

PRACTICAL OVERVIEW: SEXUAL HARASSMENT CLAIMS AND COMPLIANT POLICIES, TRAINING AND RESPONSE



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WEINSTEIN'S STATEMENT

“I came of age in the 60's and 70's, when all the rules about behavior and workplaces were different.”

BREAKING NEWS

SEXUAL HARASSMENT ACCUSATIONS

FILM PRODUCER WEINSTEIN TAKES LEAVE OF ABSENCE



WORLD NEWS TONIGHT

Sexual Harassment: Defined

- Title VII of the Civil Rights Act of 1964, 42 U.S.C. § 2000e-2(a)(1)

“It shall be an unlawful employment practice for an employer . . . to discriminate against any individual with respect to [his or her] compensation, terms, conditions, or privileges of employment, because of such individual’s . . . sex [.]”

- *Meritor Savings Bank, FSB v. Vinson*, 477 U.S. 57 (1986) (Title VII prohibits sexual harassment)

- 29 C.F.R. § 1604.11(a)

Unwelcome sexual advances, requests for sexual favors, and other verbal or 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.

Sexual Harassment: Procedurally

- Title VII Sexual Harassment:
 - Individual must file with the Equal Employment Opportunity Commission (“EEOC”) and receive a notice of right to sue before commencing a suit in court.
 - Must file with the EEOC within 180 days of the alleged unlawful act, or within 300 days if a state or local agency enforces a law that prohibits discrimination on the same basis.
 - Must file a civil action within 90 days of receiving a notice of right to sue from the EEOC.
- State Law (*e.g.*, MN):
 - Must sue or file with the Minnesota Department of Human Rights (“MDHR”) within one year of alleged discriminatory act.
 - Must file a civil action within 45 days of receiving a notice of right to sue from the MDHR.

Sexual Harassment Claims:

“Quid Pro Quo” Sexual Harassment

v.

Hostile Work Environment Sexual
Harassment

“Quid Pro Quo”

Sexual Harassment Claim

- A “quid pro quo” sexual harassment claim is one where an employee is offered an advantage in exchange for acquiescing to sexual advances, or threatened with an adverse action if the employee does not acquiesce.
- *Prima Facie Case:*
 - (1) the employee is a member of a protected class;
 - (2) the employee was subjected to unwelcome sexual harassment in the form of sexual advances or requests for sexual favors;
 - (3) the harassment was based on sex; and
 - (4) the employee’s submission to the unwelcome advances was an express or implied condition for receiving job benefits or the employee’s refusal to submit resulted in a tangible job detriment.

Hostile Work Environment Sexual Harassment Claim

- A claim of hostile work environment sexual harassment arises when “sexual conduct has the purpose or effect of unreasonably interfering with an individual’s work performance or creating an intimidating, hostile, or offensive working environment.” *Meritor Sav. Bank*, 477 U.S. at 65).
- *Prima Facie Case*:
 - (1) the employee belongs to a protected group;
 - (2) the employee was subject to unwelcome sexual harassment;
 - (3) the harassment was based on sex;
 - (4) the harassment affected a “term, condition, or privilege” of employment; and
 - (5) the employer knew or should have known of the harassment and failed to take proper remedial action.**

** Whether an employee must prove element five of the *prima facie* case depends on the identity of the harasser.

Hostile Work Environment Sexual Harassment Claim

- Litigation generally concerns the following *prima facie* elements:
 - Element Two: Unwelcome Sexual Harassment
 - Element Three: Harassment Based on Sex
 - Element Four: Harassment Affected a Term, Condition, or Privilege of Employment

***Prima Facie* Case: (1) protected group**

- Usually not at issue in sexual harassment cases, but:
- Current Circuit split regarding whether employment discrimination on the basis of sexual orientation violates Title VII.
 - 7th Cir. – actionable
 - 11th Cir. – not actionable
 - 8th Cir. – case pending: *Horton v. Midwest Geriatric Management, LLC*.

***Prima Facie* Case: (2) unwelcome harassment**

- Did the plaintiff indicate by his or her conduct that the harassment was unwelcome?
 - Did the plaintiff complain, or tell the harasser to stop, etc.?
 - Did the plaintiff engage in similar conduct at work?
 - *But see* Rule 412 of the Federal Rules of Evidence

Prima Facie Case: (3) based on sex

- “Causal nexus” between the harassment and membership in the protected group.
 - Gender-based insults may give rise to an inference of discrimination based on sex.
 - Same-sex sexual harassment is actionable under Title VII, but the harassment must be because of sex.
 - Plaintiff need not show that only one protected group (*e.g.*, women) was subjected to harassment, so long as the plaintiff shows that the protected group was the primary target of such harassment.

