MGT 380: CHAPTER 8 OUTLINE

I. SEXUAL HARASSMENT IN GENERAL
   a. Form of gender discrimination under Title VII [and FEHA]
   b. Two types of sexual harassment
      i. "quid pro quo"
         1. (e.g. tangible job detriment results from rejection of sexual advance by one in supervisory control)
      ii. "hostile work environment"
         1. (e.g. sexual conduct in workplace makes work more difficult for members of one sex than the other)
   iii. distinction not as significant for employer liability for SUPERVISORY harassment:
      1. Faragher / Ellerth (1998 U.S. Supreme Court cases - see Faragher at 306): employers strictly liable for supervisory harassment
         a. If supervisor created “quid pro quo” tangible job detriment to employee: no defense for employee
            i. [except to challenge whether there was causation between the sexual conduct and adverse employment action]
         b. If supervisor’s harassment did not result in tangible job detriment (i.e. created a "hostile work environment"): employer may assert an "affirmative defense:" [UNDER TITLE VII ONLY - CAL. COURTS DO NOT RECOGNIZE AFFIRMATIVE DEFENSE UNDER FEHA]
            i. Took reasonable steps to prevent the conduct
               1. e.g. proper training and an effective policy including proper complaint procedure
               2. [discuss: what is in an effective policy/procedure?] AND
            ii. Took reasonable steps to correct conduct,
1. conducted prompt and
effective investigation &
2. took appropriate action

iv. **OR employee unreasonably failed** to avail himself or
herself of the employer's complaint procedure or
corrective action.

1. [discuss: how could an employee
"reasonably fail" to complain
about situation? - examples.]

c. **SKIP RABIDUE:** not "controlling" case law
i. Men and women do not "assume a risk" when entering a
hostile work environment.

ii. *Harris v. Forklift Sys.:* employee does not have to prove
psychological damage to prove a hostile work environment
d. Men and women are protected from sexual harassment under
Title VII: along with disparate treatment and disparate impact,
harassment is a form of discrimination.
e. Intrasexual harassment (i.e. men harassing men, women
harassing women) may create a Title VII sexual harassment
claim.

i. *Oncale:* "evidentiary routes" to show harassment as
discrimination [see p. 282]

II. **QUID PRO QUO**

a. Terms, conditions, and privileges of employment are altered
based on sexual conduct (e.g. sexual activity in exchange for
promotion, for not being demoted, etc.)

b. Causation between employment action and sexual conduct

i. *Bryson* p. 284

III. **HOSTILE WORK ENVIRONMENT**

a. *Meritor* p. 288 [discuss: what would you do as VP of HR?]

b. Requires that the conduct:

i. Be unwelcome by harassee ("victim")

1. *McLean* p. 290 [discuss: what if McLean had been a
stellar employee but was fired after the Las Vegas
seminar?]

2. What if office romance between
supervisor/employee goes bad?
a. How to avoid: exhibit 8.5 p. 293

ii. Harassment be based on gender/sex

iii. Sufficiently severe and pervasive to create an abusive working environment
   1. reasonable person sees it as hostile or abusive
   2. "a reasonable person would find it more difficult than not" to work in this environment than members of the other gender.
   3. Ellison p. 297: "reasonable woman" if woman is the victim
   4. must also be subjectively felt by victim as well.
   5. work environment includes “cyber environment”
      a. Blakely p. 302

iv. Affects a term, condition, or privilege of employment AND:

v. If NON-SUPERVISORY harassment: employer had actual or “constructive” knowledge of the sexually hostile working environment and took no prompt or adequate remedial action.
   1. see Robinson p. 309

vi. In SUPERVISORY harassment Title VII cases: employer is strictly liable UNLESS employer can prove the Faragher / Ellerth “affirmative defense” [see I. above]

vii. In SUPERVISORY harassment FEHA cases: employer is strictly liable.

IV. EFFECTIVE POLICIES AND PROCEDURES

a. Exhibit 8.7: effective anti-harassment policy.

b. What is sexual harassment?

c. What are examples of prohibited conduct?

d. What are the penalties for violations?

e. To whom do I make a complaint?
   i. [discuss advantages to more flexibility in the individuals to whom employees may report a complaint]

f. What will be done with the complaint?

g. What does an investigation entail?

h. What are the responsibilities of the complainant and other interested parties in the investigation?
i. Include an anti-retaliation policy with discipline for violations
j. Procedures for training
k. [Also consider procedure for assessment of effectiveness of policy]
l. Include statement that employees' rights to file claim with EEOC/DFEH (in Cal.) are not disrupted by this procedure.

V. OTHER IMPORTANT CONSIDERATIONS
a. HOW TO CONDUCT AN INVESTIGATION [see . 318 - EEOC policy guidance on preserving the affirmative defense in supervisory harassment Title VII cases]
b. In California especially, be aware of tort (personal injury) claims that can arise and be included in sexual harassment claim.