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Sexual Harassment Harms the Victim and the Employer
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I. Objective – A Professional and Productive Work Environment

The objective for any employer, is to maintain a professional workplace, where no employees are subject to actions from supervisors or co-workers that are demeaning, unfriendly or unprofessional. This objective obviously includes ensuring a work environment that is free of sexual harassment, not only to ensure a productive workplace, but to ensure that the employer does not violate the law.

II. The Law Against Sexual Harassment – Relatively Recent.

The law against sexual harassment is relatively recent. Although discrimination based on sex was part of the 1964 Civil Rights Act, some courts did not interpret this law to include sexual harassment. But in 1980, the Equal Employment Opportunity Commission issued guidelines interpreting the law to include sexual harassment as sex discrimination. However until 1991, the law against sexual harassment was a right without a remedy. If the illegal harassment did not result in termination, the employee's remedy was limited to attorneys' fees and injunctive relief. In 1991, as a result of an amendment to the Civil Rights Act, employees became eligible for compensatory damages of $50,000 to $300,000, depending on the size of the employer, as well as punitive damages. The employees could also elect a trial by jury.

III. Definition of Sexual Harassment

The definition of sexual harassment which is set forth in the Code of Federal Regulations is used in the federal forum, and is generally followed in state and local forums as well.

> Harassment <u>on the basis of sex</u> is a violation of section 703 of Title VII
>
> <u>Unwelcome</u> 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, and
>
> (2) submission to or rejection of such conduct by an individual is used as the basis for employment decisions affecting such individual, **[Quid Pro Quo]** or
>
> (3) such conduct has the purpose or effect of unreasonably interfering with an individual's work performance or <u>creating an</u>

intimidating, hostile, or offensive working environment.

(29 C.F.R §1604.11(a)) (emphasis added)

IV. Two Types of Sexual Conduct Are Illegal under Title VII, Quid Pro Quo and Hostile Environment.

A. The Quid Pro Quo occurs when a supervisor makes an employee's engagement in sexual conduct either explicitly or implicitly a term or condition of an individual's employment. The employer is **strictly liable** where a supervisor's sexual harassment results in a tangible employment action against the employee. The more difficult concept to understand is hostile work environment.

B. Hostile Work Environment is unwelcome, (unwanted) sexual conduct that unreasonably interferes with an individual's work performance or creates an intimidating, hostile, or offensive working environment.

V. Hostile Work Environment

A supervisor, co-worker, or even a non-employee such as a vendor or customer can create a hostile environment. [1]

The main issues in determining whether conduct constitutes illegal sexual harassment is

1. Whether the conduct is "unwelcome"

2. Whether the working environment is "hostile." Title VII does not prohibit all verbal or physical harassment in the workplace. It is directed only at discrimination because of sex. In order to determine whether a plaintiff meets the standard, the court must examine all the circumstances including "frequency of the discriminatory conduct; its severity; whether it is physically threatening or humiliating, or a mere offensive utterance; and whether it unreasonably interferes with an employee's work performance. . ." There is both an objective and subjective dimension to these inquiries.

3. Was the employer negligent in addressing the sexual harassment experienced by the employee.

Hostile Work Environment -- Is the Conduct *Unwelcome?*

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[1] Harassment for reasons other than sex and other protected categories, does not violate the law. For example, in Gleason v. Mesirow Financial, Inc. 118 F.3d 1134, 1145 (7th Cir. 1997), the court stated,

> We do not believe that a reasonable person in the plaintiff's circumstances would conclude that she was at a disadvantage vis a vis her male coworkers because of her sex, particularly as the record reveals that both male and female employees at the desk objected to [the supervisor's] overbearing and abusive manner and his 'talking down' to desk employees. In other words, there may very well have been a hostile work environment for both sexes.....

Sexual conduct toward another person that is *welcome*, is not illegal. If certain behaviors are welcome, they do not constitute sexual harassment -- touching, date requests, comments on appearance, dirty jokes, nicknames, sexually explicit talk, lewd comments, innuendoes, sexual advances, flirting, leering, compliments, dirty pictures, winking, personal questions, treating women as helpless, contacting a woman outside of work, discussing personal relationships, dating the boss, invading personal space and backrubs.

