

WORKPLACE HARASSMENT

THE DISTINCTION BETWEEN RUDE AND UNLAWFUL BEHAVIOR

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I JUST WATCHED THE MANDATORY VIDEO ON SEXUAL HARASSMENT. IT WORKED!



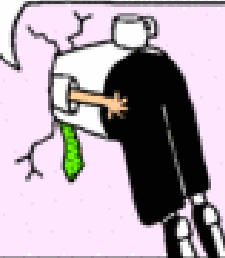
5 Adams E-mail: SCOTTADAMS@AOL.COM

IN ONLY THIRTY MINUTES, THAT VIDEO CORRECTED A BILLION YEARS OF EVOLUTION. DO SOMETHING SEXY AND WATCH ME IGNORE IT!



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I PROBABLY SHOULDN'T HAVE FAST-FORWARDED THROUGH THE BORING PARTS.



First....Why is this important?

- **Why are you having to spend your lunch hour listening to this presentation?**
 - State and federal employment laws affect virtually every aspect of your day-to-day business.
 - Complying with these laws is crucial to maintaining positive employee relations in the workplace.
 - Ignoring these laws could expose you to liability down the road.

A Few Introductory Thoughts

- The average cost to defend an employment-related claim is about \$75,000
 - Today, we will discuss how to avoid, or at least minimize, the costs of these claims – specifically, harassment claims.
- Take harassment claims seriously and let everyone in the organization know that you consider it serious business.
- Educate yourself: Know what you legally can and cannot do.
- **If there is a question: ASK before you ACT!**

Workplace Harassment



- This presentation will focus primarily on sexual harassment, but understand that workplace harassment can take many different forms.
 - Race, color, religion, sex (including pregnancy), national origin, age, disability, genetic information, etc.
- Same general principles apply.

Definition of Sexual Harassment

- Sexual harassment is unwelcomed sexual advances, requests for sexual favors, and other verbal or physical conduct of a sexual nature that affects an individual's employment, unreasonably interferes with his/her work performance, or creates an intimidating, hostile, or offensive work environment.



What Is Sexual Harassment?

- **In simple terms, sexual harassment is unwanted sexual attention. It includes any *unwelcomed*:**
 - Physical contact;
 - Sexual remarks about a person's appearance/presentation;
 - Sexual questions, jokes, anecdotes, or stories; including email or internet material;
 - Sexually explicit materials in the workplace that have no work-related purpose.

Highly Publicized Sexual Harassment Claims

- Anita Hill/Clarence Thomas
 - *In the year following the televised hearings, sexual harassment claims rose by 50%.*
- Paula Jones/President Bill Clinton
 - *Settled for a reported \$850,000.00.*
- Mitsubishi Motors
 - *The company agreed to pay \$34 million to female employees in Illinois to settle hostile work environment claims.*

A No-Win Situation for Employers

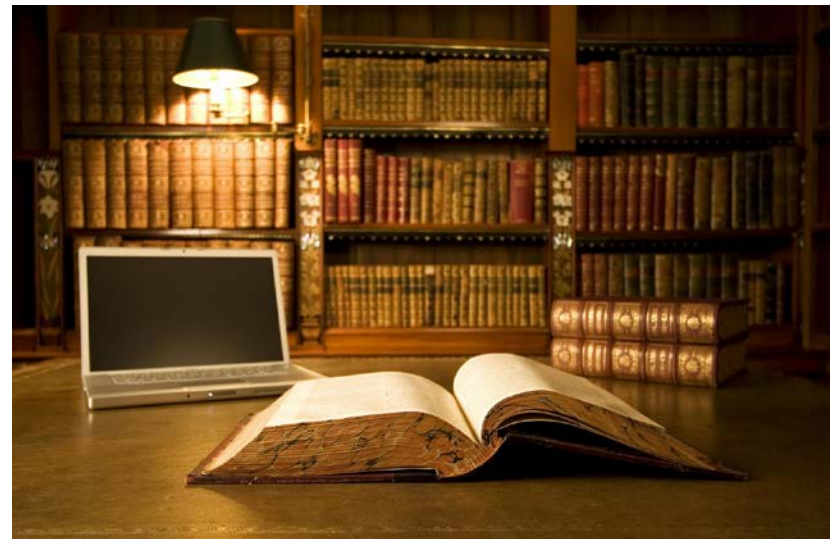
- **Sexual harassment claims are *dangerous*.**
- Millions of dollars are spent each year in defense of sexual harassment complaints and lawsuits.
- In addition to litigation costs, employers also face potential negative publicity.

