



# Chapter 7

## Sexual Harassment

### Statutory Basis

It shall be unlawful employment practice for an employer—

(1) to fail or refuse to hire or to discharge any individual, or otherwise to discriminate against any individual with respect to his compensation, terms, conditions, or privileges of employment, because of such individual's . . . sex [gender]. . . . Title VII of the Civil Rights Act of 1964, as amended. 42 U.S.C. 2000e2(a).

Unwelcome sexual advances, requests for sexual favors, and other verbal or physical conduct of a sexual nature constitute sexual harassment when (1) submission to such conduct is made either explicitly or implicitly a term or condition of an individual's employment, (2) submission to or rejection of such conduct by an individual is used as the basis for employment decisions affecting such individual, or (3) such conduct has the purpose or effect of unreasonably interfering with an individual's work performance or creating an intimidating, hostile, or offensive working environment. 29 C.F.R. Section 1604.11 (a) (EEOC Sexual Harassment Guidelines).

7-2

### Since Eden...and Counting

- Sexual harassment suits are still a frequent occurrence
- Sexual harassment class action trials
  - The “white buffalo”
- Cost to businesses
- Liability is avoidable

7-3

### Since Eden...and Counting

- Anita Hill and Clarence Thomas
  - Thomas was head of the EEOC
  - Increase in complaints after the hearings
- Recognizing sexual harassment
  - Mixed messages
- Stress as a result of sexual harassment
- Tangible costs

7-4

	<b>Where do Sexual Harassment Considerations Leave the Employer?</b>
	<ul style="list-style-type: none"> <li>• The intent of the law is <i>not</i> that the workplace either become totally devoid of sexuality on the one hand or be given completely over to employees who would misuse the law on the other.</li> <li>• <i>Unwelcome</i> activity</li> <li>• Anti-sexual harassment policies</li> </ul>
	7-5

	<b>Sexual Harassment in General</b>
	<ul style="list-style-type: none"> <li>• Two theories <ul style="list-style-type: none"> <li>– Quid pro quo</li> <li>– Hostile environment</li> </ul> </li> <li>• Theories not controlling for purposes of determining employer liability</li> <li>• <i>Rabidue v. Osceola Refinancing Co.</i></li> <li>• <i>Harris v. Forklift Systems, Inc.</i></li> </ul>
	7-6

	<b>Sexual Harassment in General (continued)</b>
	<ul style="list-style-type: none"> <li>• Most sexual harassment takes place between males and females, with the male as the harasser and the female as the harasee.</li> <li>• Males can be harassed but often do not bring suit for fear of ridicule.</li> <li>• Title VII does not protect employees from discrimination on the basis of affinity orientation.</li> </ul>
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	<b>Quid Pro Quo Sexual Harassment</b>
	<ul style="list-style-type: none"> <li>• The employee is required to engage in sexual activity in exchange for workplace entitlements or benefits such as promotions, raises, or continued employment.</li> <li>• An employer can limit a supervisor’s ability to abuse power by: <ul style="list-style-type: none"> <li>– Choosing supervisory employees carefully</li> <li>– Having in place a system with adequate monitors and checks.</li> </ul> </li> </ul>
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<b>Hostile Environment Sexual Harassment</b>	
	<ul style="list-style-type: none"> <li>• To sustain a finding of hostile environment sexual harassment, it is generally required that:               <ul style="list-style-type: none"> <li>– The harassment be unwelcome by the harassee.</li> <li>– The harassment be based on gender.</li> <li>– The harassment be sufficiently severe or pervasive to create an abusive working environment.</li> <li>– The harassment affect a term, condition, or privilege of employment.</li> <li>– The employer had actual or constructive knowledge of the sexually hostile working environment and took no prompt or adequate remedial action.</li> </ul> </li> <li>• <i>Meritor Savings Bank, FSB v. Vinson</i></li> </ul>
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<b>Unwelcome Activity</b>	
	<ul style="list-style-type: none"> <li>• Basis of hostile environment sexual harassment actions</li> <li>• Harasser actions can be direct or indirect</li> <li>• Evidence that the activity is unwelcome can also be direct or indirect</li> <li>• Unwelcomeness parameters</li> </ul>
	7-10

