A New Perspective on Sexual Harassment Legal Liability

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Olympus Spring Risk Conference
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What we will discuss.

• What is sexual harassment?
• Why do we care?
• The effects of sexual harassment.
• How to combat sexual harassment.
  – Traditional and New Approaches.
    • Policy manual information.
• Contemporary cases.
Top Stories

Top stories

Former campaign worker sues Madigan fund, Democratic Party in sexual harassment...
Chicago Tribune
5 hours ago

Sexual harassment in chemistry put under the microscope
Chemistry World
1 day ago

Ex-Madigan campaign worker files federal lawsuit alleging sexual harassment
ABC7 Chicago
10 mins ago
Top Stories
(about one hour later)

Top stories

Malcom Maddox out at WXYZ after suit accuses him of sexual harassment
Detroit Free Press
4 hours ago

Former campaign worker sues Madigan fund, Democratic Party in sexual harassment
Chicago Tribune
1 hour ago

Olympia theater's co-founder resigns amid claims sexual-harassment allegation
The Seattle Times
24 mins ago
Top Stories
(a few days later)

Top stories

- Milwaukee Fire Department records detail sexual harassment that led to...
  - Milwaukee Journal Sentinel
  - 14 hours ago

- Sexual harassment charges keep coming: 'The abuse at work never seems to end'
  - Richmond Times-Dispatch
  - 2 days ago

- Former Statehouse whistleblower reacts to latest sexual harassment scandal
  - KCCI.com
  - 24 mins ago
Sexual Harassment and the Equal Employment Opportunity Commission

• FY 2017
  – 84,254 total charges filed with EEOC
    • Race- 28,528 (33.9%)
    • Sex- 25,604 (30.4%)
    • National Origin- 8,299 (9.8%)
    • Religion- 3,436 (4.1%)
    • Color- 3,240 (3.8%)
    • Retaliation- 41,097 (48.8%)
    • Age- 18,376 (21.8%)
    • Disability- 26,838 (31.9%)
    • Equal Pay Act-996 (1.2%)
    • Genetic Information Act-206 (.2%)
What is sexual harassment?

• Unwelcome sexual advances.
• Requests or demands for sexual favors.
• Other verbal or physical conduct of a sexual nature that:
  – affects an individual’s employment;
  – unreasonably interferes with his/her work performance; or
  – creates an intimidating, hostile or offensive work environment.
Two Forms of Sexual Harassment

- Quid Pro Quo
- Hostile Work Environment
A basic overview of sexual harassment?

It is unlawful to harass any person (an applicant or employee). Sexual harassment” or unwelcome sexual advances, requests for sexual favors, and other verbal or physical harassment of a sexual nature.

Harassment does not have to be of a sexual nature and includes offensive remarks about a person’s sex. For example, it is illegal to harass a woman by making offensive comments about women in general.

Both victim and the harasser can be a woman or a man, and can be the same sex.

Although the law doesn’t prohibit teasing, offhand comments, or isolated incidents that are not very serious, harassment is illegal when it is so frequent or severe that it creates a hostile or offensive work environment or when it results in an adverse employment decision (such as the victim being fired or demoted).

The harasser can be the victim's supervisor, a supervisor in another area, a co-worker, or someone who is not an employee such as a client or customer.
Why?

• Compliance with federal and state laws including Title VII of the Civil Rights Act.

• To avoid lawsuits and potential liability.

• To be more efficient and productive.

• **Because we care about our employees and we want our organizations to be great places to work.**
Who is affected?

Sexual Harassment affects and harms us all.

The most important part of your organizational values is or should be to ensure that all employees are treated with respect and dignity.

Engaging in, condoning or not reporting sexual harassment directly conflict with those values.
Who is affected?

• Women
  – In a 2016 study performed by the EEOC, it was reported that 25%-85% of women have experienced sexual harassment in the workplace.
  – A study in the Journal of Applied Psychology found “the more that women observed hostility to toward other women at work, the lower their reported psychological well-being...and job satisfaction; lower psychological well-being in turn related to lower physical well-being...”
  – The lower well-being in-turn led to lower organizational commitment, higher job burnout and more job withdrawal.
Who is affected?

• Women
  – A Marketplace-Edison Research Poll found that nearly half of women who experienced harassment changed jobs or careers within 2 years.
Who is affected?

