Protecting Yourself from Sexual Harassment Claims

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Agenda

• Why talk about sexual harassment?
• How do you define sexual harassment?
• Who can commit sexual harassment?
• What isn’t sexual harassment?
• What are the costs of sexual harassment to the employer and to the perpetrator?
• What should an employee do if he/she is subjected to sexual harassment?
• What should a manager/supervisor do if he/she receives a complaint of sexual harassment?
• Q & A
• Title VII of the Civil Rights Act of 1964 prohibits discrimination based on race, national origin, religion, age, disability and sex

• 99,947 discrimination claims filed with Equal Employment Opportunity Commission during FY2011

• Of these 99,947 discrimination charges, 28.5% (28,534) were sex discrimination claims
Sexual Harassment Statistics

• Sexual harassment is form of sex discrimination

• Of the 28,534 sex discrimination claims filed during FY2011, 11,364 (39.8%) were sexual harassment claims
  – 16.3% filed by males

• $52.3 million in monetary benefits collected by EEOC for sexual harassment claimants
Men Harass Women
Women Harass Men
Same Sex Harassment

- **Oncale vs. Sundowner Offshore Services**, U.S. Supreme Court (1998)
  - Oncale employed as roustabout on offshore oil rig in Gulf of Mexico
  - Sexual humiliation, assault and rape threats
  - Held down in shower by supervisor and two other men; sexually assaulted with bar of soap
  - Reports of harassment passed off by management as “hazing”
How do you define SEXUAL HARASSMENT?
Two Types of Sexual Harassment

Quid Pro Quo
- Latin phrase meaning “this for that”
- Always involves supervisor and employee

Hostile Work Environment
- Continued unwanted and unwelcome pattern of behavior
- Employee is unable to do his or her job
Quid Pro Quo
Sexual Harassment

Tangible employment action taken because an employee refuses to submit to sexual demands

- Examples of tangible employment action
  - Termination
  - Demotion
  - Failure to promote
  - Transfer
  - Increased work load
  - Assignment to less favored projects
• **Supervisory relationship required** - For claimant to win, the harasser must have the power to make decisions affecting the claimant’s employment

• **Who is a supervisor?**
  – Has the authority to make or **recommend** tangible employment decisions
  – Has the authority to direct the employee’s daily work activities

• **Physicians likely to be deemed “supervisors” of hospital staff**
Quid Pro Quo Sexual Harassment (continued)

- What if threats of tangible employment actions not carried out?
  - **Burlington Industries v. Ellerth**, U.S. Supreme Court (1998); Employee may still have claim for hostile work environment
    - Supervisor comments included:
      - “Loosen up!”
      - “I could make your life very hard or very easy here at Burlington.”
      - “Are you wearing short skirts yet, because it would make your life a whole lot easier.”
Hostile Work Environment

• Elements of hostile work environment claim:
  – Claimant subjected to unwelcome conduct by a co-employee (Note: no supervisory relationship required between claimant and harasser);
  – Harassing conduct sufficiently severe or pervasive as to alter term or condition of employment; AND
  – Employer knew or should have known of the harassment.
• Even if the behavior is not intended to be offensive, it may still be unlawful.
Examples of Conduct That May Create Hostile Work Environment

- Physical Examples
  - Touching or fondling, or unnecessary intimacy such as brushing up against a person
  - Being physically threatening or intimidating
  - Leering or ogling
- Verbal Examples
  - Nasty jokes (whether spoken or written)
  - Sexually-oriented comments or suggestions about a person’s private life, sex life or physical appearance (whether spoken or written)
  - Sexual propositions or repeated unwanted requests for dates
- Visual Examples
  - Pornography
  - Sexually-oriented calendars or magazines
  - Offensive computer screen savers
“Unwelcome” means uninvited from the standpoint of the claimant. What may be “welcome” to some may be “unwelcome” to others.

Each of us has a responsibility to be sensitive to signals that a type of conduct we are exhibiting is unwelcome.

Conversely, claimants have a responsibility to send clear signals; failure to send clear signal could be construed as indication that conduct was, in fact, welcome.

Provocative dress of claimant can be considered in determining whether conduct was “unwelcome”.

Claimant’s failure to report offensive conduct can also be considered in determining whether conduct was “unwelcome”.

