Sexual Harassment in the Workplace: The Do’s, Don’ts, and Defenses of Handling Sexual Harassment Claims

Presented by:
Melanie Keeney and Kate Nash

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Introduction

• What are the applicable laws?
• What is administrative exhaustion?
• What are the categories of sexual harassment?
• Are supervisors subject to different standards of liability?
• What is the standard for claims of retaliation?
• Practical considerations for school law practitioners
• Recent developments and advanced issues
Sally is a probationary teacher at Heartbreak High. She teaches history and coaches the girl’s field hockey team. After a game one evening, Sally texts Bob, the Assistant Superintendent, that she needs to talk with him urgently about a conflict between students and some parent complaints. Bob has always had the “hots” for Sally and suggests that they meet at Hooters that evening. Sally agrees, and they meet for drinks. Sally talks about her problems and complains about how the football program gets all the money and her girls haven’t had new uniforms in years. She says she is tired of her girls being second class citizens. Bob agrees that football gets more money. In an effort to win her affection, he offers to talk to the school board about the problem. (Bob never does this.)
Bob starts to send Sally frequent text messages, suggesting that they spend more time together. They meet a few times (both are single), and Bob clearly wants the relationship to move to the next level and is getting pretty “touchy-feely.” Coworkers start to notice Bob’s interest in Sally and make comments on Facebook. Someone even takes a picture of Bob and Sally looking pretty chummy at a local bar and posts it on Snapchat with a snarky caption about the new stars of the Young and the Restless.
• Bob even joins the fray and posts some compromising pictures on Twitter. Sally is uncomfortable with the attention and starts to get “creeped out” by Bob’s increasing interest in her. He is now texting on a hourly basis. She sends him a “dear John” text. Bob seems distant and frustrated with Sally’s rejection. He follows her constantly in the building and attends every field hockey game. Sally is unresponsive and their professional meetings become strained.

• At her next evaluation, Bob marks her down for not being a team player, not managing her classroom appropriately, parent complaints, and for failing to submit lesson plans in a timely manner. He also tells Sally she is going to be put on a performance improvement plan. Sally is fed up with Bob. She goes to the Superintendent, Stella, and complains about the way Bob is treating her.
• Stella has had concerns about Sally’s performance over the years and thinks Bob is the best thing since sliced bread. Stella tells Sally that she is being ridiculous and that Sally should shake it off and grow up. Sally expresses her frustration in a Facebook post about how Stella supports sexual harassers. Stella gets wind of the post, calls Sally into her office and tells her she can start packing her bags, because she will never get renewed.

• You get a call from Stella who says that the local TV station has just called and wants to do a feature story about the sordid affair. What do you advise?
Hypothetical (continued)

• What changes if Bob is the very popular football coach?
• What changes if Bob is the Board President?
• What changes if Bob is actually Bobbie, and is a woman?
What Law(s) Apply?

- 42 U.S.C. § 2000e et seq. (“Title VII”)
- 20 U.S.C. § 1681 (“Title IX”)
- First Amendment?
- State and local laws and regulations
Unlawful employment practices

(a) Employer practices. It shall be an unlawful employment practice for an employer:

(1) to fail or refuse to hire or to discharge any individual, or 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; or

(2) to limit, segregate, or classify his employees or applicants for employment in any way which would deprive or tend to deprive any individual of employment opportunities or otherwise adversely affect his status as an employee, because of such individual's race, color, religion, sex, or national origin.

42 § 2000e-2
"No person in the United States shall on the basis of sex, be excluded from participation in, be denied the benefits of, or be subjected to discrimination under any education program or activity receiving Federal financial assistance . . . ."

20 U.S.C. § 1681
Why state court?

• Why would a plaintiff prefer to file under state law?
  • Avoid Title VII damage caps
  • Individual Liability
  • Sometimes better chance at avoiding summary judgment
Administrative Exhaustion

• Prior to filing a lawsuit under Title VII, an employee must file a Charge of Discrimination with the EEOC or the applicable state or local Fair Employment Practices Agency ("FEPA"), if one exists.
  
  – Must file the charge with the EEOC within 180 calendar days of the date of each discrete discriminatory act – note period is extended to 300 days if a state or local agency enforces a law that prohibits employment discrimination on the same basis
  
  – Must file the charge with the FEPA within whatever the limitations period is in the jurisdiction
  
  – Investigation and Right to Sue
  
  – Failure to comply means the claim is time-barred
What constitutes sexual harassment?

The Basics:

• *Quid Pro Quo* harassment – A plaintiff must prove that the employer took an adverse employment action against the employee as a result of the employee’s failure to comply with unwelcome sexual conduct.

• “*Hostile Work Environment*” harassment – conduct that has the purpose or effect of unreasonably interfering with an individual’s work performance or creating an intimidating, hostile, or offensive working environment.