Prima Facie Case: (4) affected a “term, condition, or privilege” of employment

- Sexual harassment violates Title VII when it is “sufficiently severe or pervasive ‘to alter the conditions of [the victim’s] employment and create an abusive working environment.’”
 - Severe **or** pervasive
 - Employee must show that environment was objectively and subjectively hostile or abusive.
 - The U.S. Supreme Court has described this as a “middle path,” *but see Duncan v. General Motors Corp*, 300 F.3d 928 (8th Cir. 2002).

Implications of the Identity of the Harasser

- Standards of proof and level of employer liability are determined by who did the harassing—whether the harasser was a:
 - coworker or other nonsupervisory individual;
 - a supervisor of the employee; or
 - the employer's owner or alter ego.

Identity of the Harasser: Co-Worker

- Plaintiff must establish element five of the *prima facie* case:
 - (5) the employer knew or should have known of the harassment and failed to take immediate and appropriate corrective action.
- Employers are liable where the employer (or its agents or supervisory employees) knew or should have known about the conduct **UNLESS** the employer can show that it took immediate and appropriate action.
 - The question of whether the employer's response is satisfactory is assessed under a negligence standard.
 - The employee must show that the employer received actual or constructive notice of the harassing conduct before liability can be imposed.
 - The adequacy of an employer's response is measured by whether the corrective actions taken are reasonably calculated to end the harassment.

Identity of the Harasser: Supervisor

- An employer is generally vicariously liable for a hostile work environment created by its supervisors.
 - *Burlington Indus., Inc. v. Ellerth*, 524 U.S. 742 (1998) and *Faragher v. City of Boca Raton*, 524 U.S. 775 (1998).
- An employee is a “supervisor” for purposes of vicarious liability under Title VII if he or she is empowered by the employer to take tangible employment actions against the employee. *Vance v. Ball State Univ.*, 133 S. Ct. 2434, 2439 (2013).
 - Examples of such tangible employment actions include a significant change in employment status, such as hiring, firing, failing to promote, reassignment with significantly different responsibilities, or a decision causing a significant change in benefits.
 - Employees empowered with the ability to set work schedules and supervise day-to-day work, are often considered supervisors.

Identity of the Harasser: Supervisor

- Where an employee is sexually harassed by a supervisor and suffers an adverse tangible employment action, the employer is liable.
- But, where an employee does not suffer an adverse tangible employment action, the employer may escape liability by establishing an affirmative defense under the *Faragher/Ellerth* framework.
- The *Faragher/Ellerth* defense has two necessary elements:
 - (a) the employer exercised reasonable care to prevent and correct promptly any sexually harassing behavior; **and**
 - (b) the employee unreasonably failed to take advantage of any preventive or corrective opportunities provided by the employer or to avoid harm otherwise.
- This defense must be affirmatively proven by the employer by a preponderance of the evidence.

Identity of the Harasser: Supervisor

- *Faragher/Ellerth* Defense Prong 1: The employer exercised reasonable care to prevent and correct promptly any sexually harassing behavior.
 - Factors in assessing the reasonableness of an employer's corrective measures may include:
 - (1) the amount of time that elapsed between the notice and remedial action;
 - (2) the options available to the employer, such as employee training sessions, transferring the harassers, written warnings, or termination; and
 - (3) whether or not the measures ended the harassment

