

2019 Annual Paralegal Division CLE Seminar

Harassment and Discrimination – Avoiding Claims and How to Handle Them When They Arise

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EEOC Definition of Sexual Harassment

29 C.F.R. § 1604.11(a)

“Unwelcome sexual advances, requests for sexual favors, and other verbal and physical conduct of a sexual nature constitute sexual harassment when:

(1) submission to such conduct is made either explicitly or implicitly a term or condition of an individual’s employment;

(2) submission to or rejection of such conduct by an individual is used as the basis for employment decisions affecting such individual; or

(3) such conduct has the **purpose or effect of unreasonably interfering with an individual’s work performance or creating an intimidating, hostile, or offensive working environment.”**



#me too







- *First complaint lodged against Lauer in his 20 years with NBC.*
- *Monday night NBC met with complainant.*
- *Lauer was terminated Tuesday evening.*



Donald J. Trump ✓

@realDonaldTrump

Following



Peoples lives are being shattered and destroyed by a mere allegation. Some are true and some are false. Some are old and some are new. There is no recovery for someone falsely accused - life and career are gone. Is there no such thing any longer as Due Process?

10:33 AM - 10 Feb 2018

BELIEVE HER!

Not just what the law says....



PUBLIC
OPINION

POLICIES

- **Written and distributed policies**
- **Against all forms of harassment and discrimination**
- **Apply to all employees and work situations**
- **Reporting**
- **Procedure**
- **Anti-Retaliation**

INVESTIGATIONS

- Fair, impartial
- Take all complaints seriously
- Reasonable – non-discriminatory / non-retaliatory
- Be thorough
- Document!
- Enforce and uphold policy
- Proportional discipline



WHEN THE ACCUSED IS SENIOR . .

- Outside / independent investigation
- Duty is to the client
- Creative remedies
- Protect the accuser



POTENTIAL CLAIMS BY ACCUSER

- Hostile work environment / harassment
- Discrimination
- Retaliation
- Punitive damages
- Class action

**SEXUAL
HARASSMENT**

WRONGFUL TERMINATION?

- Protected categories or activity
- Violation of public policy
- Contractual or CBA rights
- Defamation



SCENARIO

Emily has been Company's receptionist since she graduated high school 7 years ago. She is very friendly and outgoing, and makes everyone feel welcome and valued. When she was first hired, she received some counseling from HR for being too "touchy - feely" when she talked with visitors and employees alike, and for using inappropriately endearing phrases like "sweetie" or "cutie" when talking to men. While she has improved, she is known as friendly by some and downright flirty by others. Emily has also been reprimanded for lying to the Company, such as being out sick when she was really boating with her boyfriend, or saying a co-worker had sent a joke message from her Company email account when it was established Emily was really the one who had sent it.

Oscar is about 60 years old, and the majority owner of Company, serving as President and CEO. His ability to market and hold onto customers is vital to Company's business. Oscar often doesn't see a difference between his personal needs and company needs, and sometimes asks employees to do things for him that are unrelated to company business.

Recently, Oscar was late for a flight to Las Vegas for a party weekend he had planned. He asked Emily to drive him to the airport but still missed his flight. Oscar asked Emily if she'd drive him to Las Vegas, and promised her a fancy hotel room and some extra cash for hitting the slots if she would. Always spontaneous and up for an adventure, Emily agreed. What happened next is disputed.

While Oscar says that he worked on the drive down, spending much of the time on his mobile phone or on his computer, Emily says that Oscar kept asking her about her dating life, with the conversation becoming increasingly personal and sexual. She also says that Oscar put his hand on her knee, and she had to move it several times during the drive. Oscar says that he bought her dinner at a nice restaurant and then things turned romantic between them. Emily says that Oscar must have slipped something in her drink, and that she woke up in his hotel room in bed with him. Emily says she was raped. Oscar says it was consensual.

QUESTIONS:

1. Oscar does not want an investigation. What should you do?
2. How should you go about the investigation itself?
3. Presuming the investigation concludes that Oscar acted wrongfully, how does the company proceed?
4. Presuming the investigation concludes that there is insufficient evidence to support Emily's story, how does the company proceed?
5. How does the company protect Emily from retaliation?
6. Emily has hired a lawyer who makes a press release. How should the company handle inquiries?

