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The #METOO Era and Sexual Harassment

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AGENDA 


- #METOO movement and the school
- Title VII
- Sexual Harassment Liability
- Legal Claims
- Possible Consequences

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#METOO MOVEMENT

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What is #METOO? 

- Began in 2006 by Tarana Burke to help young women of color from low wealth communities who have been sexually abused, assaulted, exploited or harassed.
- Movement re-gained popularity in 2017 at the height of sexually harassment accusations against Hollywood elite, Harvey Weinstein.


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#METOO Movement AND School 

- Implications regarding relationships between:
 - Supervisors and Employees
 - Co-workers




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Worldwide conversation 

Sexual consent is a worldwide conversation

- <https://www.cnn.com/2018/04/04/world/consent-christiane-amanpour-sex-love-around-world/index.html>




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What is Sexual Harassment? 


- Unwelcome sexual advances, requests for sexual favors, verbal or physical harassment of a sexual nature
- The critical issue is whether members of one sex are exposed to disadvantageous terms or conditions of employment to which members of the other sex are not exposed.
 - not automatically discrimination because of sex merely because the words used have sexual content or connotations
- Severe or Pervasive Behavior
 - Examined in light of the totality of the circumstances:
 - Frequency of discriminatory conduct
 - Severity
 - Physically threatening or humiliating, or a mere offensive utterance
 - Unreasonably interferes with an employee's work performance

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TITLE VII

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Title VII Sexual Harassment 

- If the harasser is a co-worker, the employer may be vicariously liable if the employer was negligent
- If the harasser is a supervisor, the employer is strictly liable as long as:
 - Employee belongs to a protected class
 - Employee is subject to unwelcome harassment
 - Harassment is based on protected characteristic
 - Harassment affected condition of employment

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Types of theories:

- **Hostile Work Environment-** harasser's conduct has the purpose or effect of unreasonably interfering with an individual's work performance or creating an intimidating, hostile, or offensive working environment
 - a plaintiff must prove the following elements:
 - the subject conduct was unwelcome
 - it was based on the sex of the plaintiff
 - it was sufficiently severe or pervasive to alter the plaintiff's conditions of employment and to create an abusive work environment; and
 - it was imputable on some factual basis to the employer.
- **Quid Pro Quo-** sexual favors are directly linked to some monetary or employment benefit



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4th Circuit Precedent

- Since *Oncale v. Sundowner Offshore Servs* (1998), The Supreme Court held that a sexual harassment claim under Title VII against same-sex persons is recognizable and actionable.
 - Does not have to be motivated by a sexual desire
- Regarding same-sex harassment, prior to the Supreme Court in *Oncale*, the 4th circuit has consistently found no such action exist when filing a claim with respect to a hostile work environment. They have only addressed discrimination between the sexes.
 - *Benekritis* held that a claim of sexual harassment by a member of the same sex is not permitted under Title VII
 - *Garcia v. EF Atochem North America*, 28 F.3d 446, 452 (5th Cir. 1994); *Benekritis v. Johnson*, 882 F. Supp. 521, 525 (D.S.C. 1995)
- One pattern, at least, is clear: for same-sex harassment to support a claim, there must be an allegation of quid pro quo or, at the very least, some sexual element to the harassment or hostile environment.


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SEXUAL HARASSMENT LIABILITY


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LIABILITY 


- Faragher affirmative defense recognizes that supervisor sexual harassment may be of two types: that which results in tangible employment action, and that which does not. Even where no tangible employment action is suffered by the victim, however, an employer may be subject to vicarious liability for an actionable hostile environment created by a supervisor.
- To avoid liability, the employer has the burden of establishing the affirmative defense to liability or damages, subject to proof by a preponderance of the evidence. The defense comprises two essential elements:
 - the employer exercised reasonable care to prevent and correct promptly any sexually harassing behavior, and
 - the plaintiff employee unreasonably failed to take advantage of any preventive or corrective opportunities provided by the employer or to avoid harm otherwise.




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Proactive steps for employers/schools 

- Prevention
 - affirmatively raising the subject
 - expressing strong disapproval
 - developing appropriate sanctions
 - informing employees of their right to raise and how to raise the issue of harassment under title VII
 - developing methods to sensitize all concerned
- Provide training for employees
- Educate employees on proper conduct in the workplace setting
- Educate employees on proper conduct outside the workplace setting



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Proactive steps for employees/students 

- Respect
- If a supervisor or employee displays conduct that makes you feel uncomfortable, report the behavior.


