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# Workplace sexual harassment during the #MeToo and Time's Up movements

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Claims of sexual harassment in the workplace, while always prevalent, are expected to spike in the days, months, and years to come. This is, in large part, thanks to movements like #MeToo and Time's Up. You cannot turn on the TV, listen to the radio, or browse social media without being bombarded with new allegations of sexual harassment and/or sexual assault against the likes of Hollywood moguls (e.g., Harvey Weinstein and Les Moonves), TV personalities (e.g., former *Today Show* coanchor Matt Lauer, former NBC News anchor Tom Brokaw, PBS's Charlie Rose, and comedian Bill Cosby), and politicians and judges (e.g., President Bill Clinton, President Donald Trump, former senator Al Franken, former congressman Anthony Weiner, and, most recently, Judge Brett Kavanaugh, the newest U.S. Supreme Court Justice). Whether these allegations are substantiated or not, they undoubtedly have made an indelible impression on our collective psyches. More importantly, in what has been dubbed the "Weinstein Effect," victims now feel empowered to share their stories, especially following the #MeToo social media movement.<sup>[1]</sup> This movement has spread, turning a national spotlight on the issue of workplace sexual harassment.

So what impact is this likely to have on employers? You may well expect to see a corresponding spike in allegations of sexual harassment in your workplace. It is worth noting, too, that such claims often come down to "he said/she said," with little, if any, corroborating evidence. Yet they must be taken seriously, lest they expose your business to a claim that you failed to take prompt and effective measures to eradicate unlawful harassment from your workplace. Additionally, sexual harassment claims are one of the most difficult types of claims for an employer to successfully have dismissed on summary judgment. For these reasons, a short refresher on the subject is in order.

### **What is unlawful workplace sexual harassment?**

Generally speaking, unlawful sexual harassment is a form of sex discrimination that violates Title VII of the Civil Rights Act of 1964 and similar state civil rights laws. Title VII recognizes two types of sexual harassment: quid pro quo and hostile work environment.

Quid pro quo is a Latin phrase that means "this for that." Thus, quid pro quo harassment occurs when someone in a superior position, such as a manager or supervisor, attempts to elicit sexual favors from a subordinate employee by either promising that the favor will be returned with a job-related benefit (e.g., a promotion or salary increase) or by threatening an adverse employment action (e.g., a demotion or negative performance evaluation) if the sexual favor is not provided. Of the two types of claims, quid pro quo claims are generally less prevalent.

The more likely sexual harassment claim you may face is the so-called hostile work environment claim. This occurs when an employee claims that he/she has been subjected to unwelcome and offensive behavior (e.g., off-

color jokes, commenting on physical attributes, unsolicited hugs or shoulder rubs, discussing sexual activities) that has risen to such a level that it has become “severe or pervasive” so as to “alter the conditions of [the victim’s] employment and create an abusive working environment.”<sup>[2]</sup> Title VII requires that, in order to be actionable, the harassment “must be both objectively and subjectively offensive, one that a reasonable person would find hostile or abusive, and one that the victim in fact did perceive to be so.”<sup>[3]</sup> Courts must look at the totality of the circumstances when determining whether an environment is sufficiently hostile, including the “frequency of the discriminatory conduct; its severity; whether it is physically threatening or humiliating, or a mere offensive utterance; and whether it unreasonably interferes with an employee’s work performance.”<sup>[4]</sup>

On the other hand, the law is clear that “simple teasing, offhand comments and isolated incidents (unless extremely serious)” will not be actionable under Title VII.<sup>[5]</sup> Moreover, the harassment must be based on the victim’s sex. In some situations, it can actually be quite difficult to prove the harassment was based on the victim’s sex. Some courts, too, have found that, absent extrinsic evidence of sex discrimination, the alleged harasser’s words alone are insufficient to establish harassment. For example, one court found that the mere use of the word “bitch,” without other evidence of sex discrimination, [was] not particularly probative of a general misogynist attitude.<sup>[6]</sup> In another case, the court found the use of the word “bitch” was not necessarily motivated by gender, as several possible motives explained the speaker’s reference to the employee as a “sick bitch.”<sup>[7]</sup> Furthermore, the law does not protect against the “equal opportunity” harasser, since inappropriate conduct directed equally at both sexes is not discriminatory.<sup>[8]</sup> Courts frequently remind employees that Title VII is not a general civility code.

## **Coworker vs. supervisor harassment and employer liability**

An employer’s potential liability for workplace sexual harassment also depends on the identity of the alleged harasser—supervisor vs. coworker. When an employee is harassed by a supervisor, and a significant adverse employment action results (e.g., demotion, termination), the employer may be held strictly liable for that supervisor’s actions. If, on the other hand, the alleged harassment did not result in an adverse employment action, the employer may avoid liability under the *Ellerth-Faragher* defense.<sup>[9]</sup> This defense takes a two-step approach. First, the employer must demonstrate that it exercised reasonable care to prevent and promptly correct any sexually harassing behavior in the workplace. An example of this would be evidence that the employer has adopted and implemented an effective anti-harassment policy, including a procedure for employees to report alleged instances of sexual harassment and a framework for how allegations will be investigated and appropriately addressed. Once the employer makes this showing, it then has to demonstrate that the employee unreasonably failed to take advantage of any preventive or corrective opportunities provided by the employer (e.g., not reporting the harassment pursuant to the company’s anti-harassment policy) or to avoid harm otherwise.<sup>[10]</sup>

With respect to coworker harassment, employers may generally only be held liable if the employer knew or should have known of the alleged harassment and failed to take prompt and effective remedial action.<sup>[11]</sup> Thus, if an employer promptly and appropriately responds to an employee’s complaint, there is no cause of action under the law.

