



FREEMAN MATHIS & GARY, LLP
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Sexual Harassment Under Title VII

Freeman Mathis & Gary, LLP
100 Galleria Parkway SE
Suite 1600
Atlanta, GA 30339



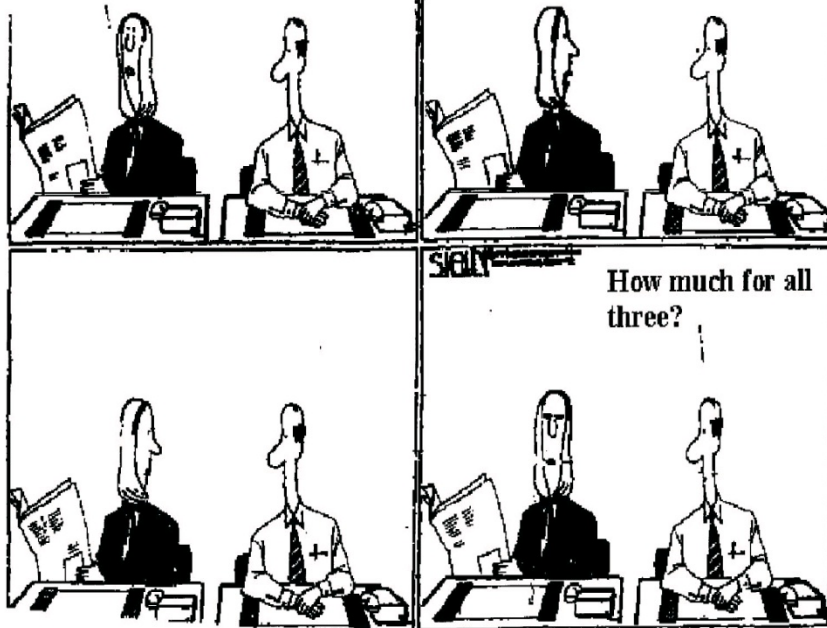
Labor and Employment Law

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Sexual Harassment

Why don't men see sexual harassment as a problem the way women do?

I mean, how would you like it if I made lewd remarks to you, described scenes from porno movies, or patted your behind?



"All the other women in the office are suing you for sexual harassment. Since you haven't sexually harassed me, I'm suing you for discrimination."



Sexual Harassment

What has changed in the last 20 years?

- Social mores
- Employees' attitudes
- Generation gap



Types of Sexual Harassment

Quid pro quo

- Employee's submission to unwelcome advances is an express or implied condition for receiving job benefits
- Employee's refusal to submit to supervisor's sexual demands results in tangible job detriment

Types of Sexual Harassment

Hostile Work Environment

Employee subjected to unwelcome harassment

- Harassment based on gender
- Harassment interferes with employee's work environment by creating
 - Intimidation
 - Hostility
 - Consistent exposure to offensive words, pictures, etc.

“Hostility”: A High Standard

- How egregious is the alleged conduct/statement?
- How often did alleged conduct/statement occur?
- Is this the first incident of alleged offensive conduct? Is it ongoing?
- Welcome/Unwelcome?
 - Often unclear

Sexual Harassment: Employer Liability

Co-employee/third party conduct

VS.

Supervisor conduct

Administrator's Obligations

- Understand the School Policy/Complaint Procedure
- Discuss the Policy with your employees
- Advise employees to report all complaints in accordance with Complaint Procedure

Obligations of all Employees

- Avoid inappropriate behavior
- Foul language
- Touching
- Off-color jokes
- Avoid personal relationships with subordinates
- Be cognizant of personal relationships between employees
- Different level of expectation once you become an administrator/manager:
 - For your actions
 - For managing the actions of employees

Complaints: Traps for the Unwary

- “I don’t want you to do anything”
- Informal, verbal complaints
- Same-sex harassment
- Gender stereotypes
- “That’s just Steve being silly”
- Snap judgments about credibility
- “Non-sexual” conduct

