

Sexual Harassment

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One area of discrimination law which has received a great deal of public attention is sexual harassment. Most discrimination cases charging harassment involve sexual harassment. However, harassment based on race, religion, national origin, age, disability, etc., is also illegal.

Sexual harassment, by definition, is unwelcome. In an early lead case in this area, *Meritor Savings Bank v. Vinson*, the Supreme Court in 1986 established that sexual advances could be unwelcome even when the victim voluntarily acceded to the advances. The Supreme Court thus rejected the concept that only sexual conduct involuntarily engaged in (as in a rape) could be actionable.

Sexual harassment claims are usually categorized two ways, quid pro quo sexual harassment and hostile environment sexual harassment. Quid pro quo sexual harassment results when someone relies upon their actual or apparent authority with the employer to extort sexual favors. This type of harassment is defined as unwelcome sexual advances, requests for sexual favors, and other verbal or physical conduct of a sexual nature, when (1) submission to such conduct is made either explicitly or implicitly as a term or condition of employment, or (2) submission to or rejection of such conduct by an individual is used as the basis for employment decisions affecting the individual.

Hostile environment sexual harassment is defined as unwelcome sexual advances, requests for sexual favors, and other verbal or physical conduct of a sexual nature that has a purpose or effect of unreasonably interfering with an individual's work performance or creating an intimidating, hostile or offensive working environment.

Many kinds of conduct can be found to give rise to hostile environment sexual harassment. The conduct must be sex based. The conduct can include epithets, slurs, negative stereotyping, threats, displays of written or graphic material that demean an individual or group because of gender, jokes, sexual hijinx, etc. The conduct must be sufficiently severe or pervasive to alter the conditions of the victim's employment and create an abusive working environment. Courts evaluate both the severity and pervasiveness of the conduct.

One of the most hotly contested areas in sexual harassment litigation is the employer's liability for sexual harassment committed by employees. The liability depends to a large extent on characterization of the harassment as either quid pro quo or hostile environment harassment. Summarizing briefly, when a supervisor engages in a coercive bargain where he or she conditions

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job benefits or detriments on submission to sexual advances by a subordinate, the activity is categorized as quid pro quo harassment. When sexual remarks, flirtations, etc. become sufficiently severe or pervasive to create a hostile work environment, the activity is categorized as hostile environment harassment.

Later United States Supreme Court cases established a standard for determining employer liability for harassment which does not depend upon characterization of the harassment as either quid pro quo or hostile environment. In two cases, *Faragher v. City of Boca Raton*, and *Burlington Industries v. Ellerth*, the Supreme Court established that an employer will be vicariously liable for sexual harassment of an employee by a supervisor with immediate or successively higher authority over the employee even when there have been no tangible job detriments resulting from the harassment. When there have been tangible job detriments, the employer may not present affirmative defenses, and will be liable. When there have been no tangible job detriments, the employer may present affirmative defenses. The affirmative defenses outlined by the Supreme Court include the employer's showing it exercised reasonable care to prevent and correct promptly any sexual harassing behavior, and the plaintiff employee's unreasonable failure to take advantage of preventive or corrective opportunities provided by the employer.

The Supreme Court's decisions confirm that employers should promulgate clear policies prohibiting sexual harassment, engage in training of their supervisory employees, and promptly address any claims of alleged sexual harassment. Both employers and employees encountering sexual harassment issues should avoid precipitous reactions and should consult competent legal counsel.

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