



SEXUAL HARASSMENT FACT, FICTION & PREVENTION (Part II)

This month's continuing dispatch education article is the final installment of a two part series dealing with sexual harassment in the work place. As with all APCO Institute continuing dispatch education articles, this material is intended to provide information regarding the subject matter covered. It is provided with the understanding that the author is not engaged in rendering legal advice. If legal advice or assistance is required, a competent professional in your area should be consulted.

Last month we discussed questions that arose from the US Supreme Court ruling in the *Meritor Savings Bank v. Vinson* case. The two primary questions were:

- What degree of abuse is needed to constitute hostility that interferes unreasonably with a victim's work performance, and
- What is the nature and extent of an employer's liability for hostile work environment?

Let's take a look at each of these individually:

Question #1 - "Degree of Abuse"

After the Meritor decision many of the lower courts held that some form of "injury" needed to be suffered by a claimant before they could prevail in a sexual harassment case.

In *Teresa Harris v. Forklift Systems, Inc.* the U.S. Supreme Court addressed this issue and concluded "*...Certainly Title VII bars conduct that would seriously affect a reasonable person's psychological well-being, but the statute is not limited to such conduct. So long as the environment would be reasonably perceived, and is perceived, as hostile or abusive, there is no need for it also to be psychologically injurious*". The decision was unanimous and the principals were laid out quite concisely.

Question #2 - "Employer Liability"

Numerous courts with significantly different conclusions have addressed the second question, i.e., "What is the nature and extent of an employer's liability for hostile work environment".

In 1998 the U.S. Supreme Court addressed this question as well as some other associated issues in the cases of *Burlington Industries, Inc. v. Ellerth* and *Beth Ann Faragher v. City of Boca Raton*. In both of these cases the Court addressed the issues of employer liability. The conclusions appear to "stretch" the traditional employer/employee agency principles expressed in the Meritor case.

Burlington Case

In the Burlington case the court set out a new standard for an employer affirmative defense in sexual harassment cases (this would apply only when there was no tangible employment action). The following two elements are necessary under this defense:

1. The employer exercised reasonable care to prevent and correct promptly any sexually harassing behavior, and
2. The plaintiff employee unreasonably failed to take advantage of any preventive or corrective opportunities provided by the employer or to avoid harm otherwise.

The availability of this defense was set out in this case because the employer had a sexual harassment policy and established procedures for harassed employees to file meaningful complaints. This case was returned to the trial court for consideration of the affirmative defense issues.

City of Boca Raton Case

In the City of Boca Raton case the court addressed the employer liability issue and, based on the facts, held the city responsible for the acts of its employees. The court also held as a matter of law that the city could not be found to have exercised reasonable care to prevent the supervisors' harassing conduct. The Court found that the supervisors in this case "...*had virtually unchecked authority over their subordinates...*" and in addition had "...*entirely failed to disseminate its policy against sexual harassment...*" among its employees. Because of this finding the court did not need to examine the issue of a possible affirmative defense by the city, i.e., the court said that if the city did not provide information on how and to whom employees should institute reports of harassment there could not be a defense.

Claiming an Affirmative Defense

The following case offers some guidance in how the courts are looking at cases of sexual harassment when an employer claims an affirmative defense. The decision in this case was filed October 10, 2000 by the Court of Appeals of Tennessee under the title of *Christa L. Keeton v. Arlyn Hill, et al.*

In this case, the employer claimed the employee was fired for falsifying company documents. The employee alleged that she was terminated in retaliation for a complaint to the company regarding sexual harassment. The company had a policy regarding sexual harassment and had explained it to all employees, including the employee in question.

The court in this case found that "...*This policy expressly prohibited sexual harassment, assured employees that it would not be tolerated and warned that there would be serious consequences for committing prohibited behavior. It advised employees who felt that they were subject to sexual harassment to "immediately report the matter" to either of two specific individuals, a woman and a man. These individuals were not the ...employee's...supervisor and, in fact were in another city*". Based on these facts, the court said the employer exercised reasonable care to prevent and promptly correct sexually harassing behavior, i.e., element #1 of the Burlington Case.

The court also found that "... *Where the company had a reasonable, broadly disseminated policy prohibiting sexual harassment, we find that...the employee's...failure to report the alleged harassment was unreasonable*". Thus element #2 of the Burlington case was fulfilled and as such, the employer prevails.

Tips for Helping Employers Prevent Claims of Sexual Harassment:

- Understand sexual harassment issues and changes in the laws/court rulings.
- Remember that every sexual harassment claim is serious.
- Realize that men as well as women may be sexually harassed.
- Put in place a strong policy against sexual harassment.
- Review the policy with all employees and train all supervisors.
- Include in the policy alternative routes for filing complaints.
- Enforce your sexual harassment policies.
- Safeguard your employees from third party work-related sexual harassment.

RESOURCES

EEOC Enforcement Guidance: Vicarious Employer Liability for Unlawful Harassment by Supervisors (6/18/99) <http://www.eeoc.gov/docs/harassment.html>.

EEOC Enforcement Guidance on Harris v. Forklift Sys, Inc. (3/8/94)
www.eeoc.gov/docs/harris.html.

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Quiz

CDE Article – SEXUAL HARASSMENT FACT, FICTION & PREVENTION (Part II)

Name: _____ Date: _____

Agency: _____

Address: _____

Phone: _____

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Email: _____

1. After this case, many of the lower courts held that some form of "injury" needed to be suffered by a claimant before they could prevail in a sexual harassment case.
 - a. *Christa L. Keeton v. Arlyn Hill, et al.*
 - b. *Burlington Industries, Inc. v. Ellerth*
 - c. *Beth Ann Faragher v. City of Boca Raton*
 - d. *Meritor Savings Bank v. Vinson*

2. To help prevent claims of sexual harassment, employers should make sure they understand sexual harassment issues and changes in the laws/court rulings.
 - a. True
 - b. False

3. Men as well as women may be sexually harassed.
 - a. True
 - b. False

4. Employers should review their sexual harassment policy with:
 - a. All employees
 - b. Supervisors only
 - c. New hires only
 - d. Only those claiming to be victims

5. Sexual harassment policies should include alternative routes for filing complaints.
 - a. True
 - b. False

6. Employers should also safeguard their employees from third party work-related sexual harassment.
 - a. True
 - b. False

7. The *Christa L. Keeton v. Arlyn Hill, et al.* case offers guidance in how courts are looking at cases of sexual harassment when an employer claims a(n) _____ defense.
 - a. Formative
 - b. Negative
 - c. Affirmative
 - d. Summative