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LEGAL CLAIMS



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Federal & State Law Claims


Federal

- Title VII of the Civil Rights Act of 1964 (Title VII)

State


- Criminal Sexual Conduct
- Assault with intent to commit criminal sexual conduct
- There is currently a Bill in the House (H 4433) entitled the "Ending Forced Arbitration of Sexual Harassment Act of 2018"
 — Status: Referred to Committee of Judiciary

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LEGAL CONSEQUENCES


YOU ARE FREE TO CHOOSE,
 BUT YOU ARE NOT FREE
 FROM THE CONSEQUENCE OF
 YOUR CHOICE.




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Consequences 

- Criminal charges
- Monetary settlements
- Reputation
- EEOC charges
 - unwelcome sexual advances
 - requests for sexual favors
 - verbal or physical conduct of a sexual nature




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Signs of Possible Harassment 

Harasser

- Stands too close and talks in an intimate way.
- Keeps looking at or commenting on your body in a way that makes you uncomfortable. *"There's a difference between saying "nice dress" and "that dress really shows off your curves."*
- Asks you about your personal life, including your romantic or sexual experiences.
- Insists on talking about their own sexual experiences.
- Keeps trying to get you to meet alone outside of work or stay late after work.
- Shows you pornographic materials or tries to get you to talk about a sexually-charged movie or song or other such topic.
- Requests sex or sexual favors, or makes any kind of sexual advance
- Requests for a date (either lunch or dinner)
- Makes comments or remarks of a sexual nature, including ones referring to physical appearance
- Makes comments or remarks about a person's sex, such as offensive comments about women or a woman's sexual orientation, as well as other comments that'd be considered discrimination
- Touches either someone or themselves in sexually provocative ways
- Threatening to fire someone or revoke perks because of declined advances
- Requesting physical or emotional contact in exchange for advancement or business opportunities.


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Signs of Possible Harassment 

Victim


- Sudden and/or frequent absences and tardiness — A coworker who is normally reliable and dependable might suddenly be late for work, call in sick, frequently leave early or miss important meetings. Your coworker might also put in for a sudden transfer or change their schedule.
- Reduced productivity — Your coworker might suddenly struggle to meet deadlines or there might be a decrease in the quality or quantity of their work produced.
- Avoidance and anxiety — You might notice that a coworker who was once incredibly extroverted now passes on opportunities to socialize or becomes visibly uncomfortable or silent when a certain person enters the room or a conversation.
- Declines professional development opportunities — Your coworker may pass up a promotion or other professional development opportunities for no apparent reason.
- Increased alcohol or drug use — This sign might not be noticeable if you don't socialize with your coworker. However, you may notice that a coworker suddenly keeps a bottle of alcohol in their desk drawer or repeatedly has a few drinks at lunch.

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If Harassment is Suspected 


- Any employee is encouraged to file a complaint with his/her immediate supervisor or principal; unless the allegations are against the immediate supervisor.
- Any employee who believes that he/she has witnessed inappropriate conduct of a sexual nature toward an employee or a student must immediately report such a situation to his/her immediate supervisor or principal; unless the allegations are against the immediate supervisor
 - *In the above instances, the employee will file the complaint with the district's sexual harassment compliance officer.*
- All administrators/supervisors/contact persons will initiate an investigation of any incident of alleged sexual harassment or inappropriate conduct of a sexual nature reported to them or observed by them in consultation with the district's sexual harassment compliance officer.

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If Harassment is Suspected (cont.) 

- All administrators/supervisors will report to the district's sexual harassment compliance officer and/or superintendent in writing the results of any investigation of sexual harassment or inappropriate conduct of a sexual nature, including corrective or disciplinary action taken.
- Inform the employee or student who brought the sexual harassment or inappropriate conduct of a sexual nature allegation that appropriate actions were taken
- Any employee who is determined to have sexually harassed another employee or engaged in inappropriate conduct of a sexual nature with a student, will be disciplined according to the district's guidelines.

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REFERENCES 

- Section 703(a)(1) of Title VII, 42 U.S.C.S. 2000e et seq.
- Code of Federal Regulations
 - Part 1604.11
- U.S. Equal Employment Opportunity Commission
 - <https://www.eeoc.gov/laws/types/harassment.cfm>

Cases

- Oncala v. Sundowner Offshore Servs. (1998)
- Spicer v. Virginia (1995)
- Faragher v. City of Boca Raton (1998)
- Burlington Industries v. Ellerth (1998)
- Ocheltree v. Scollon Prods. (2003)
- Harris v. Forklift Systems, Inc (1993)
- Meritor Savings Bank, FSB v. Vinson (1986)

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