CURRENT DEVELOPMENTS IN SEXUAL HARASSMENT CASE LAW: QUESTIONS AND ANSWERS

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ABSTRACT

The purpose of this paper is to help employers understand recent case law relevant to sexual harassment. Using federal court decisions, we outline what behaviors actually constitute sexual harassment, when employers will be liable for such harassment, and what employers can do to prevent the harassment from occurring in the first place. By adopting the proactive strategies discussed here, employers should be able to respond appropriately to any work situation involving sexual harassment.

INTRODUCTION

Sex discrimination as a legal construct has come a long way since the passage of the Civil Rights Act (CRA) in 1964. For example, when Title VII was first introduced into congress, it listed only four protected classes. Gender was added as a last-minute political maneuver, in the hopes that its inclusion would kill the bill. Some 40 years later, however, sex discrimination has evolved from forbidding just the use of sex in employment decisions, to a multifaceted construct that can be costly for employers to ignore. Today, managers and HR practitioners must be familiar with concepts like disparate treatment, adverse impact, hostile work environment harassment, and tangible employment action sexual harassment. Landmark federal court and post-CRA legislation related to gender (e.g., The Pregnancy Discrimination Act, 1978) further complicate the area by redefining—often overnight—older conceptualizations of what sex discrimination entails.

Our goal is to provide the HR practitioner with an up-to-date summary of case law relevant to sexual harassment. By reviewing landmark and recent federal court decisions, we first delineate the behaviors that constitute sexual harassment, and then explore the issue of when the company is liable for harassment committed by its employees. Finally, we suggest proactive and reactive strategies the employer can adopt to reduce the incidence of sexual harassment at its workplace, and to limit liability should such harassment occur.

From the outset, the biggest recent change in sex discrimination case law comes from the now blurred distinction between quid pro quo (i.e., this for that) and hostile

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work environment harassment. As originally conceived, quid pro quo sex discrimination occurred when a person was a victim of unwelcome sexual advances, which were tied to a term or condition of employment. Being terminated for refusing a manager's sexual advances would exemplify quid pro quo discrimination. Hostile work environment harassment, on the other hand, occurred when a person was a victim of pervasive, sex-based harassment, which altered or poisoned the work environment.

Recent Supreme Court decisions, however, have significantly diminished the importance of this distinction, both with regard to how victims establish their cases, and to whether the employer is liable.[1] Today, harassment cases involving "tangible employment actions" replace the older, "quid pro quo" label, and the issue of employer liability depends more on what the employer did or did not do, versus what it knew or should have known. Keeping these older distinctions in mind should help the reader understand the evolution of the current case law, discussed next as a series of questions and answers.

DEFINING HOSTILE WORK ENVIRONMENT HARASSMENT

1) What is a Hostile Work Environment?

A hostile work environment is created when sexual behaviors have "the purpose or effect of unreasonably interfering with an individual's work performance or creating an intimidating, hostile, or offensive work environment".[2] For harassment to be sex discrimination, though, it must be based on the victim's sex. In other words, the victim must demonstrate that were it not for his or her gender, the harassing behavior would never have occurred. The courts make this determination by focusing on (1) whether the behavior was explicitly or implicitly sexual, and (2) whether members of the same or different sex conducted it.

2) When is Sexually Explicit Behavior Considered Gender-Based?

Sexually explicit behaviors include such things as sexual propositions, innuendoes, pornographic materials, and sexually derogatory language. When the victim successfully demonstrates that the behavior in question was sexually explicit, no further evidence is necessary to establish its gender based nature. In other words, sexually explicit behavior is always gender-based.