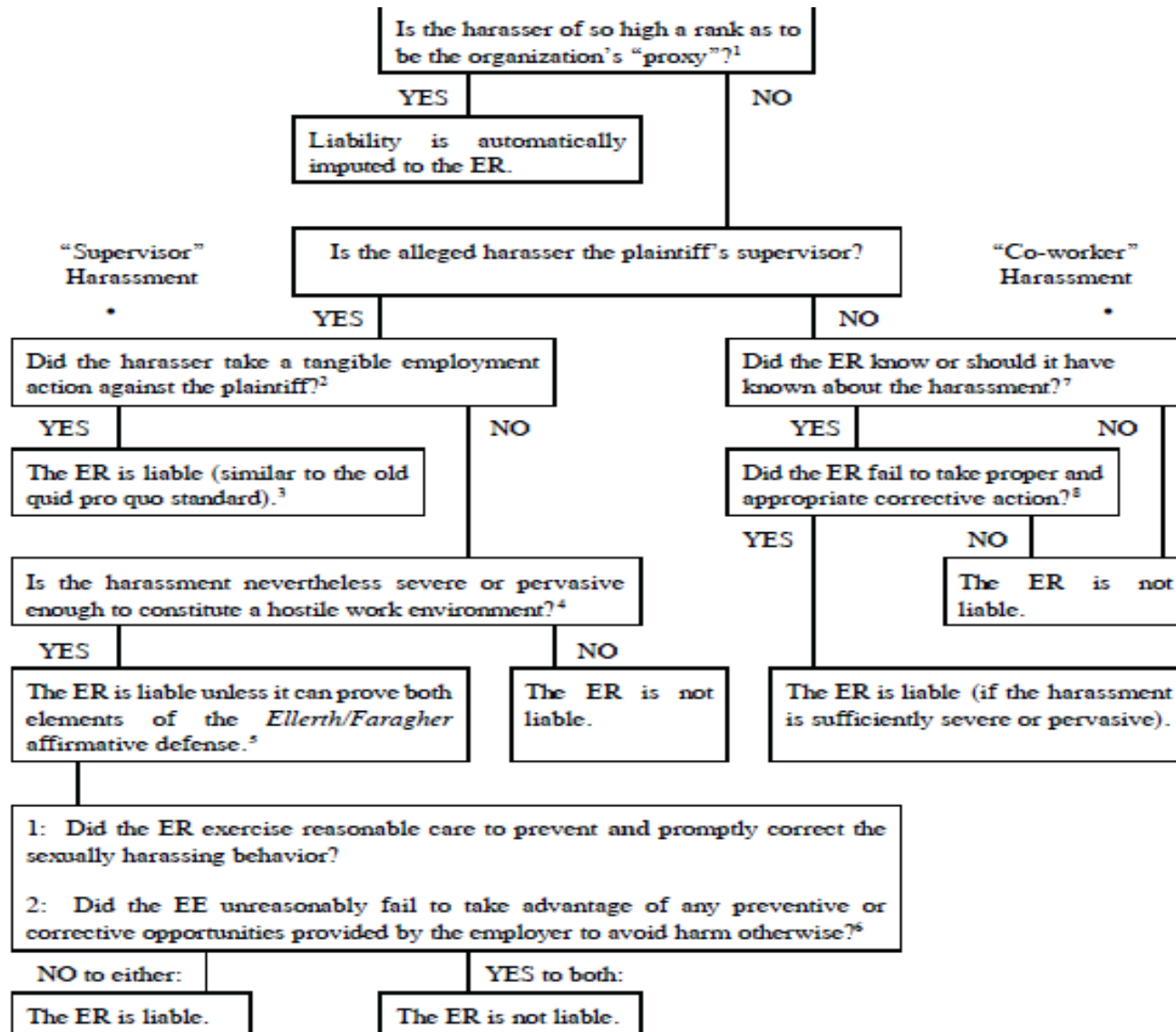
Identity of the Harasser: Supervisor

- *Faragher/Ellerth* Defense Prong 2: the employee unreasonably failed to take advantage of any preventive or corrective opportunities provided by the employer or to avoid harm otherwise.
 - To establish a plaintiff failed to take advantage of corrective opportunities, the employer generally must establish that it created and communicated a competent sexual harassment policy, which includes a complaint resolution procedure.

Identity of the Harasser: Owner

- Employers are strictly liable for harassment undertaken by the employer's proxies or alter egos.
- The *Faragher/ Ellerth* defense is not available to employers when the harassing employee acts as a "proxy" for the employer—where the harasser held a "sufficiently high position in the management hierarchy of the company," such that holding the employer company vicariously liable for his actions is proper.

Employer Liability Flow Chart



Joens v. John Morrell & Co., 243 F. Supp. 2d 920, 933 (N.D. Iowa 2003)

Associated Claims: Assault and Battery

- Under Minnesota law, a battery occurs if there is offensive or harmful contact along with intent to cause the contact.
- An assault occurs when there is a threat of bodily harm, present ability to carry out the threat, and a reasonable apprehension or fear of the threat.
- Employee must establish vicarious liability and that the tort fell within the scope of employment.

Associated Claims: Negligence

- Common claims: negligent hiring, negligent retention, and negligent supervision.
- When an employer knew or should have known of previous harassment, an employer may be liable for negligence if it takes inadequate action in response.
- Employee must show that employer knew of the harassment or show that harassment was a known risk in the industry.
- Employee must establish vicarious liability.
- Employee must avoid workers' compensation preemption.

