

OACB
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Title VII of the Civil Rights Acts of 1964

- ◆ It is an “unlawful employment practice for an employer...to discriminate against any individual with respect to his/her compensation, terms, conditions or privileges of employment, because of such individual’s race, color, religion, sex, or national origin.”



Title VII (cont.)

- ◆ Prohibits employers from making employment decisions based on the gender, age, color, religion, national origin or sex of the employee.



Prohibitions

- ◆ An Employer cannot refuse hiring, wage increases, other benefits, leave approvals, promotions, etc., because of an employee's race, color, national origin, religion, or sex.
- ◆ An Employer can't treat an employee differently because of any of the reasons above.

Prohibitions (Cont.)

- ◆ Employees are also prohibited from harassing other employees, contract workers, parents, guardians, citizens, etc., based upon any of the reasons above.
- ◆ Such harassment can be verbal, written, text messages, voice mail, email, Facebook, YouTube, twitter, or any social media communications.



Prohibitions (Cont.)

- ◆ The harassment doesn't have to occur at the workplace.
- ◆ If it can be determined that your relationship with an individual is because of your job, it then becomes work related and as such an employee can be disciplined by the employer.



What is Harassment ?

- ◆ To disturb repeatedly or persistently, torment, to trouble with repeated attacks or incursions; to pester, persecute or annoy continuously.

What is Harassment ? (Cont.)

- ◆ Notice the word(s) persistently, repeatedly, pester, annoy, etc.
- ◆ A one time remark or occurrence is not going to be categorized as harassment.
- ◆ It may be improper behavior and the person should be disciplined, but not harassment.



Today's Example

- ◆ We are going to highlight sexual harassment today. Not because it is present but just to use it as an example. You can substitute gender or race in place of the references to sexual harassment.

SEXISM

- ◆ An attitude of a person of one sex that he or she is superior to the other sex.
- ◆ Arbitrary stereotyping of social roles based on gender.
 - *All men are chauvinists.*
 - *Women care too much.*
 - *“All people lie!” Dr. House*

SEXUAL DISCRIMINATION

- ◆ A behavior that occurs when decisions are based upon a person's sex.
- ◆ Prejudiced or biased treatment based on gender
 - *A female supervisor only promotes the males under her supervision.*
 - *A male supervisor always makes sure that certain females get awards.*

SEXUAL HARASSMENT

- ◆ Unwelcome behavior of a sexual nature.
- ◆ Unwanted and offensive sexual advances or sexually derogatory or discriminatory remarks.
 - *A male continually tells off color jokes in the presence of others.*
 - *A male continually remarks that a woman looks great in sweaters or other clothes.*
 - *A female continually asks another female to go out with her.*

Sexual Harassment

- ◆ Not limited to a male harassing a female
 - Female– male
 - Male – male
 - Female – female
- ◆ Not limited to supervisor harassing an employee
 - Co-workers
 - Employee can harass a supervisor
 - Customers, clients, other third parties
- ◆ Victim doesn't have to be person directly harassed
 - Anyone affected by the offensive behavior may complain



Beyond the Workplace

- ◆ Discriminatory conduct need not occur at the work site
- ◆ Discriminatory conduct need not be perpetrated by an employee
- ◆ Off-site and third parties can be linked to discrimination in the workplace



TYPES OF SEXUAL HARASSMENT

- ◆ Quid pro Quo
- ◆ Hostile Work Environment

QUID PRO QUO HARASSMENT

- ◆ “Something for Something”
- ◆ Employment decisions based upon acceptance or rejection of unwelcome sexual behavior.
 - *A person is fired because she (or he) won't go out with a supervisor.*
 - *No sex, no job.*



Agency Law

- ◆ Law: An employer may be held liable for acts of its employees if those employees are acting on employer's behalf.
- ◆ Reality: Few employers will admit to directing an employee to engage in sexually harassing behavior as a job duty
- ◆ Issue: Harassment thus beyond the scope of official duties and not attributable to the employer