Element #2 – Conduct is Severe or Pervasive

- Claimant must prove that conduct would be considered severe or pervasive by a “reasonable person”
  - Fifth Circuit, Stewart v. Mississippi Transportation Commission (2009) – Repeated professions of love were … “at most, unwanted and offensive” but not sufficient for reasonable person to claim hostile work environment
  - Two separate actions of harassment by same supervisor, with 2-year intermission in between; no complaint filed first time
Considerations in Determining Whether Conduct is Severe or Pervasive

• How frequent is the conduct? Questionable conduct is more likely to constitute harassment if it is repeated.
• What is the position of the harasser in relation to the claimant?
• Is the conduct physically threatening or humiliating, or merely an offensive utterance?
• Does the conduct unreasonably interfere with an individual’s work performance?
Element #3 – Knowledge of Employer

• Two ways of proving employer had constructive notice:

1) Employer knew. Employee provides management level personnel with enough information to raise probability of sexual harassment.

2) Employer should have known. Harassment is so pervasive and open that a reasonable employer would have to be aware of it.
Affirmative Defenses Available to Employer

• Two affirmative defenses available:
  – Employer exercised reasonable care to prevent and promptly correct any sexually harassing behavior, and/or
  – Claimant unreasonably failed to take advantage of any preventive or corrective opportunities
    • Puebla v. Denny’s Inc., 5th Circuit (2008); Employee who was sexually assaulted by her manager twice in the same day not required to report incidents on the day they occurred, nor was she required to make report to her immediate supervisor
Good Practices by Employer

- Demonstrate that sexual harassment policy/procedure distributed to all employees
- Investigate sexual harassment complaints promptly
- Carefully document findings from investigation
- Take prompt corrective action
  - Appropriate disciplinary action
  - Training
  - Ensure victim is “made whole”
What Isn’t Sexual Harassment?

“The Stray Remark”

Unless the conduct is quite severe, a single incident of offensive sexual conduct generally does not create an abusive environment.
What Isn’t Sexual Harassment?

“The Overly Sensitive Employee”

In determining whether harassment is sufficiently severe or pervasive to create a hostile environment, the harasser’s conduct should be evaluated from the objective standpoint of a “reasonable person”

Title VII does not serve “as a vehicle for vindicating the petty slights suffered by the hypersensitive” – Zabkowicz v. West Bend Co. (E.D. Wisconsin, 1984)
Charging party alleged that her co-worker made repeated unwelcome sexual advances toward her

- An investigation disclosed that the alleged “advances” consisted of invitations to join a group of employees who regularly socialized at dinner after work.
- The co-worker’s invitations, viewed in that context and from the perspective of a reasonable person, did not create a hostile environment and therefore did not constitute sexual harassment.
What Isn’t Sexual Harassment?

“The Consensual Relationship”

• Plaintiff must make known that the conduct is **unwelcome**
• 1/3 of all romantic relationships start in the workplace
• Because sexual attraction plays a role in the day-to-day social exchange between employees, “the distinction between invited, uninvited-but-welcome, offensive-but-tolerated, and flatly rejected” sexual advances may well be difficult to discern. – Barnes v. Costle (D.C. Circuit, 1977)
Scenario: - An employee first willingly participates in conduct of a sexual nature, but then ceases to participate and claims that any continued sexual conduct has created a hostile work environment.
Employee must show that any further sexual conduct is unwelcome, work-related harassment.

The employee must clearly notify the alleged harasser that his conduct is no longer welcome.

If the conduct still continues, failure to bring the matter to the attention of higher management or the EEOC is evidence, though not dispositive evidence, that any continued conduct is welcome or unrelated to work.
Sexual Harassment is Serious

Quid Pro Quo cases - NO DEFENSE for employer – only question is $$ of damages

Green v. Administrators of the Tulane Educational Fund (U.S. District Court, E.D. Louisiana)
- Plaintiff verdict in amount of $424,673
- $124,763 in lost wages
- $300,000 for emotional distress

Zeltwanger v. Webber
- Plaintiff verdict in amount of $18,800,000

Catron v. City of Weatherford (U.S. District Court, E.D. Texas)
- Plaintiff verdict in amount of $385,569
- $19,585 for past wages, $115,984 for future wages, and $250,00 for emotional distress
Sexual Harassment is Serious
(continued)

Hostile work environment cases more difficult for employee to prove

Scribner v. Waffle House, Inc. (U.S. District Court, N.D. Texas)
- Plaintiff verdict in amount of $8,137,000 for wrongful termination when she complained

EEOC v. The Cooper Institute for Aerobics Research (U.S. District Court, N.D. Texas)
- Settlement in amount of $250,000

EEOC v. Flemings Prime Steakhouse and Wine Bar (December 2010)
- Plaintiff verdict in amount of $850,000
Potential personal loss to perpetrator:

- Loss of professional license
- Personal criminal/civil liability
- Irreparable damage to reputation, career, family
- Termination of employment
- Loss of morale for staff
- Work environment suffers
- Expose employer to risk
• Any employee who feels that he/she has been subject to sexual harassment should advise the offending individual(s) that the conduct is offensive and unwelcome, and ask that it STOP IMMEDIATELY!!!