Employees and Other Individuals Affected by Sexual Harassment

- Those who commit the acts – employees at all levels, customers, vendors, and third parties.
- Those who are targeted – victims, bystanders, and, in some cases, witnesses who are affected by the harassment.
- **VICTIM AND HARASSER CAN BE MEMBERS OF SAME SEX.**

Genesis of Harassment Claims in Texas

- Title VII of the Civil Rights Act of 1964
- Texas Commission on Human Rights Act



Types of Sexual Harassment

- Quid Pro Quo (Latin for "this for that" or "something for something")
- Hostile work environment

Quid Pro Quo Harassment Defined

- Discriminatory behavior by a supervisor that compels an employee to elect between acceding to sexual demands and forfeiting job benefits, continued employment or promotion, or otherwise suffering tangible job detriments.

Ewald v. Wornick Family Foods Corp., 878 S.W.2d 653, 658 (Tex. App. – Corpus Christi 1994, writ denied).

Elements of a Quid Pro Quo Claim

- Employee is subjected to unwelcome sexual advances or requests for sexual favors by a supervisory employee;
- Harassment is based on sex or gender;
- Employee's submission to the unwelcome advances is an express or implied condition for receiving job benefits; OR the employee's refusal to submit to the sexual demands results in a tangible job detriment.

Example: Sally Smith is denied a promotion after rejecting her supervisor's sexual advances.

Hostile Work Environment Defined

- A sexually hostile work environment exists when unwelcome sexual advances, requests for sexual favors, sexually abusive or vulgar language, or other verbal, visual, or physical conduct unreasonably interfere with an individual's work performance or create an intimidating, hostile, or offensive work environment.

Meritor Sav. Bank, FSB v. Vinson, 477 U.S. 57, 66-67 (1986).

Elements of Hostile Work Environment Claim

- Employee subjected to unwelcome sexual harassment based upon sex or gender;
- Harassment was sufficiently severe or pervasive to affect a term, condition, or privilege of employment; and
- Employer knew or should have known of the harassment and failed to take remedial action.

Additional Considerations

- To state a claim, an individual must prove the conduct was *unwelcome*.
- In addition to speech and/or conduct, protections also extend to explicit or suggestive items displayed in the workplace.

Example: John Doe repeatedly places pornographic photos in Sally Smith's desk.

What Is "Severe and Pervasive" Conduct?

- **Must be objectively and subjectively offensive.**
 - The conduct must be offensive to a reasonable person; AND
 - The person complaining must actually find the conduct hostile and offensive.

- **Courts distinguish between boorish and offensive conduct versus that which is so severe and pervasive that it destroys the opportunity to succeed in the workplace.**
 - Mere offensive utterances are not actionable.

Totality of the Circumstances Test

- **In determining whether circumstances of work environment rise to the level of actionable sexual harassment, courts consider the totality of the circumstances:**
 - Frequency and severity;
 - Whether the conduct was physically threatening or humiliating, and whether it was obvious to others;
 - The victim's ability to avoid it; and
 - The degree to which the conduct unreasonably interfered with an employee's work performance.

When is the Employer Liable for Hostile Work Environment?

- **If the harasser is a supervisor with authority over the victim → vicarious liability.**
 - But affirmative defense may apply.
- **If the harasser is a coworker → employer is liable if it knew or should have known of the harassment and failed to take appropriate action.**
 - Notice may be actual or constructive.



Legal Defense

- **The law provides an employer a specific defense to hostile work environment claims. This defense is available if:**
 - No tangible adverse action was taken against the plaintiff (*i.e.*, discharge, demotion);
 - Employer exercised reasonable care to prevent and promptly correct the harassing behavior (*i.e.*, harassment policies demonstrate reasonable care to prevent such behavior); and
 - Employee unreasonably failed to take advantage of any preventative or corrective opportunities provided by the employer to otherwise avoid the harm (*i.e.*, failure to report).

Damages Recoverable for Sexual Harassment

- **The remedies potentially available to a plaintiff include:**

- Back pay, including lost wages and benefits;
- Reinstatement or front pay;
- Plaintiff's attorneys fees (in addition to the employer's own attorney's fees);
- Payment of expert witness fees;
- Compensatory damages for emotional pain and suffering;
- Punitive damages; and
- Court costs.



Sexual Harassment Claims Have Evolved



- Same-sex sexual harassment claims have become more common.
- Sex-stereotyping can be actionable sexual harassment.
- More cases filed involving sexual harassment by non-employees (vendors, customers, etc.).

The Future of Sexual Harassment Claims...?

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“Your touchscreen computer claims you touched it in an inappropriate manner.”

DALLAS | HOUSTON | AUSTIN | munsch.com

The Future of Sexual Harassment Claims

- Sexual favoritism – where an employee is a third party bystander to a supervisor's favoritism of another employee.
 - 29 C.F.R. 1604.11(g)
- E-mail/internet harassment claims are now very common.
 - Employees who sent list of "25 Reasons Beer is Better than Women" over e-mail system cost employer \$2.2 million in settlement dollars.
- Social media and textual harassment claims are on the rise.

