

# UNITED STATES EQUAL EMPLOYMENT OPPORTUNITY COMMISSION



## Sexual Harassment

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# TITLE VII OF THE CIVIL RIGHTS ACT OF 1964, AS AMENDED

## PROTECTED BASES

- Race
- Color
- National Origin
- Religion
- Sex
- Retaliation (also applies to the ADA and ADEA)



# Sex Discrimination

- Sexual harassment is a form of sex discrimination in violation of Title VII
- Harassment must be sexual in nature



# What is Sexual Harassment?

- Conduct must be unwelcome to the target of the harassment
- Unwelcome-
  - Employee did not solicit or incite it and
  - Employee regarded the conduct as undesirable or offensive.



# What is Sexual Harassment (cont.)?

- The harasser or target can be a man or a woman
- Same sex-harassment is actionable
- Harassment can be verbal, physical, or pictorial
- An employee does not have to be the target of the harassment to be affected by the conduct



# Other Forms of Harassment

- Racial Harassment
- Religious Harassment
- National Origin Harassment
- Sex Harassment
- Age Harassment
- Disability Harassment



# KNOW WHAT BEHAVIORS CAN BE CONSIDERED HARASSMENT

- Demands for sexual favors for job benefits
- Unwelcome and deliberate touching
- Unwelcome sexually suggestive looks/gestures
- Unwelcome pressure for sexual favors or dates
- Favorable treatment for sexual favors
- Unwelcome teasing, jokes, remarks, that are sexual, derogatory based on a protected basis, or ethnic slurs
- Unwelcome letters, telephone calls, e-mails or distribution of materials that are sexual or derogatory.
- Physical assaults based on a protected basis



# Two Types of Sexual Harassment

- Quid Pro Quo (Tangible Job Action )
- Hostile Work Environment



# Elements Of Quid Pro Quo Sexual Harassment

- The harasser must be a supervisor
- The sexual harassment culminates in a tangible job action



# Who qualifies as a “Supervisor?”

- Someone who has authority
- To undertake or recommend tangible job actions
- To direct employee’s daily work activities
- The person doesn’t have actual authority
- But employee reasonably believed the harasser had actual authority
- Automatic
- President, owner, partner, high-ranking official



# IS IT TANGIBLE EMPLOYMENT ACTION HARASSMENT?



- Tangible employment action-any significant change in employment status
- It need not be an adverse action
- It must be causally linked to supervisory harassment
- Examples-hiring, firing, promoting, demoting
- The affirmative defense is not available
- Is constructive discharge a tangible employment action?

# IS CONSTRUCTIVE DISCHARGE A TANGIBLE EMPLOYMENT ACTION?

## 2004 Supreme Court Decision

- Constructive Discharge-A hostile work environment so severe that a reasonable person would feel compelled to resign.
- It is a tangible employment action if an “official act” underlies the constructive discharge.
- Examples of “official acts”
  - Humiliating demotion
  - Extreme cut in pay
  - Transfer to unbearable position



# Hostile Work Environment Harassment

- Derogatory comments or conduct by a supervisor, co- worker or non employee targeting a protected bases or sexual in nature that have the purpose or effect of ...
  - Creating an intimidating, hostile, or offensive working environment
  - Interferes significantly with a person's job performance



# Elements of Hostile Work Environment Harassment

- Context
- Severity
  - How bad is it?
- Frequency
  - How often does it happen?
- Isolated comments rarely create a hostile environment
- A single incident of physical sexual conduct can create a hostile environment



# KNOW STANDARD FOR A VIOLATION

- THE STANDARD FOR DETERMINING A VIOLATION DIFFERS DEPENDING ON WHETHER THE HARASSER IS A
  - Co-worker/non-employee
  - Alter ego of the employer
  - Supervisor



# CO-WORKER/NON-EMPLOYEE HARASSMENT



- Liability is not automatic
- Must establish the employer knew or should have known about the harassing conduct
- Employer must then show it took immediate and appropriate corrective action to correct harassment and prevent its recurrence

# WAS HARASSMENT BY AN ALTER EGO OF THE EMPLOYER?

- Liability is automatic
- Alter ego-someone of sufficiently high rank to be treated as the employer's proxy.
- Examples-president, owner, partner, corporate officer.



# HARASSMENT BY A SUPERVISOR

- Liability may or may not be automatic
- Types of supervisory harassment
  - Tangible employment action harassment
    - Automatic liability
  - Hostile environment harassment
    - Liability not automatic
    - Recourse to the affirmative defense



# IS IT HOSTILE ENVIRONMENT HARASSMENT BY A SUPERVISOR?

The affirmative defense is available to the employer to avoid liability

- The employer has the burden and must prove both prongs of the affirmative defense
  - First prong: did the employer exercise reasonable care to prevent and correct the harassment?
  - Second prong: did the employee unreasonably fail to utilize the employer's complaint procedure or to avoid all harm otherwise?



# FIRST PRONG-AFFIRMATIVE DEFENSE



- Did the employer exercise reasonable care to prevent and correct harassment?
  - Must establish, communicate and implement an adequate anti-harassment policy and complaint procedure
  - Must conduct adequate investigation
  - Must take immediate and appropriate corrective action
  - Must take other reasonable measures to prevent and correct harassment

# SECOND PRONG-AFFIRMATIVE DEFENSE

- Did the employee unreasonably fail to utilize the employer's complaint procedure or to avoid all harm otherwise?
  - Did the employee use the complaint process, provide truthful information and otherwise cooperate with the investigation?
  - Did the employee unreasonably delay complaining?
  - If no complaint was filed, why not?
  - If no complaint was filed, did the employee take other steps to avoid harm?



