LEGAL COMPLIANCE WITH THE SEXUAL HARASSMENT LAWS OF THE UNITED STATES

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INTRODUCTION

This article discusses federal law in the United States concerning sexual harassment in the workplace, the legal standards for determining sexual harassment, defenses to such claims, and preventative measures companies may take to comply with the law and prevent sexual harassment from occurring. In addition, this article seeks to alert Japanese companies (doing business in the U.S.) to the standards by which their and their employees' actions will be judged and provide practical suggestions for avoiding liability for sexual harassment.

The U.S. Courts first recognized sexual harassment in the workplace as a legal claim in 1976. There is no specific federal statute that concerns sexual harassment exclusively. Rather, Title VII of the Civil Rights Act of 1964, the federal employment discrimination statute that prohibits discrimination based on gender, has been interpreted as prohibiting sexual harassment in the workplace. *See Williams v. Saxbe, 413 F. Supp. 654 (D.D.C. 1976).*

U.S. courts have struggled to establish uniform legal standards for determining what conduct constitutes workplace sexual harassment and under what circumstances companies should be held responsible for such conduct. Part of the difficulty has arisen from the rapid change in societal awareness of sexual harassment. The time has long passed since the legal definition of sexual harassment was limited to supervisory male employees harassing subordinate female employees by directing unwanted sexual attention upon them. Today, sexual harassment takes a myriad of forms and some uncertainty still exists as to what conduct constitutes unlawful harassment.

Two of the most significant sexual harassment cases decided by the United States Supreme Court are *Burlington Industries, Inc. v. Ellerth, 524 U.S. 742 (1998)* ("*Ellerth"*), and *Faragher v. City of Boca Raton, 524 U.S. 775 (1998)* ("*Faragher").* These decisions address company liability for sexual harassment by supervisors and provide a common-sense legal framework for analyzing sexual harassment claims and assessing company liability for such claims.

The *Ellerth* and *Faragher* cases were decided against a backdrop of rapidly increasing lawsuit damage awards and settlements received by claimants in sexual harassment cases. For example, in 1998, the EEOC announced that Mitsubishi

Motor Manufacturing of America, Inc. had agreed to pay $34 million to more than 350 current and former female employees to resolve a sexual harassment suit brought against that company. Significantly, a common element in cases resulting in large awards is the unresponsiveness, or perceived unresponsiveness, of the company to the complained of harassment.

The potential penalty to companies stemming from their failure to understand the law of sexual harassment and the affirmative obligations placed upon them by the courts and the federal Equal Employment Opportunity Commission ("EEOC") has increased exponentially. Without a doubt, prudent companies will make certain that their individual managers become educated on the law of sexual harassment and take measures to eradicate harassment from the workplace.

SEXUAL HARASSMENT DEFINED

EEOC is the U.S. governmental agency responsible for enforcement of the federal laws prohibiting discrimination in the workplace. EEOC has published guidelines on sexual harassment. *29 C.F.R. § 1604.11 (1993)*.

EEOC defines sexual harassment as "unwelcome sexual advances, requests for sexual favors, and other verbal or physical conduct of a sexual nature." According to EEOC's guidelines, such acts constitute sexual harassment when: (1) submission to such conduct is made a term or condition of employment, or (2) submission to or rejection of such conduct is used as a basis for employment decisions affecting the individual, or (3) such conduct has the purpose or effect of unreasonably interfering with an employee's work performance or creating an intimidating, hostile, or offensive working environment. This definition of sexual harassment in its guidelines has been widely accepted and noted with approval by the U.S. Supreme Court.

TYPES OF SEXUAL HARASSMENT

There are two primary categories of sexual harassment. The first is "quid pro quo" ["this for that"] sexual harassment, which occurs when a supervisor, manager, or other superior employee conditions an employment benefit or continued employment on another employee's acquiescence in unwelcome sexual behavior. The second primary category of sexual harassment is commonly referred to as "hostile environment" sexual harassment.

