BIAS IN THE LAW & THE #ME TOO MOVEMENT

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The Basics

- Harassment is a form of employment discrimination that violates Title VII of the Civil Rights Act of 1964, the Age Discrimination in Employment Act of 1967, and the Americans with Disabilities Act of 1990.
- In 1986, the Supreme Court for the first time recognized that sexual harassment is a violation of Title VII. Meritor Savings Bank v. Vinson, 477 U.S. 57 (1986).

Harassment Defined by the EEOC

- Unlawful harassment is unwelcome conduct that is based on race, color, religion, sex (including pregnancy), national origin, age (40 or older), disability, genetic information or other legally protected class when this conduct explicitly or implicitly affects an individual's employment, unreasonably interferes with an individual's work performance, or creates an intimidating, hostile, or offensive work environment.

Sexual Harassment Defined by the EEOC

- Unwelcome sexual advances, requests for sexual favors, and other verbal or physical conduct of a sexual nature constitutes sexual harassment when submission to or rejection of this conduct explicitly or implicitly affects an individual's employment, unreasonably interferes with an individual's work performance or creates an intimidating, hostile or offensive work environment.

Recent Sexual Harassment Cases You May Not Have Heard Of

- Chopourian v. Catholic Healthcare W. (2012): A federal jury in California awarded Chopourian $168 million, potentially the largest judgment in U.S. history for a single victim of workplace sexual harassment.
- Carla Ingraham vs. UBS Financial Services (2011): Ingraham was fired by UBS after bringing harassment to the attention of her employer. State court awarded $11 million agreeing that the employer had retaliated against her.
  - Ingraham's sexual harassment lawsuit was preceded by UBS' lawsuit seeking a Declaratory Judgment that it and its employees did not sexually harass or retaliate against Ingraham in violation of Title VII of the Civil Rights Act or the Missouri Human Rights Act

Sexual Harassment Defined by the Courts

- Prima Facie case:
  - (1) the employee belongs to a protected class;
  - (2) the employee was subjected to unwelcome sexual harassment;
  - (3) the harassment was based on sex;
  - (4) and the harassment affected a term or condition of employment. Meritor 477 U.S. at 65-66.

Sexual Harassment Defined Cont.

- Two kinds of sexual harassment:
  - (1) quid pro quo claims (unwelcome demands); and (2) hostile work environment.
- The starting point of what is and what is not sexual harassment hinges on whether the conduct in question is "unwelcome."

Prong #1: Protected Class

- Most people are presumed to fall under at least one protected class (i.e. race, gender, religion, national origin, age).
- However, courts have denied discrimination claims when an employees' asserted protected class was not under the traditional protected classes of Title VII. Vickers v. Fairfield Med. Ctr., 453 F.3d 757 (6th Cir. 2006).
  - The EEOC as well as the 1st, 6th (prior to Vickers), 9th and 11th Circuits and many U.S. District Courts have held that LGBT persons are protected under Title VII

Prong #2: Unwelcome

- Unwelcomeness requires proof that the conduct was: (1) unsolicited; or (2) uninvited. Henson v. City of Dundee, F.2d 897, 903 (1982).
- Unwelcome conduct can be very difficult to determine in isolation. The fact finder must consider the totality of the circumstances in light of the "record as a whole." 29 C.F.R. § 1604.11(b) (1985).

Prong #3: Based on Sex

- In cases involving different genders, it is easier to tell harassment that is based on sex.
- In cases of same harassment by a person of the same sex, it may be more difficult to prove sexual harassment.
  - Sexual harassment because of sexual orientation has become more accepted as a Title VII violation
- Recently, "gender non-conformance" has satisfied the "because of sex" element. Prowel v. Wise Bus. Forms, Inc., 579 F.3d 285, 292 (3d Cir. 2009).

Prong #4: Affected a Term or Condition of Employment

- The unwelcome conduct must be "severe" or "pervasive" as to alter a term or condition of employment. Harris v. Forklift Systems Inc., 510 U.S. 17,22 (1993).
- Usually, single instances of offensive conduct are not enough.

Prong #4: Affected a Term or Condition of Employment Cont.

- Difference between flirtatious behavior and sexual harassment is viewed both objectively and subjectively from victim's perspective. Harris at 21.
  - i.e., the victim has to subjectively perceive the environment as abusive, and the environment has to be objectively abusive as thought of by a reasonable person in the plaintiff's position.