There is no absolute answer on what conduct will be determined to be unwelcome, and therefore illegal. Instead there is a judgment process based on different factors.

Definition of Unwelcome

The conduct cannot have been encouraged or incited by the alleged victim. Reed v. Shepard, 939 F.2d 484 (7th Cir. 1991) In this case, the Court viewed the plaintiff's supposed exhibitionism, suggestive gift-giving and foul mouth as sufficient encouragement of sexually suggestive conduct, that the conduct she received in response was deemed welcome.

But a willingness to engage in sex related banter does not make other gender-based harassment welcome. In Carr v. Allison Gas Turbine Division, General Motors Corpl, 32 F. 3d 1007 (7th Cir. 1994) an effort by the woman, to be "one of the boys" did not mean that all manner of sexual conduct was welcome.

The question is whether the victim's actions were consistent with the assertion that the conduct was unwelcome.

The Supreme Court has held that a victim's "voluntary" submission to sexual advances of her supervisor, does not mean that the complained of conduct was welcome. Meritor Savings Bank v. Vinson, 477 U.S. 57 (1986) The district court had dismissed the case based on its belief that Vinson and her supervisor engaged in a consensual sexual relationship and therefore Vinson had not been discriminated against because of her sex.

The plaintiff alleged that her supervisor made sexual advances toward her, fondled her and raped her on several occasions. The plaintiff interpreted the conduct as quid pro quo-style harassment in that she feared that she would lose her job if she did not engage in sexual relations with her supervisor. However the Court also characterized the supervisor's alleged behavior as hostile work environment harassment because, even if the supervisor did not condition job benefits on engaging in sexual relations, the conduct was of the type and severity that the plaintiff's terms of employment may have been constructively altered by having to endure it.

2. Hostile Work Environment – Is the conduct "intimidating, hostile, or offensive" objectively and subjectively?

The question is how much unwelcome conduct will rise to the level of illegal sexual harassment? There is no absolute answer. As many courts are quick to point out, the prohibition against sexual harassment does not make illegal merely vulgar and mildly offensive behavior. It is not a "general civility code."[2]

In Patton v. Keystone RV Company, 455 F.3d 812 (7th Cir. 2006), the court determined

[2]Oncale v. Sundowner Offshore Servsl, 523 U.S. 75 (1998)

that the employee was justified in quitting due to the fact that the supervisor put his hand up her shorts. The court stated that the mere existence of physical contact does not create a hostile environment. Casual contact that might be expected among friends – "[a] hand on the shoulder, a brief hug, or a peck on the cheek" – would normally be unlikely to create a hostile environment in the absence of aggravating circumstances such as continued contact after an objection. *Id.* And "[e]ven more intimate or more crude physical acts – a hand on the thigh, a kiss on the lips, a pinch of te buttocks – may be considered insufficiently abusive to be described as 'severe' when they occur in isolation." *Id.* But when the physical contact surpasses what "(if it were consensual) might be expected between friendly coworkers . . . it becomes increasingly difficult to write the conduct off as a pedestrian annoyance." *Id.*

The "line between a merely unpleasant working environment on the one hand and a hostile or deeply repugnant one on the other" is not bright. Baskerville v. Culligan Int'l Co., 50 F.3d 428, 431 (7th Cir. 1995) It is based on the totality of the circumstances, such as the nature of the sexual advances and the context in which the alleged incidents occurred. A single incident generally does not constitute illegal harassment. The incidents must be pervasive but not necessarily sexual in nature.

However, the danger for employers, who do not address what may be viewed as minor incidents, is that these incidents can escalate into much more serious conduct. The more serious conduct may prompt breakdowns in the workplace, lawsuits, damage the employer's standing in the community, and ultimately result in liability.

In the case of McKenzie v. Ill. Dept. of Transportation, 92 F.3d 473 (7th Cir. 1996), a sexual harassment claim was dismissed which was based on a handful of sexually suggestive comments made over a three-month period.