• Report the incident to supervisor, Human Resources, or Compliance Hotline (888-800-1096)
If harassment is reported to you, report the harassment up the chain of command and to the Human Resources Department.

Human Resources/management must investigate quickly and determine whether corrective action is necessary.
Prompt Remedial Action

- Do whatever is necessary to end the harassment - Initiate disciplinary action against the offending supervisor/employee
- Prevent the misconduct from recurring
- Make the victim whole by restoring lost employment benefits or opportunities
Example of Bad Employer Responses

In Zabkowicz v. West Bend Co., (E.D. Wisconsin), plaintiff complained on numerous occasions about harassing conduct of co-workers. Supervisor took no remedial action other than to hold departmental meetings at which he reminded employees of the company’s policy against offensive conduct. Supervisor never documented an investigation or disciplined any employee until the plaintiff filed an EEOC charge, at which time one of the offending co-workers was discharged and three others were suspended.
Example of Prompt Remedial Action by Employer

In McMorris v. Louisiana State Penitentiary (5th Circuit, 2008), the victim had suffered harassment at the hands of a penitentiary chaplin for 6 months. Employer began investigation on the same day harassment was reported. Chaplin resigned. Victim given leave due to the distress of the incident, but resigned when she was asked to return to work. Court ruled victim’s claim for sexual harassment failed because employer’s response clearly demonstrated “proper and prompt remedial action.”
Follow the FACTS

- Familiarize yourself with the company policy
- Address incidents of sexual harassment immediately
- Cooperation
- Thorough investigation
- Satisfactory resolution
Familiarize yourself with the company policy

- Read the policy
- Ask questions
- Keep a copy in a safe place
Address incidents of sexual harassment immediately

- Employee must report
- Management must respond
Follow the FACTS (continued)

Cooperate

Full cooperation of all parties is expected and required
Thorough investigation

- Documentation of complaints
- Employee interviews
- Signed statements
Satisfactory resolution

- Swift response and resolution
- Objective review of the facts
- Fair and appropriate response
Identify the two (2) forms of sexual harassment.
Test Question #1

Answer – Quid Pro Quo and Hostile Work Environment
In proving up a hostile work environment, the victim must establish that his/her supervisor engaged in conduct that was so severe or pervasive as to alter a term or condition of employment. True or False?
False. No supervisory relationship need be established in proving up a hostile work environment. It is possible for a non-supervisory co-worker to create a hostile work environment.
In proving up quid pro quo sexual harassment, the victim must have suffered a tangible adverse employment action. True or False?
Test Question #3

True. In quid pro cases, the claimant must prove that he/she suffered a tangible adverse employment action after refusing to submit to the harasser’s sexual demands.
Test Question #4

Identify the three elements of a hostile work environment claim.
Test Question #4

(1) Unwelcome conduct that is (2) so severe or pervasive that it alters a term or condition of employment, and (3) was known about (or should have been known about) by the employer.
Upon receiving a sexual harassment complaint, it is sufficient for management to hold a departmental meeting and remind all employees of Scott & White’s policy against sexual harassment. True or False?
False. Management must thoroughly investigate the complaint and take all appropriate corrective action to ensure any sexually harassing behavior is stopped.
Someone who sends nasty jokes to their co-workers via Scott & White email may be legitimately accused of having engaged in sexual harassment. True or False?
True. Sexual harassment may be verbal in nature. It would be necessary in this case to ascertain whether the emails in question were unwelcome and were sufficiently severe or pervasive as to create a hostile work environment.
Test Question #7

Sexual harassment must persist over a long period of time to be considered actionable. True or False?
False. A single incident can be considered sexual harassment is sufficiently severe.
Test Question #8

Sexual harassment can occur between persons of the same gender. True or False?
True. Same-sex harassment is possible. Likewise, while not as common, males have successfully demonstrated that they have been sexually harassed by females.
Thank You