Associated Claims: Retaliation

- Under the *McDonnell Douglas* burden-shifting framework, an employee must prove:
 - (1) that he or she engaged in statutorily protected conduct;
 - (2) that he or she was subjected to an adverse employment action by the employer; and
 - (3) that a causal connection exists between the employee's conduct and the employer's action.

Associated Claims: Title IX

- Student must show:
 - (1) he or she was subjected to quid pro quo sexual harassment or a sexually hostile work environment;
 - (2) he or she provided **actual notice** of the situation to an official of the educational institution with authority “to address the alleged discrimination and to institute corrective measures”; and
 - (3) the institution’s response to the harassment was so inadequate that it amounted to “**deliberate indifference.**”

Problematic Employer Policy

“All employees should be mindful to treat their co-workers, subordinates, supervisors, and third parties with respect at all times. Any employee who feels that he or she is being subjected to harassment in any form is encouraged, if they are comfortable doing so, to confront the harasser regarding their behavior. Regardless, any employee experiencing harassment or witnessing harassment of another employee may contact a member of the management team to get the issue investigated and resolved.

DISCLAIMER: We are offensive. We say inappropriate things and push the envelope. That doesn't mean that we mean them or are trying to hurt anyone's feelings. If you are easily offended, you may want to reconsider your employment at **[REDACTED]**. If you sue **[REDACTED]** on hostile-workplace related grounds, **[REDACTED]** will sue you for being boring and a ninny.”

Employer Anti-Harassment Policies

A policy should:

- Inform employees harassment is prohibited.
 - Clearly state what the employer prohibits and what the employer expects.
 - Provide concrete and easy-to-understand examples.
 - Make clear the examples are merely illustrative, but not intended to be an exclusive list.

This section beginning here on policies provides an overview of the material set forth Minnesota CLE's Sexual Harassment text, particularly in the chapter, "Anti-Harassment Policies, Complaints Procedures & Culture" by Jenny Gassman-Pines of Greene Espel, PLLP

Employer Anti-Harassment Policies

A policy should:

- Prohibit conduct that may not be illegal, but that is inconsistent with the employer's workplace expectations.
 - Employers can choose to define conduct that constitutes sexual harassment and hostile work environment more broadly than the law defines such conduct and enforce such policies against employees.
- Make clear who the policy covers.
 - It should be clear that anti-harassment policies apply to every level of the organization—from the top down.
 - Employers should consider including a prohibition on harassment by non-employees. The EEOC recommends that anti-harassment policies cover applicants, clients, and customers as well.

Employer Anti-Harassment Policies

A policy should:

- Identify who employees should contact to discuss harassment questions or concerns.
- Encourage employees to report conduct that they believe may be prohibited harassment even if they are not sure that the conduct violates the policy.
- Affirm that employees will not be retaliated against for asking questions or sharing their concerns.
 - The policy should include a clear and unequivocal statement that retaliation is prohibited and will not be tolerated.

Employer Anti-Harassment Policies

A policy should:

- Clearly explain the complaint, reporting, and investigation process.
 - The policy should describe the steps of the investigation process.
 - The policy should include an affirmation that, if a complaint is made, the employer will provide a prompt, impartial, and thorough investigation.
 - The policy should provide information about how the employer will handle confidentiality.

Employer Anti-Harassment Policies

A policy should:

- Explain the possible consequences for violating the policy.
- Provide multiple avenues for complaints.
 - A complaint procedure that requires employees to report harassment to the individual who is harassing them—for example, their supervisor—will not be effective. A complaint process must allow an employee to bypass their harasser in order to make a complaint.
 - For small employers, the EEOC recommends designating at least one person outside an employee's reporting chain to receive complaints and allowing employees to report harassment to any manager.
- Ensure managers understand their responsibility to stop, address, and prevent harassment.

Employer Anti-Harassment Policies

A company's policy should be readily available to employees.

- Employers should take steps to publicize the policy and ensure employees know it exists.
- Employers may want to consider:
 - Making the policy available in an employee handbook, on a company intranet, posted or available in the Human Resources workspace or a central, regularly visited location (e.g., breakroom, copy room).
 - Reminding employees about the policy during Human Resources trainings.
 - Reminding employees through routine communications from Human Resources and other leaders.
 - Providing a copy of the anti-harassment policy to all new hires and have new employees sign an acknowledgment of receipt.
 - Recirculating the anti-harassment policy on an annual basis.

