

## **Sex Harassment – An Overview for the Supervisor**

Christine M. Meadows, Jordan Schrader P.C., Portland, OR

Title VII of the Civil Rights Act of 1964, amended in 1991, prohibits harassment on the basis of race, religion, sex and national origin. 42 U.S.C. §§2000e. Title VII is applied to all employers with fifteen or more employees.

Sexual harassment is classified as one of two types.

**Quid pro quo harassment:** Employee is propositioned in exchange for keeping a job or getting a promotion. To successfully bring a claim of harassment, the employee need not succumb to the advance. *Burlington Industries, Inc. v. Ellerth*, 524 U.S. 742 [employee propositioned and subjected to boorish behavior, but promoted before quitting, could still make claim].

**Hostile Environment harassment:** Employee is subjected to an atmosphere of harassment or hostility so pervasive it alters the terms and conditions of employment and creates an abusive work environment. *Meritor Savings Bank, FSB v. Vinson*, 477 U.S. 57 (1986).

The law governing sexual harassment has evolved beyond just distinguishing between quid pro quo and hostile environment.

### **Liability for actions by supervisors**

Employers are strictly liable for supervisor harassment that “culminates in a tangible employment action, such as discharge, demotion, or undesirable reassignment.” *Faragher v. Boca Raton*, 524 U.S. 775 (1998).

### **Employer Defenses**

When there has been no tangible employment action, an employer may raise an affirmative defense to liability. The employer must prove: 1. it exercised reasonable care to prevent and correct sexually harassing behavior, and 2. the employee unreasonably failed to take advantage of any preventive or corrective opportunities to avoid harm. *Burlington Industries, Inc. v. Ellerth*, 118 S. Ct. 2257 (1998).

**Policies and Investigation.** Employer can defend against liability and damages where it can show it used reasonable care in stopping harassment, such as a strong anti-harassment policy and a thorough investigation. Where an employee did not take advantage of procedures in place by reporting harassment, employee’s case is affected. *Ibid.* However, where the employer fails to distribute its policy to employees and has no means for making a complaint, the employer cannot claim it acted reasonably to prevent the harassment. *Faragher v. City of Boca Raton, Florida*, 524 U.S. 775 (1998).

This defense is also not available in cases of constructive discharge arising from the acts of a supervisor. *Pennsylvania State Police v. Suders*, 542 U.S. \_\_\_\_ (2004).

**Constructive Discharge** is one where the employee has resigned because the working conditions became so unendurable that a reasonable person in the employee's position would feel there is no reasonable alternative but to quit. *Ibid.*

### **Same Sex Harassment**

Illegal harassment can occur between two people of the same sex.

*Oncale v. Sundowner Offshore Services, Inc.*, 118 S.Ct. 998 (1998) [male employee was harassed when other male employees and supervisor on oil rig taunted and sexually assaulted him and told him they would continue to do so, court applied a hostile environment test, finding conduct was that which a reasonable person in the plaintiff's position would find severely hostile or abusive].

### **Harassment under other Federal Law – Title IX of the Education Amendments of 1972**

Sexual harassment claims may be brought under other statutes where appropriate.

*Gebser v. Lago Vista Independent School Dist.*, 118 S. Ct. 1989 (1998) [teacher having sexual relationship with minor student in his class, student sued without first reporting to the school district].

The Court indicated claims may be possible under Title IX of the Education Amendments (rather than Title VII of the Civil Rights Act), however, the Court found where the school district was not told of the incident before the lawsuit was filed and had no opportunity to remedy the situation, it is not liable. Liability arises from deliberate indifference – taking no effective action to stop the harassment.

### **Other protections**

**Executive Order 11246** – prohibits federal contractors from discriminating on the basis of race, color, religion, sex or national origin and requires affirmative action to ensure employment without regard to those factors.