Overview of the Law on Harassment

Early Development of the Law on Workplace Harassment

Title VII of the Civil Rights Act of 1964 prohibits employment discrimination because of an individual’s race, color, religion, sex, or national origin. Title VII does not explicitly define workplace harassment as a form of discrimination. However, federal courts as early as 1971 began to recognize that workplace harassment can be a type of unlawful discrimination. The Supreme Court did not recognize sexual harassment until the landmark 1986 case of Meritor Savings Bank, FSB v. Vinson. In that case, the court described two types of sexual harassment. Quid pro quo harassment exists when an employee must submit to a supervisor’s request for sexual favors in exchange for a job benefit or to avoid a job detriment. For example, an employee who was demoted because she would not go out on a date with her supervisor would be a victim of quid pro quo harassment. Hostile-environment sexual harassment is more common and occurs when the following conditions are met:

- Verbal or physical conduct of a sexual nature exists in the workplace.
- The conduct is unwelcome.
- The conduct is severe or pervasive.
- A reasonable person would believe that the conduct creates a hostile work environment.

In deciding whether a hostile environment exists, courts look at all the circumstances, and no single factor is definitive.

Harassment of Any Legally Protected Group Is Unlawful

Although all of the Supreme Court’s decisions on workplace harassment involve sexual harassment, the court noted in Meritor that a number of federal courts had already concluded that harassment based on race, religion, or national origin also violates Title VII. After Congress passed the Age Discrimination in Employment Act and the Americans with Disabilities Act, federal courts reached consensus that workplace harassment of any legally protected group is unlawful. As a result, employer prevention efforts should focus on all types of unlawful harassment, not just sexual harassment.

Trends in Harassment Claims

The number of sexual harassment claims shot up in the early 1990s due to the confluence of two events. The highly publicized 1991 confirmation hearings of Supreme Court Justice Clarence Thomas focused national attention on sexual harassment when Thomas was accused of sexual harassment by a former employee. A few weeks later, Congress passed the Civil Rights Act of 1991, which made sexual harassment cases more lucrative to plaintiffs. The 1991 law allows Title VII plaintiffs to select whether they want their case heard by a judge or a jury. Prior to that time, all Title VII cases were decided by judges, who were generally viewed as more predictable and less generous to plaintiffs than juries. In addition, the law allows plaintiffs to recover damages for emotional distress as well as punitive damages for bad conduct by employers.
The number of sexual harassment charges filed with the Equal Employment Opportunity Commission (EEOC) more than doubled from 1991 to 1994 but has since decreased by approximately one-third from 2000 to 2011. However, the number of other types of harassment charges received by the EEOC has risen steadily. Starting in 2007, sexual harassment charges represented less than half of the harassment charges received by the EEOC. Consequently, a policy or training program that focuses exclusively on sexual harassment is outdated because it fails to address the majority of harassment exposure.

The Carrot and Stick Approach for Employers

In the late 1990s, the Supreme Court developed a carrot and stick approach designed to encourage employers to prevent harassment. Employers that develop a strong harassment prevention policy, engage in harassment prevention training, and develop effective complaint mechanisms gain a valuable weapon in harassment lawsuits called an affirmative defense, which allows a judge to dismiss a harassment lawsuit before it ever goes to a jury. If a case does go to a jury, employers that make strong harassment prevention efforts are protected from punitive damages, which often significantly exceed the monetary award that a plaintiff could otherwise receive. In contrast, employers that fail to make strong harassment prevention efforts forfeit the affirmative defense and receive no protection from punitive damages.

Specifically, in Burlington Industries, Inc. v. Ellerth, the court held that an employer is directly liable for harassment by a supervisor if the harassment results in a tangible job detriment for the victim, such as firing, failure to promote, or a significant change in benefits. However, the court also held that an employer could avoid liability if no tangible job detriment occurred and “(a)… the employer exercised reasonable care to prevent and correct promptly any sexually harassing behavior; and (b)… the plaintiff employee unreasonably failed to take advantage of any corrective opportunities provided by the employer.” The court explained this second condition in the companion case of Faragher v. City of Boca Raton, stating that employers cannot be held liable by an employee who failed to report the harassment when the employer educated employees about its harassment policy and established an effective complaint mechanism. This defense to harassment lawsuits became known as the Faragher/Ellerth affirmative defense. The following year, the Supreme Court held in Kolstad v. American Dental Association that an employer could avoid punitive damages if it showed good-faith efforts to educate employees on anti-discrimination laws.

Alternative Terminology for Sexual Harassment

After the Faragher and Ellerth decisions, some commentators suggested that instead of thinking about sexual harassment as either quid pro quo or hostile environment, it is easier to think of harassment as either “economic” or “environmental.” Although this alternative terminology has not been widely adopted by courts or lawyers, it is used in some harassment prevention courses. Proponents of the alternative terminology maintain that it defines sexual harassment according to the consequences experienced by the
victim rather than the status of the perpetrator. The term "economic harassment" includes both quid pro quo and hostile environment harassment if the victim suffers a tangible economic detriment. The term "environmental harassment" includes quid pro quo or hostile environment harassment that does not result in a tangible economic detriment and therefore is subject to the affirmative defense outlined in Faragher and Ellerth. Trainers, facilitators, and presenters can decide whether the traditional or alternative terminology is best suited to their harassment prevention programs.