But in Brinkley v. The City of Green Bay, 392 F. Supp. 2d 1052 (E.D. Wi 2005), the Court stated that the woman put forth evidence sufficient to state a claim for a hostile work environment, based on the presence of pornographic magazines in areas, including bathrooms frequented by the women firefighters.

The test for a hostile work environment includes both an objective prong, -- sufficient severity or pervasiveness from the perspective of a reasonable person -- and a subjective prong -- abusiveness from the perspective of the complainant.

In this regard, the Supreme Court has ruled that the environment must be objectively hostile to the reasonable person, as well as subjectively hostile and offensive to the employee herself. Harris v. Forklift Systems, 510 U.S. 17 (1993).

In Harris, the president of the company called a woman manager a "dumb ass woman" "we need a man as the rental manager" "you're a woman, what do you know." He asked female employees to retrieve coins from his front pants pockets, made sexual innuendoes about plaintiff and other women's clothing, and after the plaintiff closed a deal, asked if she promised the guy sex.

The district court found that although some of the comments would be offensive to a reasonable woman they were not so severe as to be expected "to seriously affect [Harris'] psychological well-being," and therefore did not reach the level of harassment. The Court of Appeals for the Sixth Circuit agreed but the Supreme Court reversed.

Justice O'Connor, writing an unanimous opinion for the court, defined a hostile work environment as one that "a reasonable person would find hostile or abusive." She also stated that there is not a Title VII violation "[i]f the victim does not subjectively perceive the environment to be abusive. . ."

Courts have found that evidence that an employee believes that the environment is abusive includes complaining, invoking the employer's complaint procedure, and keeping a log of the harasser's conduct. See Dey v. Colt Const. & Development Co. 28 F.3d 1446 (7th Cir. 1994).

3. Hostile Work Environment – Did the employer fail to exercise reasonable care in addressing the sexual harassment experienced by the employee. (i.e. was the employer negligent?)

The employer will be shielded from liability for supervisors, co-workers or third parties sexual harassment, where the employer can demonstrate: It had a complaint procedure in place, the employee failed to use it without a justifiable reason, or after the employee invoked the complaint process, the employer moved quickly to address and correct the harassment. Otherwise, employers are liable when they know or should have known about supervisors, co-workers or non-employees harassment and fail to take prompt and reasonable remedial action. Again, where the employer promptly takes steps to end the harassment, the employer will generally not be found liable.

In *Erickson v. Wi Dpt. of Corrections*, 469 F.3d 600 (7th Cir. 2006), the employer argued that employer liability for negligence can only arise in a Title VII case if an employer has notice of actual prior acts of sexual harassment. Before that, the employer argued, no duty exists to discover or remedy sexual harassment.

The court disagreed and held that an employer is liable if it fails to respond to a reasonable notice, under the circumstances, that sexual harassment might occur. In *Erickson*, the fact that the female employee expressed concern about being left alone with a prisoner on work release, and the fact that the employer implemented training emphasizing that male inmates might attempt to establish inappropriate relationships with female employees, put the employer on notice of the danger of sexual harassment.

In *Jackson v. County of Racine*, 474 F.3d 493 (7th Cir. 2007), the court found that there was evidence of sexual harassment but because the employees delayed in bringing it to the attention of the employer and the evidence reflects when it was brought to the attention of the employer, the employer acted quickly, the employer has a complete defense to a charge of sexual harassment.

In *Isaacs v. Hill's Pet Nutrition, Inc.* 485 F.3d 383 (7th Cir. 2007), the court determined that the employer's actions with respect to male coworkers' harassment of the plaintiff was insufficient. The court stated that the evidence reflected that the employer "deemed the men's morale more important than the woman's welfare" which conclusion would be enough to support an award of damages under Title VII

In Baker v. McKenzie, (California) seven and a half million dollar punitive judgment entered against law firm, when for years lawyers had tolerated another's lawyers sexual harassment of support staff, because of the substantial revenue the lawyer generated..