• Men
  – A recent Washington Post survey found that 10% of men have experienced sexual harassment in the workplace.
  – The Journal of Applied Psychology found the results were the same for men. “The results for men were identical to those for women.” Like the women in the study, “men were negatively affected the more they observed uncivil and harassing behavior directed toward women and the more they perceived [the organization] as lax about sexual harassment.”
Who is affected?

- **The Organization**
  - According to the EEOC, since 2010, private employers have paid out $698.7 million to employees alleging harassment through the Commission’s administrative enforcement prelitigation process alone.
  - Further, in 1994 the Merit Systems Protection Board, conservatively estimated that “as a result of sexual harassment, job turnover ($24.7 million), sick leave ($14.9 million), and decreased individual ($93.7 million) and workgroup ($193.8) productivity had cost the government a total of $327.1 million.”
  - The effect on the morale of employees and the organization is serious. Both men and women can find their work disrupted by sexual harassment, even if they are not directly involved.
The settlements and claims keep coming...

Congress Spent $115,000 in Taxpayer Money to Settle Sexual Harassment Claims
And the stakes keep getting higher…

**Sexual harassment costs Fox News up to $110 million in last nine months**

The company has paid $10 million in the last three months alone
And higher.

$168 Million Awarded in California Sex Harassment Suit

By ENJOLI FRANCIS  March 2, 2012

The California woman who won close to $168 million this week in a harassment suit against a Sacramento hospital -- possibly the biggest employment verdict for a single employee in U.S. history -- is "reeling" from the victory, her lawyer told ABC News.
# Recent Cases Involving Public Entities

**Sanchez v. California Dept of Corr., 2015 WL 3849673 (E.D.Cal. June 12, 2015).**

**Jury Verdict.**

- Hostile work environment.
- Retaliation.

**Statutes:**

- Title VII.
- California Fair Employment and Housing Act.

**Related Opinions/Documents:**


**Compensatory:** $550,000.

**Punitive:** $15,000.
Recent Cases Involving Public Entities

<table>
<thead>
<tr>
<th>Case</th>
<th>Statutes</th>
<th>Settlement</th>
</tr>
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</table>
• Retaliation. | • Compensatory: $250,000.  
Statutes:  
• Title VII.  
• Idaho Code § 67-5911. |
How do we combat sexual harassment?

• The most effective tool against sexual harassment is prevention.

• Harassment will not go away if ignored.

• If left unaddressed, the harassment will become more pervasive and severe and will become more difficult to remedy.
Prevention

• The traditional approach has been to develop procedures to implement a strategic defense against future lawsuits.
  – Reactive.
  – Learn from past and current lawsuits and/or cases.
  – Take what we learn and implement it in our policy and procedures manual.
The U.S. Supreme Court has set out standards of employer liability for supervisors in sexual harassment hostile work environment cases in two companion cases.
Faragher v. City of Boca Raton, 118 S.Ct. 2275 (June 26, 1998)

Faragher worked for the city as a lifeguard. She alleged that throughout her employment, two of her immediate supervisors created a sexually hostile environment for her and other female lifeguards. The hostile environment included repeatedly subjecting them to offensive touching and remarks.

The lifeguards worked out of a beach office with the supervisors, and had no contact with senior managers.

The city had a sexual harassment policy during plaintiff's employment, but it was never disseminated to the lifeguards or their supervisors.
Faragher v. City of Boca Raton

The Court outlined a defense for employers involved in sexual harassment suits but determined that any avenue to such a defense by the city was closed, noting the city's failure to disseminate its policy against sexual harassment, failure to keep track of supervisors' conduct, and the fact that the city's policy did not include any assurance that a harassing supervisor could be bypassed in registering complaints.
The Court recognized an affirmative defense to liability, even where a supervisor did create the actionable environment. The affirmative defense requires an employer to demonstrate that:

1) the employer exercised reasonable care to avoid harassment and to eliminate it when it might occur, and

2) the complaining employee failed to act with reasonable care to take advantage of the employer's safeguards and to otherwise prevent harm that could have been avoided.
Plaintiff's supervisor allegedly made repeated offensive remarks to her. He also allegedly threatened to deny her tangible job benefits, stating, after she gave no encouragement to his sexual remarks, that he could make her life "very hard or very easy."

