



# ALFA International

## The Global Legal Network





# ALFA International Sexual Harassment in the Era of #MeToo: An Employer's Evolving Obligations

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# #MeToo Movement

- ⦿ Extra-Legal
- ⦿ Court of public opinion
- ⦿ Significant reputational and business consequences

**Alyssa Milano**

✓ @Alyssa\_Milano

If you've been sexually harassed or assaulted write 'me too' as a reply to this tweet.

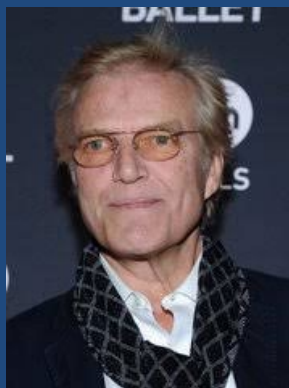
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# #MeToo Movement

- Who gets sued?
  - Can be employer *and* wrongdoer
- Possible Criminal Conduct



# #MeToo Movement



# Scenario

- ① You just got back from Christmas vacation when your phone rings. You answer to find a woman on the phone who identifies herself as June. She says she used to work at the organization in 1979 and she was “taken advantage of” by male managers. She asks to speak to the Executive Director.

# Scenario

- ◎ What to do with June?
  - Tell her wrong number and hang up
  - Attempt to investigate
  - Put her on with the ED
  - Listen attentively and empathize, but tell her there is nothing you can do



# Scenario

- ⦿ Harsh as it may seem the last response is likely all that is available
- ⦿ Maybe check to see if others still work there from 1979
- ⦿ Truth is sex harassment was not nationally recognized as unlawful



# Statistics

- ◎ Recent poll by HoneyBook (platform for freelance events-industry workers)
  - 54% cited being sexually harassed
    - 77% unprofessional comments
    - 76 % demeaning nicknames
    - 60% physical intimidation
  - 83% never reported incidents
  - 51% of those who did report cited no action taken as a result

# Statistics

|                | FY 2010 | FY 2011 | FY 2012 | FY 2013 | FY 2014 | FY 2015 | FY 2016 | FY 2017 |
|----------------|---------|---------|---------|---------|---------|---------|---------|---------|
| <b>Charges</b> | 12,695  | 12,461  | 12,569  | 12,379  | 12,146  | 12,573  | 12,860  | 12,428  |

# EEOC Guidance

## ⦿ Themes of Proposed Guidance

- Engaged Leadership
- Consistent and demonstrated accountability
- Comprehensive harassment policies
- Trusted and accessible complaint procedures
- Regular, interactive training specific to audience



# Legislation

- ◎ 2017 Tax Reform Law: The “Weinstein Tax”
  - Cannot deduct legal fees/amounts paid out to employee as expense if settlement agreement contains non-disclosure clause
  - Same for employee?



# Legislation

- ◎ Congressional Accountability Act Reform Act
  - Legislators must use own funds to settle sexual harassment claims
  - Abolish confidentiality
- ◎ Sexual harassment training requirement for Congressional staffers



# Legislation

- ⦿ Ending Forced Arbitration of Sexual Harassment Act
  - Arbitration of employment claims under fire more generally
- ⦿ Attorneys general from every state have petitioned Congress to prohibit arbitration of sexual harassment claims
- ⦿ Other state laws – stay tuned!

# Discrimination Overview

- ① Unlawful to **discriminate** against any individual with respect to compensation, terms, conditions or privileges of employment **BECAUSE OF** race, color, religion, sex, national origin, age, disability, veteran status etc.
- ① Unlawful to **retaliate** against an individual for making a complaint of discrimination

# Most Common Employment Discrimination Statutes

- Title VII: sex, race, color, national origin, religion, pregnancy
  - Harassment/Hostile Work Environment Claims
- ADEA: 40 plus – no cap
- ADA: disability
- Other: USERRA, GINA, etc.
- Family and Medical Leave Act



# State Laws

- Assault/Battery/Rape
- Intentional infliction of emotional distress
- False imprisonment
- Negligent hiring and supervision

*(against individual wrongdoer and employer AND no cap on damages)*

# Employment Lawsuits

- Expensive

Defense costs

Reinstatement

Back pay/Front pay

Punitive damages

Compensatory – pain and suffering

- Additional Costs

- Reputation
- Time
- Stress and Aggravation
- Emotional
- Seemingly without end



# The History

- Harassment is not a word that exists in the text of Title VII
- Prior to 1986 most courts saw a “Hostile Environment” as simple interactions between men and women
- 1986 Meritor Savings Bank v. Vinson



