

# Sexual Harassment

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# A High Profile Issue

- Controversial
  - Testimony at confirmation hearings for Supreme Court Nominee Clarence Thomas.
  - Lawsuit against former President Bill Clinton.
- Now many people think they are experts on the subject, but what the law permits is unclear....

# Types of Sexual Harassment

- Quid Pro Quo
  - Offers to do something in exchange for submission to physical advances.
    - “I will give you a promotion if....”
    - “I will make your job easier if....”
- Hostile Working Environment
  - Much more common.

# Quid Pro Quo

- **Unwelcome does not mean involuntary.**
  - May seem necessary to keep the job
  - May result in benefits
    - Raises
    - Promotions
    - Better schedules or working conditions
- **Romantic relationships can be difficult to distinguish.**
  - Supervisors in relationships with subordinates
  - Favoritism of one employee

# Hostile Working Environment

- Happens when co-workers, supervisors, or outside parties engage in unwelcome sexual conduct in the workplace.
- Must result in interference with an employee's work performance or create an intimidating, hostile, abusive, or offensive environment.

# Hostile Working Environment

- Examples of Conduct That May Create a Hostile Working Environment:
  - Sexual jokes or innuendo
  - Pornographic or suggestive emails
  - Pin-ups or dirty cartoons
  - Name calling
  - Back rubs or touching
  - Inquiries into private life
  - Favoritism
- The key is that the conduct is “Unwelcome.”

# The Unwelcomeness Inquiry

- Courts have confirmed the correct focus of sexual harassment inquiries is on the “unwelcome” nature of the conduct.
- The issue is not what the actor intended, but how the conduct impacted the victim.

# The Unwelcomeness Inquiry

- **Can an employee claim sexual harassment when conduct is welcome?**
  - *Enjoys engaging in sexual banter*
  - *Welcomes dirty jokes*
  - *Frequently exchanges sexual emails*
- **No, but relying on “welcomeness” as a defense is dangerous.**



# Analyzing Potential Liability

- What is welcome today may not be welcome tomorrow or two weeks from now.
- Though the direct recipient of the conduct may welcome it, other employees witnessing the conduct may not.
- Sometimes what appears to be truly welcome is not welcome.

# Avoiding Liability

- Refrain from engaging in any conduct which could be described as inappropriate for the workplace or sexual in nature.
- Don't engage in conduct if you wouldn't...
  - *Want it on the front of the Des Moines Register.*
  - *Want to explain it to your children.*
  - *Want your spouse, parent, minister, or rabbi to know.*

# The Consequences

- **The Courts Look To:**

- Frequency of the conduct.
- Severity of the conduct.
- Whether the conduct was physically threatening, humiliating, or merely an utterance.
- Whether the conduct unreasonably interfered with the victim's ability to perform their job.
- Whether the actor was a supervisor.

# Who is a Supervisor?

In June 2013, the Supreme Court clarified the definition of “supervisor” for purposes of vicarious liability under Title VII of the Civil Rights Act.

- A supervisor is any employee empowered by an employer “to take tangible employment actions against the victim.”
- Such an employee is able to effect “a significant change in employment status, such as hiring, firing, failing to promote, reassignment with significantly different responsibilities, or a decision causing a significant change in benefits.”

# The Consequences

- Sexual Harassment claims can open the door to other types of claims...
  - *Intentional Infliction of Emotional Distress*
  - *Assault or Battery*
  - *Personal Liability for Employees*
- Damages may include compensatory and punitive damages.

# Scenarios

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