Common Sexual Harassment Issues

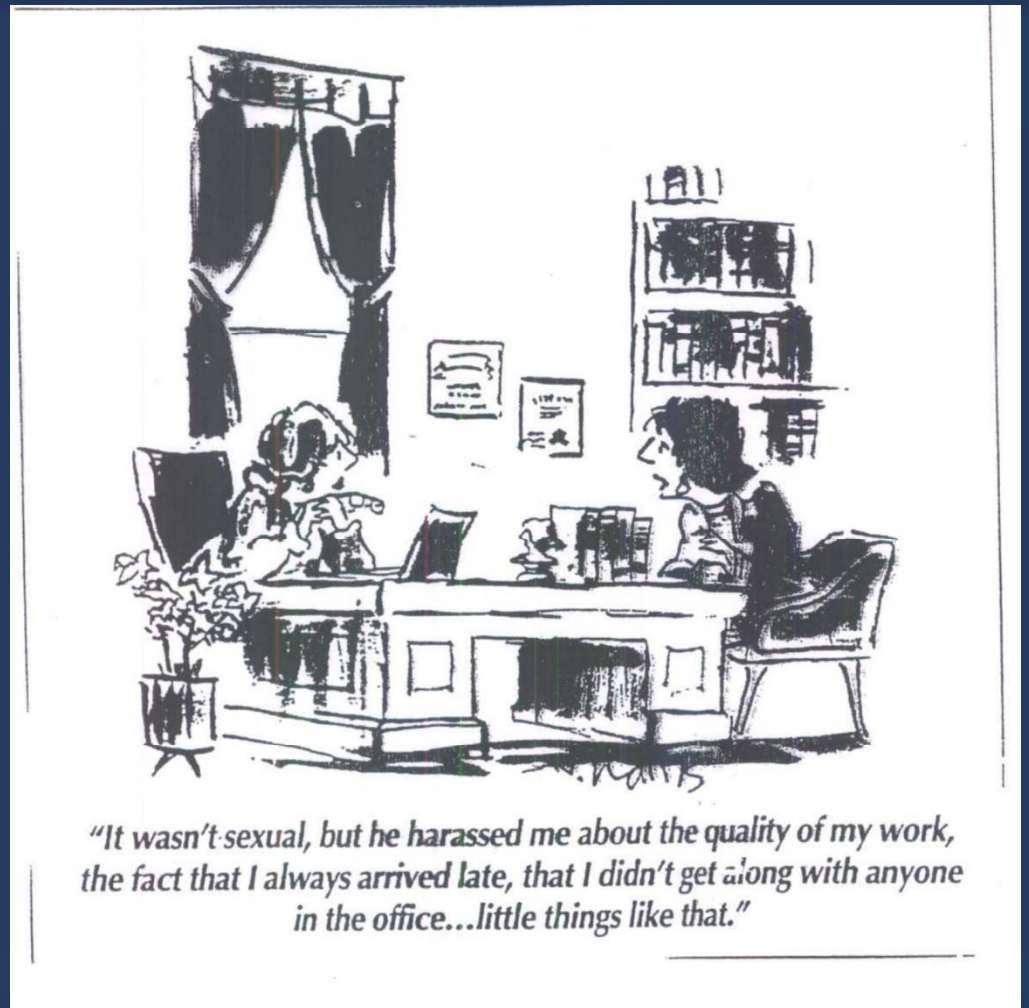
- Anonymous complaint
- Suspect supervisor is involved with employee
- Teacher says she is subject of vendor advance
- Employee kidding, teasing and joking
 - Employee may be laughing, but may be offended
 - “You had to be there”

Common Sexual Harassment Issues

- Technology
 - Internet
 - Email
 - Text messages
 - Cell Phone Cameras/Pictures
 - Radio programs

Other “Harassment”

- Race
- Religion
- National Origin
- Disability
- Age
- *Retaliation*



Model Equal Opportunity Employment Policy & Complaint Procedures

Key Components of Successful Policy

- Consistency (single policy)
- EEO Reporting Agent (backup)
- Training
- Developing standard review procedures

What Do You Do If You Receive A Complaint From An Employee?

- Follow EEO Policy and Complaint Procedure
- Advise Complainant to follow Complaint Procedure
- Be cognizant of “retaliation”

Faragher Affirmative Defense

No liability if:

- School exercises “reasonable care” to prevent and promptly correct harassment; and
- Employee unreasonably fails to take advantage of preventative or corrective opportunities or to avoid harm otherwise.
 - Failure to complain/follow complaint procedure
 - Refusal to cooperate in review/investigation
 - Refusal to notify in timely fashion

Create Investigation Procedures

- Standard operating procedures for harassment investigations should include:
 - Notification of appropriate administrative officials;
 - Investigation procedure, including selection of investigator;
 - Form documents
 - Employee Complaint Form
 - Witness Summaries
 - Procedure to be followed at conclusion of investigation
 - Maintenance of records related to allegations/investigation

Review of Complaint

- Launch review immediately
- Determine scope of review
 - Allegations?
 - Does harasser admit or deny allegations?

