Shining New Light on an Old Problem

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So Here’s Where It All Began . . .
Or did It?

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<th>Year</th>
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<th>% of Charges Filed by Males</th>
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Sexual Harassment Law

Origin

Background
Title VII - 1964

- Prohibits discrimination in the workplace on the basis of:
  - Race
  - Color
  - Sex
  - National Origin
  - Religion
Title VII Coverage

• Hiring
• Discharge
• Compensation
• All other terms and conditions of employment
Michigan Law on Harassment

Discrimination and Harassment in Michigan are illegal under the Elliott-Larsen Civil Rights Act and the Michigan Persons with Disabilities Civil Rights Act
The Michigan law prohibits discrimination in employment based on:

- Race
- Color
- Religion
- Sex (which includes pregnancy, childbirth or a medical condition related to pregnancy)
- Marital Status
- National Origin
- Disability
- Age
- Height
- Weight
U.S. Supreme Court Decisions
Law Evolves

1986
Meritor Savings v. Vinson
(Unwelcome even though participation was voluntary)

1993
Harris v. Forklift Systems
(Hostile Work Environment – severe or pervasive conduct)

1998
Oncale v. Sundowner Offshore Services, Inc.
(Same sex harassment violated Title VII)

1998
Burlington Industries v. Ellerth, and Faragher v. City of Boca Raton
(New standard for employer liability for Supervisor/Manager conduct)
Facts About Harassment

- Harasser can be a man or a woman
- Victim does not have to be the opposite sex of the harasser (same sex harassment)
Facts About Harassment (cont.)

- Harasser can be the victim’s supervisor, an agent of the employer, a supervisor in another area, a co-worker or a non-employee — customer, vendor, etc.
- Harassment can occur outside work at social events, whether or not the company sponsors the event
- Harassment can occur without economic injury to or discharge of the victim
- Victim does not have to be the person harassed but could be someone affected by the offensive conduct
Supervisor’s/Manager’s Responsibilities

• Do not engage in this behavior
• Role in preventing such behavior
• Role in receiving any employee complaint
Sexual Harassment
Legal Definition
What is Sexual Harassment?

EEOC defines it as:

Unwelcome sexual advances, requests for sexual favors, and other verbal or physical conduct of a sexual nature constitutes sexual harassment when:

Submission to or rejection of the conduct is made either explicitly or implicitly a term or condition of an individual’s employment.
What is Sexual Harassment? (cont.)

• Submission to or rejection of such conduct by an individual is used as a basis for employment decisions affecting such individual.

• Such conduct unreasonably interferes with an individual’s work performance.

• Creates an intimidating, hostile or offensive work environment.
Michigan Law Definition of Sexual Harassment

Unwelcome sexual advances, requests for sexual favors, and other verbal or physical conduct or communication of a sexual nature under the following conditions:

(i) Submission to the conduct or communication is made a term or condition either explicitly or implicitly to obtain employment . . .

MCLA § 37.2103
Michigan Definition (cont.)

(ii) Submission to or rejection of the conduct or communication by an individual is used as a factor in decisions affecting the individual's employment . . .

(iii) The conduct or communication has the purpose or effect of substantially interfering with an individual's employment . . . or creating an intimidating, hostile, or offensive employment environment

MCLA § 37.2103
What is “UNWELCOME” or “UNWANTED” Conduct?
According to the EEOC, a General Definition of “Unwelcome Conduct” is:

The challenged conduct must be unwelcome “in the sense that the employee did not solicit or incite it, and the sense that the employee regarded the conduct as undesirable or offensive”
Who Determines Whether Sexual Statements or Acts are Unwelcome?

