

Workplace Harassment in the Age of #MeToo

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“If all the women who have been sexually harassed or assaulted wrote “Me Too” as a status, we might give people a sense of the magnitude of the problem.” Facebook Post.



Statistics

48% woman working in US say they have personally experienced an unwelcome sexual advance or verbal or physical harassment at work.

- Oct. 2017 NBC News/Wall Street Journal Poll

< 10% of individuals who say they have experienced workplace harassment ever formally complained about it.

- EEOC reports

From Victim Blaming to #MeToo

1991

“In trying to determine whether you are telling falsehoods or not, I’ve got to determine what your motivation might be,” Heflin asks at the 1991 Capitol Hill hearing. “Are you a scorned woman? Do you have a martyr complex? Do you see yourself coming out of this as a hero in the civil rights movement?”

Questions by Senate
Judiciary Committee



2017

Due to the volume of accusers (most of whom sought nothing) Harvey Weinstein is blamed. The Weinstein Company terminated his employment and later filed for bankruptcy.



Consequences of #MeToo

- Fallout from these very public cases.
- Increased settlement value of harassment cases, particularly if members of upper-level management are accused.
- A company depicted as tolerant of workplace sexual harassment could have difficulty retaining and attracting talent or clients, resulting in lost revenue and profit, decreased investor confidence, and lower stock prices.

What do lawyers need to know today?

Exactly what they have needed to know for the past 30 years. The law has not changed (yet).



The Law

- **Title VII** prohibits discrimination in employment on the basis of race, color, religion, sex, pregnancy and national origin and applies to the applicants as well as employees.



The Law (cont.)

- **The ADA:** Title I of the Americans with Disabilities Act, 42 U.S.C. § 12101, et seq. covers employers engaged in interstate commerce with 15 or more employees.
- **The PHRA:** Pennsylvania Human Relations Act, 43 Pa. Stat. Ann § 951, et seq. The PHRA prohibits discrimination on the basis of race, color, religious creed, ancestry, age (40 or older), sex, national origin, disability, the use of a guide or support animal because of blindness, deafness or physical handicap, and possession of a general education development (“GED”) certificate rather than a high school diploma. It covers employers with four or more employees. The PHRA also applies to certain independent contractors and provides individual liability for aiding and abetting prohibited discrimination.

But wait – there's more

- **The NJLAD:** The New Jersey Law Against Discrimination, N.J.S.A. 10:5-1, et seq. The NJLAD prohibits unlawful employment discrimination by employers, labor organizations and employment agencies. In addition, any person who aids, abets, incites, compels, coerces or otherwise assists in the commission of or attempt to commit any of the acts declared unlawful by the NJLAD or retaliates against any person who engaged in conduct protected by the Act violates the law. The NJLAD covers all employers regardless of the number of employees employed.

Workplace Harassment is NOT Just About Sex

All forms of harassment are analyzed similarly, regardless of the protected characteristic that motivated such harassment. See, e.g., *Harris v Forklift Sys., Inc.*, 510 U.S. 17 (1993) (defined hostile environment in a way that encompassed race, color, religion, national origin, and gender).

What Is Harassment?

Unwelcome verbal or physical conduct motivated by an individual's membership in a **protected class**: when EITHER

- (1) submission to or rejection of such conduct by an individual is used as the basis for employment decisions affecting such individual; OR
- (2) the conduct is sufficiently **severe** or **pervasive** to create a **hostile work environment** for a reasonable person in the complainant's circumstances.



QUID PRO QUO

Benefits of employment conditioned on submission to supervisor's sexual advances.

- *Sleep with me or I will ruin your career / you will be in my next movie*
- Go out with me and you will get the shift you want



HOSTILE WORK ENVIRONMENT

Discriminatory intimidation, ridicule, and insults which is sufficiently severe or pervasive to alter the conditions of the victim's employment.

- Examples of conduct that could lead to a hostile work environment include comments, jokes, graffiti, sexual advances and remarks, touching, questionable compliments, pornography, or other offensive verbal or physical conduct relating to one's sex. *See Harris v Forklift Sys., Inc.*, 510 U.S. 17, 21-22 (1993); *Meritor Sav. Bank v Vinson*, 477 U.S. 57 (1986).



Conduct must be based on an employee's protected characteristics;

- Conduct must be severe or pervasive;
- Conduct must be unwelcome, and
- Conduct must unreasonable interfere with an employee's working conditions.

