



Sexual Harassment in Employment



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What is sexual harassment?

- ☞ Unwelcome sexual advances, requests for sexual favors, or other verbal behavior or physical conduct of a sexual nature when:
1. Submission to such conduct is made an implicit condition of an individual's employment;
 2. Submission to or rejection of such conduct affects employment opportunities; or
 3. Such conduct interferes with an employee's work or creates an intimidating, hostile or offensive work environment.

29 C.F.R. § 1604.11

Types of Harassment



∞ Quid Pro Quo

∞ Hostile Environment

Quid Pro Quo



- ❧ Latin for “This for That”
- ❧ When employment decisions or expectations are based on an employee’s willingness to grant or deny sexual favors.
 - ❧ Demanding sexual favors in exchange for a promotion or a raise
 - ❧ Disciplining or discharging an employee who ends a romantic relationship
 - ❧ Changing job performance expectations after subordinate refuses repeated requests for a date

Hostile Environment



- ☞ Where unwanted or unwelcome verbal or nonverbal behavior in the workplace focuses on the sexuality of another person or occurs because of a person's gender or other protected characteristic and interferes with person's work environment

“Unwelcome” Behavior



- ❧ Any unwanted, unsolicited, unincited conduct imposed on a person who regards it as offensive or undesirable.
- ❧ When a person communicates that the conduct is unwelcome, it becomes illegal.

Unwelcome Behavior

Hypotheticals

- ❧ Co-worker continues to massage employee's shoulders after employee tells him to stop or complains to supervisor?
- ❧ Supervisor comments favorably on the length of employee's skirts and employee says "thank you" and feels flattered?

Hostile Environment



- ❧ Conduct must be severe OR pervasive enough to create a work environment that a reasonable person would consider it hostile.
- ❧ Conduct must be subjectively and objectively offensive.
- ❧ It is not necessary to show physical harm.

Hostile Environment . . .



- ∞ 5 elements for prima facie claim:
 1. Employee is a member of a protected group (gender, race, etc.);
 2. The occurrence of unwelcome sexual harassment;
 3. Causal nexus between harassment and membership in protected group;
 4. The harassment affected a term, condition, or privilege of employment, and;
 5. Employer knew or should have known of harassment and failed to take prompt and effective remedial action.

Behaviors that create a hostile environment:



- ❧ Off-color jokes or teasing
- ❧ Comments about body parts or sex life
- ❧ Suggestive or demeaning pictures, posters, calendars or cartoons
- ❧ Leering, staring or gesturing
- ❧ Repeated requests for dates
- ❧ Touching – brushes, pats, hugs, pinches
- ❧ Assault

Employer Liability for Sexual Harassment



- ❧ Whether the employer is liable for sexual harassment depends on whether harasser is a supervisor or co-worker:
 - ❧ Who is the harasser (supervisor or co-worker)?
 - ❧ Who is a “supervisor” depends on many factors.
 - ❧ Whether harassment results in a negative *tangible employment action*.

“Tangible Employment Action”

- ❧ A significant change in employment status
- ❧ Includes, but is not limited to:
 - ❧ hiring, firing,
 - ❧ failing to promote,
 - ❧ reassignment with significantly different responsibilities, or
 - ❧ a decision causing a significant change in benefits.

Employer Liability for Sexual Harassment



- ❧ Harassment by SUPERVISOR that results in negative tangible employment action
 - ❧ Employer vicariously liable unless prove non-discriminatory explanation that is not pretextual
- ❧ Harassment by CO-WORKER that results in negative tangible employment action
 - ❧ Not Available unless there are exceptional circumstances.

Employer Liability for Sexual Harassment



- ⌘ Harassment by SUPERVISOR that does not result in negative tangible employment action
- ⌘ Employer liable unless can prove both elements of *Faragher/Ellerth* affirmative defense

Faragher v. City of Boca Raton, 524 U.S. 775 (1998)

Burlington Indus. V. Ellerth, 524 U.S. 742 (1998)

Employer Liability for Sexual Harassment



☞ *Faragher/Ellerth* affirmative defense:

1. Employer exercised reasonable care to prevent and promptly correct harassment, AND
2. Employee unreasonably failed to take advantage of preventive or corrective opportunities provided by employer or to avoid harm otherwise

Employer Liability for Sexual Harassment



- ❧ First element of *Faragher/Ellerth* defense
 - ❧ Reasonable care generally requires an employer to establish, disseminate, and enforce an anti-harassment policy and complaint procedure
 - ❧ The existence of an effective anti-harassment policy and complaint procedure will often satisfy first element

Employer Liability for Sexual Harassment



- ❧ First element of *Faragher/Ellerth* defense
 - ❧ Reasonable care generally includes employer instructing all supervisors and managers to address or report to appropriate officials complaints of harassment regardless of whether complaint is informal or formal

Employer Liability for Sexual Harassment



- ❧ Second element of *Faragher/Ellerth* defense
 - ❧ Employer must show that employee unreasonably failed to take advantage of preventive or corrective measures
 - ❧ If employee unreasonably delayed in complaining, and earlier complaint could have reduced the harm, then affirmative defense could operate to reduce damages

Employer Liability for Sexual Harassment



- ⌘ Harassment by CO-WORKER that does not result in negative tangible employment action
 - ⌘ Employer liable if knew or should have known of conduct and failed to take immediate and appropriate corrective action.

