

7.6: SEXUAL HARRASSMENT

Sexual harassment is a form of sexual discrimination. It is a violation of both NYS' HRL and Title VII of the federal Civil Rights Act of 1964. The EEOC defines sexual harassment as follows:

“Unwelcome sexual advances, requests for sexual favors, and other verbal or physical conduct of a sexual nature constitute sexual harassment when this conduct explicitly or implicitly affects an individual's employment, unreasonably interferes with an individual's work performance, or creates an intimidating, hostile, or offensive work environment.”

In employment situations, there are two categories of sexual harassment, quid pro quo or a hostile work environment. They often occur together.

#MeToo

Any discussion regarding sexually harassment in 2018 should include the #MeToo movement. It started with famous Hollywood directors like movie mogul Harvey Weinstein, actors like Bill Cosby, and news personalities like Bill O'Reilly being accused by women in their respective industries of decades of sexual harassment, it quickly grew and brought to light the prevalence of sexual harassment of those not so famous regular people who are also victims. The movement is now a national in scope and changing the way people think about the treatment of women in and out of the workplace.

In 2018, NYS expanded its sexual harassment laws, apparently to some degree in response to the #MeToo movement. Here are some of the highlights of the changes to the law in NYS.

- **Non-Employee Liability:** The Human Rights Law prohibition against sexual harassment in the workplace now applies to nonemployees, such as independent contractors, consultants, vendors, subcontractors, and persons providing services pursuant to a contract.
- **Mandatory Arbitration:** CPLR Section 7515 was added so that employers in NYS are now prohibited from requiring employees to sign agreements that require mandatory binding arbitration of claims relating to sexual harassment. Such clauses are null and void as a matter of law.
- **Non-Disclosure Settlement:** GOB § 5-336 and CPLR Section 5003-b were added so employers in NYS will now be prohibited from requiring nondisclosure clauses in any settlement, agreement, or other resolution of any claim, where “the factual foundation for which involves sexual harassment” unless the condition of confidentiality is the complainant or plaintiff's preference.

It should be noted that sexual harassment should not be confused with sexual assaults and rape. Sexual assaults and rape are crimes. The perpetrators are charged and prosecuted by the state. Sexual harassment in the workplace in and of itself is not a crime but a civil case. Individuals who commit sexual crimes can also be involved in sexual harassment.

QUID PRO QUO SEXUAL HARASSMENT

When a manager or other authority figure of the employer offers that he or she will give the employee something like a raise or a promotion, or not fire an employee or reprimand an employee for some type of sexual favor, it is called quid pro quo sexual harassment. An employer can be responsible even if this act only occurs once. It also applies to job applicants that are the subject of this kind of harassment if the hiring decision was based on the acceptance or rejection of the sexual advances.

HOSTILE WORK ENVIRONMENT SEXUAL HARASSMENT

Employers can be held liable for their employees' unwelcome sexual harassment of another employee when it is so severe that it creates what is called a hostile work environment in violation of both Title VII and the HRL. Courts often consider the following questions in analyzing a hostile environment harassment claim.

- Was the conduct verbal, physical, or both?
- What was the frequency of the conduct?
- Was the conduct hostile or patently offensive?
- Was the alleged harasser a co-worker or supervisor?
- Did others joined in perpetrating the harassment?
- Was the harassment directed at more than one individual or was the victim singled out?

The EEOC Enforcement Guidance dated March 19, 1990 is particularly helpful in working through what is and is not sexual harassment in the workplace. The Enforcement Guidance states in part the following regarding a hostile work environment:

Sexual harassment is “unwelcome . . . verbal or physical conduct of a sexual nature . . .” 29 C.F.R. § 1604.11(a). Because sexual attraction may often play a role in the day-to-day social exchange between employees, “the distinction between invited, uninvited-but-welcome, offensive-but-tolerated, and flatly rejected” sexual advances may well be difficult to discern. *Barnes v. Costle*, 561 F.2d 983, 999, 14 EPD 7755 (D.C. Cir. 1977) (MacKinnon J., concurring). But this distinction is essential because sexual conduct becomes unlawful only when it is unwelcome. The Eleventh Circuit provided a general definition of “unwelcome conduct” in *Henson v. City of Dundee*, 682 F.2d at 903: the challenged conduct must be unwelcome “in the sense that the employee did not solicit or incite it, and in the sense that the employee regarded the conduct as undesirable or offensive.”

In determining whether unwelcome sexual conduct rises to the level of a “hostile environment” in violation of Title VII, the central inquiry is whether the conduct “unreasonably interfer[es] with an individual’s work performance” or creates “an intimidating, hostile, or offensive working environment.” 29 C.F.R. § 1604.11(a)(3). Thus, sexual flirtation or innuendo, even vulgar language that is trivial or merely annoying, would probably not establish a hostile environment.

In determining whether harassment is sufficiently severe or pervasive to create a hostile environment, the harasser’s conduct should be evaluated from the objective standpoint of a “reasonable person.”

When an employer receives a complaint or otherwise learns of alleged sexual harassment in the workplace, the employer should investigate promptly and thoroughly. The employer should take immediate and appropriate corrective action by doing whatever is necessary to end the harassment, make the victim whole by restoring lost employment benefits or opportunities, and prevent the misconduct from recurring. Disciplinary action against the offending supervisor or employee, ranging from reprimand to discharge, may be necessary. Generally, the corrective action should reflect the severity of the conduct.

It should be noted that if a superior is involved in creating the hostile work environment, the employer will be liable. If the harassment is committed by a coworker the employer is liable if the employer knew or should have known about the harassment, unless the employer took immediate corrective action to remedy the situation.

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