Employer Liability for Sexual Harassment

- For the most part, an employer's liability for sexual harassment depends on the harasser's position in the workplace, and the kind of sexual harassment being alleged.
- However, an employer is strictly liable for harassment by a supervisor that results in a "tangible employment action."
  - Recent case of Mayo-Coleman v. American Sugar Holdings (USDC:SDNY 06/15/18) – jury granted $1.7 million in compensatory damages and $11.7 in punitive damages

Quid Pro Quo Sexual Harassment

- Couple of buzzwords here:
  - "Supervisor" is an employee that has authority to recommend employment decisions affecting the employee.
  - "Tangible Employment Action" may be termination, failure to promote or hire, and loss of wages.
- Quid Pro Quo harassment happens far less than "hostile work environment" harassment.

Supervisors v. Nonsupervisors

- A "supervisor" is: (1) an individual that has authority to take or recommend tangible employment decisions affecting the employee; or (2) an individual that has authority to direct the employee's daily activities. EEOC Enforcement Guidance: Vicarious Employer Liability for Unlawful Harassment by Supervisors (1999)
  - SCOTUS addressed this definition in Vance v. Ball State, 570 U.S. 421 (2013)
- A "co-worker" or "nonsupervisory" is: someone that has no real authority to make employment decisions or direct the plaintiff's work activities. Id.
  - The Vance decision focused upon the fact that some co-workers have authority to give work assignments

Employer Liability for Nonsupervisors

- An employer may still be liable for "nonsupervisors" if the employee "reasonably believed that the harasser had such supervisory power." Burlington Industries, Inc. v. Ellerth, 524 U.S. 742, 759 (1998).
  - The Vance court decided the question left open by Burlington as to who qualifies as a "supervisor" as one where the harassment culminates in a tangible employment action
  - An employer can avoid liability by establishing
    - It exercised reasonable care to prevent and correct any harassing behavior
    - The employee unreasonably failed to take advantage of the preventive or corrective opportunities that the employer provided

Tangible Employment Action

- Usually inflicts "direct economic harm" on the employee and "requires an official act of the enterprise." Ellerth, 524 U.S. at 761.
- However, courts have found reassignment duties without any economic harm actionable. Bryson v. Chicago State Univ., 96 F.3d 912 (7th Cir. 1996).

Hostile Work Environment Sexual Harassment

- More frequently, harassment that is "hostile" is claimed.
- "Hostile" is preventing someone from doing their job.
- Courts have defined it as: (1) severe or pervasive enough to interfere with work; (2) employer was aware of the conduct; and (3) the victim believed that he or she had to tolerate the behavior.

Employer Affirmative Defenses

- Only applicable where no "tangible employment action occurred."
- Most courts require defendants to prove both prongs, although some have allowed defendants to prevail when satisfying prong #1. Frederick v. Sprint/United Mgmt. Co., 246 F.3d 1305, 1313 (11th Cir. 2001).

Employer Affirmative Defenses – Prong #1

- Employer's "reasonable care" can be shown by:
  - (1) adoption of anti-harassment policies;
  - (2) anti-harassment training for supervisors;
  - (3) supervisors' conduct is monitored by employer; and
  - (4) employees having access to reporting procedures for harassment.
- Importantly, an employer simply having a harassment policy may not satisfy its burden. Id.
  - Note: the increasing number of states requiring training

Employer Affirmative Defenses – Prong #1

- Additionally, the employer must take "preventative" measures to correct the harassment brought to his/her attention.
- Corrective action may include:
  - (1) an immediate, thorough investigation into the conduct; and
  - (2) the immediate suspension of the alleged harasser. Coates v. Sundor Brands, Inc., 164 F.3d 1361, 1365-66 (11th Cir. 1999).

Employer Affirmative Defenses – Prong #2

- This prong focuses on whether the employee unreasonably failed to use the employer's complaint procedure.
- For example, an employee that does not report the alleged harassment to the required people in the company is unreasonable. Ellerth, at 765.
- Further, an employee that did not sign letters to management reporting harassment were unreasonable attempts to notify employer.

Employer Liability for Third Parties

- Employers may be liable for harassment of employees by non-employees when the employer knew or should have known of the conduct and failed to take immediate and corrective action. 29 C.F.R. § 1604.11(e).
- Non-employees/third parties can include customers, independent contractors, and employees of independent contractors.

Liability Specific to Nonprofits

- Ordinarily, members of associations are not considered employees. Love v. Cmty. Nutrition Network, 2010 U.S. Dist. LEXIS 133011 (N.D. Ill. Dec. 16, 2010).
  - Also true for members who serve on an association's committees.
- Volunteers that are members of the Board of an association are not considered employees. Zimmerman v. North American Signal Co., 704 F.2d 347 (7th Cir. 1983).

Liability Specific to Nonprofits Cont.

- Volunteers are not given Title VII protection.
- However, certain kinds of association volunteers resemble employees where a court may give them employment status. Volling, et al. v. Antioch Rescue Squad, 2012 U.S. Dist. LEXIS 171623 (N.D. Ill.).
  - Work assignments, training, probationary periods, and close supervision.