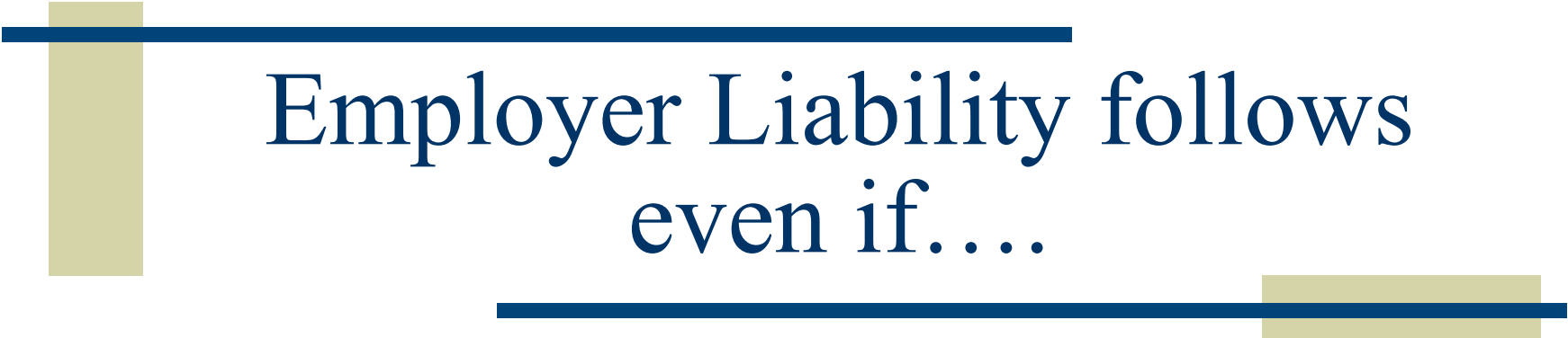
Court Interpretations of Agency Law

- ◆ Employer IS vicariously liable for conduct amounting to sexual harassment on the part of supervisors and other superiors.



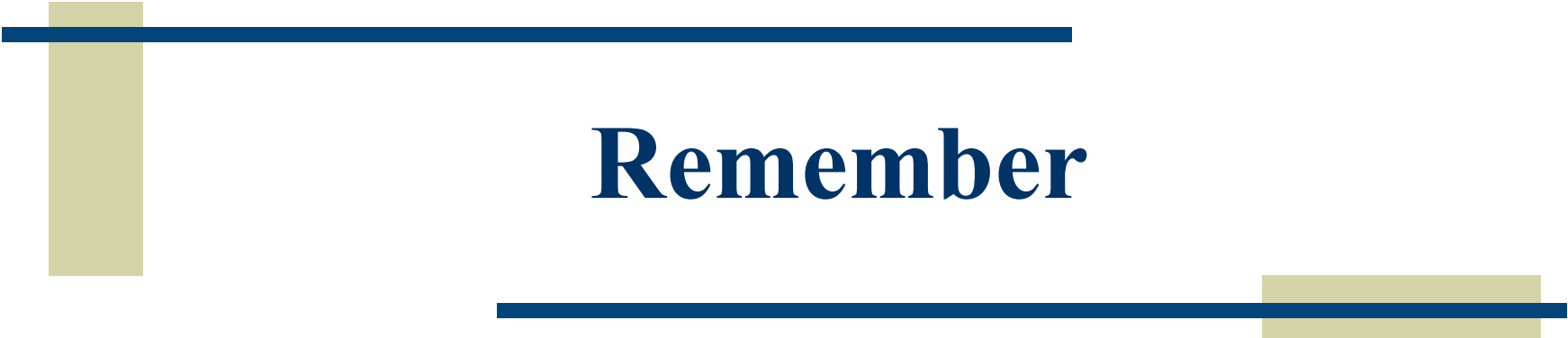
Why?

- ◆ Authority to control the terms, conditions, and privileges of an employee's employment
- ◆ Harassment in the context of, or with respect to, a matter over which the supervisor has Delegated Authority
- ◆ Quid Pro Quo Harassment



Employer Liability follows even if....

