

Sexual Harassment Complaints: Effective Investigations



Leslie Ann Bridges

OFFICE OF THE ATTORNEY GENERAL

Title VII

Title VII of the Civil Rights Act of 1964 is a federal law that prohibits employers from discriminating against employees on the basis of sex, race, color, national origin, and religion.



Tenn. Code Ann. § § 4-21-401, *et al.* Employment-Related Discrimination



42 U.S.C.A. § 2000e – Title VII

It shall be an unlawful employment practice for an employer --

to fail or refuse to hire or to discharge an individual, or otherwise to discriminate against any individual with respect to his compensation, terms, conditions, or privileges of employment, because of such individual's race, color, religion, sex, or national origin.



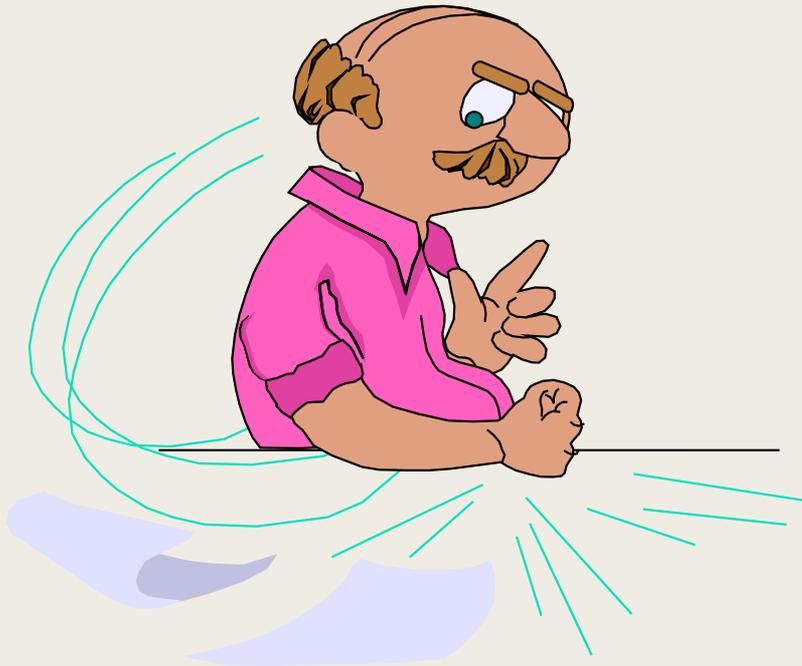


Title VII is Violated. . .

When the work place is permeated with “discriminatory intimidation, ridicule, and insult,” . . . That is “sufficiently severe or pervasive to alter the conditions of the victim’s employment and create an abusive work environment,” . . .



Hostile Work Environment Three-Part Test



Conduct is

- Unwelcome;
- Based on gender, race, or other protected characteristics;
- Severe or pervasive.

Hostile Work Environment Three-Part Test

- Conduct is Unwelcome



Sexual Harassment Statute

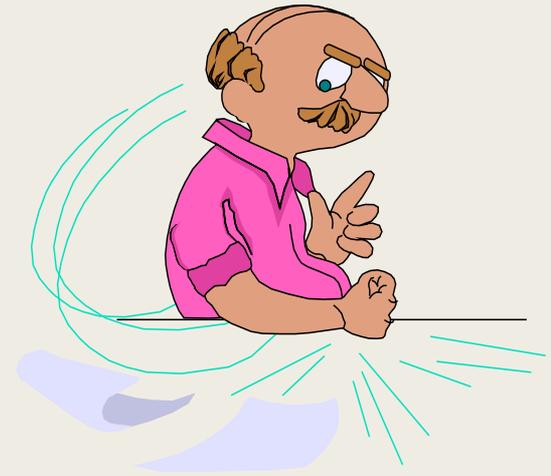
The statute does not reach genuine but innocuous differences in the ways men and women routinely interact with members of the same sex and of the opposite sex. The prohibition of harassment on the basis of sex requires neither asexuality nor androgyny in the workplace.

- *Oncale v. Sundowner Offshore Services, Inc.*,
118 S.Ct. 998, 523 U.S. 75, 140 L. Ed. 2d 201
(1998).



Hostile Work Environment Three-Part Test

- Conduct is based on gender, race, or other protected characteristics



Sexual Harassment



Sexual harassment claims do not have to be about sex-only gender based.