**Examples of the Carrot and Stick Approach**

Federal courts have rewarded employers that engaged in these best practices and punished those that did not. The following are some examples:

- **Affirmative Defense Granted**
  In *Swingle v. Henderson*, the court granted the Faragher/Ellerth affirmative defense and dismissed the plaintiff's case because of the employer's extensive good-faith efforts to prevent sexual harassment. The employer showed that it had provided training on harassment at orientation, posted notices on where and how to complain about harassment, and reminded employees regularly about its policy.

- **Affirmative Defense Denied**
  In *Miller v. Woodharbor Molding & Millworks, Inc.*, a court found that an employer had not made good-faith efforts to prevent sexual harassment. Although its employee handbook included a sexual harassment policy, the plaintiff's supervisors were not familiar with the policy, had never been trained on sexual harassment, and did not understand the employer's procedures for reporting harassment.

- **Punitive Damages Reversed**
  In *Bryant v. Aiken Regional Medical Centers, Inc.*, a jury awarded $90,000 in compensatory damages and $210,000 in punitive damages to a surgical technician who alleged racial harassment. On appeal, a federal appellate court reversed the $210,000 punitive damage award because the employer had extensively publicized its harassment policy and held group exercises and training classes for its employees.

- **Punitive Damages Allowed**
  In *Anderson v. G.D.C., Inc.*, the plaintiff alleged that she had been retaliated against for protesting sexual harassment. A federal appellate court held that punitive damages could be awarded because the employer had not engaged in good-faith efforts to prevent discrimination and harassment. The employer had never adopted a policy and had provided no training on the topic. Its only effort was a nondiscrimination poster in one location and the plaintiff testified she was not aware of the poster.

**Best Practices Established by Federal Courts**

In numerous decisions interpreting *Faragher*, *Ellerth*, and *Kolstad*, lower federal courts have outlined best practices for employers wanting to take advantage of the affirmative defense in harassment cases and avoid punitive damages. These include:

- Establish a policy prohibiting all types of unlawful harassment. Many employers mistakenly rely on just a sexual harassment policy. As described on pages 13-14, a good policy prohibits all types of unlawful harassment as well as retaliation against a complainant or witness.

- Distribute and publicize the policy. Employers should distribute the policy to all employees and publicize it by posting it in prominent places, including the institutional website, and explaining it in employee newsletters. In addition, the institution should remind employees of the policy annually. For example, an annual email with a web link to the policy reminds employees of the institution's commitment to harassment prevention.

- Develop effective complaint and investigation procedures. Courts have emphasized that adopting policies is not enough. Employers must effectively enforce those policies by creating procedures for reporting harassment, investigating potential harassment, and taking prompt remedial action to stop harassment from recurring.

- Train employees and supervisors. Institutions need to train all faculty and staff on how to recognize harassment, where to report it, and what to do if they witness it. Courts examine training efforts on a case-by-case basis to determine whether employers have made good faith efforts to prevent harassment in the workplace.
The Costs of Not Training

The costs of not training can be exorbitant, including high attorney fees, large jury awards, and significant nonmonetary damages. In theory, damages in Title VII cases are capped at $100,000 to $300,000, depending on the size of the institution. However, many savvy plaintiff attorneys have found ways to get around the caps by filing suit under both Title VII and state nondiscrimination laws. Federal courts have ruled that when an award in such a suit exceeds the Title VII caps, the court should allocate the award to maximize the payment to the plaintiff.18 As a result, one federal appellate court reinstated a $3 million punitive damages award in a sexual harassment case,19 while another upheld a $2.3 million award in a racial harassment case.20

Some state institutions have gained a false sense of security, believing that they will be protected from harassment suits by sovereign immunity under the 11th Amendment. However, sovereign immunity only applies to harassment claims brought under the federal Americans with Disabilities Act and Age Discrimination Act.21 It does not apply to racial or sexual harassment claims, the two most common types of harassment charges reported to the EEOC.22 In addition, sovereign immunity does not apply when individuals bring harassment suits under state law or when the EEOC files a suit on behalf of an individual who would normally be precluded by sovereign immunity.23 For example, in harassment cases brought under California law, a jury awarded $30.6 million to six women who alleged that their employer repeatedly ignored sexual harassment by a manager. After more than a decade of litigation, the employer succeeded in reducing the award but still paid more than $6 million to the plaintiffs and more than $7 million to the plaintiffs’ attorneys.24

Aside from the monetary costs, harassment cases generate significant nonmonetary costs that are difficult to quantify but are very real. Institutions often face negative publicity, decreased employee productivity, and poor employee morale. In the final analysis, the most compelling reasons for training are moral rather than financial. Ensuring a workplace free from harassment is the right thing to do. Furthermore, teaching is a key mission of all educational institutions and is consistent with the legal reasons for educating faculty and staff on harassment prevention.


1. See Rogers v. EEOC, 454 F.2d 234 (5th Cir. 1971).
3. Id. at 66.
7. The number of “other” types of harassment charges in 2007 was determined by subtracting the number of EEOC sexual harassment charges for that year from the total number of EEOC harassment charges for that year.
9. Id. at 765.
15. 80 F. Supp. 2d 1026 (N.D. Iowa 2000).
16. 333 F.3d 536 (4th Cir. 2003).
17. 281 F.3d 452, 461 (4th Cir. 2002).
23. EEOC v. Board of Regents of the University of Wisconsin System, 288 F.3d 296 (7th Cir. 2002).

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