- ◆ takes steps to prevent supervisor misconduct
- ◆ lacks knowledge of the misconduct
- ◆ seeks to stop further incidents



Remember

- ◆ Supervisor, as an agent of employer, IS an “employer” for purposes of Title VII.
- ◆ Supervisors and employers also may be subject to liability under State law tort doctrines: assault, battery, intentional infliction of emotional distress

HOSTILE WORK ENVIRONMENT as Sexual Harassment

- ◆ A work environment created by unwelcome sexual behavior that adversely affects an employee's ability to do his or her job. Such behavior is offensive, intimidating, and/or hostile.
 - *A coworker who continually tells dirty jokes, even though not directed at a specific person, could create a hostile work environment.*

Sexual Harassment by Co-Workers

- ◆ EEOC position: Employer is responsible for actions of co-workers when it knows, or should have known, of misconduct and fails to take action to correct it.
- ◆ Negligent Liability
- ◆ Sexual harassment by customers
- ◆ Court decisions unclear

SEXUAL HARASSMENT

YOU BETTER KNOW IT
WHEN YOU SEE IT!

- 
- ◆ Remember employees ARE the front line.
 - ◆ Don't "Ignore it until there is a complaint."
 - That's just the way Jane/Jim is..."
 - ◆ A Pro-active approach is recommended

How is Sexual Harassment Defined?

- ◆ Practical definitions
 - Requests for sexual favors
 - Unwelcome sexual advances
 - Physical or verbal conduct of a sexual nature if it is linked to employment decisions, affects a person's work performance, or creates a hostile working environment.



How is Sexual Harassment Defined?

- ◆ Legal definitions
 - Title VII of the Civil Rights Act
 - State laws
 - Court Cases



EEOC: Equal Employment Opportunity Commission

- ◆ Enforcement agency for Title VII
- ◆ Conducts investigations
- ◆ Provides informal resolution services
- ◆ Administrative Review option



EEOC Authority

- ◆ Compel employer to take measures aimed at ending the harassment
- ◆ Reinstate employees terminated for resisting sexual harassment
- ◆ Award compensation to victims

Compensatory Damages Civil Rights Act of 1991

- ◆ Up to \$50,000 for employers with 15 – 100 employees
- ◆ Up to \$100,000 for employers with 101 – 200 employees
- ◆ Up to \$200,000 for employers with 201 - 500 employees
- ◆ Up to \$300,000 for employers with more than 500 employees

TYPES OF CLAIMS UNDER TITLE VII

Quid Pro Quo Harassment

Hostile Environment Harassment

Quid Pro Quo or “Tangible Job” Harassment

- Having tangible aspects of employment affected
- Submitting to the conduct was either made a terms of employment or used by the employer as a basis for making an employment decision affecting the employee



Hostile Environment Harassment

- ◆ An environment that is so tainted with sex or gender based discrimination that the “terms, conditions, or privileges of employment” are adversely affected.
- ◆ A pervasive atmosphere in which the purpose or effect is unreasonably interfering with work performance, or which creates an intimidating hostile, or offensive work environment.



Hostile Environment Harassment

- Employee was subjected to unwelcome sexual advances, requests for sexual favors, or other verbal or physical conduct of a sexual nature.
- Except for the fact of the employee's gender, he/she would not have been subjected to the harassment, and the harassment affected a term or condition of employment by either unreasonably interfering with the work environment or created an intimidating, hostile, or offensive work environment.

WHAT MAKES SEXUALLY ORIENTED BEHAVIOR IMPROPER?

- ◆ Title VII proscribes:

Unwelcome sexual behavior that
affects a term or condition of
employment

Unwelcome Behavior

- ◆ “Unwelcome” is conduct that the target did not solicit nor incite and that the target considers undesirable or offensive.
- ◆ Issue is not whether target voluntarily submitted, but whether target, by his/her conduct, indicated to the harasser that the actions were unwelcome.
- ◆ Acquiescence to sexual conduct in the workplace does not compel the conclusion that the conduct is welcome.

Unwelcome Behavior - Example

- ◆ A dating relationship develops mutually between two employees (not unlawful under Title VII).
- ◆ One party decides to end the relationship – must clearly notify the other party that previously accepted behavior is no longer welcome.
- ◆ The other party must abide by that notice.