HEY, **GIRLIE BOY!** TOO BAD YOU
COULDN'T CLOSE THAT DEAL. I GUESS
THIS IS A **MAN'S JOB**, HUH? WHY DON'T
YOU JUST WEAR A **DRESS** TO WORK?
YOU'D SURE LOOK **CUTE** IN ONE! ...
HA HA **HA HA HA HA HA HA HA HA HA!**



**When Men
Taunt Men, Is
It Sexual
Harassment?**

By Margaret Talbot

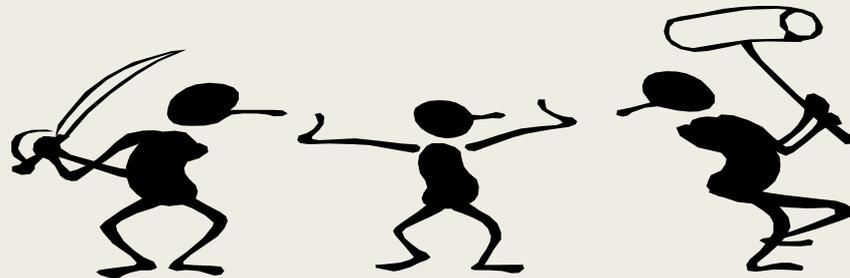
Plus: Europe & the U.S., by A. S. Byatt · Clive Barker & Disney, by Dwight Garner · Myth & Madison Ave., by Jonathan Dee

Same-Sex Harassment

In *Oncale v. Sundowner Offshore Services*, the U.S. Supreme Court ruled that Title VII of the Civil Rights Act of 1964 also applies to same-sex harassment. The Court noted that harassing conduct need not be motivated by sexual desire to support an inference of discrimination.

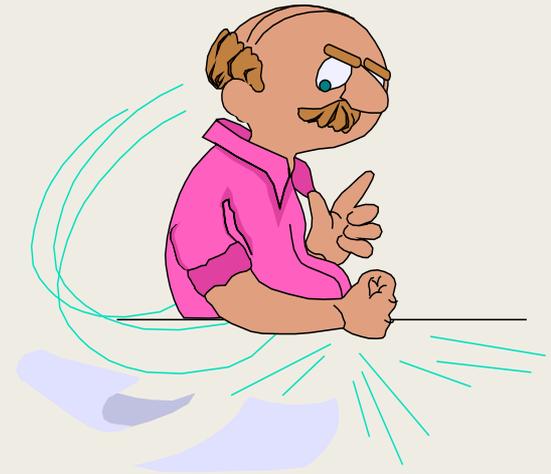
Third Party Harassment

An employer may be legally responsible for harassment of its employees by a non-employee if the employer knew or should have known about the harassment and failed to take immediate and appropriate corrective or preventive action.



Hostile Work Environment Three-Part Test

- Conduct is severe or pervasive



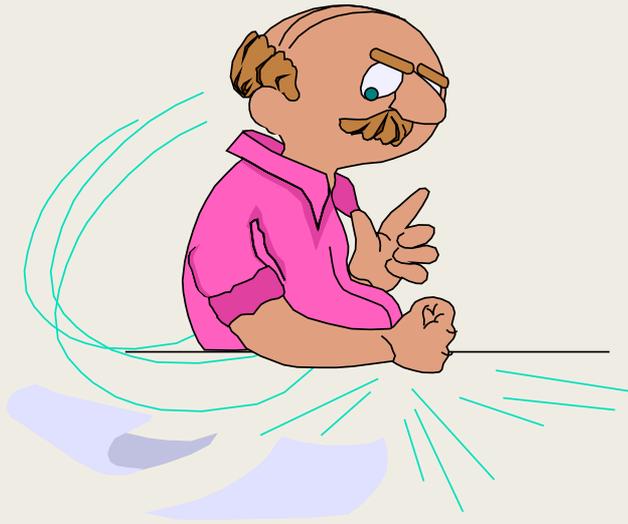
Pervasiveness

Totality of Circumstances

- Frequency of discriminatory conduct
- Severity
- Physically threatening or humiliating



Hostile Work Environment Three-Part Test



Conduct is

- Unwelcome;
- Based on gender, race, or other protected characteristics;
- Severe or pervasive.

Employer Liability for Harassment by Co-Employees

An employer is liable for harassing conduct by non-supervisory employees when a member of management knew or should have known of the conduct and failed to take immediate and appropriate corrective action.

Employer Liability for Harassment by Supervisors

Employers are “vicariously” or automatically liable for sexual harassment by supervisors when there is an adverse job action to the harassee.

Examples of Tangible Employment Actions

- Hiring and firing;
- Promotion and failure to promote;
- Demotion;
- A decision causing a significant change in benefits; and
- Compensation decisions.

Employer Liability for Harassment by Supervisors

When no adverse job action is taken against the employee, employers are still “vicariously” or automatically liable for sexual harassment by supervisors unless the employer can prove the following:

Employer Liability for Harassment by Supervisors

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

Who is a Supervisor?