For example, a female police communications operator claimed she was harassed by coworkers and her supervisor during a two-week training period. The alleged behaviors included explicit sexual gesturing (e.g., the men grabbing their private parts while yelling obscenities), offensive sexual conversations (e.g., discussions of people having sex with animals), and the posting of vulgar images. The court determined that

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[1]Burlington Industries Inc. v. Ellerth (1998). 524 U.S. 764-65, 141 L. Ed. 2d 633, 118 S. Ct. 2257.
[2]EEOC Enforcement Guidelines on vicarious Employer Liability for Unlawful Harassment by Supervisors (1999). 8 FEP Manual (BNA) 405:7654.

because the behavior was so sexually explicit, it was gender-based by default.[3] Sexually explicit behavior is always deemed to be sexual harassment if such behavior is severe or pervasive (see below).

3) When is Non-Sexually Explicit Behavior Considered Gender-Based?

When the behavior in question is objectionable, but not sexually explicit, its gender-based nature must be demonstrated by showing that the behavior would never have occurred if not for the victim's sex. Take, for example, the case where a victim was told by her supervisor that she was "too pretty to work here," and that when angered, the supervisor shook the victim and grabbed her breasts.[4]

The court found that the first incident was sexually explicit (and thus gender based) because the supervisor likely would not have made the comment to a male employee. The second incident, however, was not deemed to be gender based because the supervisor had a history of inappropriately touching both male and female employees when angry. The court thus determined that the supervisor grabbed the victims breasts not because she was a female, but because the supervisor was angry.

4) How Severe or Pervasive Must the Behavior Be?

Gender-based behaviors must be sufficiently severe or pervasive for a hostile work environment to exist. To meet this requirement, the behaviors must be both subjectively offensive to the victim, and objectively offensive to a reasonable person. When both conditions are met, the harassment is deemed severe enough to alter the conditions of employment, thus creating an illegal hostile work environment.

In deciding whether the behavior was <u>subjectively</u> offensive, the courts rely on the plaintiff's testimony. Critical to this determination is how the victim felt at the time the behavior occurred. For example, behavior that humiliates a plaintiff to the point of seeking psychological treatment would certainly be considered subjectively offensive. [5]On the other hand, behavior will likely not be considered subjectively offensive if the victim claimed to have merely "blown it off," and did not seem offended by the behavior at the time that it occurred.[6]

An <u>objectively</u> offensive environment is one so offensive, it alters the conditions of employment. The courts consider the totality of circumstances in making this determination, including the frequency of the behavior, its severity, and whether it was physically threatening / humiliating, or merely just offensive. An environment needs to be found as hellish by a reasonable person. Hence, a small number of offensive

[3] Suders v. Easton (2003). U.S. App 3rd Cir. LEXIS 7152.
[4] Mast v. IMCO Recycling of Ohio (2003). U.S. App 6th Cir. LEXIS 1940.
[5] Quantock v. Shared Marketing Services (2002) U.S. App. LEXIS 25466.
[6] Mast, note 4 above.

comments over a short period of time would not constitute an objectively offensive work environment.[7]

Behavior that is sexually explicit, especially if long-standing, will be considered objectively offensive. Consider the supervisor who frequently boasted of his sexual exploits, and often changed and "adjusted" himself in front of his victim. In one instance, he grabbed the victim by her waist, pulled her onto his lap, and tried to kiss her while touching her buttocks. The court found that these actions were clearly permeated with discriminatory intimidation, ridicule, and insult sufficiently severe and pervasive as to alter the conditions of her employment.[8]

If severe enough, the conduct in question does not have to be longstanding or frequent to be objectionably offensive. For instance, during a single meeting, a company president propositioned an account supervisor three times for sex, grabbed her breasts and forcibly kissed her. Although these actions occurred in just one meeting, they were severe enough to create an objectionably abusive environment. The court in this case determined that the behaviors went far beyond occasional workplace vulgar banter, tinged with sexual innuendo.[9]

