SEXUAL HARASSMENT AND DISCRIMINATION

WHAT IS IT?

SEXUAL HARASSMENT IS

- Unwelcome and offensive conduct that is based on sex (including pregnancy)

IT IS UNLAWFUL TO HARASS A PERSON BECAUSE OF THEIR SEX

- Sexual Harassment can include:
  - Requests for sexual favors
  - Unwelcome sexual advances
  - Verbal or physical harassment of a sexual nature
  - Offensive remarks about a person's sex, e.g., comments about women in general

WHAT IS OFFENSIVE CONDUCT?

- Offensive jokes, slurs, epithets or name-calling
- Physical assaults, threats or intimidation
- Ridicule, mockery, insults or put-downs
- Offensive objects or pictures
- Interference with work performance

WHO CAN BE THE HARASSER?

- The victim's supervisor
- A supervisor from another section or area
- An agent of the employer – independent contractor or service provider brought into the office by the employer
- A co-worker
- A non-employee, e.g., customer or client
- The harasser can be a man or a woman, and the victim and harasser can be the same sex

WHO IS THE VICTIM?

- The victim does not have to be the actual target of the offensive conduct. A victim can include:
  - Another employee who witnesses the conduct;
  - A client; or
  - Anyone else affected by the offensive conduct.

SEXUAL HARASSMENT HAS TWO CATAGORIES

QUID PRO QUO

HOSTILE WORK ENVIRONMENT

QUID PRO QUO - "THIS FOR THAT"

- When a job, job benefit, or the absence of a job detriment is explicitly or implicitly conditioned upon an employee's acceptance of sexual conduct.

HOSTILE WORK ENVIRONMENT:

- Unwelcome verbal or physical conduct of a sexual nature that a reasonable person would consider sufficiently severe or pervasive to alter the conditions of employment and create an abusive working environment.

QUID PRO QUO

Moody v. Atl. City Bd. of Edu., 870 F.3d 206 (3rd Cir. 2017)

- Custodial foreman with discretion to select substitute custodians to work at the school and to assign work made sexual comments to plaintiff (substitute custodian) and offered to assign her more hours in exchange for sexual favors. Foreman also touched plaintiff inappropriately and sent explicit sexual texts. Foreman went to plaintiff's house and demanded sex. Plaintiff felt job was threatened if she refused sexual advances and submitted. When she told foreman it would not happen again, her hours were reduced.

MOODY V. ATL. CITY BD. OF EDU., cont'd

- After investigation by employer found no harassment, Employee sued the school district.
- District's MSJ granted with court finding harasser not supervisor and that employee didn't suffer any tangible employment action. Also noted District's prompt remedial action.
- Circuit court reversed noting a reasonable factfinder could find: foreman's actions sufficiently severe or pervasive to constitute sex harassment; that foreman was plaintiff's supervisor for purposes of *respondeat superior* liability because he controlled work assignments and hours.

HOSTILE WORK ENVIRONMENT

HERNANDEZ V. FAIRFAX COUNTY, 719 F. APP'X 184 (4TH CIR. 2018)

- Male fire station captain – female firefighter
- Inappropriate touching and inappropriate suggestive comments lead to complaint to fire captain's boss; fire captain starts to document female's activities in binder.
- Female ultimately transferred and then reprimanded for aggressive confrontation during a basketball game. Employee sued claiming hostile environment and retaliation.

HERNANDEZ V. FAIRFAX COUNTY, cont'd

Circuit court reversed MSJ for defendant finding a reasonable jury could:

- Find the fire captain's conduct was sufficiently severe or pervasive to constitute hostile work environment.
- Conclude that the fire captain's conduct was imputable to county because:
  - County knew of the binder
  - Never instructed fire captain to desist in tracking employee

Remanded to determine if written reprimand was disproportionately severe and retaliatory.

ZETWICK V. CTY. OF YOLO, 850 F.3D 436 (9TH CIR. 2017)

- Female county correctional officer brought action against a male sheriff alleging that the sheriff created a hostile work environment, based on unwelcome hugs and at least one unwelcome kiss.
- The proper standard is whether the defendant's conduct was "severe *or* persuasive." Summary judgement is appropriate only if the conduct was "*neither* severe *nor* persuasive enough to alter the conditions of employment."