  – Severe? Pervasive? Unwelcome?
What is a “hostile environment?”

- Comments
- Communications
- Social Media Postings
- Touching
- Propositions
- Sexual Assault
- Quiz on what the courts say
Hostile Environment Issues

- Does it matter where the conduct occurred?
- Does it matter who was involved?
- Scope and course of employment
- Don’t forget about insurance coverage issues!
**Meritor Savings Bank v. Vinson**

- Decided by Supreme Court in 1986
- Vice President of Meritor Savings Bank propositioned bank manager for sex
- Employee resisted, but eventually gave in because she feared she would lose her job
- “Repeated demands” over four years for sex/sexual favors
- Had sex between forty to fifty times (including several instances of forcible rape)
Meritor Savings Bank v. Vinson (continued)

- Holding: Vinson was subjected to a hostile work environment and could prevail
- Sex discrimination includes sexual harassment/hostile work environment
- Employee must prove:
  - Conduct was sufficiently severe or pervasive
  - Conduct was unwelcome
Harris v. Forklift Systems, Inc.

- Decided by Supreme Court in 1993
- President of Forklift Systems demeaned and sexually harassed manager
- Insults based on gender and other misconduct
Harris v. Forklift Systems, Inc. (continued)

• Holding: Harris was subjected to hostile work environment and could prevail

• “Totality of circumstances” test

• Includes objective AND subjective factors

• Employee does NOT have to establish psychological injury (i.e. no medical testimony necessary)

• Factors to consider
Oncale v. Sundowner Offshore Services

• Decided by Supreme Court in 1998
• Male employee sexually harassed by male supervisors and coworkers
• Subjected to sex-related humiliating actions
• Was physically assaulted by two supervisors “in a sexual manner”
• Another supervisor threatened him with rape
Oncale v. Sundowner Offshore Services (continued)

• Holding: Plaintiff was subjected to hostile work environment

• Sexual harassment can occur between persons of the same sex, but the harassment must still be “based on sex.”

• Words that have “sexual content or connotation” are NOT per se harassment “based on sex”

• Distinguish between simple teasing and severely hostile or abuse conduct
Supervisor Sexual Harassment

• What constitutes a “supervisor?”

• *Vance v. Ball State* (2013) – Defined “supervisor” as someone who is “empowered . . . to take tangible employment actions against the victim.”

• Who are supervisors in the school context?
Supervisor Sexual Harassment

• Strict Liability
  – If a supervisor takes a tangible job action against a subordinate, the employer is liable

• If there is no tangible job action
  – Employer can assert affirmative defense
    o Employer acted to prevent and correct the harassment
    o The employee did not take advantage of preventative or corrective opportunities
Two cases decided by the Supreme Court on the same day:

• *Burlington Industries v. Ellerth* (1998) - When no tangible job action is involved, an employer may have an affirmative defense to supervisor harassment

• *Faragher v. City of Boca Raton* (1998) – The city was held liable for a supervisor’s actions because it had not taken steps to address the harassment
Non-Supervisor Sexual Harassment

- Hostile work environment
- Management level employee knew or should have known of harassment
- Management level employee failed to implement appropriate remedial action
What about Title IX?
What constitutes retaliation?

- **Jackson v. Birmingham Board of Education** *(2005)*
  - Girls’ basketball coach complained about the lack of resources for the team
  - Following those complaints, he received poor evaluations and was fired

- Court held that he could state a claim for retaliation under Title IX
Recent Developments

• Pregnancy Discrimination
  – Does Title VII protect pregnant women against discrimination based on their condition?
    o Accommodation requests
    o Absences

  – Young v. United Parcel Service (2015) – The Supreme Court held that a pregnant employee could state a claim by showing it was “more likely than not” that the employer’s actions were based on discriminatory motive
Recent Developments

- What does Title VII’s reference to “sex” protect?
  - Biological?
  - Transgender?
  - Gender Identity?
  - Gender Fluid?
  - Nonconformance with Gender Stereotypes?
Recent Developments

• What does the government say constitutes “sex?”
  – EEOC’s position (Complainant v. Anthony Foxx, EEOC Decision No. 010133080 – July 16, 2015)
  – Obama Executive Order 11478 regarding federal employees
  – OCR’s position
  – State laws
Practice Pointers

• Policy issues
• Training
• Investigations
  – 4th Amendment
  – Privilege
  – Social Media
  – Charge Stage
  – Litigation
  – Multiple Defendants and Conflicts of Interest
  – Remedies
QUESTIONS?
Melanie Gurley Keeney, Esq.
mkeeney@tuethkeeney.com

Katherine L. Nash, Esq.
knash@tuethkeeney.com

Tueth, Keeney, Cooper, Mohan & Jackstadt, P.C.
Main: 314-880-3600  Fax: 314-880-3601
www.tuethkeeney.com