# FINAL DETERMINATION ON HOSTILE ENVIRONMENT HARASSMENT BY SUPERVISORS

- The employer has the burden to prove both prongs of the affirmative defense.
    - Did the employer took adequate measures to prevent and correct the harassment, but the employee complained appropriately, the employer is liable?
    - If the employer proves the first prong did the employee unreasonably delay in complaining. If so the employer is liable but damages may be reduced.
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# Employer Pitfalls

- Not having a strong policy
- Lack of on-going training to all employees
- Managers/Supervisors failing to respond to complaints appropriately
- Incomplete investigations
- Failing to take immediate corrective actions
- Retaliation



# Case Study 1

Aimee is a 19-year-old waitress at a popular chain restaurant. Her supervisor regularly makes sexual comments to her and tries to hug her. Aimee also sees other women being touched and told sexual comments by male employees. She heard a rumor that one woman was sexually assaulted by another male employee. She complains to the restaurant manager about everything that has happened to her and everything that she has seen and heard.



- What should Aimee's manager do?
- What responsibilities does the manager have?
- Who should the manager talk to?
- What should the manager tell Aimee?
- Are there other facts you would like to know?



# Case Study 1 Cont'd

In the course of investigating Aimee's complaint, her manager finds evidence that she was groped and told "you're jeans should be tighter" by her supervisor.

Aimee's manager also finds evidence that another woman was sexually assaulted by a co-worker, and that woman has filed charges with the local police.



- What should the manager do about Aimee's supervisor?
  - What is the company's responsibility regarding harassment by supervisors?
- What should the manager do about the sexual assault by the co-worker?
  - What is the company's responsibility regarding harassment by a co-worker?
  - What other information would you want to know?



# EEOC v. Hometown Buffet, Inc. (S.D. CA 2009)

- Arose out of complaints from the El Cajon location
- EEOC found a class of at least 7 female employees who were subjected to the following by male managers, supervisors, and co-workers for a period of almost ten years:
  - Groping, hugging, kissing, sexual advances, being stalked by male employees outside of work
  - One female employee was raped by a male coworker



# EEOC v. Hometown Buffet, Inc. (continued)

## Breakdown of the company's complaint procedure

- Corporate complaint line was down with a message directing employees to speak to store managers
- Management told women who complained that they could not “go above their heads” to HR
- Management's response to complaints was to tell the women they were being too sensitive and to get along better with other employees
- Language barrier: many of the women were monolingual Spanish speakers



# EEOC v. Hometown Buffet, Inc. Resolution

- Settled in 2009 after extensive discovery
- Monetary settlement of \$710,000 to the class of victims
- 2 year consent decree
  - Annual training for employees regarding sexual harassment and retaliation
  - Creation of a formal complaint procedure
  - Accessibility to Spanish speakers



# Case Study #2

Maria is a field worker at a Southern California vineyard. At work, her supervisor walks behind her and brushes his frontal region against her buttocks as he walks by. Maria has heard from other women that her supervisor has threatened them to have sex with him, or else they will be fired. She also sees that he openly flirts with the younger female workers and gives them extra breaks and better supplies if they flirt back. Maria is offended, and complains about all of this to the vineyard's owner.



- What should the owner do next?
- What types of sexual harassment should the owner be concerned with?
- What if the owner personally hired Maria's supervisor, and does not believe the supervisor could do the things Maria says?
- Is there other information you would need to know?



# EEOC v. Rivera Vineyards (Coachella Valley 2005)

- EEOC found a class of at least 27 women field workers who were harassed:
  - Touching, grabbing, groping by senior male managers
  - One woman was raped
- EEOC also found a class of 37 workers who were fired in retaliation for complaining of the harassment
- Women were also denied promotional opportunities



# EEOC v. Rivera Vineyards Resolution

- Settled in 2005 for \$1,050,000 on behalf of the harmed female farm workers
- One of the largest monetary settlements for agricultural workers
- Three year consent decree
  - Reinstatement for wrongfully terminated workers
  - Hiring of an EEOC consultant
  - Implementing new harassment policies and procedures
  - Providing annual EEOC training for managers and employees



# Case Study #3

Miriam works at your steel plant. After being subjected to what she thinks is sexual harassment by her supervisor, she complains to human resources. Two weeks later, her supervisor fires her. She files a charge of discrimination alleging retaliation with the EEOC.



- You are the HR employee who receives the Charge. What do you do next?
- Who would you talk to?
- What facts do you need?
- Is this retaliation?



# Case Study #3 (Continued)

Miriam's fiancée, Eric, also works for your company. While you are dealing with Miriam's charge of discrimination, Eric's supervisor fires him. Eric then files a charge of discrimination with the EEOC alleging retaliation. The charge lands on your desk.



- What do you do next?
- Who do you talk to?
- What facts do you need?
- Is this retaliation?
  - If yes, why? What is the protected activity?
  - If no, why not?



# Thompson v. North American Stainless, LP (SC 2010)

- Eric Thompson was fired after his fiancée, Miriam, filed a charge of discrimination alleging sex harassment with the EEOC.
- Eric then filed a charge for retaliation.
- The Supreme Court found that Eric's charge was valid, and he could have a colorable retaliation claim
- Broad interpretation of retaliation





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