

Sexual Harassment in the Law Firm Setting

Presented by

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Introduction: What is sexual harassment?

Generally, unlawful harassment is unwelcome conduct, based on any basis protected by law, which has the purpose or effect of unreasonably interfering with an employee's work performance or creates an intimidating, hostile or offensive working environment. The Equal Employment Opportunity Commission guidelines on sexual harassment provide, in relevant part:

“Harassment on the basis of sex is a violation of section 703 of Title VII. 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.”

Generally, sexual harassment falls into one of two categories: (a) *quid pro quo*, meaning this for that; and (b) hostile work environment.

The key words in the EEOC guidelines, for either type of harassment, are *sexual* and *unwelcome*. In order for behavior to be unlawful, it must have both characteristics.

To be considered a hostile work environment, the conduct must unreasonably interfere with working conditions, and must be both severe and pervasive. An isolated sexual comment will not state a claim. Conduct will be judged from the objective viewpoint of a reasonable person facing the same conditions.

Case one

Tom and Mary are associates at a large law firm. They begin a romantic relationship which lasts for several months. Tom then breaks up with Mary and begins to date someone else. Mary goes to a senior partner and complains that she has been sexually harassed by Tom. (1)

Case two

Bill and Susan, law firm associates, have a consensual, romantic relationship for several months. Susan breaks up with Bill. Bill continues to come to Susan's office and her home, and ask her to have sex with him. Sometimes, he touches her while making these requests. Susan keeps telling him that the relationship is over and she doesn't want him to touch her or talk to her about sex. Finally, Susan goes to a partner in the firm and complains about Bill. The partner tells Bill to stop, and arranges for Bill and Susan not to work together. (2)

Case three

All facts are the same as case two, except that when Susan comes to the partner, he tells her that she and Bill are both adults and they need to work this out. Bill's behavior continues, and Susan sues the firm. (3)

Case four

Wendy is a paralegal in the Litigation Dept. Jack is the senior paralegal in the Litigation Dept. He assigns the litigation paralegals to their cases, and follows up with them regularly to make sure they are doing their assignments. Jack begins to sexually harass Wendy by touching her and asking her to have sex with him, even after she repeatedly says no to him. Wendy never reports Jack's behavior to anyone at the firm. She sues for sexual harassment. (4)

Case five

Peter is a partner in the firm. He asks his assistant Deena to have sex with him. Even though she doesn't want to, in order to keep her job Deena sleeps with Peter when he requests it. This goes on for several years. The firm has a well-publicized policy against harassment, and a system for reporting harassment, but Deena never tells anyone about Peter's behavior. After four years of having sex with Peter, Deena sues. (5)

Case six

Calvin is president of Mega Industries, a client of the firm. One day he meets in the office with Jim, a partner, and Chloe, an associate. He asks Chloe to come to lunch the next day to speak further about the matter. At lunch he tells Chloe that he is very attracted to her, and wants to send a number of matters to the firm for her to handle. However, he also wants them to begin a romantic relationship and Chloe gets the message that she must have sex with Calvin if she is to get the legal work. Chloe tells Jim about this, and Jim tells her to grow up, that if she wants to have Mega's business she knows what she needs to do. (6)

Case seven

Hank and Lucy are both partners at a law firm. Lucy keeps suggesting to Hank that they go away for the weekend together, telling their spouses that they are going to a legal conference. When Hank refuses to go, Lucy tells the firm management committee that in her view Hank is a poor performer, and both the quality of his work and the amount of time he spends at the practice are way below average. She suggests that Hank be fired. However, the committee canvasses the other partners, who support Hank, and there is no change in his status. (7)

Case eight

Jill is an associate in the law firm's Labor Department. The "culture" of the department includes swearing, and telling racy stories and off-color jokes at department meetings. Both partners and associates engage in this kind of activity. Jill quietly endures the department culture for several months, but then sues for harassment. (8)

Case nine

Same facts as case eight, except that Jill, in order to fit in, also begins swearing, and telling off-color jokes. She then sues for harassment. (9)

Notes

(1) Key issue: was Tom's conduct unwelcome. If not, there is no harassment.

(2) As summarized by the California Supreme Court in a recent case, under the Fair Employment and Housing Act ("FEHA") there are "...two standards of employer liability for sexual harassment, depending on whether the person engaging in the harassment is the victim's supervisor or a nonsupervisory coemployee. The employer is liable for harassment by a nonsupervisory employee only if the employer (a) knew or should have known of the harassing conduct and (b) failed to take immediate and appropriate corrective action." *State Dept. of Health Services v. Superior Court (McGinnis)*, 2003 DJDAR 12662.

(3) Was the partner, who is the employer's agent, taking immediate and appropriate corrective action?"?

(4) See *McClung v. Employment Development Dept.*, 2003 DJAR 12389. Supervisor under FEHA has power to hire, fire and control working conditions, such as promotions, pay increases and adjusting grievances.

(5) See *McGinnis, supra*, in which the California Supreme Court stated that there is an "avoidable consequences defense," meaning that if the employer has established and publicized a policy against harassment, and procedures for complaining of harassment, and if some or all of the conduct could have been avoided had the victim promptly reported it, the employer's damages will be lessened. In the Court's words: "This defense will allow the employer to escape liability for those damages, and only those damages, that the employee more likely than not could have prevented with reasonable effort and without undue risk, expense, or humiliation, by taking advantage of the employer's internal complaint procedures appropriately designed to prevent and eliminate sexual harassment."

(6) In 2003 the California legislature passed AB 76 which extends liability for sexual harassment of nonemployees if the employer knew or should have known of the conduct and did not take appropriate corrective action.

(7) What are Hank's damages? Are the terms and conditions of his employment in any manner affected?

(8) Is the conduct severe and pervasive?

(9) Is the conduct "unwelcome"?