29 C.F.R. § 1604.11 (d)

Employer Liability for Sexual Harassment



⌘ Remedial action for sexual harassment by CO-WORKER

⌘ Proper remedial action need be only “reasonably calculated to stop the harassment.” (i.e., remedial action that does not end the harassment can still be adequate if it is reasonably calculated to do so).

Engel v. Rapid City Sch. Dist., 506 F.3d 1118 (8th Cir. 2007)

Employer Liability for Sexual Harassment



- ❧ Factors to consider when assessing reasonableness of remedial measures
 - ❧ Amount of time elapsed between notice of harassment and remedial action
 - ❧ Option available to employer (training sessions)
 - ❧ Disciplinary action(s) against harasser

Stuart v. Gen. Motors Corp., 217 F.3d 621 (8th Cir. 2000)

Same-sex sexual harassment

- ☞ Sex discrimination consisting of same-sex sexual harassment is actionable under Title VII.
 - ☞ *Oncale v. Sundowner Offshore Services*, 523 U.S. 75 (1998).
- ☞ Sexually harassing behavior or statements made to members of the same sex or gender.

Personal Liability



❧ Federal Law (Title VII)

❧ No personal liability

❧ Iowa Law

❧ Supervisors and co-workers may be personally liable under state law (Iowa Civil Rights Act makes it unlawful for individuals to discriminate) and civil tort theory (assault)

❧ Damages include emotional distress, lost earning, attorney fees, and expenses

Hypotheticals



- ❧ Supervisor tells employee that he will get a raise if he complies with supervisor's request for sexual favor.
- ❧ Supervisor and employee have consensual romantic relationship.
- ❧ Co-worker continues to ask employee for date after being repeatedly refused.

What do you think?



- ❧ Supervisor is aware of same sex co-workers engaging in sexually based name calling and grabbing/ hitting each other's genitals when "playing around."
- ❧ Co-worker regularly forwards sexually explicit e-mails to other employees and employees joke with co-worker about e-mails in break room.
- ❧ Supervisor has scantily clad female swimsuit model as computer wallpaper on password protected computer.

What do you think?



- ❧ Supervisor says “nice legs” and winks at female employee.
- ❧ Supervisor pats female employee on buttock after a job well done.
- ❧ Supervisor and co-workers make sexually suggestive comments about female supervisors abilities as a firefighter during training exercises.

SEXUAL HARASSMENT AND OTHER HARASSMENT:

(The Employer's) policy regarding sexual harassment or other types of harassment is that acts of sexual harassment or other types of harassment by any employee are prohibited employment practices and are subject to sanctions and disciplinary measure.

The Equal Employment Opportunity Commission defines sexual harassment as any "unwelcome" sexual advance, request for sexual favors, or other verbal or physical conduct of a sexual nature directed at an employee by an employer. Such conduct is unlawful if submission to it is a condition of employment, used as a basis for making employment decisions affecting the employee, has the effect of unreasonably interfering with the employee's work performance, or creates an intimidating, hostile or offensive work atmosphere.

Other types of prohibited conduct by all employees, including management, or other non-employees include sexual advances, propositions, verbal abuse of a sexual nature, suggestive touching, suggestive gestures or comments, graphic verbal description of an individual's body, and the display in the workplace of sexually suggestive objects or pictures.

Any employee who feels he / she has encountered sexual or other harassment or discrimination should report it to the (Owner or General Manager) immediately. All complaints made in accordance with (The Employer's) harassment reporting procedures will be investigated promptly, and if the allegations are found to be true, disciplinary action will be taken against the offending person, up to and including termination of employment.

Employees are assured that this procedure has been established for their benefit and to allow them the freedom of expressing feelings and / or complaints. No employee need fear reprisal or retaliation for registering a harassment complaint. (The Employer) is dedicated to removing all forms of sexual harassment and is committed to a prompt and impartial investigation and resolution of any complaint.

By Brent L. Hinders, 3/29/2019

RECEIPT AND ACKNOWLEDGEMENT

I acknowledge that I have received a copy of the _____ (hereinafter “_____”) Sexual Harassment and Other Harassment Policy (“the Policy”) and I further acknowledge that I have read it and understand it. I recognize that the _____ reserves the right to modify or terminate matters covered in the Policy at any time. I agree to comply with the terms of the _____ as set forth in the Policy.

Date

Employee