- Whether sexual statements or acts are **unwelcome** is determined by the recipient’s **perception**, not by what was intended

- Intent v. Impact
Two Components of Determining “Unwelcome”

**SUBJECTIVE**
Harassment must result in a negative effect on the person being harassed

**OBJECTIVE**
Harassment must be the type which would also negatively affect a reasonable person

**NOTE:** “Voluntary” submission to sexual harassment can still be “unwelcome”
When there is conflicting evidence as to welcomeneness, EEOC will consider:

- The record as a whole; and
- The totality of the circumstances

29 CFR § 1604.11(b)
Types of Sexual Harassment
EEOC Previously Classified Harassment as Either:

- Quid Pro Quo
- This for That

- Hostile Work Environment
Quid Pro Quo

• Unwelcome sexual advances, requests for sexual favors or other verbal or physical conduct of a sexual nature if submission to or rejection is made a term or condition of employment or is used as a basis for an employment decision

• Only supervisors/managers could engage in this form of sexual harassment
Hostile Work Environment
Sexual Harassment
Hostile Work Environment

Sexual harassment can be created by supervisors, managers or co-workers or third parties.
Hostile Work Environment

Examples of “conduct that can create a sexually hostile work environment”

• Physical touching
• Sexual comments, suggestions, jokes, or innuendoes
• Suggestive looks or leers
• Sexually-oriented noises
• Displaying sexually suggestive materials
Conduct Examples (cont.)

• Derogatory comments and sexually stereotyped insults such as:
  • Calling a person “honey,” “babe” or “sweetheart”
  • Referring to a female as “bimbo” or “chick”
  • Calling a male a “stud,” “boy” or “hunk”
• Implying that a person is incapable of handling certain job duties because of his/her gender
Intentional physical conduct which is sexual in nature such as:

- Hugging
- Kissing
- Pinching
- Patting
- Grabbing
- Squeezing
- Brushing against another’s body
How Much is Required to Create a Sexually Hostile Environment?

Severe or Pervasive (sliding scale)

Severe = one egregious incident could be enough

Pervasive = a series of less egregious conduct
Factors in Determining if Conduct is Severe or Pervasive

According to EEOC’s 1990 Enforcement Guidance:

- Whether the conduct was verbal or physical, or both
- How frequently it was repeated
- Whether the conduct was hostile or patently offensive
- Whether the alleged harasser was a co-worker or a supervisor
Factors in Determining if Conduct is Severe or Pervasive

• According to EEOC’s 1990 Enforcement Guidance, where an employee’s supervisor sexually touches an employee, it will normally find a violation

• Whether others joined in perpetrating the harassment

• Whether the harassment was directed at more than one individual
Limits on the Definition of Harassment

• Federal law does not prohibit simple teasing, offhand comments, or isolated incidents that are not “extremely serious.” However, such conduct may be in violation of company policy.

• Conduct must be “so objectively offensive as to alter the conditions of the victim’s employment.”

• According to EEOC, “The conditions of employment are altered only if the harassment culminated in a tangible employment action or was sufficiently severe or pervasive to create a hostile work environment.”

EEOC’s 1999 Enforcement Guidance
Tangible Employment Action
Sexual Harassment
Tangible Employment Action

- Occurs when harassment culminates in a tangible employment action
- EEOC and the Supreme Court recognize that because an employer acts through its supervisors, a supervisor’s undertaking of a tangible employment action constitutes an act of the employer
Tangible Employment Action

• If a supervisor undertakes or recommends a tangible employment action based on a subordinate’s response to unwelcome sexual demands, the employer is liable and cannot raise the affirmative defenses.
Tangible Employment Action

• The result is the same whether the employee rejects the demands and is subjected to an adverse tangible employment action or submits to the demands and consequently obtains a tangible job benefit.

• Such harassment previously would have been characterized as “quid pro quo.”
What is a Tangible Employment Action?