The context of the job is also important, and whether behaviors are offensive should be weighed in relation to the typical behaviors occurring at the particular worksite. Take, for example, the case where a male supervisor commented that he was jealous of his male employee's girlfriend. And, on one occasion, as the male employee bent over, the supervisor allegedly fondled his anus from behind. The courts considered these actions to be objectively offensive because such behaviors were not normal in this particular work environment. That is, sexual joking and male-on-male horseplay were not common here, and no one testified to seeing any male employee touch another male employee in a sexual manner.[10]

Based on Questions 1-4 above, sexual harassment can be defined as a form of sex discrimination, occurring when a victim is harassed based on his or her gender, in such a pervasive or severe fashion as to alter the work environment. Sexually explicit behavior is always deemed to be gender based. When the harassing behavior is not sexually explicit, however, the victim may still prove it was gender based by showing that if not for the victim's sex, the harassing behavior would never have occurred. Further, the victim can show that the harassment altered the work environment by proving both that it was subjectively offensive to the victim, and objectively offensive to a reasonable person in the same position as the victim. Having defined sexual harassment, we next turn to the issue of employer liability.

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[7] Rogers v. City of Chicago (2003). U.S. App 7th Cir. LEXIS 3506.
[8] Mack v. Otis Elevator (2003). U.S. App 2nd Cir. LEXIS 6948
[9] Quantock, note 5 above.
[10] La Day v. Catalyst Tech, Inc. (2002). U.S. App 5th Circ. LEXIS 16476

EMPLOYER LIABILITY FOR SEXUAL HARASSMENT

5) What if the Harasser is a Supervisor or Manager?

The courts recognize that one's job title alone does not determine whether an employer is really a supervisor or a manger. Instead, one must consider the tasks, duties and responsibilities of the individual in question. In general, however, a supervisor is defined as:

> any individual having authority, in the interest of the employer, to hire, transfer, suspend, lay off, recall, promote, discharge, assign, reward, or discipline other employees, or responsibly to direct them, or to adjust their grievances, or effectively to recommend such action (29 U.S.C. 152).[11]

While a manager is anyone who:

> formulates and effectuates management policies by expressing and making operative the decisions of their employer (29 U.S.C. 152).[12]

Assuming either definition is met, the next step is determining whether a tangible employment action resulted from the harassment. A tangible action affects a term or condition of employment; for example, demoting the victim for refusing to submit to a sexual demand. Any harassment affecting a victim's wages, hours or working conditions would likely be considered tangible. In addition, threats of the above, or the act of constructive discharge (i.e., making work so unpleasant, the victim is forced to quit), are also considered tangible employment actions.

In cases like these (previously referred to as "quid pro quo" cases), the company is always vicariously liable. Because the employer empowers its supervisors and managers to make decisions affecting the work status of others, both are in effect, "agents" of the company. As such, when the harasser is an agent, and the harassment results in a tangible action, the company is liable. Only when the agent's behavior is non-tangible can the company hope to escape liability. To do this, the company must successfully argue an affirmative defense.

6) What is the Affirmative Defense?

When the supervisor's behavior is offensive, but does not result in tangible action, the employer may avoid liability by showing that:

- it exercised reasonable care to prevent the harassment, and took prompt actions to correct the harassment after it occurred and,

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[11] NLRB v. Bell Aerospace Co. (1974). 267 U.S., 281, S. Ct. 1757.
[12] NLRB, note 11 above.

- the victim failed to take advantage of corrective opportunities provided by the employer.

In one example, a supermarket manager allegedly harassed several of his female employees. After a lengthy delay, the victims filed a formal complaint against the manager. In the resulting investigation, the company demoted and then transferred the manager. According to the court, the supermarket's affirmative defense was successful, because, the:

- supermarket had an effective policy in place before the harassment occurred.
- policy was communicated to employees, including the step review process that victims could follow to lodge complaints.
- supermarket responded promptly and appropriately to correct the harassment, once notified.
- victim's delay in reporting the harassment to the appropriate parties was unreasonable.[13]

7) What if the Harasser is a Co-Employee, Customer, or Passer-by?