Affects a Term or Condition of Employment

- ◆ Factors to Consider
 - Verbal, physical, or both
 - Frequency
 - Hostile & Obviously Offensive
 - Harasser was supervisor
 - Harasser joined by others
 - One employee or several as target

Probably Not Actionable under Title VII

- ◆ Occasional instances of
 - Sexual flirtation
 - Innuendo
 - Vulgar sexist language

COURT CASES

**Sexual Harassment
Is
Illegal**

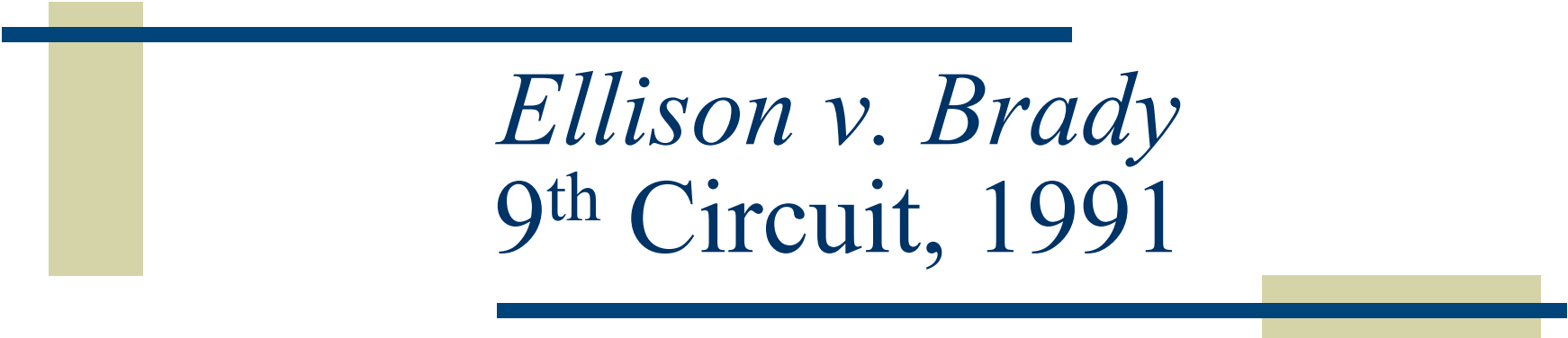
Meritor Savings Bank v. Vinson

US Supreme Court, 1986

- ◆ Affirmed EEOC guidelines that sexual harassment IS a form of sex discrimination
- ◆ If supervisor has acted as employer's agent, the employer is liable for the supervisor's actions.

Robinson v. Jacksonville Shipyards
Florida, 1991

- ◆ Severely criticized employer for inadequate and unsympathetic responses to complaints of sexual harassment



Ellison v. Brady 9th Circuit, 1991

- ◆ New standard for “hostile work environment”
 - Reasonable woman v. reasonable person, if party being harassed is a woman
 - Behavior men would consider unobjectionable could be offensive to many women
 - Determinant is from the perspective of the victim, not the perpetrator (KEY ISSUE)

Boykin v. Michigan Department of Corrections, 6th Circuit, 2000

- Do not have to distinguish between hostile environment and *quid pro quo* harassment
- If there was a tangible job detriment and a supervisor committed the harassment, the employer is strictly liable. There is no defense.
- If a peer committed the harassment, the employer will only be liable if it knew or should have known of the harassment, and failed to take prompt and effective remedial action.

Affirmative Defense

- ◆ First Defense: Employer exercised reasonable care to prevent and correct sexually harassing behavior.
- ◆ Second Defense: Employee unreasonably failed to take advantage of any preventative or corrective opportunities provided by the employer.

First Defense

- ◆ Explicit policy with a complaint procedure is not technically required,
- ◆ BUT the need for such a policy may be addressed in litigation
- HAVE A POLICY WITH A COMPLAINT PROCEDURE!

Second Defense

- ◆ Proof that an employee failed to use reasonable care to avoid harm is not limited to showing failure to use a complaint procedure,
- ◆ BUT such failure will normally suffice to satisfy the employer's burden.
- HAVE A POLICY WITH A COMPLAINT PROCEDURE THAT EMPLOYEES KNOW ABOUT!



NO Affirmative Defense

- ◆ If supervisor's harassment culminates in tangible employment action, such as discharge, demotion, or undesirable reassignment.

QUESTIONS ???

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