He did not carry out any threats and she received a promotion while working there. Plaintiff did not inform upper management of the supervisor's conduct during her employment, but did her explanation for her resignation.
Employers are vicariously liable for supervisors who create hostile working conditions for those over whom they have authority.

In cases where harassed employees suffer no job-related consequences, employers may defend themselves against liability by showing that they quickly acted to correct the harassing behavior and that the harassed employee failed to utilize the employer's protection.

Such a defense is not available when the alleged harassment culminates in an employment action.
Personnel Policies and Procedures

• What does your policy manual say?
  – Work Environment?
  – Drug Free Workplace?
  – Workplace Violence?
  – Harassment?
Personnel Policies and Procedures

• Sexual harassment section.
  – Policy should include:
    • Clear definitions
    • Prohibited conduct
    • Employee responsibility
    • Complaint procedures
    • Retaliation
Sample Prohibited Conduct

• Includes but not limited to:
  – Sexual Flirtations
  – Verbal Abuse including that of a sexual nature
  – Graphic or suggestive comments about an individual’s dress or body
  – Sexually degrading words to describe an individual
  – The display of sexually suggestive objects or images.
Employee Responsibility

• Report any instances of harassment to the proper person.

• Cooperate with investigations
Supervisor Responsibility / Complaint Procedures

• Investigate the complaint in a prompt, impartial, and confidential manner.
  – Immediately notify organizational manager and legal counsel.

• At the conclusion of the investigation, the employee will be notified of the findings and conclusions.
Retaliation

• **DO NOT** retaliate against the complainant, victim, witnesses, etc.
What is retaliation

- Retaliation is any adverse action taken against an employee for filing a complaint or supporting another employee’s complaint.
  - Example- An employee files a complaint with her employer alleging that her supervisor made sexual advances toward her while at a conference. After filing the complaint, the supervisor reassigned her to a less desirable shift.
Retaliation

• **DO NOT** retaliate against the complainant, victim, witnesses, etc.
Retaliation

• According to the EEOC, Retaliation is the most alleged basis of discrimination in the federal sector and the most common discrimination finding in federal sector cases.
Retaliation

• It is important to understand retaliation to prevent it from occurring.
• Retaliation has a chilling effect on employees and the organization.
• Employees will be less likely to speak out against or to participate.
Retaliation

• Managers and supervisors must work diligently to ensure that retaliation is not permitted in the workplace.

• Conduct separate and focused training on retaliation for managers and supervisors.
Other examples of retaliation

- It could be retaliation if an employee alleges harassment and the employer:
  - reprimands the employee
  - transfers the employee to a less desirable position;
  - engages in verbal or physical abuse
  - threatens to make, or actually make reports to authorities
    - Example: reports immigration status or contacts police
  - increase scrutiny
  - spread false rumors
  - make the person's work more difficult (work schedule)
Retaliation

• DO NOT retaliate against the complainant, victim, witnesses, etc.
Some if not most harassment is never reported. Why?

- It is perceived as too risky.
- Employees don’t want to take the risk alone.
- Fear of retaliation.
- Don’t know where or whom to report.
- Don’t think anything will be done.
- They may not want to end someone’s career — they just want to stop the behavior.
Developing or Maintaining a Culture

• Empower and Inform Employees
  – Employees should know and comply with organizational policies and procedures.
  – Employees should know and whom to report incidents they experience directly, indirectly involved in or witness.
  – Employees should cooperate with investigations.
  – Employees should support victims of harassment.
Developing or Maintaining a Culture

• Empower and Inform Employees
  – Create and/or reinforce the message.
  – Seek input from key employees.
  – Consider forming a committee, team or group consisting of various departmental employees, genders, ages and responsibilities within the organization.
Developing or Maintaining a Culture

• Empower and Inform Employees
  – Obtain buy-in: Every employee should have a clear understanding of how the issue of sexual harassment will be prioritized, what their specific role in implementing policy will be, and how the organization will support them.
  – Reinforce the message: Reinforce the message through organizational communications such as newsletters, staff meetings and trainings. Be accessible and prepared to answer questions, give directions and provide leadership.
  – Keep the pulse: Fear of retaliation often prevents employees from reporting incidents. Regular check-ins, evaluations and anonymous culture surveys if done correctly are effective ways to gather important feedback.
Developing or Maintaining a Culture