SAME SEX HARASSMENT

- In *EEOC v. Hob Bros. Const. Co., LLC.*, 731 F.3d 444 (7th Cir. 2016), court of appeal upheld lower court decision holding that plaintiff was harassed because of sex where plaintiff's crew superintendent directed "sex-based epithets like 'fa--ot,' 'pu—y,' and 'princess'" at plaintiff's masculinity.
- In *Robertson v. Siouxland Cmty. Health Ctr.*, 938 F.Supp. 2d 831 (N.D. Iowa 2013), the court found plaintiff has adequately pleaded that she was subjected to discrimination or harassment because of sex. Plaintiff alleged her female supervisor was "inappropriately infatuated with [plaintiff's] sexual orientation, because the supervisor sent a number of inappropriate texts and emails about her attraction to Plaintiff and her curiosity about hooking up with a woman."

IS THE HARASSMENT OBJECTIVELY HOSTILE?

In deciding if the conduct rises to actionable harassment, courts have considered:

The frequency of the conduct;

The severity of the conduct;

Whether it is physically threatening of humiliating or merely an offensive utterance; and

Whether it unreasonably interferes with the plaintiff's work performance.

CAN ISOLATED INCIDENT BY NON-SUPERVISOR RESULT IN LIABILITY TO EMPLOYER?

BROOKS V. CITY OF SAN MATEO, 229 f.3D 917 (9TH Cir. 2000)

Employee was touched on stomach and breast by co-worker. When reported, the offending employee was placed on leave pending investigation. Although not the employee's first act of assault, it was the first reported.

When complaining employee returned to work after a leave of absence, she was ostracized by male employees and her supervisors mistreated her, including in relation to shifts, vacation time and sick leave, as well as giving discipline disproportionate to other employees and negative job evaluations.

BROOKS

- On summary judgment, the trial court found no hostile work environment, holding the incident was not severe or pervasive enough to give rise to hostile work environment.
- Ninth Circuit upheld lower court, noting the offensive conduct must be subjectively as well as objectively offensive, based on the totality of the circumstances. It determined that because there was
  - No likelihood of the incident being repeated
  - No physical injury or harm requiring medical intervention, and
  - Employer took immediate action
- There was no remedy under Title VII for sex harassment, and
- The employer could not be held liable for retaliation because there was no adverse employment action.

ARE THREATS FROM A SUPERVISOR ENOUGH?

Both the Ninth and Second Circuit courts have held that threats to take some tangible employment action, such a termination, are sufficient to meet the requirements of a quid pro quo claim.

The Ninth Circuit said that a tangible employment action occurs when, in order to avoid a supervisor's threatened action, the employee complies with the supervisor's demands. In *Holly D. v. Cal. Inst. Of Tech,* 339 F.3d 1158 (9th Cir. 2003), the court found the supervisor had imposed the added requirement that she submit to his weekly sexual abuse in order to retain her job.

ARE THREATS A TANGIBLE EMPLOYMENT ACTION?

- The same has not been true in the Southern District of Texas, where at least two courts have declined to find a tangible employment action where employees submitted to the sexual advances to avoid the threatened employment action.

PREVENTION IS THE BEST TOOL TO ELIMINATE SEXUAL HARASSMENT IN THE WORKPLACE.

- Employers are encouraged to take steps necessary to prevent sexual harassment from occurring. They should clearly communicate to employees that sexual harassment will not be tolerated. They can do so by providing sexual harassment training to their employees and by establishing an effective complaint or grievance process and taking immediate and appropriate action when an employee complains.

SEX DISCRIMINATION

UNLAWFUL EMPLOYMENT PRACTICES BASED ON SEX

DISPARITY IN PAY

DISCRIMINATION BECAUSE OF PREGNANCY

TYPES OF DISCRIMINATION CLAIMS

- Title VII prohibits discrimination in employment based on race, color, religion, sex (including gender identity and sexual orientation and pregnancy), national origin, age (40 or older), disability or genetic information (protected class).
- Title VII also prohibits retaliation for complaining of discrimination or taking any other step to report these discriminatory policies.

