

Sexual Harassment

I Title VII: prohibits discrimination on various grounds, including sex

II What is sexual harassment

A The EEOC's Guidelines define "sexual harassment" by describing the kinds of workplace conduct that may be actionable under Title VII, including "[u]nwelcome sexual advances, requests for sexual favors, and other verbal or physical conduct of a sexual nature." 29 C.F.R. § 1604.11(a) (1985).

B The Supreme Court has held (in the Meritor v. Vinson case) that "without question" a supervisor's sexual harassment constitutes discrimination on the basis of sex.

III Quid pro quo sexual harassment.

A Quid pro quo sexual harassment occurs when consent or acquiescence to sexual advances is essentially a "condition of employment" or the basis for favorable treatment in the workplace.

IV Hostile environment sexual harassment.

A To establish a prima facie case of sexual harassment based on a hostile or abusive work environment under Title VII of the 1964 Civil Rights Act, a complainant must show that:

1 The employer (or the employer's "agent"¹)

a engaged in "discriminatory intimidation, ridicule, and insult" based on the employee's sex

b that was "unwelcome";

c "sufficiently severe or pervasive to alter the conditions of [the victims] employment";

d to lead a reasonable person to perceive it to be "hostile or abusive"²

¹

42 U.S.C. § 2000e(b) defines "employer" to include any "agent" of an employer.

²*Harris v. Forklift Systems, Inc.*, ___ U.S. ___, 114 S.Ct. 367, 370 (1993), citing *Meritor Savings Bank v. Vinson*, 477 U.S. 57, 67 (1986). In his concurring opinion, Justice Scalia noted that "hostile" and "abusive" in this context "mean the same thing." *Id.*, 114 S.Ct. at 372.

- (1 The determination of whether there was a "hostile or abusive" environment is to be made by looking at the totality of the circumstances.³

e and that the employee actually perceived to be "abusive."⁴

- (1 It is not a requirement that the conduct in question have "seriously affect[ed] the employees' psychological well-being" or otherwise have been "psychologically injurious."⁵

V Related issues from *Meritor*:

A Unwelcome vs. voluntariness: consent does not mean not unwelcome

B Plaintiff's dress and personal fantasies: might be relevant on issue of whether plaintiff found the advances unwelcome

VI Investigation and Remediation

A In Watson v. Dixon and Duke University, No. 103A99, 2000 N.C. LEXIS 527 (Supreme Court of North Carolina July 13, 2000), the North Carolina Supreme Court upheld the Court of Appeals' affirmance of a \$500,000 punitive damages award against Duke University on the grounds that Duke's failure to promptly investigate an employee's sexual harassment allegations constituted "ratification" of the harasser's conduct.

B Noting (among other things) that the plaintiff had "followed written policy in reporting [the] harassment, but that Duke failed to follow such policy in dealing with [the alleged] behavior," the court stated that "the facts . . . present ample evidence which tends to show that Duke ratified the conduct of [the alleged harasser] through its failure to act after it knew facts which would have led a person of ordinary prudence to investigate and remedy the conduct." Id., 130 N.C. App. at 55, 502 S.E.2d at 21.

C Plaintiffs in sexual harassment lawsuits often sue the harassing supervisor (or employee) as well as the employer, and these suits often include claims for intentional infliction of emotional distress. The North Carolina Court of Appeals has recognized that "sexual harassment is substantially certain to cause injury to the person harassed," and plaintiffs in such cases usually seek, and sometimes are awarded, punitive damages.

³*Id.*, 114 S.Ct. at 370.

⁴*Id.*

⁵*Id.* at 371, citing *Meritor*, *supra*, note 1, 477 U.S. at 67.

D ***Further, because the Court of Appeals also has ruled that sexual harassment does not "arise out of or occur within the scope of the [harassing] employee's employment," a supervisor's harassing conduct may not be covered by the employer's liability insurance, and the employer (or its insurer) might therefore deny any obligation to defend a harassing employee.***

1 **Because such conduct falls outside the scope of employment, the Attorney General might decline to provide representation and indemnification if the AG concluded that the defendant State employee had engaged in sexual harassment.**

2 **In other words, a harassing employee can face substantial monetary liability, as well as attorneys' fees and court costs.**

E ***However, if an employer promptly investigates allegations of sexual harassment and takes swift and appropriate remedial action where harassment is found, the employer may avoid liability and the likelihood of a subsequent lawsuit may be substantially diminished.***

F ***In other words, an effective investigation and remediation policy usually works to everyone's advantage by:***

1 **providing a confidential and non-adversarial process for protecting and vindicating the victims of sexual harassment;**

2 **enabling the employer to discipline those whose conduct creates a hostile workplace; and**

3 **limiting -- in most cases -- the harasser's "punishment" to the employer-administered disciplinary action.**

1 **Indeed, even if that disciplinary action is termination of the harasser's employment, the consequent reduction in the likelihood of a lawsuit limits the adverse consequences the harasser otherwise might experience.**