• The message **must** come from the top.
• It must be clear that the organization cares about the policy and is invested in the employees and their well-being.
• Must be sincere.
• Lead by example.
• Build relationships.
• Build trust.
Developing or Maintaining a Culture

• How do we get the message out?
• Training.
• Training has not worked but still do it.
  – EEOC charge process.
  – But the EEOC admits:
    • “Much of the training done over the last 30 years has not worked as a prevention tool — it’s been too focused on simply avoiding legal liability.”
Developing or Maintaining a Culture

• Training
  – Strongly emphasize:
    • Sexual harassment is against policy and in some cases a criminal offense.
    • No one, regardless of the position or their contribution to the organization is above the policy.
    • There is a zero-tolerance policy for sexual harassment.
    • The organization has a plan (policy) in place to address sexual harassment.
Developing or Maintaining a Culture

• Training
  – Avoid videos.
  – Large groups, small groups.
  – Supervisors and managers.
  – Employees.
  – Vary the content.
Developing or Maintaining a Culture

• Training has not worked but still do it anyway.
  – Bystander Training. Instead of pigeon-holing employees into roles they may not want or may not see themselves as (harasser or victim) provide specific training for bystanders.
  – Bystander training equips everyone in the workplace to stop harassment because they can act as an intervenor.
  – A study published in Military Medicine found that soldiers who received bystander training were significantly more likely than those who did not to report having taken action when they saw harassment.
Developing or Maintaining a Culture

• Training
  – Bystander training includes instructions on talking to victims of harassment after an incident. Victims may feel isolated, and employees may not know if the interaction was consensual.
    • Example: “I saw that ______. Are you OK with that?”
Developing or Maintaining a Culture

• Training
  – Focus on middle management as a first line of defense.
  – One witness with decades of experience told the EEOC:
    • “If I had limited assets to improve the climate of any organization, I would invest ninety-five percent of them in middle managers. These are the people who make all of the difference in the day-to-day lives of organizations and people. When we train middle managers, we don’t just train them about how to spot and address problem behavior — we teach them empirically sound things to do and say when an employee seeks them out to discuss a problem.”
Developing or Maintaining a Culture

• Implementing policies and procedures that utilize traditional methods of sexual harassment prevention and integrate new ideas, perspectives methods along with a clear and consistent message is more effective than the traditional reactionary strategic defense against future lawsuits.
• More importantly, it is an opportunity to help build an organizational culture that fosters respect, transparency, and accountability and sends the message that this is a great place to work.
• The efforts to develop and maintain this culture creates trust and loyalty at every level, attracts and retains talent, builds a successful brand from the inside out where employees are more productive and happy.
Questions? Comments?
Recent Cases Involving Public Entities

<table>
<thead>
<tr>
<th>Case Name</th>
<th>Claims and Relevant Statutes</th>
<th>Damages or Settlements</th>
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</table>
**Statutes:**  
• 42 U.S.C. 2000e (Title VII).  
• Maine Human Rights Act, 5 M.R.S. §§ 4551, et seq. ("MHRA"). | • Compensatory: $85,000  
• Injunctive relief: During a six-year enforcement period, the employer agreed to:  
  • appoint an EEO coordinator and supervisor;  
  • revise policies and procedures;  
  • post notices; and  
  • provide discrimination training. |
## Recent Cases Involving Public Entities


**Jury Verdict:**

- Assault and battery.
- Intentional infliction of emotional distress.
- Wrongful termination.
- Retaliation.

**Statutes:**

- Title VII.
- New Hampshire common law.