DISPARATE IMPACT OR DISPARATE TREATMENT

- Disparate Impact claims are made when apparently neutral policies or practices have a disproportionately negative effect on applicants or employees of a protected class.
- Disparate treatment claims are made when employers treat employees differently because of their membership in a protected class.

DIFFERENT EMPLOYMENT CONDITIONS BASED ON SEX MAY BE PERMISSIBLE

- In *Bauer v. Lynch*, 812 F.3d 340 (4th Cir.) *cert. denied,* 137 S. Ct. 372 (2016), a male plaintiff sued the FBI because he could not do the number of pushups required of a male recruit, where female recruits were not required to obtain that same number. The district court found the unequal requirements were counter to Title VII's prohibition on sex discrimination.

BAUER V. LYNCH, cont'd

- On appeal, the Circuit Court ruled that the use of gender-normed physical fitness test for assessing recruits was not discriminatory because "the physiological differences between men and women impact their relative abilities to demonstrate the same levels of physical fitness."
- The Court further found that utilizing physical fitness standards that distinguish between the sexes on the basis of their physiological differences, but which impose an equal burden of compliance on both sexes, requiring the same level of fitness of each, does not contravene Title VII.

SAME GENDER SEX DISCRIMINATION

Mayes v. WinCo Holdings, Inc., 846 F.3d 1274 (9th Cir. 2017)

- Female freight crew supervisor at grocery store sued after she was fired for taking stale cake from bakery to share with co-workers.
- Employee sued under Title VII alleging the firing was not for theft and dishonesty but as pretext to allow a man to be put in charge of the freight crew.
- Employee offered examples of discriminatory comments and specific indirect attacks on the employer's credibility, alleging the female manager did not like a "girl" running the freight crew, replaced employee with male on a safety committee because he would be "better in the position," and criticized employee when she took leave to care for her children.

MAYES V. WINCO HOLDINGS, INC., cont'd

- Trial court granted summary judgment to defendant.
- Ninth Circuit reversed, finding that employee had submitted both direct and indirect evidence that the reasons stated for her termination were pretext and the matter should proceed to trial.
- Don't discount possible discrimination just because it comes from person of the same gender as the employee who is complaining.

DISCRIMINATION DUE TO PREGNANCY "LIGHT DUTY" ACCOMMODATIONS

- *Young v. United Parcel Serv., Inc.*, 135 S.Ct. 1338 (2015)

After taking leave for successful *in vitro* fertilization, pregnant employee was deemed unable to perform essential lifting functions functions. Although UPS provided accommodations to employees who were injured on job, had disability covered by ADA or had lost Dept. of Transportation certificates, it refused to provide accommodations to pregnant employees.

After both trial and appeals court ruled for UPS, SCOTUS revered and remanding holding that failing to provide accommodations for non-pregnant works, but not pregnant workers raises a material question as to whether UPS's policies are more favorable to non-pregnant workers.

DISCRIMINATION DUE TO PREGNANCY LACTATION

EEOC v. Houston Funding II Ltd., 717 F.3d 425 (5th Cir. 2013)

Employee took leave of approximately six weeks to have baby , remaining in contact with office throughout leave. When she was preparing to return to work, employee asked to use breast pump at work; her request was denied. She asked to use a back room to pump breast milk, but was advised by a partner that her position was filled. She later received a letter of termination stating she had abandoned her job.

Employee filed EEOC charge and EEOC sued alleging sex discrimination. The trial court granted defendants summary judgment motion finding that termination due to lactation did not qualify as sex discrimination. On appeal the circuit court remanded ruling that lactation was related to female physiology and was a related medical condition of pregnancy.

DISCRIMINATION IN PAY AND COMPENSATION

- Discrimination in pay is prohibited by Title VII of the Equal Rights Act
- Discrimination in pay is prohibited by the Equal Pay Act of 1963 (EPA)
- Discrimination in pay is prohibited by the Age Discrimination in Employment Act (AEDPA)
- Discrimination in pay is also prohibited by Title I of the Americans with Disabilities Act of 1990. (ADA)

EQUAL PAY ACT

Corning Glass Works v. Brennan, 417 U.S. 188 (1974)

The EPA is violated when the employee show that:

- the employer is paying different wages to employees of the opposite sex
- That the employees are performing jobs which require equal skill, effort and responsibility
- That the employees have similar working conditions.