Quid pro quo harassment occurs where submission to a supervisor's sexual overtures is made a term or condition of employment, or submission to or rejection of such conduct is used as a basis for employment decisions affecting the individual employee. Quid pro quo harassment typically arises in situations where a supervisor uses his or her authority to induce a subordinate employee to grant him or her sexual favors.

Hostile work environment harassment exists if conduct of an offensive sexual nature has the purpose or effect of unreasonably interfering with an employee's work performance or creating an intimidating, hostile, or offensive working environment for that employee. Therefore, an employee pursuing a claim for hostile environment sexual harassment generally has to prove that: (1) he or she was subjected to conduct based on sex or conduct of a sexual nature; (2) the conduct was unwelcome; and (3) the conduct was sufficiently severe or pervasive to create an abusive working environment. *Meritor Sav. Bank, FSB v. Vinson, 477 U.S. 57 (1986)*. No specific employment benefits need be lost or gained by the affected employee. Supervisors and non-management employees can engage in conduct creating a hostile or abusive work environment and subsequent company liability.

Examples of behaviors, which can create a hostile work environment, when they are sufficiently severe and pervasive, include, but are not, limited to:

- Unwanted sexual advances.
- Offering employment benefits in exchange for sexual favors.
- Making or threatening retaliation after a negative response to sexual advances.
- Visual conduct such as leering, making sexual gestures, displaying sexually suggestive objects or pictures, cartoons, calendars or posters.
- Verbal conduct such as making or using derogatory comments, epithets, slurs, sexually explicit jokes, or comments about an employee's body or dress.
- Written communications of a sexual nature distributed in hard copy or via computer network.

- Verbal sexual advances or propositions.
- Verbal abuse of a sexual nature, graphic verbal commentary about an individual's body, use of sexually degrading words to describe an individual, suggestive or obscene letters, notes or invitations.
- Physical conduct such as touching, assault, impeding or blocking movements.
- Retaliation for making harassment reports or threatening to report harassment.

Harassing conduct does not need to be "motivated by sexual desire to support an inference of discrimination on the basis of sex." *Oncale v. Sundowner Offshore Sers., Inc., 523 U.S. 75 (1998).* It is essential, however, that the employee somehow establish that the behavior at issue "actually constituted 'discrimination . . . because of *sex."* Such evidence may include examples of behavior of a sexually oriented nature or conduct that has offensive sexual connotations.

Moreover, companies should not assume simply because conduct does not involve sexual overtones that it does not constitute sexual harassment. Sexual harassment need not involve overtly sexual behavior, such as groping and unwanted propositions. Rather, courts continue to hold that behavior based upon stereotypical notions relating to an individual's gender also constitutes sexual harassment.

Furthermore, an employee need not show that he or she suffered any tangible job detriment as a result of the sexual harassment to establish a hostile environment claim. Nor does the employee have to demonstrate that the conduct seriously affected his or her psychological well-being or led him or her to suffer other types of personal injury. In *Harris v. Forklift Systems, Inc., 510 U.S. 17 (1993),* the U.S. Supreme Court held that the proper focus of an inquiry in a hostile environment claim should be on the nature of the conduct, not the psychological impact such conduct has on the employee. The Supreme Court held that conduct that does *not* create an "objectively hostile or abusive work environment" (i.e., an environment that a "reasonable person" would find hostile or abusive) is not sexual harassment.

In *Oncale v. Sundowner Offshore Servs., Inc.*, the U.S. Supreme Court held that the "objective severity of the harassment" should be judged from the perspective of a "reasonable person" in the employee's position," considering the totality of the circumstances and the social context in which the behavior occurs. Yet, even if a reasonable person would consider an environment to be abusive, unless the environment is also "subjectively perceived" by the employee to be abusive, the terms of his/her employment have not been "altered" sufficiently to state a claim of sexual harassment under Title VII.

COMPANY LIABILITY FOR SEXUAL HARASSMENT

Companies can become liable for workplace sexual harassment committed by supervisors, non-management employees and even non-employees (such as customers or vendors). Additionally, in certain circumstances, companies can become liable to those not harassed if other similarly situated employees are favored because they welcome a supervisor's sexual overtures.