Costs Involved in Responding to Sexual Harassment Claims – EEOC Statistics

	2010 All Charges	2010 Harassment Charges	2010 Sexual Harassment Charges
Charges Filed	99,922	30,989	11,717
Monetary Benefits (in millions)	\$319.4	\$98.5	\$48.4

	2011 All Charges	2011 Harassment Charges	2011 Sexual Harassment Charges
Charges Filed	99,947	30,512	11,364
Monetary Benefits (in millions)	\$364.7	\$100.2	\$52.3

Costs of Claims Are Rising

- The number of harassment- and sexual harassment-based EEOC charges decreased in 2011.
- **However, the monetary relief obtained by claimants through the EEOC increased!**
- These types of claims are becoming increasingly expensive for employers.

Survey of Jury Verdicts and Settlements in Sexual Harassment Cases

- *U.S. EEOC v. Mid-American Specialties*, 774 F.Supp.2d 892 (W.D. Tenn. 2011) (sexual harassment and retaliation). Jury awarded over \$1.5 million to three claimants, including \$1.1 million in punitive damages.
- *Kimzey v. Wal-Mart Stores, Inc.*, 107 F.3d 569 (W.D. Mo. 1997) (hostile work environment). Jury awarded plaintiff \$50,000,000 in punitive damages and \$35,000 in compensatory damages.
- *Scribner v. Waffle House, Inc.*, 976 F. Supp. 439 (N.D. Tex. 1997) (hostile work environment). Plaintiff was awarded over \$8 million.

Survey of Jury Verdicts and Settlements in Sexual Harassment Cases

- *Chopourian v. Catholic Healthcare West*, No. S-09-2972 KJM KJN, 2012 WL 1551728 (E.D. Cal. Apr. 30, 2012) (sexual harassment, retaliation, and other tort claims). Jury awarded a total of nearly \$168 million – \$125 million in punitive damages, \$39 million for mental anguish, and \$3.5 million for lost wages and benefits. Believed to be the largest single-plaintiff verdict on an employment claim in history.
- *Pitre, Inc.* (same-sex sexual harassment and retaliation). Suit filed by the EEOC. Defendant car dealership settled lawsuit for more than \$2 million.

Preventing Sexual Harassment

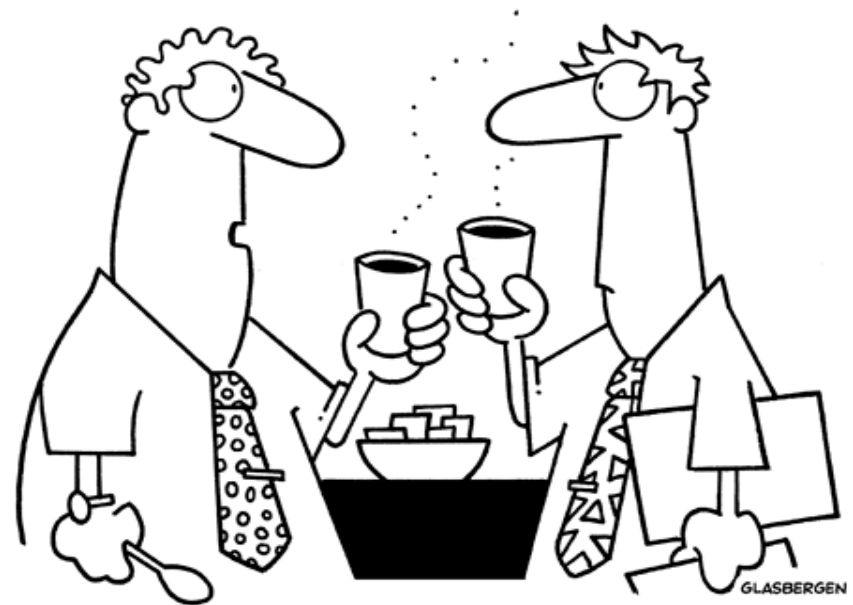
- Maintaining a respectful and harassment-free workplace requires effort from both the employer and the employees.



Prevention – Employer's Responsibilities

- Establish an effective written policy and complaint procedure.
- Distribute policy to all employees and provide training.

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**“Our sexual harassment policies are too strict.
I got in trouble for trying to embrace change.”**

Prevention – Employer's Responsibilities

- Conduct a full and thorough investigation of all complaints.
- Take prompt, appropriate, and effective remedial action where necessary.

Prevention – Employees' Responsibilities

- Know and comply with company policy.
- Address incidents of sexual harassment immediately.
 - Report harassment to a direct supervisor or, if need be, a higher level management or human resources official. Record the time, place, and details of the incident and identify all potential witnesses.
- Cooperate with investigations. Also, be supportive of your co-workers to report incidents timely and properly.

Thank You!

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