#MeToo: Revisiting Sexual Harassment in the Post-Weinstein Era

Arizona Paralegal Association
2018 Annual Legal Conference
Don Johnsen
Gallagher & Kennedy
Legal Landscape

- Courts have 40+ years of experience in assessing sexual harassment claims (Rogers case, 1972)
- Supreme Court has further refined legal analysis of sexual harassment claims (Faragher, Ellerth, Oncale cases, 1998)

- Courts have not (yet) demonstrated a tendency to change their analysis of sexual harassment claims
Two Types of Sexual Harassment

- “Tangible action” harassment
- “Hostile environment” harassment

“Tangible Action” Harassment

- Basing an employment decision upon an individual’s acceptance or rejection of a sexual advance or sexual conduct
  - Hiring and firing decisions
  - Transfer, promotion, and demotion decisions
  - Discipline and discharge decisions
“Tangible Action” Harassment

If then W-2 Wage and Tax Statement

If no then You’re fired!
“Hostile Environment”
Harassment

- Verbal or physical conduct based on sex
- Unwelcome to the victim
- Offensive to a reasonable person
- Pervasive

Verbal or Physical Conduct Based on Sex

- Remarks, jokes, discussions

Verbal or Physical Conduct Based on Sex

- Remarks, jokes, discussions
Verbal or Physical Conduct Based on Sex

- Physical contact
Verbal or Physical Conduct Based on Sex

- Physical contact

Photos, magazines, calendars
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Verbal or Physical Conduct Based on Sex

- Electronic communication

A mean or angry boss is not necessarily engaging in “sexual” harassment

Electronic communication
Verbal or Physical Conduct Based on Sex

- A mean or angry boss is not necessarily engaging in “sexual” harassment
Verbal or Physical Conduct Based on Sex

- A mean or angry boss is not necessarily engaging in “sexual” harassment
- #MeToo alert: Common basis for summary judgment

“Unwelcome” Conduct
Consensual Conduct

- Mutual joking is not “harassment”
- Consensual conduct is not unlawful
Consensual Conduct

Client’s policy: “Reciprocal attraction between co–workers is not considered sexual harassment.”

I find you an attractive co–worker.
I find you an attractive co-worker.

I reciprocate.

“Reasonable Person” Standard

Question is whether a reasonable person in the recipient’s situation would find the conduct truly “hostile”
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Note sex-based differences in perceptions of workplace conduct

Question is whether a reasonable person in the recipient’s situation would find the conduct truly “hostile”

#MeToo alert: Common basis for summary judgment

“Pervasive” Conduct
“Pervasive” Conduct

- Isolated incidents generally do not constitute unlawful “harassment”
- Ongoing harassment is unlawful

#MeToo alert: Common basis for summary judgment
Investigation/Remedial Action

Employers must investigate complaints of unlawful discrimination or harassment
Investigation/Remedial Action

If unlawful discrimination or harassment has occurred, employer must take appropriate corrective measures
Investigation/Remedial Action

- If unlawful discrimination or harassment has occurred, employer must take appropriate corrective measures

You’re fired!

Investigation/Remedial Action

- #MeToo alert: Common basis for summary judgment

Impact of #MeToo?
Impact of #MeToo?

- Defendants win a lot of sexual harassment cases on conclusion that conduct was not sufficiently "offensive" or "pervasive" to constitute actual "unlawful harassment"

Impact of #MeToo?

- Supervisor "sniffed me" and "rubbed up against me"
- Supervisor called plaintiff a "dumb blond" and then tried to kiss her (2X)
- "How about trying a 'French maid' costume for work?"
- "Baby doll, you and me belong in bed together"
- "You could strip, you know that?"

Impact of #MeToo?

- "Baby doll, you and me belong in bed together"
- "I'll bet you really moan and groan when you're going at it"
- "Your elbows are the same color as your nipples"
- "You've got the sleekest ass in the office"
- "You castrating bitch"
Impact of #MeToo?
Will #MeToo movement affect judges’ assessment of whether particular behavior is sufficiently “offensive” or “pervasive” to constitute actual “unlawful harassment”?

Further questions?

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