**Compensatory:** $20,000 (assault and battery).

**Compensatory (retaliation and wrongful discharge):** $49,500.

**Attorneys' fees and costs:**

- Requested: $158,709.50.
- Awarded: $98,237.50.
Recent Cases Involving Public Entities

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<td>• Assault and battery.</td>
<td>• Compensatory: $20,000 (assault and battery).</td>
<td>• Title VII.</td>
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<td>• Attorneys' fees and costs:</td>
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<tr>
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<td>• Requested: $158,709.50.</td>
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## Recent Cases Involving Public Entities


**Jury Verdict.**

**Related Opinions/Documents:**
- *Balu v. City of New York, 2015 WL 4395479 (E.D.N.Y.).*

**Statutes:**
- Title VII.
- New York City Human Rights Law.

**Hostile work environment.**

**Retaliation.**

**Compensatory: $300,000.**

**Punitive: $25,000.**
# Recent Cases Involving Public Entities

**Legg v. Ulster City, 2014 WL 4642613 (N.D.N.Y. Aug. 20, 2014).**

**Jury Verdict.**

- Hostile work environment.
- Disparate treatment.
- Equal protection.
- Retaliation.

**Statutes:**
- Title VII.

**Related Opinions/Documents:**
- *Legg v. Ulster Cty, 2014 WL 5781299 (N.D.N.Y.).*

**Compensatory (Title VII):** $200,000.

**Compensatory (Section 1983):** $200,000.

**Attorneys' fees and costs:** Motion pending.

**Appeal:** Defendant's motion for reconsideration denied.
## Recent Cases Involving Public Entities


**Jury Verdict.**

**Related Opinions/Documents:**

**Statutes:**
- Title VII.
- Section 1983.

- Hostile work environment.
- Disparate treatment.
- Retaliation.

**Remittitur:**
- Compensatory: $80,000

**Compensatory:** $465,000.

- Attorneys' fees and costs:
  - Requested: $437,036 (fees) and $24,616.42 (costs).
  - Awarded: $260,389.29 (fees) and $24,616.42 (costs).
# Recent Cases Involving Public Entities

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<tr>
<td><strong>Jury Verdict.</strong></td>
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<td>Related Opinions/Documents:</td>
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<tr>
<td>• Hostile work environment.</td>
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<td>• Retaliation.</td>
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<td><strong>Statutes:</strong></td>
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<tr>
<td>• Title VII.</td>
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<td>• Compensatory: $100,000.</td>
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<td><strong>Remittitur:</strong> Motion Denied.</td>
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## Recent Cases Involving Public Entities


**Jury Verdict.**

- Hostile work environment.
- Retaliation.

**Statutes:**

- Title VII.
- PHRA.

**Remittitur:**

- Compensatory: $75,000.

**Compensatory:**

- $1,000,000.
- Attorneys' fees and costs:
  - Requested: $84,034.76.
  - Awarded: $84,034.76.
## Recent Cases Involving Public Entities

<table>
<thead>
<tr>
<th><strong>Case</strong></th>
<th><strong>Defendant</strong></th>
<th><strong>Verdict</strong></th>
<th><strong>Statutes</strong></th>
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<td>Disparate treatment.</td>
<td>Attorneys' fees and costs:</td>
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<td>Jury Verdict.</td>
<td></td>
<td>Requested: $456,061.50 (fees) and $35,144.91 (costs).</td>
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<td>Related Opinions/Documents:</td>
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<td>Statutes:</td>
<td>Awarded: $100,000 (fees) and $35,144.91 (costs).</td>
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<td>• <em>Hairston v. Prince George's Cnty.</em>, 2012 WL 5995451 (D. Md. Nov. 28, 2012).</td>
<td></td>
<td>• Title VII.</td>
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<td>• Md. Code State Gov't § 20-601.</td>
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<td>• Section 1983.</td>
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### Recent Cases Involving Public Entities

**Alexander v. City of Jackson Miss.,** 456 F. App'x 397 (5th Cir. 2011).

**Jury Verdict and Settlement.**

Related Opinions/Documents:


<table>
<thead>
<tr>
<th>Hostile work environment.</th>
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<tr>
<td>Retaliation.</td>
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</table>

**Statutes:**

- Title VII.
- Section 1983.

<table>
<thead>
<tr>
<th>Back pay and compensatory: $750,000.</th>
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<tbody>
<tr>
<td>Attorneys’ fees and costs:</td>
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<tr>
<td>Requested: $463,979.50 (fees) and $214,759.76 (costs).</td>
</tr>
<tr>
<td>Awarded: $185,591.80 (fees) and $78,309.98 (costs).</td>
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**Appeal:** The employer's motion for a new trial was granted.

**Settlement:** The parties agreed to settle for $249,986 and a requirement that the city alter its training and enforcement of sexual harassment policies.