Sexual Harassment Does Not Always Involve Touching

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Often when employers consider the issue of sexual harassment, they think of the manager or co-worker who engages in inappropriate physical touching of another employee. However, sexual harassment does not have to involve physical touching to be unlawful and to expose an employer to liability.

Employers have been held liable when the harassment involved simply verbal conduct or visual displays.

Two Types of Harassment

The federal Equal Employment Opportunity Commission (EEOC) defines sexual harassment under Title VII as (1) unwelcome sexual advances, requests for favors and other verbal or physical conduct of a sexual nature and (2) conduct, the submission or rejection of which affects an individual's employment unreasonably or interferes with an individual's work performance or creates an intimidating or hostile work environment.

There are two types of sexual harassment:

1. Quid pro quo harassment occurs when the victim suffers concrete economic consequences, such as firing or demotion for rebuffing the sexual harassment.

2. Hostile work environment harassment occurs when there has been unwelcome sexual conduct that is sufficiently "severe or pervasive" so as to alter the conditions of employment.

Unacceptable Non-Physical Behavior

Non-physical conduct can constitute sexual harassment in a variety of situations.

Examples of inappropriate behaviors include:

- Idle chatter of a sexual nature and graphic sexual descriptions.
- Sexual slurs or sexual innuendos.
- Sexually provocative comments about a person's clothing, body and/or sexual activities.
- Sexual or risqué jokes or "kidding" about sex or sex-specific traits.
- Sexual teasing.
- Suggestive sounds such as catcalling, whistling or kissing sounds.
- Comments or questions about the sensuality or sexual relationship of a person or his or her spouse or significant other.
- Mimicking of a sexual nature about the way a person walks, talks or sits.
- Implied or overt threats if sexual attention is not given.

- Distribution or display of written or graphic materials that are derogatory or are of a sexual nature, including e-mails, graffiti, inappropriate Internet pictures or content, or posters.
- Unsolicited propositions for dates or sexual contact.
- Sexual gestures.

Harassment Must Be Severe and Pervasive

In general, when the victim is the target of both verbal and physical conduct, the hostility of the environment is exacerbated and a violation is more likely. However, non-physical harassment alone can create liability.

The EEOC says that when the alleged harassment involves verbal conduct, the investigation should ascertain the nature, frequency, context and intended target of the remarks. For example, the EEOC may ask:

- Did the alleged harasser single out the charging party?
- Did the charging party participate?
- What was the relationship between the charging party and the alleged harasser?
- Were the remarks hostile and derogatory?

No one factor alone determines whether the conduct violates state or federal law. Instead, the EEOC examines the total circumstance. Moreover, whether sexual harassment occurred will be examined from the standpoint of a "reasonable person." The seemingly objective reasonable person standard, however, is not considered in a vacuum. The investigation takes the victim's perspective and the context of the harassment into account.

Must Implement Zero Tolerance Policies

The key to avoiding liability for hostile work environment sexual harassment is implementing and enforcing zero tolerance policies. If the employer waits until the conduct in the workplace is severe and pervasive, it is too late — employees already have violated the law.

Acting at the first sign of inappropriate sexual conduct should be every manager's responsibility. It is easy to let a joke or comment here and there slide, but doing so might eventually create an environment that is hostile.

What Should Employers Do?

Employers should:

1. Adopt and implement strongly worded anti-harassment policies.
2. Train all supervisory employees on what type of conduct and behavior constitutes sexual harassment.

3. Inform supervisory employees that they will be held accountable for how they handle inappropriate sexual behavior in the workplace and for the type of working environment they create or allow.
4. Adopt e-mail and Internet policies prohibiting sexual or obscene material, including "dirty" jokes. Reserve the right to monitor employee's e-mail and Internet activities.
5. Prohibit retaliation.

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Six Examples of Liability for Non-Physical Sexual Harassment

Here are six examples of cases involving employer liability for non-physical sexual harassment in the workplace:

1. A federal district court found that a hostile work environment was established by the presence of pornographic magazines in the workplace, vulgar comments concerning the magazines, sexually oriented pictures in a company-sponsored movie and slide presentation, and sexually oriented pictures and calendars in the workplace. The court said the proliferation of pornography and demeaning comments — if sufficiently continuous and pervasive — might create a hostile work environment where "women are viewed as men's sexual playthings rather than as their equal co-workers."

2. The EEOC obtained an order against Applebee's restaurant for sexual harassment of a female restaurant manager trainee. The harassment included being asked to engage in a threesome with a manager and his wife, being called a lesbian and comments about her breasts. She complained to the general manager and assistant general manager but they merely laughed at the trainee, inquired about her sexual orientation and told her to "deal with it." The restaurant was ordered to pay the trainee $137,500 and conduct training on sexual harassment and retaliation.

3. The EEOC obtained an order against a group of emergency care physicians who subjected the sole female emergency room doctor to sexual harassment. The harassment included graphic sexual language and gestures, sexually explicit jokes, sexual banter and solicitations and jokes about whether the patients' medical conditions were related to sexual intercourse. The group was ordered to pay nearly $300,000 in damages and another $200,000 in attorneys' fees. The company also was ordered to distribute a sexual harassment policy and to conduct annual training.

4. The EEOC obtained an order against a construction contractor who subjected female workers to a sexually hostile work environment, including sexually explicit and offensive graffiti about women in portable toilets and in other areas of the construction site.

5. A California Court of Appeal held that an employee was allowed to proceed with her sexual harassment claim that involved a "campaign of staring." The conduct began with overt sexual harassment. After the employee complained, the alleged harasser began driving by and staring at her for 5 to 10 minutes at a time. The court, citing earlier case law, noted that the conduct did not necessarily have to do with sexual conduct but may

instead amount to intimidation and hostility with the purpose of interfering with work. The employee's gender does have to be a substantial factor. The court noted that the stares alone might not constitute sexual harassment, but there was enough evidence to allow the case to go to the jury.

6. An employer of two females who were repeatedly invited to participate in an Internet pornographic Web site and who were repeatedly exposed to pornography downloaded on workplace computers was denied summary judgment. One employee testified that on at least 10 different occasions she had been exposed to pornography on a co-worker's computer.

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