Liability Specific to Nonprofits – Members and Directors

- Even though a member is not an employee, an association may be liable for the harassment by a member if it is negligent.
- As directors are not employees, liability for harassment may turn on whether they are deemed to be "supervisors" and can affect the terms of someone's employment.

Insurance Coverage to Think About

- Improper Sexual Conduct Coverage: Can be added to your General Liability coverage and protects against claims of sexual misconduct, typically between an employee and a client.
- Employment Practices Liability Coverage: Can be added to your D&O coverage and protects against lawsuits of sexual harassment, typically between employees but does not include clients.

How to Prevent Sexual Harassment from Happening

- Review you organization's sexual harassment policy at your next Board meeting.
- Ensure that your organization's officers and management know their role in the reporting and investigation of claims.
- Anticipate a possible crisis and prepare.

How to Prevent Sexual Harassment from Happening – Internal Reporting

- Promote internally your anti-harassment policy.
- Remind employees of the zero tolerance approach to harassment.
- Encourage employees to come forward internally with their concerns using the company policies.

How to Prevent Sexual Harassment from Happening – A Complaint

- Treat any complaint with sensitivity and ensure that confidentiality is upheld to the extent that it is possible to do so.
- Investigate the matter promptly with an open mind.
- Ensure that the complainant is not required to report to or work with the alleged perpetrator.
  - This may involve a suspension or transferring the perpetrator temporarily to a different role.

How to Prevent Sexual Harassment from Happening – A Complaint Cont.

- Be decisive: take appropriate action based on the outcome of the investigation.
- If the complaint is well-founded, the perpetrator should be subject to disciplinary action.
- Do not take any retaliatory action against the complainant.
- Lead by example: this may mean making some difficult decisions in relation to senior employees.

States are developing new laws concerning sexual harassment and requiring specific training

- Most states still rely on laws such as:
  - Alaska Human Rights Act
  - California Fair Employment and Housing Act
  - New Jersey Law Against Discrimination
  - Ohio Civil Rights Act
  - Oklahoma Anti-Discrimination Act
  - Oregon Fair Employment Opportunity Act
  - South Dakota Human Relations Act
  - Federal Equal Employment Opportunity Act

Twenty-seven States now require Compliance Training

California Fair Employment and Housing Act

Mandatory:

Originally for employers with 50 or more employees

As of January 1, 2019 – for employers with 5 or more employees

Requirements:

Two hours of mandatory interactive (classroom or online) sexual harassment training for all supervisory employees.

As of January 1, 2019 – one hour of interactive sexual harassment for all non-supervisory employees

Twenty-seven States now require Compliance Training

California
Nevada
Utah
Colorado
New Mexico
Oklahoma
Texas
Iowa
Wisconsin
Illinois
Tennessee
Michigan
North Carolina
Virginia
Pennsylvania
Maryland
Delaware
New Jersey
New York
Connecticut
Rhode Island
Massachusetts
Vermont
New Hampshire
Maine
Florida
Washington

Twenty-seven States now require Compliance Training

New York State Human Rights Law &
New York State Labor Law

Mandatory for ALL Employers as of October, 2018:

- Create a Sexual Harassment Prevention Policy (see supplement)
- Create a Sexual Harassment Prevention Training Program (see supplement)
- Provide an internal process for complaints

Requirements:

- Must meet or exceed minimum standards (see supplement)
- Should be provided in native language of employees
- All employees must complete training at least once per year
  - New employees to complete training within 30 days of start date

Twenty-seven States now require Compliance Training

Texas Commission on Human Rights Act

Mandatory for Employers with 15 or more employees for 20 or more weeks in the current or previous year:

Requirements:

- All state employees must receive sexual harassment training with 30 days of start date and every two years thereafter

Twenty-seven States now require Compliance Training

Illinois Human Rights Act
Texas Labor Code (Employment Discrimination)

Mandatory for Employers with 15 or more employees for 20 or more weeks in the current or previous year:

Requirements:

- All state employees must receive sexual harassment training
- Texas requires this with 30 days of start date and every two years thereafter
- Illinois currently has no timing
  - Statute introduced in February, 2019 to expand Illinois mandate to all employers

#Me Too Influence on Political Bodies

- The Alabama House of Representatives adopted a sexual harassment policy in 2015
- The Alabama Senate adopted a more detailed sexual harassment policy in 2018 which prohibits
  - Making unwelcome sexual advances or requests for sexual favors or other verbal or physical conduct of a sexual nature as a condition of employment or continued employment.
  - Making submissions to or rejections of the conduct the basis for administrative decisions affecting employment.
  - Creating an intimidating, hostile, or offensive working environment by the conduct.

#Me Too Actual Circumstances

- Discussion of real-life scenarios occurring
  - At work
  - In court
  - At CLLA or other association meetings