

Sexual Harassment Liability Under Title VII

Title VII of the Civil Rights Act of 1964 ("Title VII"), as amended, prohibits discrimination in employment in hiring, firing, compensation, and terms, conditions or privileges of employment on the basis of race, color, religion, sex, or national origin. Title VII applies to employers with 15 or more employees on the payroll. Discrimination on the basis of sex includes sexual harassment, either quid pro quo harassment or "hostile work environment." The United States Supreme Court recently held that Title VII's prohibition against sexual harassment applies when the harasser and the harassed employee are of the same sex. *Oncale v. Sundowner Offshore Services, Inc., et. al.*, No. 96-568 (U.S. Sup. Ct. 3/4/98). (Sexual harassment of students is covered by Title IX of the Education Amendments of 1972.)

I. QUID PRO QUO SEXUAL HARASSMENT

Quid pro quo means "something for something." Quid pro quo sexual harassment occurs when submission to or rejection of unwelcome sexual conduct by an individual is used as the basis for employment decisions affecting such individual. The classic example is when a supervisor offers a promotion in exchange for sex.

II. HOSTILE WORK ENVIRONMENT SEXUAL HARASSMENT

To recover for sexual harassment under a hostile environment claim, an employee must demonstrate that (1) he or she was subjected to unwelcome harassment, (2) the harassment was based on sex, (3) the harassment was sufficiently severe or pervasive as to alter the terms or conditions of employment and create an abusive working environment (judged by both an objective and subjective standard), and (4) that the employer knew or should have known of the harassment. In general, relatively isolated instances of non-severe misconduct will not support a hostile environment claim.

Employers are held vicariously liable for harassment by supervisory personnel. An employer is liable for a co-worker's harassment only if it knew or should have known about the harassment and failed to take prompt, remedial action.

III. SUPREME COURT ANNOUNCES NEW AFFIRMATIVE DEFENSE

The U.S. Supreme Court recently issued two opinions that clarify the extent of an employer's liability for supervisor sexual harassment. The issue in both cases was whether an employee who refuses the unwelcome sexual advances of a supervisor, yet suffers no tangible retaliation, can recover against the employer.

The Supreme Court held that an employer can be vicariously liable for a hostile environment created by a supervisor. However, the employer may utilize an affirmative defense. The employer will not be liable if it demonstrates that (1) the employer exercised reasonable care to prevent and correct sexually harassing behavior and (2) the employee unreasonably failed to take advantage of this protection. Proof that an employer had an anti-harassment policy with a complaint procedure, which the employee unreasonably failed to use, would defeat the claim. *Burlington Industries, Inc. v. Ellerth*, No. 97-569, U.S. Supreme Court, (June 26, 1998), *Faragher v. City of Boca Raton*, No. 97-282, U.S. Supreme Court, (June 26, 1998)

This affirmative defense is not available when a supervisor's harassment culminates in a tangible employment action such as a termination or demotion. Thus, employers remain vicariously liable for quid pro quo harassment.

IV. LIABILITY FOR SEXUAL HARASSMENT BY NON-EMPLOYEES

A U.S. District Court in Illinois has allowed a female employee to maintain a civil action against her employer for sexual harassment by a non-employee in the workplace. The court, in a case of first impression in the Seventh Circuit, decided that "the harasser's status as a non-employee does not as a matter of law shield the employer from liability under Title VII, if the employer knew or should have known of the harassment." *Menchaca v. Rose Records, Inc.*, 67 Fair Empl. Prac. Cas. (BNA) 1334, 1995 WL 151847 (N.D. Ill. 1995).

It is unknown whether other courts will follow the reasoning of this case. It would conceivably be possible for a teacher to bring a Title VII action for hostile environment sexual harassment by a student if the school had reason to know about the harassment and did not take prompt, remedial action.

V. DAMAGES

A successful Title VII plaintiff can be awarded compensatory and punitive damages, attorneys' fees and costs, and interest. If the harassment is so intolerable that the victim is forced to resign, reinstatement and backpay may be awarded. The total of compensatory and punitive damages is limited, depending upon the size of the employer, as follows: \$50,000 for employers who have 15 to 100 employees; \$100,000 for employers who have 101 to 200 employees; \$200,000 for employers who have 201 to 500 employees; and \$300,000 for employers having more than 500 employees. Damages such as attorney fees and interest that can be awarded is in addition to the cap.

VI. AVOIDING LIABILITY

Many anti-discrimination laws, such as Title VII and some state laws, impose an affirmative duty on employers to investigate complaints of sexual harassment. Schools should have an anti-harassment policy, with a complaint procedure, in place to take advantage of the Supreme Court's recent decisions. A school may also avoid liability by showing that it immediately investigated a complaint of harassment and took prompt and appropriate action to remedy the situation. What constitutes an adequate investigation is not the subject of this article. It would be wise to consult with a qualified discrimination attorney to set up a complaint procedure and a plan for investigation and remedial action.

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