And when the employer fails to show that the disparity in pay is due to a seniority system, a merit system, a system that measures earning by quantity of production, or a differential based on any factor other than sex.

SEX DISCRIMINATION IN PAY - DOES PRIOR SALARY MATTER?

- In *Rizo v. Yovino,* No. 16-25372, 2018 U.S. App. LEXIS 8882 (9th Cir. Apr. 9, 2018)* a female employee complained she was paid less than male employees doing the same work. The County conceded it paid her less, but argued the difference was based on factors other than sex, an affirmative defense under the Equal Pay Act. (* SCOTUS just remanded this case because judge who wrote opinion died before it was issued.)
- The Ninth Circuit upheld the lower court's denial of summary judgment for defendants reasoning that prior salary alone, or in combination with others, cannot justify a wage differential because prior salaries were often determined on the basis of sex.
- In future, "any factor other than sex" will be limited to "legitimate job-related factors, such as a prospective employee's experience, education, ability or prior job performance.

ECONOMIC FACTORS MAY (OR MAY NOT) BE "FACTOR OTHER THAN SEX" JUSTIFYING PAY DIFFERENTIAL

Lauderdale v. Ill. Dep't of Human Servs.,876 F.3d 904 (7th Cir. 2017),

- When female superintendent of state school for deaf was offered dual position as superintendent over schools for deaf *and* visually impaired after male superintendent of school for visually impaired resigned, female asked to be paid at least what former male superintendent had been paid for the one school. Defendant counter-offered a lower salary, which female ultimately accepted. She sued claiming new salary violated EPA.

LAUDERDALE V. ILL. DEP'T OF HUMAN SERVS. ECONOMIC FACTORS DO JUSTIFY DISPARITY

- Court granted summary judgment to defendants and 7th Circuit affirmed, finding:
  - Employer/defendant rightfully believed the new salary fell under a detailed pay plan for state employees which applied to the new position.
  - Employer's application for special approval of a pay increase greater than allowed under the pay plan was denied.
  - Employee's prior salary was a legitimate factor other than sex which was considered in making the pay determination and plaintiff had not claimed that her prior wage was the result of discrimination.
  - The evidence in the record supported the employer's genuine concern about ongoing budget crises.

DINDINGER V. ALLSTEEL, INC., 853 F.3D 414 (9TH CIR. 2017) ECONOMIC FACTORS NOT JUSTIFY DISPARITY

- Female employees sued claiming they were paid less than men performing equal work, presenting evidence that there were paid less than at least two other males employees in same position performing equal work.
- Defendants claimed seniority differences and economic conditions justified the disparity in pay, to which plaintiffs presented evidence of pretext – other females employees who were paid less than male employees – "me too" evidence.
- Eighth Circuit affirmed lower court verdict for the plaintiff after trial noting that defendants did not show that cost-saving measures, such as job restructuring or a freeze of merit-based pay raises caused the pay disparity, particularly where evidence suggested defendant did not uniformly rely on seniority in setting wages.

NEVADA CASE LAW REGARDING EQUAL PAY

University and Community College System of Nevada v. Farmer, 113 Nev. 90, 930 P.2d 730 (1997)

White female sued University System claiming pay discrimination when System hired black male faculty member at higher wage before it hired her. She claimed the higher wage was based on the fact that the black professor was male.

- System had an unwritten "minority bonus policy in its affirmative action plan which was designed to increase minority teaching staff by allowing a department to hire additional faculty members after an initial placement of minority candidate.
- When female sued the Nevada Supreme Court overturned a jury verdict for the female finding that the constitutionally implemented affirmative action plan was a business-related reason for the wage disparity and qualified as a legitimate factor other than sex.

PATRAW V. GROTH, 127 NEV. 1165 (2011)

Female coach sued UNR on various claims, including sex discrimination and retaliation, claiming she was not paid as much as head coaches of men teams.

On appeal, NSCT upheld summary judgment for employer noting that employee failed to present evidence that the coaching positions were substantially equal and that the University demonstrated significant differences in the responsibilities and obligations among its various head coaching positions, justifying the differences in salaries.

QUESTIONS DISCUSSION