

Handling Sexual and Other Harassment Claims in a Post-#MeToo World

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Agenda:

- The legal context of harassment claims.
- How did we get here? A brief history of sexual harassment law.
- A corporate compliance approach to addressing sexual harassment claims.
- A 14-Step action plan every employer should consider adopting.
- Conclusion, takeaways, and questions

The Legal Context of Harassment Claims:

The federal anti-discrimination laws created protected classes of individuals who could file claims based on 4 primary theories of discrimination:

- disparate treatment;
- disparate impact;
- harassment**; and
- retaliation

The Legal Context of Harassment Claims:

Two theories can be used to prove unlawful harassment:

- *quid pro quo*; and
- hostile work environment.

The Legal Context of Harassment Claims:

The Equal Employment Opportunity Commission's (EEOC) **1980 Guidelines on Discrimination Because of Sex** define sexual harassment 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 a term or condition of employment;
2. submission to or rejection of such conduct by an individual is used as the basis for employment decisions affecting the 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"

(The first two parts of the definition is the *quid pro quo theory*; the third part is the **hostile work environment theory**.)

Employer Liability for Harassment:

Co-Worker Harassment: The employer is liable only if it **knew or should have known** about the harassment but failed to act.

Supervisor Harassment: If the harassment results in a **tangible employment action** such as termination or demotion, the employer is held strictly liable even if it did not know about the supervisor's harassment.

However, when the supervisor's harassment does not result in a **tangible employment action**, the employer can raise an affirmative defense by showing: (1) it exercised reasonable care to prevent and correct sexually harassing behavior; and (2) the employee unreasonably failed to take advantage of this protection. (Translation: *if an employer has a compliant anti-harassment policy with a complaint procedure and the employee does not file a complaint, the employer can defeat the employee's claim*).

How did we get here? A brief history of sexual harassment law:

The beginning:

¹⁹⁶⁴Title VII of the Civil Rights Act is passed which prohibits employment discrimination based on race, color, sex, or national origin. The EEOC enforces Title VII.

¹⁹⁷⁵The term “sexual harassment” arose from a conscious-raising session that Cornell Professor Lin Farley held with a group of her students. Farley’s book, “Sexual Shakedown: The Sexual Harassment of Women on the Job” (1975) introduced the public to the concept of sexual harassment for the first time.

A brief history of sexual harassment law (continued)

The 1980’s:

¹⁹⁸⁰The EEOC Guidelines on Discrimination Because of Sex

¹⁹⁸⁴*Jenson v. Eveleth Taconite Co.*, 824 F. Supp. 847 (D. Minn. 1993)(Interpreting Section 703 of Title VII, the court established the criteria for determining when unwelcome conduct of a sexual nature constitutes sexual harassment, defined the circumstances under which an employer may be held liable, and suggested affirmative steps an employer should take to prevent sexual harassment.

A brief history of sexual harassment law (continued)

The 1980's:

¹⁹⁸⁶*Meritor Savings Bank v. Vinson*, 477 U.S. 57. The Supreme Court for the first time recognized that sexual harassment is a violation of Title VII. The Court cited the EEOC's 1980 Guidelines as support.

A brief history of sexual harassment law (continued)

The 1990's:

¹⁹⁹⁰The EEOC's Policy Guidance on Employer Liability Under Title VII for Sexual Favoritism discusses potential employer liability when an opportunity or benefit is denied to one employee and given to a supervisor's paramour or to an employee who submits to sexual advances or requests.

¹⁹⁹¹ The Civil Rights Act of 1991 modified Title VII to add more protection against discrimination in the workplace. The CRA allows harassment and discrimination plaintiffs the right to a jury trial in federal court. Also, for the first time, it gives plaintiffs the right to collect compensatory and punitive damages, subject to a cap based on the size of the employer.