



#MeToo, Adult Victims of Sexual Misconduct, & Legal Liability

2018 Arkansas School Boards Association
School Law Seminar

Title VII of the Civil Rights Act of 1964 (“Title VII”)

Why do I care about Title VII?

What does it do anyway?

Title VII prohibits discrimination in employment in hiring, firing, compensation, and terms, conditions or privileges of employment on the basis of race, color, religion, sex, or national origin.

Some History

- o Title VII was enacted one year after President Kennedy's second plea to Congress regarding civil rights. On employment discrimination specifically, Kennedy appealed to the democratic principal that no **MAN** should be denied employment commensurate with **HIS** abilities because of **HIS** race or creed or ancestry.

Because of . . .

SEX

No, not THAT kind...

It shall be an unlawful employment practice for an employer—

(1) to ... 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...

Sex as in gender

- “Sex” was added via an amendment to support the minority sex after a suggestion proposed by the National Women’s Party
- Despite opposition, the amendment passed and Lyndon Johnson signed the Civil Rights Act into law on July 2, 1964.
- For the first time in American history, private and public sector employers were prohibited from discriminating in employment on the basis of their gender.
- However, at that time, it was interpreted only to mean that the provision protected women from discrimination in employment due to the fact that they were female. Initially, discrimination due to pregnancy was still permissible.

What does sexual harassment
have to do with it?



Sex as in sexual harassment

- In 1986 the Supreme Court ruled that sexual harassment was always discrimination “because of sex”
- So, sexual harassment is a form of sex discrimination under Title VII
- Even when sexual harassment does not lead to economic injury, it is impermissible sex discrimination under Title VII
- Meritor Sav. Bank, FSB v. Vinson, 477 U.S. 57 (1986)

So, what is sexual harassment?

(1) Quid Pro Quo Sexual Harassment

(2) Hostile Work Environment

Quid Pro Quo

- o Sexually harassment where an individual in an authoritative role offers or hints that they will give a subordinate something of benefit in return for satisfaction of a sexual act

Hostile Work Environment

- o Employee must prove that (1) there was unwelcome harassment; (2) the harassment was based on sex; (3) the harassment was sufficiently severe or pervasive as to alter the terms or conditions of employment and create an abusive working environment; and (4) the employer knew or should have known of the harassment.

EEOC defines sexual harassment:

Unwelcome sexual advances, requests for sexual favors, or other verbal or physical conduct of a sexual nature when:

- ① submitting to the unwelcome conduct was explicitly or implicitly a term or condition of an individual's employment
- ① submission to or rejection of such conduct was the basis for employment decisions, or
- ① the offending conduct has the purpose OR effect of unreasonably interfering with an individual's work performance or creating an intimidating, hostile, or offensive working environment

What it is not...

- Generally speaking, it can't be an isolated instance of non-severe misconduct.
- Title VII is not to become a “general civility code”
- Thus, it is a very difficult legal task to establish the fourth element in a hostile work environment claim - that the “harassment was so severe or pervasive as to alter a term, condition, or privilege of employment.”
- A person must show “that the workplace is permeated with discriminatory intimidation, ridicule, and insult.”
- *Scusa v. Nestle U.S.A. Co., Inc.*, 181 F.3d 958 (8th Cir. 1999)

Totality of the Circumstances

- To determine a hostile or abusive work environment, the totality of the circumstances must be considered:
- First – would a “reasonable person” have found it to be that way?
- Second – did the victim actually subjectively perceive it that way?
- *Harris v. Forklift Sys., Inc.*, 510 U.S. 17, 114 S. Ct. 367 (1993)

Same-sex harassment

- Supreme Court later held (1998) that even when the harasser and the harassed are of the same sex there is liability under Title VII
- *Oncale v. Sundowner Offshore Servs.*, 523 U.S. 75, 118 S. Ct. 998 (1998)

Employer Liability

o Supervisor/Manager
harassment of
employee:

-Employer is held
vicariously liable

o Coworker
harassment:

-Employer liable only
if knew or should
have known about the
harassment

Non-employee

- Some jurisdictions have held that even when the harasser is a non-employee in the workplace environment, an employer is not shielded from liability under Title VII if the employer knew or should have known about the harassment

Examples of Potential Sexually Harassing Behavior

- ① Sharing sexually inappropriate images or videos or posters, such as pornography, with co-workers or displaying the same
- ① Sending suggestive letters, notes, or e-mails
- ① Telling lewd jokes, or sharing sexual anecdotes
- ① Making inappropriate sexual gestures
- ① Staring in a sexually suggestive or offensive manner, or whistling
- ① Making sexual comments about appearance, clothing, or body parts
- ① Inappropriate touching, including pinching, patting, rubbing, or purposefully brushing up against another person
- ① Asking sexual questions or making offensive comments about someone's sexual lifestyle choices

Quiz Time!

- o Music teacher Matt is crushing hard on Math teacher Molly. He doesn't want anyone to know, so he really doesn't speak with her much at the school other than in passing. However, he decided to send her messages on Facebook each day telling her things like she has the best backside of any other teacher on campus. Molly is disgusted and ignores the messages. However, when she gets a picture of Matt's genitals, she finally decides to file a complaint.
- o Title VII problem for the district?
- o Why or why not?
- o What questions or changes in the fact pattern might make a difference?

Quiz Time!

- ① Principal Pete notices that Science teacher Samantha smiles at him a lot. They begin to flirt and then they start a texting relationship. He gave her high marks on her evaluation. A month or two later, they start sleeping together. She breaks it off, but not before another employee reported the relationship to the Superintendent.
- ① Title VII problem for the district?
- ① Why or why not?
- ① What questions or changes in the fact pattern might make a difference?

Quiz Time!

- Superintendent Stewart gets easily annoyed with Principal Paul. Principal Paul is not openly gay, but people suspect he might be. In a series of meetings with other principals, administrators, and teachers, Superintendent Stewart makes several inappropriate jokes about homosexuals and always seems to eyeball Principal Paul when he does it. One day, he followed that up with, “why don’t you tell us if that is true, Principal Paul?,” suggesting that he would know because he is a homosexual.
- Title VII problem?
- Why or why not?
- What questions or changes in the fact pattern might make a difference?

Quiz Time!

- ① English teacher Erik is a funny guy. Most teachers really like him; he is gregarious but also can be a bit loud and obnoxious at times. One cold day in the teacher's lounge, many of the teachers had stayed at school to eat lunch. Erik told a crude joke and used the name Sunny for the female in the joke. Spanish teacher Sunny was also in the room and was very offended. She reported him.
- ① Title VII problem for the district?

But, what if ...

- o It turns out English teacher Erik has actually been doing things similar to this quite often because he finds Spanish teacher Sunny very attractive. Nobody has said anything because he is a likeable guy and nobody figured he meant any harm even though Spanish teacher Sunny did seem shy and uncomfortable when he did it. Even Principal Paul had been in the room a few times without saying anything to him so none of the teachers felt it was necessary.

How do we protect a school district from liability?

- ① have an anti-harassment policy in place
- ① have a complaint procedure in place
- ① a school may also avoid liability if it can show that it immediately investigated a complaint of harassment, followed by prompt and appropriate remedial action

- An employer will not be liable for sexual harassment if it takes prompt remedial action which is reasonably calculated to end the harassment once the employer knew or should have known about the harassment. *See Carter v. Chrysler Corp.*, 173 F.3d 693, 702 (8th Cir. 1999).

o What questions would you have for a potential victim of sexual harassment if conducting an internal investigation?

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