In Storey v. Illinois State Police, 2006 U.S. Dist. LEXIS 57970 (S.D. Ill.) the court determined the woman trooper was subjected to a hostile work environment based on her sex, but it dismissed the sexual harassment complaint. It stated that the employer had in place, a sexual harassment and discrimination policy but she waited thirteen months to file a complaint. The employer investigated, and exercised reasonable care to prevent and correct the harassing behavior. While the employee argued that the employer never punished the harasser, and instead permitted him to resign, the court said the important point is, the behavior was corrected.

But as the court observed in Hostetler v. Quality Dining, Inc., 218 F.3d 798 (7th Cir. 2000) the remedial measures cannot make the victim worse off. In this case, a female employee was permitted to pursue her sexual harassment claim even though the employer transferred her to end the harassment, because her new location was inconvenient and arguably left her worse off.

VI. Retaliation Against an Employee For Filing a Complaint is Illegal – Retaliation is defined as any actions that a reasonable employee would find to be materially adverse such that the employee would be dissuaded from engaging in the protected activity.

It is a violation of Title VII for an employer to discriminate against any of its employees because the employee has opposed any practice made unlawful under this act. An employee must show she engaged in a protected activity and suffered an "adverse action" as a result.

It is sufficient that for an employee to raise a good faith charge of sexual harassment. The employee does not need to actually prove a violation of the law. Many times, the employee's underlying discrimination claim may fail, but s/he may prevail on the retaliation claim.

In order for the employee to show she suffered an "adverse action" it is sufficient to show she was subject to action that might dissuade a reasonable employee from engaging in protected activity. Burlington Northern & Santa Fe Ry. v. White, 126 S.Ct. 2405 (2006).

In Burlington, the court rejected an employer's contention that the reassignment of an employee could not be materially adverse because her former and present tasks fell within the same job description. Instead the court noted that where the evidence reflected that her post transfer duties were "dirtier, more arduous and less prestigious" she demonstrated that she suffered an "adverse action."

The case, involved a woman's allegation that the employer retaliated against her for complaining about sexual harassment. White was the only woman forklift operator in her department. After she complained about sexual harassment, the employer disciplined the harasser, but then reassigned her to duties that required her to work outside in the hot sun. The court determined that the employer's action might "well have dissuaded a reasonable employee from making or supporting a charge of discrimination."

In *Lewis v. City of Chicago*, 496 F.3d 645 (7th Cir. 2007) found that the City retaliated against the woman, when she was given more dangerous assignments, after she complained that she was denied an assignment because of her sex.

In *Pantoja v. American NTN Bearing Mfg* (7th Cir. 2007), an employee with previous performance problems was fired after complaining about discrimination. The court stated that a

jury might believe that the employer did not see his previous difficulties as firing offenses until the employee complained about discrimination.

In a subsequent decision, a district court dismissed a woman's sexual harassment lawsuit, but found retaliation occurred when the employer assigned the trooper to a job with substantially less responsibilities. Storey v. Illinois State Police, 2006 U.S. Dist. LEXIS 57970 (S.D.Ill). The court said that "[i]f one knows that her decision to complain about a supervisor's illegal activities would meaningfully derail her career, would such a person hesitate to complain? The answer must be yes."

VII. Damages

Backpay, compensatory damages for emotional pain, suffering, inconvenience, mental anguish, loss of enjoyment of life, punitive damages, prejudgment interest, reinstatement, front pay where reinstatement is inappropriate, injunctive and declaratory relief, medical expenses, annuity or pension payments.

VIII. Steps to Take If An Employee Believes S/He is a Victim of Harassment.

1. Pursue internal remedies – Review the Employer's Harassment Policy – Complain to Appropriate Personnel

2. Seek Counsel

3. File a Complaint with the Appropriate Government Agency.

Local Agency – In Madison, an individual who believes he or she is a victim of sexual harassment can file a complaint with the City of Madison Equal Opportunities Employment Commission.

State Agency – the Equal Rights Division within the State of Wisconsin Department of Workforce Development,

Federal agency – the Equal Employment Opportunities Commission, in Milwaukee.