Harassment in the Workplace and Employer Liability

Federal law forbids an employer to engage in certain harassment that takes place **because of** the employee's sex, race, religion, disability, or other protected status. Take sexual harassment as an example. Probably the best way to look at it is that sexual harassment is one form of sex discrimination.

I will be discussing **sexual harassment** here, as the law has developed under Title VII. However, **the same general principles will apply to racial harassment**, national origin harassment, religious harassment, disability harassment, and age harassment. Also, state laws often have similar protections against harassment.

Basic definition. Sexual harassment exists when, because of an individual's sex, the employer causes the workplace to have intimidation, ridicule, and insult that is so severe or pervasive that it alters the conditions of an individual's employment. The original source of the harassment can be management, a supervisor, co-workers, or customers.

Traditionally, lawyers have divided harassment into **two categories**: **(1)** quid-pro-quo and **(2)** hostile environment.

Quid-pro-quo harassment. If the employer denies the employee a "**tangible job benefit**" (such as a promotion, pay raise, getting fired, not being hired) because of sex, then that's a violation. For example, Jane gets fired because she refused to have a sexual relationship with her supervisor. In these cases the employer is liable even if the employer had a policy against sex harassment and even if upper management did not know about it.

Hostile environment harassment is more complex. The hostile working conditions must be both objectively and subjectively offensive, and must be so pervasive or severe that they alter the employee's working conditions.

- **Objectively offensive.** The question is whether a reasonable person would find the conduct offensive. It's not flirting or lack of sensitivity. It can be physical touching, offensive words, or other conduct.
- **Subjectively offensive.** The conduct has to be personally offensive to the individual. Lawyers sometimes say that the conduct must be "unwelcome."
- **Pervasive or severe.** The conduct must be severe enough, or pervasive enough (or both) so it alters the employee's working conditions. Courts will look at the whole situation over a length of

time. They will look at whether physical contact was involved, the nature of the insults or other words, how often the conduct was repeated, and the entire circumstances. The more severe the conduct is, the less pervasive it needs to be.

- **Because of sex.** In every case, there must be proof that the offensive environment or tangible employment action was "because of sex." The proof is fairly easy when a supervisor acts because of sexual desire, but such proof is not necessary. It is enough that one sex is being treated differently than the other. It is not necessary that the perpetrator and the victim be of the opposite sex, so long as "because of sex" proved.

Assuming sexual harassment can be proved, is the employer liable? Under Title VII no statutory liability attaches to individuals such as supervisors or managers. So the question is whether the employer (the corporation or partnership) is liable. If it was quid-pro-quo (involving a tangible employment action), then the employer will be liable even if it was only a supervisor that took the action. However, things are much more complicated when dealing with hostile environment cases.

Employer Liability. Let's assume we've already established that an employee was sexually harassed (or racially harassed, etc.).

The next step is to find out **whether the employer is going to be liable** for that harassment under Title VII. Remember that **individuals** (even supervisors and managers) are **not personally liable** under Title VII. **Only "employers" are.** So that's why we must ask whether the employer (the corporation, company, partnership, or whatever) is liable. (As an aside, remember that individuals sometimes can be liable under state law.)

Look at two things: (1) What kind of harassment (either quid-pro-quo or hostile environment). (2) Who is the harasser (manager, supervisor, co-worker, customer).

Quid-pro-quo harassment. If the employer denies the employee a "tangible job benefit" (such as a promotion, pay raise, getting fired, not being hired) because of sex, then that's called quid-pro-quo harassment. The employer will be liable even if the employer has a policy against harassment and management was not aware of what was happening.

Hostile environment harassment.

Hostile environment harassment done by senior officers of the company, the employer is usually liable even if there was a policy prohibiting harassment.

Hostile environment harassment done by a supervisor, the employer will be liable unless the employer can prove an affirmative defense by proving both of the following:

Reasonable care to prevent harassment. The employer has to use reasonable care both (a) to prevent and (b) to promptly correct by having a non-harassment policy. The policy should be widely disseminated, brought to the attention of employees, include a complaint process that includes a method for bypassing the offending supervisor, and management should monitor supervisors' behavior.

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Failure to take advantage of anti-harassment policy. The employer can prove that the employee failed to take advantage of the employer's anti-harassment policy. For example, the employee knew about the policy but did not notify her supervisor or manager that she was being harassed.

Hostile environment harassment done by a co-worker or a customer, the liability of the employer is proved in a different way. The employee must show that the employer knew the harassment was happening (or reasonably should have known) and then failed to take prompt and effective steps to make it stop.