Liability for the Acts of Supervisors

In 1990, the EEOC issued its *Policy Guidance on Sexual Harassment* that describes what reasonable measures companies need to take to avoid liability for the sexual harassment conduct of its managers/supervisors. According to the Guidance, "an company will *always* be held responsible for acts of 'quid pro quo' harassment," regardless of whether the company knew or should have known about the harassment, or whether the company approved of the supervisor's actions."

With regard to hostile environment claims, the EEOC Guidance states that an company will be held liable for the acts of its supervisors in situations where the company had "actual or constructive knowledge" that sexual harassment was occurring and "failed to take immediate and appropriate corrective action." EEOC instructs that absent the presence the of a "strong, widely disseminated, and consistently enforced company policy against sexual harassment, and an effective complaint procedure," employees could reasonably believe that a harassing supervisor's actions will be ignored, tolerated, or even condoned by upper management. On the other hand, the EEOC Guidance also instructs that such a preventive program, coupled with a record of taking effective remedial action when complaints of harassment are made, could effectively shield a company from liability for hostile environment sexual harassment committed by supervisors.

In *Ellerth* and *Faragher*, the U.S. Supreme Court established standards for assessing company liability for supervisory harassment, which are very similar to those set forth in the EEOC's 1990 Policy Guidance. The Supreme Court held that an company's liability for the acts of a supervisor should be judged by federal common law agency principles regardless of whether the harassment is characterized as "quid pro quo" or hostile environment. The Court noted that the focus in assessing company liability for supervisor harassment should not rest on the category of harassment at issue, but rather on the nature of actions taken by the supervisor.

The Supreme Court in *Ellerth* and *Faragher* also explained that in situations where a supervisor takes "tangible employment actions" in furtherance of his or her harassing conduct, such actions will be presumed to be the "acts of the company." Thus, a company will be strictly or automatically liable for such actions regardless of whether the company knew the acts had taken place, and regardless of whether the tangible employment action occurred in the context of a quid pro quo or hostile environment harassment situation. Tangible employment actions include, by way of example, hiring, firing, failing to promote, or reassigning the employee to a significantly different job.

However, according to *Ellerth* and *Faragher*, the company will not be automatically liable where the offending supervisor takes no tangible employment action. In such circumstances, the company can present an affirmative defense to liability or damages if it can prove the following: (1) that it exercised reasonable care to prevent and promptly correct any sexually harassing behavior by publishing an anti-harassment policy with a complaint procedure; and (2) that the employee unreasonably failed to take advantage of any preventive or corrective opportunities provided by the company or to otherwise avoid harm. The Court noted that the purpose of the affirmative defense was to give companies an "incentive to prevent and eliminate harassment" and require employees to "take advantage of [any] preventive or remedial apparatus" provided by their companies.

Liability for the Acts of Coworkers

Companies will be held liable for coworker harassment if it knew or should have known of the harassment and failed to take immediate and appropriate corrective action. The EEOC regulations specifically provide that "an company is responsible

for acts of sexual harassment in the workplace where the company (or its agents or supervisory employees) knows or should have known of the conduct, unless it can show that it took immediate and appropriate corrective action." *29 C.F.R. § 1604.11(d) (1993)*. This standard for assessing company liability for coworker harassment is a "negligence standard." In order to avoid being found negligent and, therefore, liable for coworker sexual harassment, companies are strongly encouraged to develop sexual harassment prevention programs, as discussed below.

Liability for the Acts of Non-Employees

A company will be liable for the sexually harassing conduct of non-employees when the company knows, or should have known, of the conduct and fails to take immediate and appropriate corrective action. The extent of the company's control over the conduct of the non-employee who committed the harassment will be taken into account.

Liability To Those Not Harassed

Employees may have a cause of action for hostile environment sexual harassment even when they are not directly subject to the harassing behavior. Thus, sexual harassment may occur where employment benefits are granted because of one employee's submission to a supervisor's request for sexual favors, but other equally or better qualified employees are denied those benefits. *29 C.F.R. § 1604.11(g) (1993)*.

