



## Sexual Harassment: Are Title VII Claims Poised For a Comeback?

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# Two Tests for Discrimination

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- Disparate treatment – more common of the two. Test of intent to discriminate based upon protected status. Intent to discriminate is an element of claim.
- Disparate impact – discriminatory effect of facially neutral policy. No intent need be shown.
  - The Supreme Court re-affirmed availability of a disparate impact theory available under ADEA in 2005 in *Smith v. City of Jackson*, 544 U.S. 228 (2005).

# Disparate Treatment Case

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- Direct evidence of discrimination; or
- McDonnell Davis Burden Shifting Analysis – Not strictly for summary judgment
  - Prima facie case
    - Employee member of protected class
    - Qualified for position
    - Denied opportunity to do work (or get benefit) which was given to someone outside protected class
  - Employer must *articulate* legitimate, non-discriminatory reason for challenged decision.
  - Plaintiff must prove falsity of employer's proffered reason.

# Two Types of Sexual Harassment

## Quid Pro Quo

Quid Pro Quo

So just how badly do you want this promotion, sweetie?



Hostile Work Environment

# Harassment

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Unlawful harassment is harassment which creates a work environment that is ***hostile, offensive, or intimidating*** to the employee and is made that way ***on the basis of*** a characteristic protected by law (e.g. sex, sexual orientation, religion, age, disability).

Title VII's prohibition on sex discrimination includes "[t]he creation of a hostile work environment through harassment."

# Hostile Work Environment

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- **discriminatory** intimidation, ridicule or insults, which are;
  - sufficiently severe or pervasive that they;
  - alter the conditions of employment and;
  - create an abusive working environment; where
  - Undertaken by “employer”
    - One who has control over conditions of employment; or
    - Employer knew or should have known of the harassment and failed to take prompt remedial action.



# It May Also Include Conduct...

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- that creates an intimidating, hostile or offensive working environment.
- that either implicitly or explicitly requires submission to sexual favors as condition of employment or compensation; or
- unwelcome advances or behavior of a sexual nature, whether physical, verbal or visual in nature.



# But not all “hostility” is actionable

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- Title VII’s prohibitions are not a ‘civility code’ and are not designed to rid the workplace of vulgarity.
- Discriminatory behavior creates a hostile workplace only when it is "so objectively offensive as to alter the 'conditions' of the victim's employment" *and* when the victim finds it subjectively offensive to the same degree.
- "Conduct that is not severe or pervasive enough to create . . . an environment that a reasonable person would find hostile or abusive" is insufficient to give rise to a hostile-work-environment claim.



# But not all “hostility” is actionable

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- Courts;
  - consider "all the circumstances, including the frequency of the discriminatory conduct; its severity; whether it is physically threatening or humiliating, or a mere offensive utterance; and whether it unreasonably interferes with an employee's work performance."
  - Title VII "requires neither asexuality nor androgyny in the workplace" and "does not reach genuine [\*18] but innocuous differences in the ways men and women routinely interact with members of the same sex and of the opposite sex."

# Two Requisite Elements to Test

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- Objective Standard:
  - The conduct was so severe or pervasive that a reasonable person would find it to create a hostile or abusive environment.
- Subjective Standard:
  - The victim must establish that he or she subjectively perceived the conduct to be hostile or abusive.

# Isolated Instances Not Actionable

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- “Simple teasing, offhand comments, and isolated incidents (unless extremely serious) will not amount to discriminatory changes in the terms and conditions of employment.”
  - *Clark County School District v. Breeden, 2001*
- A single or isolated incident of offensive conduct does not generally create a hostile work environment, with some obvious exceptions.

# Must Be Attributable to Employer

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- In *Vance v. Ball State University*, Supreme Court ruled on who qualifies as a “supervisor” whose discrimination is attributed to employer for purposes of liability.
  - A supervisor is only one with the power to take “tangible employment actions” (e.g., hiring, firing, etc.) against the victim;
  - One who merely directs the worker’s day-to-day activities does not create liability for the employer.

# Ellerth/Faragher Test

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- If harasser does not qualify as the “employer,” under the *Vance* test, and thus no tangible employment action occurred, employer can avoid liability under *Ellerth/Faragher* standard if:
  - it "exercised reasonable care to prevent and correct any sexually harassing behavior," and
  - “the plaintiff unreasonably failed to take advantage of the preventative or corrective opportunities that the employer provided.”

# Sexual Harassment is Not Limited to male-female interactions

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Employees can pursue Title VII claims where a hostile work environment is created by conduct committed by one or more individuals who are of the same sex as they are or based on their actual or perceived sexual orientation.





# Gender Stereotype Nonconformity

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- “[A] plaintiff can satisfy Title VII's because-of-sex requirement with evidence of a plaintiff's perceived failure to conform to traditional gender stereotypes.” *Price Waterhouse v. Hopkins* (1989)
  - discrimination against women who do not wear dresses or make-up. *Lewis v. Heartland* (8<sup>th</sup> 2010)
  - work crew superintendent thought male employee was not manly-enough. *EEOC v. Boh Bros* (2013)

# “Non-traditional” Gender Claims

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- “[D]iscrimination against a transsexual because she is a transsexual is not 'discrimination because of sex...transsexuals are not a protected class under Title VII...”
- “[C]ourts have been reluctant to extend the sex stereotyping theory to cover circumstances where the plaintiff is discriminated against because the plaintiff's status as a transgender man or woman, without any additional evidence related to gender stereotype nonconformity.”

# “Non-traditional” Gender Claims

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- “Actionable sex discrimination under Title VII includes discrimination against those who do not conform to sex or gender stereotypes.”
- Recently (last month) failure-to-conform stereotyping protection from *Price Waterhouse* has been expanded to include transgender persons.
  - “Title VII protects transgender persons because of their transgender or transitioning status, because transgender or transitioning status constitutes an inherently gender non-conforming trait.”
  - an employer cannot take action against an employee “based on that employee's status as a transgender person without being motivated, at least in part, by the employee's sex.”

# Hostile Work Environment

## Avoiding and defending claims

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- Strict workplace rules which are strictly and uniformly enforced
- Written policies which provide **requirements** for reporting
  - Requirement of employee instruction and acknowledgement
  - Mechanism to bypass “chain of command”
- Prompt investigation and *resolution* of complaints
  - Documentation evidencing findings and prompt and appropriate remedial action on complaints
- Remedial mechanisms for proven incidents
  - Complainant participation and acknowledgement



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