up. Is this based on a protected characteristic?

Man v. Man

Joe and Fred are good buddies. They have a way of relating that includes good natured ribbing. Joe calls Fred bad names associated with homosexuality because it is fun. Fred is not gay. Fred tells Joe he should wear his dress to work. Fred tells Joe he is a wuss. Is this behavior potentially based on gender?

Pervasive and Severe

- Alters the terms and conditions of employment and creates an abusive work environment
- Subjective and Objective components
- What is work environment? (bar after work? Christmas party? In breakroom after shift? The parking lot?)
- Can e-mails complainant never knew about be part of then existing work environment?

The law on pervasive and severe

- Petty slights and annoyances are not sufficient
- The conduct must be the kind that is intimidating and hostile to a reasonable person
- It must be both objectively and subjectively pervasive and severe
- It must substantially affect the work environment

More P & S Guidance

- Sexual flirtation, innuendo, vulgar language that is “trivial” will not be sufficient
- A single incident (unless severe) or isolated incidents are insufficient
- The “mere utterance” of a racial epithet is not sufficient
- There must be a pattern of offensive conduct

Severe Hypothetical

Sally and Mark are on a business trip together. They rent a car and Sally drives. She locks the doors from her side and begins to discuss her sexual activities while touching Mark on his upper thigh. Severe? Would it be different if the roles were reversed? What if there was no touching?

Employer Liability

- Coworker conduct: negligence standard. If the employer knew or should have known of harassment and failed to take prompt action reasonably likely to end conduct.
- Supervisory liability: strict liability unless the employer shows that it exercised reasonable care to prevent and promptly correct and employee unreasonably failed to complain

Coworker Hostile Environment Liability

- Knew or should have known of harassment
- Dirty jokes in emails and porn on computers?
- Supervisor always stays in office so doesn't see conduct?
- Action “reasonably likely to end conduct”
- Slap coworker on the butt—what is appropriate action?

The Alleged Harasser

- Has no rights (except under CBA)
- Will be the one to bear the burden of any interim action
- Will face severe discipline because overreacting creates no exposure while the opposite is not true
- Faces stigma at work if still employed

Supervisory Liability

- Employer's burden of proof
- "Exercised reasonable care to prevent harassment"
- Training, policy enforcement, prior conduct with prior complaints
- "Promptly Correct"
- Investigation and punishment

Retaliation

- Employee filed charge or engaged in protected activity
- Employer or co-workers took materially adverse employment action against complainant (objective standard)
- There is a causal link to protected activity
- No protection for “bad faith” complaints
- **SAME REMEDIES AS HARASSMENT**

Elements of Retaliation

Protected Activity: complainant or witness or someone who opposes harassment

Are these persons protected?

Joe disables the office computers because of dirty emails.

Joe calls his supervisor a jerk because he tells dirty jokes.

Elements of Retaliation 2

What if mixed motives for poor treatment?

- The Plaintiff need only prove that the retaliation was a **MOTIVATING FACTOR**
- Employer failure to stop co-employee harassment of worker constitutes adverse action

Is this a materially adverse employment action?

- Assign different shift?
- Different office location?
- Send home during investigation?
- Co-employees will not invite to social functions
- Co-employees will not chit chat at work

Unlawful Harassment in Real Life

- Tony Teacher was emailed a nude photo by a student. He is devastated and traumatized. He demands that the student be switched out of his class to another teacher. He wants a finding that he has been sexually harassed. He demands that there be “reasonable discipline” like a suspension for ten days. How do you handle this?

What to do when there is a complaint

- Commence investigation by designee
- Have a copy of the policy available for definitions
- Use interim corrective action
- Be reasonably prompt (not same as HHB)
- Generate a report when complete and administer reasonable discipline

Investigation Problems

- Jane complained about sexual harassment. She is an emotional mess. She asks you to have let her bring her husband to the investigatory interview. Okay?
- The witnesses are afraid that they will be disciplined for failing to stop the harassment, they ask for a union rep. Okay?
- The accused forgets to notify the union. Okay?