Favoritism based upon the granting of sexual favors can constitute hostile environment sexual harassment because such an environment communicates the message that "the way for a woman to get ahead in the workplace is by engaging in sexual conduct." An example of this occurred in the Mitsubishi Motors case where female employees complained that participation in off-duty sex parties was a condition prerequisite to Job advancement with the company.

DEFENSES TO A CLAIM OF SEXUAL HARASSMENT

Defense Based on *Ellerth* and *Faragher* to a Claim of Hostile Environment Harassment by a Supervisor

In situations in which an employee alleges sexual harassment by a supervisor without suffering any tangible detriment, the company may establish an affirmative defense based upon a showing of two elements. First, the company must show that it exercised reasonable care to prevent and promptly correct any sexually harassing behavior. Second, the company must show that the complaining employee unreasonably failed either to take advantage of preventive or corrective opportunities provided by the company or otherwise to avoid harm. The availability of this affirmative defense clearly depends upon the company's *proactive* steps, both prior to the harassing behavior and in response to complaints.

Employee Welcomed the Alleged Sexual Advances

The proper inquiry is not whether the participation in sexual conduct was voluntary, but whether it was unwelcome. This distinction was intended to cover situations where employees are coerced into engaging in sexual behavior due to feeling compelled to do so. An employee who was once consensually involved with the alleged harasser will face greater difficulty in demonstrating that the conduct in question was "unwelcome." An employee who terminates a consensual sexual relationship with a supervisor may have to prove that adverse employment decisions were made against him or her because of a refusal to resume the relationship.

Harassment Not Severe or Pervasive

A hostile environment claim usually requires a pattern of offensive conduct. Unless the conduct is quite severe, as in the case of some physical sexual harassment, a single or isolated incident of offensive sexual conduct or remarks generally will not suffice to create a legal claim of sexual harassment. The U.S. Supreme Court has identified several factors to determine whether the alleged harassment was sufficiently severe or pervasive, including: (1) the frequency of the discriminatory conduct; (2) its severity; (3) whether it was physically threatening, humiliating, or a mere offensive utterance; and (4) whether it unreasonably

interfered with the harassed employee's work performance.

STATUTORY REMEDIES AVAILABLE TO SEXUALLY HARASSED EMPLOYEES

Successful sexual harassment claimants are entitled to backpay, reinstatement to the job they lost, compensatory damages (for pain, suffering, humiliation, and embarrassment) in cases of intentional discrimination and punitive damages in cases where the company acted in a malicious or reckless manner. Under Title VII, the total amount of compensatory and punitive damages which a successful plaintiff can recover is capped at $50,000 - $300,000, depending upon the number of employees working for the Company. Also, the employee is entitled to recover her attorney's fees if she is successful in her lawsuit.

PREVENTIVE STEPS FOR COMPANIES

Establishing and Communicating an Effective Sexual Harassment Policy

Anti-harassment policies containing complaint procedures should be distributed periodically and companies should provide training to all employees to ensure that they understand their rights and responsibilities. The EEOC recommends that a sexual harassment policy and complaint procedure should contain, at a minimum, the following:

- Clear explanation of prohibited conduct;
- Protection against retaliation for complaining employees;
- Clearly described and accessible complaint procedure;
- Assurance of confidentiality to the best extent possible;
- Effective investigative process; and
- Assurance of immediate and appropriate corrective action when harassment has occurred.

An effective company policy for the prevention of sexual harassment should clearly describe the different types of conduct that constitute prohibited harassment. The policy should state that such conduct is also prohibited by state, federal and (where applicable) local law. The policy should further provide for an

employee's right to complain and participate in an investigation about sexual harassment without fear of retaliation. Furthermore, the policy must contain a reporting and complaint procedure affording employees more than one avenue of access to the complaint procedure.

The sexual harassment policy should explain the company's procedure for prompt and fair investigation of all sexual harassment complaints, usually discussing the degree of confidentiality to be expected. It also is important to provide for appropriate and immediate measures to be taken to discipline offenders and to prevent recurrence of violations. A policy also may state that, if the harassment has caused harm to an employee, the harm will be redressed.