When is Conduct “Severe or Pervasive”?

- Severe: “so objectively offensive as to alter the ‘conditions’ of the individual’s employment.” *Oncale v. Sundover Offshore Servs., Inc.*, 523 U.S. 75 (1998). Severe conduct is not “simple teasing, offhand comments or isolated incidents that are ‘extremely serious.’” *Faragher v. City of Coca Raton*, 524 U.S. 775, 787-88 (1998).
- Pervasive repeated, routine or generalized offensive conduct that so permeates the workplace as to alter terms and conditions of employment.

What Is Unwelcome Conduct?

The unwelcome nature of conduct is generally determined by examining the complaining party's response to the conduct. See *EEOC v. Sunbelt Rentals, Inc.*, 521 F.3d 306, 314 (4th Cir. 2008) (the employee's response to the harassers, complaint to HR, and request for transfer demonstrate unwelcome nature of conduct).



When Is an Employer Liable for Harassment?

An employer is **always liable** for a supervisor's sexual harassment if it culminates in a **tangible employment action**.

When **no tangible employment action** is taken, the employer may raise an affirmative defense to liability or damages (**the Faragher/ Ellerth Affirmative Defense**).

When Is an Employer Liable for Harassment?

- **Harassment by Non-Supervisors**

- Employers *are not* strictly liable for hostile environments created by non-supervisors. Instead, the plaintiff must establish a factual basis for imputing liability to the employer.
- Courts typically apply a negligence standard for determining whether the employer is liable in these situations, *i.e.*, whether the employer knew or should have known of the harassment, but failed to take prompt remedial action. *Rorrer v. Cleveland Steel Container*, 712 F. Supp. 2d 422, 435 (E.D. Pa .2010) (summary judgment denied where employee's personnel file showed no investigation into her complaints of harassment from a co-worker).

Who is a Supervisor?

- The Supreme Court has defined a “supervisor” for purposes of vicarious liability under Title VII as an employee who is “empowered by the employer to take tangible employment actions against the victim.” *Vance v. Ball State University*, 133 S. Ct. 2434, 2454 (2013).
- The NJ Supreme Court has defined a “supervisor” for purposes of liability under the NJLAD as an employee that had the authority to take or recommend tangible employment actions affecting the complaining employee, or to direct the complainant’s day-to-day activities in the workplace. *Aguas v. State*, 220 N.J. 494, 500 (2015).

Faragher/Ellerth Affirmative Defense

Defense to liability or damages exists where employer can establish by a preponderance of the evidence that:

- (1) the **employer** exercised **reasonable care** to prevent and remedy promptly any harassing behavior (with the focus on the timing and nature of the employer's response); AND
- (2) the **employee** alleging harassment **unreasonably failed** to take advantage of preventative or corrective opportunities provided by the employer, or to otherwise avoid the harm.

Faragher/Ellerth Affirmative Defense

- **Only available in a hostile environment situation; never in a quid pro quo situation.**
- Employer's procedures must be clear, available, and known to all employees.
- Employer's actions adequate as a matter of law, where management investigates within a day after being notified of the harassment.
- Employer must show it "spoke to the alleged harasser about the allegations and the company's sexual harassment policy, and warned the harasser that the company does not tolerate any sexual comments or actions."
- Although employee must not unreasonably refuse to utilize the employer's remedial measures, "acting reasonably" does not require the employee to file a complaint.

Harassment and Gender Norms

Same-Sex Harassment – Actionable

Reverse Sexual Harassment – Actionable



Discrimination Based on Transgender Status / Sexual Orientation – Can be Actionable

- Gender discrimination “can extend to certain situations where the plaintiff fails to conform to stereotypical gender norms.” *Price Waterhouse*
- *Zarda v. Altitude Express, Inc.*, No. 15-3775, (2nd Cir. 2018) (sexual orientation discrimination is gender discrimination)

Same-Sex Harassment

Oncale v. Sundowner Offshore Services, Inc., held: “Title VII’s prohibition of discrimination (because of ...sex) protects men as well as women” from harassment motivated by gender, regardless of harasser’s or victim’s gender or sexual desire, where “members of one sex are exposed to disadvantageous terms or conditions of employment to which members of the other sex are not exposed.” 523 U.S. 75, 77-80 (1998).

Same-Sex Harassment (cont.)