An individual qualifies as an employee's "supervisor" if:

- the individual has authority to undertake or recommend tangible employment decisions affecting the employee; *or*
- the individual has authority to direct the employee's daily work activities.

The firm discourages consensual sexual or romantic relationships between individuals when one of the parties has any direct or indirect supervisory responsibility over the other. Parties who enter into such relationships should take prompt steps to terminate the supervisory responsibility.



Retaliation

An employer is prohibited from retaliating against an employee who takes part in protected activity.



Protected Activity

An employee generally engages in protected activity if he/she:

1. Made a charge; or
2. Participated in an investigation, proceeding or hearing; or
3. Opposed illegal activity; or
4. Exercised, claimed or asserted a protected right.



The Most Dangerous Claim Employers Face

Monitor the situation during and after the investigation, to ensure that the complainant, as well as all other employees, are not subjected to illegal conduct.

Prompt and Complete Investigation



Follow the policy



Effective Complaint Procedure

An effective complaint procedure should contain the following elements:

- *A clear explanation of prohibited conduct.*
- *A clearly described complaint process that provides accessible avenues of complaint.*
- *Assurance that the employer will protect the confidentiality of harassment complaints to the extent possible.*

Effective Complaint Procedure

- *Assurance that employees who make complaints or provide information related to such complaints will be protected against retaliation.*
- *A complaint process that provides a prompt, thorough, and impartial investigation.*
- *Assurance that the employer will take immediate and appropriate corrective action when it determines that harassment has occurred.*

Effective Complaint Procedure

An explanation of the consequences:

- *An employee may be subjected to disciplinary action for conduct which, although not a violation of state or federal law, nevertheless constitutes a violation of this policy.*

Who Should Investigate and Why

The Usual Suspects:

1. *Human Resources*
2. *Legal Counsel*
3. *Internal Investigators/Auditors*
4. *Outside Investigators/Employment
Lawyers*

Who Should Investigate and Why

1. How many employment investigations;
2. Formal training;
3. How many investigations for this employer; and
4. How many investigations allegations substantiated versus unsubstantiated.

Who Should Investigate and Why

Qualities:

- Impartial,
- Thorough,
- Prompt, &
- Experienced



Skills

1. Good interviewer
2. Articulate
3. Good writer



Team Approach

1. Coordinator e.g. Lawyer
2. Investigator
3. Manager



Appointing Harasser's BFF to Investigate

Supervisor called Plaintiff his “work wife” and his “slave,” rubbed her shoulders as she worked, and positioned himself so she backed into his crotch when she moved boxes. Higher-level executives responded by putting the alleged harasser’s best friend, an HR manager, in charge of an investigation.

Miles v. Davita Rx, LLC.

INVESTIGATION TIPS

- Create a file.
- Review law and policies.
- Create a plan.
 - Scope
 - Interview parties and witnesses.
 - Collection of evidence.
- Be consistent.
- Avoid disruption.
- Keep an open mind
- Do not promise confidentiality.
- Make a decision.
- Appropriate remedies.
- Reinforce policy.
- Be prompt.

No Privilege Should Attach To An Investigation



General Interview Techniques

- Prepare thoroughly in advance of the interview.
 - *Determine the issues that should be explored.*
 - *Understand the law.*
 - *Understand what facts are necessary to reach a conclusion.*
 - *Determine what written documents will assist in reaching a conclusion.*
- Prepare a detailed outline of key questions.

According to the EEOC, questions employers might ask during a complaint investigation include the following:

- *Who committed the alleged harassment?*



Common Questions and Whether You Should Use Them

- *What response did you make when the incident(s) occurred or afterward?*
- *How did the conduct affect you?*
- *How would you like to see the situation resolved?*



Consistent Introductory Comments

1. Purpose of investigation;
2. Do not promise absolute confidentiality – disclosure will be only made to those with a legitimate business reason to know; and
3. No retaliation for participating in an investigation.

Matters That Should Be Covered With Alleged Wrongdoer

- Identify and allow the individual to respond to each alleged improper statement or action.
- Ask the accused to identify all persons he/she believes should be interviewed as part of the investigation.
- If the accused denies wrongdoing and claims that the person raising the issue is lying, explore possible reasons.

Finding the Right Words



- Do not be adversarial or confrontational.
- Do not argue or apologize.
- Do not suggest outcome.

Maintaining Your Focus

- Focus on behavior, not the employee.
- Focus on the action, not the intent.
- Focus on the problem, not the cause.