MANAGING RISK

ATTACKED FROM
EVERY
WHERE



Why do periodic sexual harassment training?

- Can provide a helpful defense
- Ensure employees know how to seek help if they are the victim of harassment
- Promotes a safe and respectful work environment
- Opportunity to train on other types of discrimination and harassment

Why do periodic sexual harassment training?

- In 1998, the U.S. Supreme Court decided:
 - *Burlington Industries, Inc. v. Ellerth*
 - *Faragher v. City of Boca Raton*
- In hostile work environment cases, employer may assert an affirmative defense that:
 - The employer exercised reasonable care to prevent and correct promptly any sexual harassing behavior, and
 - The plaintiff employee unreasonably failed to take advantage of any preventative or corrective opportunities provided by the employer or to avoid harm otherwise.

General v. Tailored Trainings

Video or Live Presentation?

Key Elements of Training

1. Supervisor and Non-supervisor sessions
2. Set the right tone
3. Teach what sexual harassment is
4. Give appropriate and relevant examples of prohibited conduct
5. Explain reporting and investigation process
6. Emphasize anti-retaliation policy
7. Discuss scenarios and cases
8. Take the opportunity to cover other types of harassment and discrimination
9. Document attendance and keep a copy of slides in file
10. Annual

Sexual Harassment Policies

- Easily available without having to ask for it
- Multiple options as to which supervisors can receive the complaint
- Ensure supervisors understand reporting responsibility
- Take all complaints seriously
- Confidentiality – cannot promise not to tell
- Prompt and appropriate investigations
- Sincere and effective efforts to protect against retaliation
- Do not inadvertently punish the victim
- Commensurate and appropriate discipline

HARSCO CORP v. RENNER

10th Circuit, January 2007

- Oinking, barking, grunting, and moaning
- So fat that intercourse would be difficult
- Name calling
- Blocked her movement – hallways, car, and restroom
- Spit tobacco on her car
- “Well, what do you want me to do about it?”
 - Told her to use a bathroom in another location

Severe and Pervasive

U.S. Supreme Court: Conduct that is not severe or pervasive enough to create an objectively hostile or abusive work environment – an environment that a reasonable person would find hostile or abusive – is beyond Title VII’s purview. We have always regarded that requirement as crucial, and as sufficient to ensure that courts and juries do not mistake ordinary socializing in the work place – such as male-on-male horseplay or intersexual flirtation – for discriminatory “conditions of employment.”

Oncale v. Sundowner Offshore Services, Inc.

Severe and Pervasive

Scenario 1:

Supervisor is found to have done the following:

1. Propositioned female employee on one occasion
2. Had a naked woman screen saver
3. Showed her a penis-shaped pacifier
4. Created and posted a recruitment poster portraying her as the President/CEO of the Man Hater's Club of America

Severe and Pervasive?

The 8th Circuit said no – not sufficient.

Severe and Pervasive

Scenario 2:

Supervisor propositioned a female employee 3 times in the same conversation where she refused him 3 times.

Severe and Pervasive?

The 7th Circuit said yes – sexual harassment.

Severe and Pervasive

Scenario 3:

Employee was exposed to:

1. Daily offensive language and sexually explicit radio programming; and
2. One-time exposure to a pornographic image on a co-worker's computer.

Severe and Pervasive?

The 11th Circuit said yes – not severe, but so pervasive that it is sexual harassment.

How To Avoid the Sexually Charged Workplace?

Harassment

- Frequent subject of Utah litigation
- Sexual, racial, age, gender, religion
- Hostile work environment
- Supervisors must understand their reporting obligations
- Investigate/address complaints
 - Documentation
- Annual training

Retaliation

- Often higher risk that the underlying complaint
 - Discrimination, harassment, safety, etc.
- Difficulty of protecting from supervisors
- Watch for adverse employment actions
 - Moving the complaining employee
- Proactive HR – follow up

Questions?

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THANK YOU

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