When the harasser is neither a manager nor a supervisor, the organization can still be held liable for sexual harassment. The definition of sexual harassment in these cases is the same as that used above; the harassing behavior must be gender-based, subjectively offensive to the victim, and objectively offensive to a reasonable person.[14]

If the harassing behavior rises to the level of sexual harassment, the company will be found liable if it knew about the harassment (or should have), but failed to act. The burden of proof is on the victim to show that the employer was indeed aware of the harassment, yet either took no action, or took inappropriate action. An example of inappropriate action by an employer would be to transfer the victim, rather than the guilty employee, to a different location.[15]

Note also that customers of the employer, and even passers-by, can create hostile work environments for an organization's employees, with resulting liability for employers. In one instance, two male customers sexually harassed a female waitress on multiple visits to the restaurant. The waitress complained to management, who then refused her request to be excused from waiting on the men. Subsequently, one of the male customers pulled the waitress' hair, and groped her breasts. The Tenth Circuit upheld the jury award of $200,000 from the district court, finding the employer liable for the actions of its customers in creating a hostile work environment because it knew about the harassment, but failed to act.[16]

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[13] Madray v. Publix Supermarkets (2000). U.S. App11th Circ. LEXIS 5802.
[14] Oncale v. Sundowner Offshore Servs., Inc. (1999). 523 U.S. 75, 140 L. Ed. 2nd 201 118 S. Ct. 998.
[15] Ellison v. Brady (1991). U.S. App 9th Circ. 924 f.2d 872, 876.
[16] Lockard v. Pizza Hut, Inc (1998) U.S. App. 10th Circ. 162 f.3rd 1062.

Summarizing Questions 5-7, when the harasser is a manager or supervisor, company liability depends on several factors. First, if the harassment resulted in tangible employment actions, the employer is always "vicariously" liable under the agency principle discussed above. When the harassing behaviors do not result in tangible action, however, employer liability depends on these issues:

- Did the company have an effective policy in place before the harassment occurred?
- Did the policy outline the steps a victim could take to report allegations of harassment?
- Was the policy communicated to employees?
- Did the company promptly investigate the complaint, and did it respond appropriately?
- Did the victim fail to take timely advantage of the company's policy?

Hence, the best employer policy for limiting liability is to be both proactive and reactive about preventing sexual harassment. These are issues we turn to next.

PREVENTING SEXUAL HARASSMENT

8) What Type of Anti-Harassment Policy Should a Company Implement?

To prevent sexual harassment, and protect itself from liability, the organization should have an effective anti-sexual harassment policy already in place. Under EEOC guidelines, an effective policy is one clearly stating that sexual harassment will not be tolerated. The policy must provide examples of behaviors that will be interpreted as sexual harassment, and delineate the consequences of being accused of violating that policy. Employers should print the policy in the employee handbook, with periodic redistribution. Finally, employees should also sign a statement acknowledging that they have read and understood the policy.[17]

9) How Should a Company Investigate Employee Complaints?

Management should take every sexual harassment claim seriously. Inadequate investigations, or inappropriate remedies, open the door for successful harassment suits. In this regard, employers should hold the persons conducting the investigation accountable for mishandling complaints. For example, in one case, the courts found that the employer handled the harassment claims inappropriately on two occasions. On the first occasion, the complaint was not investigated, and the actions (offering the plaintiff money for sex and touching her buttocks) were later labeled as mere horseplay. On the second occasion, the investigator literally laughed out loud when he heard the victim's complaint (a male coworker grabbed her hand, and said that he wanted to "eat" her).[18]

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[17] Gardner, S. and Johnson, P. (2001). Sexual Harassment in Healthcare: Strategies for Employers, Hospital Topics, 79, 4, 5-12.
[18] Watson v. Blue Circle 2003). U.S. App. LEXIS 5556.