<b>“Love Contracts”</b>	
	<ul style="list-style-type: none"> <li>• How they work</li> <li>• What is included</li> <li>• What it should do</li> <li>• How it is useful</li> <li>• Is it legally defensible</li> <li>• Is it worth the effort</li> </ul>
	7-11

<b>Comparison</b>	
	<ul style="list-style-type: none"> <li>• Quid pro quo sexual harassment               <ul style="list-style-type: none"> <li>– Workplace benefit promised, given to, or withheld from harassee by harasser</li> <li>– In exchange for sexual activity by harassee</li> <li>– Generally accompanied by a paper trail</li> </ul> </li> <li>• Hostile environment sexual harassment               <ul style="list-style-type: none"> <li>– Activity by harasser, toward harassee that</li> <li>– Is unwanted by the harassee</li> <li>– Is based on harassee’s gender</li> <li>– Creates for harassee a hostile or abusive work environment</li> <li>– Unreasonably interferes with harassee’s ability to do his or her job</li> <li>– Is sufficiently severe and/or pervasive</li> <li>– Affects a term or condition of harassee’s employment</li> </ul> </li> </ul>
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<b>Severe and Pervasive Requirement</b>	
	<ul style="list-style-type: none"> <li>• Does the harassing activity unreasonably interfere with an employee’s ability to perform?</li> <li>• Was the activity an isolated occurrence?               <ul style="list-style-type: none"> <li>– If isolated, was it severe?</li> </ul> </li> <li>• Claims do not require findings of severe psychological harm.</li> </ul> <div style="border: 1px solid black; padding: 5px; margin-top: 10px;"> <p><b>Severe and pervasive activity</b>            Harassing activity that is more than an occasional act or is so serious that it is the basis for liability.</p> </div>
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<b>Severe and Pervasive Requirement (continued)</b>	
	<ul style="list-style-type: none"> <li>• Circumstances that can determine whether an environment is hostile or abusive:               <ul style="list-style-type: none"> <li>– Frequency of the discriminatory conduct</li> <li>– Its severity</li> <li>– Whether it is physically threatening or humiliating or a mere offensive utterance</li> <li>– Whether it unreasonably interferes with an employee’s work performance</li> </ul> </li> </ul>
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<b>Perspective Used to Determine Severity</b>	
	<ul style="list-style-type: none"> <li>• Reasonable person standard</li> <li>• “Reasonable woman” or “reasonable victim” standard</li> <li>• Viewing severity and pervasiveness from different perspectives renders different results</li> </ul>
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<b>“Sexual” Requirement Explained</b>	
	<ul style="list-style-type: none"> <li>• Sex versus gender</li> <li>• Anti-female animus               <ul style="list-style-type: none"> <li>– Derogatory terms when referring to women</li> <li>– Often accompanied by sexually based activity</li> </ul> </li> <li>• Harassment by electronic means</li> </ul>
	7-16

<b>Employer Liability for Sexual Harassment</b>	
	<ul style="list-style-type: none"><li>• Supervisor toward employee (tangible employment action)</li><li>• Supervisor toward employee (no tangible employment action)</li><li>• Coworker harassment third party harassment of employee</li></ul>
	7-17

<b>Other Important Considerations</b>	
	<ul style="list-style-type: none"><li>• Determining the truth of allegations<ul style="list-style-type: none"><li>– Inherent plausibility</li><li>– Demeanor</li><li>– Motive to falsify</li><li>– Corroboration</li><li>– Past record</li></ul></li><li>• Retaliation and employee privacy</li><li>• Corrective action</li><li>• Damages and jury trials</li><li>• Tort and criminal liability</li></ul>
	7-18

<b>Summary</b>	
	<ul style="list-style-type: none"><li>• Consensual activity is not a violation of Title VII.</li><li>• Unwelcome sexual advances that cause one gender to work under conditions or terms of employment different from those of the other gender constitute sexual harassment for which the employer may be liable.</li><li>• Employers will be responsible only if the sexual harassment is severe and pervasive.</li><li>• Activity does not have to be sexual in nature to constitute sexual harassment.</li><li>• Employers should treat all sexual harassment complaints seriously and act on them quickly.</li><li>• Prevention is imperative to avoid sexual harassment claims and lessen liability.</li><li>• Employers need a strong anti-sexual harassment policy that is vigorously enforced.</li></ul>
	7-19