Harassment Training

- Following *Burlington and Ellerth*, sexual harassment training has become ubiquitous.
- In its 2016 Report, the EEOC's Select Task Force on Harassment considered whether training is effective in preventing harassment, and whether some types of training were better than others.
- The Task Force recommended training based on civility (holistic training focused on a respectful culture) and bystander intervention.

The section beginning here on training provides an overview of the material set forth in the chapter, "Effective Training to Prevent Sexual Harassment" by Fran Sepler, MA of Sepler & Associates.

Harassment Training

- Compliance Based Training for Employees includes:
 - An explanation of the employer's **policy**;
 - **Definitions** that support the employer's policy and clarify prohibited behavior;
 - **Examples** of behavior that could be harassing and the impact of such behavior on targets and organizations;
 - **Instructions** about how to **respond** to and report harassment;
 - A discussion on the **consequences** for unlawful conduct;
 - Discussion of **non-retaliation**;
 - **Hypotheticals** for discussion;
 - Explanation of the **investigative** process; and
 - Outside **resources** for those who feel harassed.

Harassment Training

- Compliance Based Training for Supervisors includes:
 - Everything in the employee based training;
 - Information on the obligations of supervisors when they become **aware of** possible harassment;
 - Steps to take to **respond** to an employee complaint and how to **document** complaints;
 - Supervisor's interaction with **human resources** regarding sexual harassment complaints; and
 - The importance of **setting the tone** and responding to inappropriate behavior.

Harassment Training

- Respect in the workplace training includes:
 - Helping people to develop a shared understanding of behavior that is helpful vs. counterproductive creates a baseline.
 - Providing tools: models, scripts, documents, etc.
 - Practice
 - Bystander intervention training
 - Use of Hypotheticals

Harassment Investigations

- EEOC Taskforce Checklist: Does the employer . . .
 - have a process for timely responding to a report and initiating an investigation?
 - have well-trained, objective, and neutral investigators?
 - use investigators who document all steps taken from the point of first contact and who prepare a written report using guidelines to weigh credibility?
 - ensure that investigations protect the privacy of individuals who file complaints or reports, individuals who provide information during the investigation, and the person(s) alleged to have engaged in harassment, to the greatest extent possible?

The section beginning here on investigations provides an overview of the material set forth in Minnesota CLE's Sexual Harassment text, particularly in the chapter, "Sexual Harassment Investigations in the Age of #MeToo" by Veena A. Iyer, Jen Cornell, Sandra L. Jezierski of Nilan Johnson Lewis PA

Harassment Investigations

- EEOC Taskforce Checklist, cont.: Does the employer . . .
 - have mechanisms to determine whether individuals who file reports or provide information during an investigation experience retribution, and authority to impose sanctions on those who engage in retaliation?
 - have a policy or practice of ensuring that the individuals who file reports of harassment are able to report to work and perform their job without having to see or confront the alleged harasser?
 - have systems in place to ensure that, during the pendency of an investigation, individuals alleged to have engaged in harassment are not “presumed guilty” and are not “punished” unless and until a complete investigation determines that harassment has occurred?
 - communicate the determination of the investigation to all parties and, where appropriate, communicate the sanction imposed if harassment was found to have occurred?

Harassment Investigations

- Intake interview:
 - Private location
 - Thank the reporter
 - Obtain facts in a non-judgmental manner
 - State that employer policies will be followed
 - Make assurances of non-retaliation
 - Discuss expectations and timeline for follow-up

Harassment Investigations

- Who should conduct the investigation, pros and cons to each:
 - Non-Human Resources personnel
 - Human Resources personnel
 - In-house Counsel
 - Outside Counsel
 - Independent Investigators

Harassment Investigations

- Protective measures during the investigation:
 - Consideration of remedial measures
 - Safety measures: involve security or law enforcement?
 - Suspension of alleged harasser?
 - Preservation of evidence

Harassment Investigations

- Considerations when planning an investigation:
 - Scope of the investigation
 - Evidence collection and preservation plan
 - Interview plan
 - Preserving the attorney-client privilege

Harassment Investigations

- Investigatory findings:
 - Credibility findings
 - Factual findings
 - Does the employer obtain a report?
 - Preserving privilege in the report

Harassment Investigations

- Possible actions following a report:
 - Termination
 - Discipline
 - No disciplinary action
 - Training
 - Audits
 - Support for reporter or victim
- Appropriate communication of investigatory process and findings

Questions?