- According to EEOC, a tangible employment action is “a significant change in employment status”
- According to EEOC, unfulfilled threats are insufficient

1999 EEOC Enforcement Guidance
Examples of Tangible Employment Actions

- Hiring and firing
- Promotion and failure to promote
- Demotion
- Undesirable reassignment
- A decision causing a significant change in benefits
- Compensation decisions
- Work assignment decisions
Supervisor’s/Manager’s High-risk Conduct

• Off-Premises, Work-Related Conduct
  • 24/7 obligation

• Dating Subordinates
  • Unwelcome? The relationship ends

• Touching Employees

• Sexual Jokes and Conversations

• E-mail
  • They don’t “disappear”
Employer Liability

Liability –
How much is this going to cost us?
Employer Liability for Actions of Supervisors

• Employers may be held vicariously liable for the actions of their supervisors

• According to EEOC, the type of harassment engaged in by the supervisor determines whether an employer can raise an affirmative defense to vicarious liability
Employer Liability for Quid Pro Quo and Tangible Employment Action Harassment

- Strict (Automatic) Liability

- If a plaintiff proves tangible employment action harassment occurred, the employer is liable for the supervisor’s harassment
Employer Liability for Quid Pro Quo and Tangible Employment Action Harassment

According to EEOC’s 1999 Enforcement Guidance, there is no affirmative defense to tangible employment action harassment.

• “If a supervisor undertakes or recommends a tangible employment action based on a subordinate’s response to unwelcome sexual demands, the employer is liable and cannot raise the affirmative defense.”
Employer Liability For Hostile Work Environment Harassment

- If there is not a tangible employment action, an affirmative defense to vicarious liability is available
Your Conduct in the Workplace

A helpful suggestion to avoid engaging in or to identify inappropriate conduct is to ask yourself the following questions:

• Would I do or say this if my spouse/significant other were present?

• Would I object if someone said or did this to my spouse/daughter/son or significant other?

• Would I want my behavior reported in the newspaper?
The Affirmative Defense to Vicarious Liability

“If an employee was subject to a pattern of harassment that created an unlawful hostile environment, but the employee unreasonably failed to complain to management before she suffered emotional harm and the employer exercised reasonable care to prevent and promptly correct the harassment, then the employer will avoid all liability”

EEOC’s 1999 Enforcement Guidance
Harassment Is Prohibited Against

• Employees
• Applicants

Employers are required to take all reasonable steps to prevent harassment
Remedies for Employment Discrimination

Employee Options:

• File an Administrative Complaint
• File a Private Lawsuit
Remedies Available for Employment Discrimination

• Back pay
• Hiring
• Promotion
• Reinstatement
• Out-of-pocket expenses
• Front pay
• Policy changes

• Training
• Affirmative relief
• Actual damages, including for emotional distress
• Attorney’s fees and other court costs
So, What Do We Do?

It’s all about culture.
Keys to Inclusion

- Focusing on the individual (not as a member of a group)
- Change in mindset
- Top down commitment (words and actions)
- Integrating the individual into your team
- Challenging your biases
Where Do We Start?

According to the EEOC’s Guidance we start with prevention:

• An effective preventive program should include an explicit policy against sexual harassment that is clearly and regularly communicated to employees and effectively implemented.

• The employer should affirmatively raise the subject with all supervisory and non-supervisory employees, express strong disapproval, and explain the sanctions for harassment.
Where Do We Start?

The employer should also have a procedure for resolving sexual harassment complaints.

- The procedure should be designed to ‘encourage victims of harassment to come forward’ and should not require a victim to complain first to the offending
Where Do We Start?

- It should ensure confidentiality as much as possible and provide effective remedies, including protection of victims and witnesses against retaliation.
You need a policy and not the same one you have had for 20 years.
You Need to Communicate and Train

• Train your managers and supervisors
• Train your employees
• Train bystanders
You Need to Implement

When an employer receives a complaint or otherwise learns of alleged sexual harassment in the workplace, the employer should investigate promptly and thoroughly.
You Need to Implement

The employer should take immediate and appropriate corrective action by **doing whatever is necessary to end the harassment**, make the **victim whole** by restoring lost employment benefits or opportunities, and **prevent** the misconduct from recurring.
You Need to Implement

• Disciplinary action against the offending supervisor or employee, ranging from reprimand to discharge, may be necessary. Generally, the corrective action should reflect the severity of the conduct.

• The employer should make follow-up inquiries to ensure the harassment has not resumed and the victim has not suffered retaliation.
Thank you!

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