## **Does the law only protect women from sexual harassment?**

Despite the recent media attention to male-on-female harassment, sexual harassment involves more than just male harassers and female victims. Anyone, male or female, can be a victim of sexual harassment. Furthermore, the U.S. Supreme Court has held that Title VII also prohibits same-sex harassment in some instances. In order to

show that the harassment was based on sex in these circumstances, the employee must demonstrate: (1) credible evidence that the harasser was homosexual, (2) evidence that make[s] clear that the harasser is motivated by general hostility to the presence of [the same sex] in the workplace, or (3) comparative evidence about how the alleged harasser treated members of both sexes in a mixed-sex workplace.<sup>[12]</sup> Employers may even be liable for harassment by third parties, such as customers, vendors, or independent contractors.

## The actions you can take

So how can you, the employer, avoid becoming the next news headline? Below are five simple and practical things you can and should do, if you haven't already. Given today's social and political climate, time is of the essence.

1. Examine your employment policies/employee handbook to ensure that workplace sexual harassment is addressed in a realistic and thoughtful manner. At the very least, your policies should clearly indicate the company has a "zero tolerance" for workplace sexual harassment and identify examples of conduct that would violate the company's standards (e.g., off-color jokes, unsolicited touching, sharing pornographic images) and should ensure that employees will not face retaliation for reporting harassment or participating in an investigation.
2. Encourage employees to immediately report any concerns and establish several avenues for employees to do so. A 24-hour hotline or intranet reporting mechanism is always a good idea. Supervisors/members of management should also be *required* to immediately report any instances of unlawful harassment they personally observe or which is reported to them by human resources, with serious consequences (i.e., discipline, up to and including termination) if they fail to do so.
3. Disseminate your policies appropriately and train all employees, including managers, on a regular basis. In order for policies to be effective, employees must be aware of their existence. Therefore, anti-harassment policies should be given as part of the onboarding process, and companies should require an acknowledgement of receipt from employees.
4. Take immediate and appropriate action once a complaint of workplace sexual harassment is received. This should include, at a minimum:
  - a. Initiating an investigation coordinated by human resources;
  - b. Interviewing and obtaining written statements from the victim and all witnesses, including the alleged harasser;
  - c. Obtaining copies of relevant documents (e.g., text messages, emails);
  - d. Preparing a clear record of the investigation by taking notes during interviews and keeping your notes concentrated on objective information, free of conclusions or opinions (keep in mind, if a lawsuit is filed, these notes may well be used as an exhibit in a courtroom);
  - e. Taking reasonable steps during the investigation to separate the victim from the alleged harasser; and
  - f. Not ignoring older complaints. It's not unusual to find out during the investigation about some prior inappropriate conduct. Simply because a complaint was not previously made, it does not make the incident irrelevant.
5. Be consistent in your enforcement of policies. Do not make exceptions for high-performing or high-

ranking individuals, and take care to ensure that your supervisors/managers do not “play favorites” with respect to how they enforce the company’s policies against workplace harassment.

## Takeaways

- Check your policies. All companies should examine their employment policies/employee handbooks to ensure that workplace sexual harassment is addressed.
- Have a plan in place. Leaders should establish multiple ways for employees to report any concerns, including a 24-hour hotline or a dedicated internal webpage.
- Take reports seriously. Supervisors and/or members of management should be required to report any instances of harassment immediately.
- Be ready to act. Once a complaint of workplace sexual harassment is received, take immediate and appropriate action.
- Keep a clear record. During interviews, take unbiased notes about objective information. These notes may be used as an exhibit if a lawsuit is filed.

<sup>1</sup> CBS News, “Powerful men confronted as ‘Weinstein Effect’ goes global,” December 11, 2017, <https://cbsn.ws/2j4C3XZ>

<sup>2</sup>Faragher v. City of Boca Raton, 524 U.S. 775, 786 (1998) (citing Meritor Savings Bank, FSB v. Vinson, 477 U.S. 57, 67 (1986)).

<sup>3</sup>Harris v. Forklift Systems, Inc., 510 U.S. 17, 21–22 (1993)).

<sup>4</sup>Id. at 23.

<sup>5</sup>Faragher, 24 U.S. at 788.

<sup>6</sup>Hocevar v. Purdue Frederick Co., 223 F.3d 721, 737 (8th Cir. 2000).

<sup>7</sup>Galloway v. General Motors Serv. Parts Operations, 78 F.3d 1164, 1167–68, 70) (7th Cir. 1996).

<sup>8</sup>Holman v. Indiana, 211 F.3d 399, 403 (7th Cir. 2000).

<sup>9</sup> This defense was announced by the U.S. Supreme Court in two companion cases, *Burlington Industries, Inc. v. Ellerth*, 524 U.S. 742 (1998), and *Faragher v. City of Boca Raton*, 524 U.S. 775 (1998).

<sup>10</sup>Faragher, 524 U.S. at 807; *Burlington Industries, Inc. v. Ellerth*, 524 U.S. 742, 765 (1998).

<sup>11</sup>29 C.F.R. § 1604.11(d) .

<sup>12</sup>*Oncale v. Sundowner Offshore Servs., Inc.*, 523 U.S. 75, 79 (1998).

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