If issues remain:

- Assign investigator
 - Impartial
 - Trained
 - Informed

Investigation of Complaint

- Who should you interview?
 - Complainant
 - Alleged harasser
 - Third parties reasonably expected to have relevant information
- Scope of questions
 - Focus on all allegations and relevant allegations
- Privacy issues
 - Where, where, who?
 - Health records

Investigation of Complaint

- Timely but thorough
- Document all aspects of investigation
- Make a Determination
 - Unsubstantiated/no corroborating evidence; or
 - Prompt remedial action required
- Meet with Complainant
 - Notify him/her of findings
 - Preferably orally and in writing

Common Investigation Mistakes

- Pre-judging
- Ignoring previous complaints of harassment against individual
- Failure to investigate or address all of the issues
- Failure to interview all relevant witnesses
- Failure to review/analyze relevant documents
- Failure to distinguish between first-hand knowledge and hearsay
- Allowing witnesses to be vague in their responses
- Assigning improper investigator

Working With the EEOC

- EEOC Charge
- Mediation or position statement?
 - Is the charging party still employed by the school?
 - Does the charging party have an attorney?
 - What is your goal?
- Onsite investigation
- EEOC Determination
- Legal action

Retaliation

1. Participation Clause - Filed Charges, Testified or Participated in Investigation, Proceeding or Hearing
2. Opposition Clause - Opposed Any Practice Made Unlawful Under the Act

Retaliation: Participation Principles

- Participation: actions arising out of participation in investigation, proceeding or hearing
- Examples of Common Participation:
 - Filing an EEOC Charge
 - Filing lawsuit
 - Testifying in lawsuit (trial or deposition)
 - Supplying affidavit

Retaliation: Participation Principles

Statements Typically Protected

- Attacks on Employer
- Employer's Honest Belief Testimony Fabricated
- Letter to EEOC
- Protected even if statements are false or malicious

Retaliation: Participation Principles

Examples of Actions Not Protected. . .

- Lying (or baseless allegations) during employer's pre-EEOC Charge Investigation
- Refusal to cooperate in employer's investigation

Retaliation: Opposition Protection

REQUIREMENTS:

- **Opposition Must Be Based on Reasonable and Good Faith Belief**

Not "Cindy told me that Sally said . . ."

- **Must be complaining about unlawful act**

Based on protected category

Retaliation: Opposition Protection

NOT EVERYTHING TRIGGERS PROTECTION

- Disruptive Conduct
- Frequent, Voluminous and Specious
- Insulting and Angry Manner
- Threats of violence
- Accosting Supervisor with Accommodation Requests
- Misappropriating Confidential Documents

Retaliation: Opposition Protection

NOT EVERYTHING TRIGGERS PROTECTION

Vague or Generalized Complaints

- “I don’t feel I am being treated fairly”
- “I feel that I am being subjected to a hostile work environment”

REMEMBER:

Disloyalty is Not Grounds For Discipline

Prohibited Conduct

- “Materially Adverse Action”
- Would Dissuade Reasonable Worker From Making or Supporting A Charge of Discrimination
- Not Petty Sights and Trivial Harms
 - Office further from the teacher’s lounge, etc.

Examples: Materially Adverse Actions

Actions that negatively impact employee's career/promotion opportunities

- Written Reprimands When Used to Support More Severe Punishment
- Performance Improvement Plans
- Exclusions from Meetings That Impact Employee's Job

Materially Adverse Actions: Gray Areas

- Cutting off opportunity to earn overtime
- Contesting unemployment benefits
- Denial of pay raise
- Increased job scrutiny
- Investigations of employee conduct
- Increase/Decrease of Job Duties

Takeaways

- Understand statutory protections
- Train administrators/employees
- Notify employees harassment and retaliation are prohibited
- Respond promptly and fairly
- Follow up with employees who make claims
- Be tough on employees who deserve it
- Avoid retaliation pitfalls
- Structure decisions with litigation in mind