The company's policy should contain clear guidelines and procedures for complaint filing. Namely, employers should (1) remind the complainant of the procedures for reporting sexual harassment when they initiate a complaint. (2) have more than one person to whom a complaint can be made, especially in cases where the immediate supervisor is the one being accused. (3) reassure complainants that retaliation will not be tolerated, and instruct them to report any incidents of retaliation.[19]

10) How Should a Company Respond when Allegations prove to be True?

The employer must take corrective action as soon as it finds that sexual harassment has taken place. However, even immediate corrective action does not completely protect an organization from liability. If the organization's response (e.g., warnings, or write-ups) does not stop the behavior in question, further actions (e.g., moving the alleged harasser, termination) should be taken.

In one case, the employer initially addressed the problem by issuing several warnings to the harasser, stating that his threatening, intimidating behavior would not be tolerated, and that he must avoid any further contact with the victim. Months later, the harassment persisted; the company changed his work schedule so that he and the plaintiff would work in different buildings and be on different shifts. The company finally suspended, and eventually terminated the employee after the victim obtained a court order against him. The employer, however, was found liable. According to the court, once the company realized its initial warnings were ineffective, waiting 18 months to take stronger actions was unacceptable.[20]

11) How Should a Company Respond When the Alleged Harasser has a Known History of Harassment?

Employers must be especially cognizant of employees with a history of harassing behaviors. The company is liable for harassment committed by such employees if it fails to take additional steps to prevent such behaviors from reoccurring. Because past behavior is a good predictor of future behavior, employers are legally required to adopt preventative measures to ensure that those with a history of such behavior do not harass again. In one case, an employer promptly investigated all complaints and gave the guilty party a warning that was effective in stopping the harassment for a time. When the harassment resurfaced, the employee was suspended, transferred, and finally terminated. The employer was still found liable because the court ruled that they should have realized that these responses would be ineffective. The employer should taken stronger actions in light of the individual's past history of harassing behavior.[21]

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[19] Wendt, A. and Slonaker, W. (2002). Sexual Harassment and Retaliation: A Double-Edge Sword, S.A.M. Advanced Management Journal, 67, 4, pp. 49-58.
[20] Crowley v. L.L. Bean, Inc (2002). U.S. App 1st Cir. LEXIS 19268.
[21] Minnich v Cooper Farms, Inc. (2002). U.S. App 6th Cir. LEXIS 12876

12) What Type of Sexual Harassment Training Should be Given?

To limit liability, employers should also provide effective sexual harassment prevention training to their employees. Research has shown most employees accurately recognize the behaviors associated with quid pro quo harassment, but not those associated with hostile work environment harassment. Therefore, if an organization is dedicated to preventing sexual harassment, it should provide training on the behaviors and actions that can be interpreted as creating a hostile work environment.[22]

Summarizing Questions 8-12, an employer can reduce both the incidence of sexual harassment at its workplace and its liability should harassment occur by adopting a number of proactive strategies. First, the company should implement a zero-tolerance policy against sexual harassment, and effectively communicate the policy to all its employees. Second, the company should promptly investigate all complaints of sexual harassment, take quick, appropriate actions to remedy the situation, and hold those in charge of the investigation accountable for their decisions. Finally, the company should provide effective training for its employees, especially with regard to identifying behaviors that cross the line between normal work place banter and sexual harassment.

IN CONCLUSION

Our goal was to clarify these issues by stipulating what constitutes sexual harassment, when employers will be liable for such harassment, and what employers can do to prevent the harassment from occurring in the first place. Armed with this knowledge, employers should be able to create a workplace free from sexual harassment, and be able to appropriately respond, both proactively and reactively, to any work situation involving sexual harassment.

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[22] Icenogle, M.L., Eagle, B.W., Ahmad, S, and Hanks, L. (2002). Assessing Perceptions of Sexual Harassment Behaviors in a Manufacturing Environment, Journal of Business and Psychology, 16, 4, 601-616.