Moreover, it is essential that the sexual harassment policy regularly be communicated to all employees to ensure they are aware of and understand the sexual harassment policy and its procedures. Toward this end, companies are well advised to be sure that each new employee receives a copy of the policy and to reissue the policy to each employee annually. A method for tracking its communication and receipt, such as obtaining a signed verification from each employee, is good practice.

Companies should not maintain their sexual harassment policies only in management binders or on office shelves. Current policies can be placed on an organization's Intranet and can thus be
available 24 hours per day. Encrypted computer signatures can validate that the policy has been received. However, for most companies a signed paper copy of the policy
will still be the most efficient method of insuring that each employee has received it.

Conduct Fair, Appropriate and Prompt Investigations of Sexual Harassment Complaints

At the outset of an investigation of a sexual harassment complaint, the company's representative should fully inform the complaining employee of his or her rights under the company sexual harassment policy, as well as under any other relevant policy, such as one relating to internal grievances. The company should then conduct a full and effective investigation that, at a minimum, generally includes interviewing the complaining employee, the alleged harasser, any witnesses to the

conduct, and any other person who may be mentioned during the course of the investigation as possibly having relevant information. The investigator should be an uninvolved individual, without first-hand knowledge of the alleged facts, who is capable and, ideally, experienced in undertaking an investigation and familiar with the policy's requirements.

The resulting determination should be communicated on a timely basis to the complaining employee and the alleged harasser. If sexual harassment is found, a prompt and effective remedy such as voluntary reassignment, rescheduling or transfer should be provided to the complaining employee, and suitable disciplinary action taken against the harasser. The company also should take steps to ensure that no further harassment occurs, and that there is no retaliation against the complaining employee or any other employee who participated in the investigation. Companies should document each step in the investigation process.

Take Appropriate and Effective Remedial Action

It is imperative that companies undertake prompt and effective remedial action to ensure that any sexual harassment ceases and does not recur, and to address the harassed employee's concerns. Companies should pay particular attention in choosing the action to be taken in response to the harassment claim, and they should continue to monitor the situation to ensure that the harassment has, in fact, ended.

While the employee victim is not entitled to decide what remedial action is appropriate and the harasser's discharge is not always necessary or advisable, companies must nevertheless determine those steps that will assist in making the harassed employee comfortable in the workplace and free of a recurrence. For example, grant the request for a leave of absence by the harassed employee, involuntary transfer of the harasser, or voluntary, non-retaliatory transfer of the victim could be appropriate in certain cases. Importantly, companies should not require the harassed employee involuntarily to change jobs or transfer to alleviate the situation, nor require any other significant changes in terms and conditions of his or her employment, to avoid a well-founded claim of retaliation be created.

Conduct Preventive Sexual Harassment Training

Among the most effective steps a company can take to limit liability for sexual harassment is the training of its employees in sexual harassment prevention. This

training should be in two parts.

First, all employees should be trained sufficiently to give them a basic understanding of sexual harassment including the applicable laws and of the company's specific policy for sexual harassment prevention and remedy. All employees will thereby at least minimally be sensitized to the issue of sexual harassment.

Second, management and senior staff should be further trained as to how to identify and remedy sexual harassment. This more sophisticated training often includes a comprehensive analysis of the company's harassment prevention policy as well as outlining the steps and scope of the investigation process. Managers should be trained regarding the conduct of the investigation, and the importance of appropriate and effective remedial action without retaliation in responding to any complaint.

It is imperative that managers receive a strong message from the company's top executives and its board of directors that acts of sexual harassment will not be tolerated. Through comprehensive, preventive sexual harassment training, the company can limit its potential exposure to sexual harassment liability; prevent some violations of law and policy; and ensure that claims are treated seriously, properly investigated, and remedied when necessary. Meaningful training also demonstrates and communicates the company's commitment to eliminating unlawful sexual harassment from its workplace.

The content of this article is intended to provide a general guide to the subject matter. Specialist advice should be sought about your specific circumstances.