Collecting Evidence

Ask for any documents such as journals, notes, emails, voicemails, texts, or social media conversations that may support complaint.



Taking Notes

1. Drafter and Date
2. Contemporaneous
3. Accurate
4. Legible



Making A Determination

Inform both the complainant and the accused of the results after you reach a conclusion.

Making A Determination

There are three possible findings:

- *There is no evidence that a violation of the policy occurred.*
- *The evidence shows that a violation of the policy occurred.*
- *The evidence is inconclusive.*

Is It A Swearing Contest?

1. Interview witnesses and review tangible evidence.
2. Examine quality of evidence.
3. Is there corroboration on either side?
4. Examine motives.



Report & File Retention

Needs to be maintained as confidential and kept separately-away from personal files.



Common Mistakes

- Trying to resolve complaints personally.
- Ignoring a complaint because the alleged sexual harassment occurred several years ago.
- Waiting for a formal complaint.
- Jumping to conclusions.
- Failing to act because the employee who complained of sexual harassment told his or her supervisor to do nothing.

Be nice



Adequate Remedial Action



Interim Remedial Measures

Intermediate measures may include:

1. Placing the alleged wrongdoer on paid or unpaid leave, pending the outcome of the investigation.
2. Allowing the complainant paid time off during the investigation.
3. Alternating work assignments so that an alleged harasser does not work directly with or supervise the complainant.
4. Ensuring that all supervisors understand that retaliation will not be allowed.

Appropriate Action Options to be Considered

- Training
- Suspension of the alleged harasser.
- Discharge of the alleged harasser.



Appropriate Action Options to be Considered

A written memo to the alleged harasser stating that the employer has not been able to determine whether any unlawful action occurred, but reiterating the employer's policy against the alleged action and making clear that recurrence will not be tolerated.

Appropriate Action Options to be Considered

- Reinforce harassment policy.
- Requiring training.



Avenues for Removal, Interim Measures, and Indemnification

Automatic Removal Upon Criminal Conviction

- *An elected county official must immediately vacate office if convicted of a felony. Tenn. Code Ann. § 8-48-101(6) and Tenn. Code Ann. §§ 40-20-114(a), 40-20-112.*

Avenues for Removal, Interim Measures, and Indemnification

Ouster for Knowing or Willful Misconduct

- County officials are subject to removal under the ouster law codified at Tenn. Code Ann. §§ 8-47-101, *et seq.*
- Section 8-47-101 provides that “[e]very person holding any office of trust or profit, under and by virtue of any of the laws of the state, either state, county, or municipal, . . . who shall knowingly or willfully commit misconduct in office . . . Shall forfeit such office and shall be ousted from such office in the manner hereinafter provided.” (emphasis added).

Avenues for Removal, Interim Measures, and Indemnification

Removal of Court Clerk for Misbehavior in Office

- A court clerk may be removed from office by the court in which the clerk serves for “misbehavior in office” or “[f]or any other cause to which the penalty of removal from office is attached by law.” Tenn. Code Ann. § 18-1-301(5), (6).
- The court may also immediately suspend a clerk who is indicted for engaging in a felony or misdemeanor in office. Tenn. Code Ann. § 18-1-302.

Avenues for Removal, Interim Measures, and Indemnification

Removal of a Clerk & Master

- “Chancellors shall appoint their clerks and masters, who shall hold their office for six years. . . . Any Clerk may be removed for malfeasance, incompetency or neglect of duty, in such a manner as may be prescribed by law.” Tenn. Const. art VI, § 13.

- “Should any clerk or clerk and master fail to comply with the order of the clerk or clerk and master’s court, it shall be the imperative duty of the court to remove the clerk or clerk and master, and appoint some other person in the clerk’s or clerk and master’s place.” Tenn. Code Ann. § 18-2-213.

Avenues for Removal, Interim Measures, and Indemnification

Removal of Elected Coroner

- If a county's legislative body elects a coroner, it may also remove the coroner for "misconduct." Tenn. Code Ann. § 8-9-102.

Avenues for Removal, Interim Measures, and Indemnification

Methods for Removing Judges-the Tennessee Constitution provides for two methods of removing judges from office:

- The first method is removal by concurrent vote of both Houses of the General Assembly under Tenn. Const. art. VI, § 6.
- The second method for removing a judge from office is the impeachment process established by Tenn. Const. art. VI, § 4.

Avenues for Removal, Interim Measures, and Indemnification

Indemnification

- If a county is held liable for the non-compliance of an official with chapter 23, then the county may seek reimbursement from that official where (1) conduct was intentional and knowing, and (2) constituted illegal behavior in the workplace. Tenn. Code Ann. § 5-23-109.