Actionable in several circuits for some time on theory that protection should be gender-neutral. *See, e.g., Baskerville v. Culligan Intern. Co.*, 50 F.3d 428, 430 (7th Cir. 1995) (while sexual harassment of women by men is the most common kind, “we do not mean to exclude the possibility that sexual harassment of men by women, or men by other men, or women by other women would not also be actionable in appropriate cases.”)

Oncale re: sexual orientation: “Courts and juries have found the inference of discrimination easy to draw in most male-female sexual harassment situations, because the challenged conduct typically involves explicit or implicit proposals of sexual activity; it is reasonable to assume those proposals would not have been made to someone of the same sex. The same chain of inference would be available to a plaintiff alleging same-sex harassment, if there were credible evidence that the harasser was homosexual.” 523 U.S. at 80.

Thanks for the law, now what about real life?

- Train Train Train

- Conduct Sexual Harassment Training
- Have regular mandatory training sessions, with sign in sheets. Set the tone early and often that this is serious and consequences for violating the training standards will be swift and severe.



Thanks for the law, now what about real life?

Make sure employees (**especially managers**) are aware of the definition of sexual harassment as well as reporting and investigating procedures. Use a lot of examples of what could be considered sexual harassment in the workplace if it is unwelcomed and occurs on a severe and pervasive basis:

- Sexual innuendoes and comments
- Sexually suggestive sounds or gestures
- Repeatedly asking a person out for dates
- Ogling or leering, staring at someone
- Rating a person's looks or sexuality

Thanks for the law, now what about real life?

– While all conduct of this nature is inappropriate, some misdeeds are worse than others. The courts are more likely to find an illegal, hostile work environment where there is:

- Pornography
- Sexual jokes
- Touching
- Degrading comments
- Embarrassing questions



Thanks for the law, now what about real life?

- Have Concise Reporting Procedures with Options

When you establish reporting procedures, it's critical to give employees at least two reporting options so they don't get stuck having to report to the supervisor they believe is harassing them.

- Make the process as simple as possible

Thanks for the law, now what about real life?

- When you talk reporting policies with your staff, let them know:
 - It's okay to file a complaint
 - Filing a complaint will not negatively affect their job status, pay or title
 - Immediately report retaliation
 - Both Federal and state laws prohibit employers from retaliating against workers who oppose discriminatory employment practices - for example, by reporting incidents of sexual harassment to their supervisor.

Thanks for the law, now what about real life?

- **Have a Plan for Doing Investigations**
 - Be prepared before there is a problem.
 - Interview professional investigators in advance and have him or her on call.
 - Take immediate steps to prevent any further harassment
 - Keep it confidential (but do interview witnesses)
 - Document (keep in confidential file, not personnel file)

Thanks for the law, now what about real life?

- Dealing with #MeToo

An employee posts on social media that they have been the victim of workplace harassment

Is a virtual, hashtag-based complaint a real complaint?

ABSOLUTELY

Thanks for the law, now what about real life?

- Treat a social media post with this message the same way you would any other allegation of sexual harassment in the workplace. Work through your company's standard investigative process to uncover the facts.
- Taking #MeToo posts seriously reinforces zero-tolerance harassment policies. If the employee who made the post says either it wasn't applicable to this situation or they don't want to file a complaint, document the conversation.

Take Action

- Unless the Complaint is Not Credible, Take Action
 - If there is sufficient reason to credit the allegation, real consequences have to follow, no matter who the offender is. “Joe being Joe” is not a sufficient response. Weighing the offender’s profitability against the nature of the behavior cannot be part of the decision making process when it comes to meting out consequences.



Be Proactive (for real)

- Review your policies. Do they actually encourage employees to come forward? What is the company's culture – is low grade disrespect tolerated? Are the leaders of the company modeling respect for all?
- Are promotion and performance procedures vulnerable to abuse? What are your checks and balances to prevent anyone from threatening to withhold benefits or promising to provide advancement for improper reasons?
- Consider an anonymous company wide survey of experiences, attitudes and perceptions.

Conclusion

- In 1991 the nation was shocked by Anita Hill's testimony at Clarence Thomas' nomination hearing. Employment law experts declared a sea change in workplace conduct had taken place.
- More than three decades later, it appears that little has changed.
- Employers need to take a hard look at their culture and examine if employees at all levels are expected to treat co-workers, and be treated by coworkers, with respect.

QUESTIONS?