# The History

## Meritor:

- Title VII not limited to quid pro quo
- Supervisor and employee had relations over 50 times
- Employee claimed supervisor followed her to the bathroom and exposed himself
- Employee claimed supervisor raped her on several occasions

# The History

## Meritor:

- Activity ceased in 1977. She was fired a year later for taking excessive leave
- Even if conduct was voluntary, employee did not feel she could say no
- Hostile environment



# Two Types of Harassment

- ◎ Quid Pro Quo – “This for That”
  - Sex for job, promotion, better schedule, etc.
- ◎ Hostile Work Environment
  - Not just “sexual” harassment
  - Race, age, disability, religion

# Unlawful Harassment

- Employee belongs to protected group (Age – 40 and over, Minority, Sex, Disability)
- Unwelcome harassment *because of* group status
- Harassment was sufficiently severe or pervasive to alter terms and conditions of employment
  - Objective
  - Subjective
- Basis for Holding Employer Liable—Negligence/Strict Liability

# What Harassment Is Not

- ⦿ Remedy for Every Work-Related Slight
- ⦿ Boss is a Jerk - But Still Causes Problems
- ⦿ Customer Is Obnoxious
- ⦿ Nepotism - But People Don't Like It
- ⦿ Dating - But Be Careful!
- ⦿ Civility Code



# What Harassment Could Be

- ⦿ Male → Male
- ⦿ Male → Female
- ⦿ Female → Female
- ⦿ Female → Male
- ⦿ Homosexual Conduct
- ⦿ Hazing / Bullying
- ⦿ Unwanted Romance
- ⦿ Non-Romantic Sexual Conduct

VERBAL . . . NON-VERBAL  
CONDUCT . . . PHYSICAL  
CONDUCT . . . SEXUAL ASSAULT

# What Harassment Could Be

- ⦿ Sexual Stereotyping
- ⦿ The “Touchy-Feely” Types



- ⦿ Not just about sex



# Liability

- ⦿ If Manager/Supervisor Caused Harassment, Employer May Be Strictly Liable
- ⦿ If Co-Worker, Customer or Other Third Party Caused Harassment, then Employer Liable If It Knew or Should Have Known of Harassment

# Liability

## Who is a Supervisor?

- Power to hire and fire
- Power to direct work activities
- Power to recommend hiring and firing



# Strict Liability

- If Harassment Results in **Tangible Employment Action** = Vicarious or Strict Liability
- **Tangible Employment Action** = Significant Change in Employment Status, such as Hiring, Firing, Failing to Promote, Reassignment with Significantly Different Responsibilities or a Decision Causing a Significant Change in Benefits

# Affirmative Defense

- ◎ If No **Tangible Employment Action** =  
Affirmative Defense is Available
  - Employer Used Reasonable Care to **Prevent and Correct** Promptly any Harassing Behavior
  - Employee Unreasonably Failed to Take Advantage of any Preventive or Corrective Opportunities or to Avoid Harm Otherwise

# Prevention

- ① Develop Effective No-Harassment Policy
  - Define and Prohibit Harassment
  - Establish Reporting Structure
  - Confidentiality
  - No Retaliation
- ① Disseminate Policy
- ① Prove Dissemination



# Prevention

- ① Train Employees!
- ① What is effective training?
  - Online training vs. in person training
  - Asking/answering questions
  - Group discussions
  - Increases number of complaints?





# Prevention

- ⦿ Nothing will stop the determined predator, but:
- ⦿ For all others, training is a key element
- ⦿ Helps employees to understand boundaries and explains how to report



# Correction

- Take All Complaints Seriously
- Review Handbook Procedures
- Investigate IMMEDIATELY
- Interview Complainant, Alleged Harasser, and Witnesses
- Take Remedial Action Based on Investigation
- Continue to Monitor



# Correction



- ⦿ What is reasonably calculated to stop the harassment?
  - What works depends on the person
  - Is this a lack of understanding or fundamental flaw
  - Don't have to terminate even if the victim asks for that result

# Correction

- Occasionally you get repeat offenders
- Expect that termination may be the only recourse
- Expect retaliation claims



# Retaliation

- ⊙ Action Taken Against Employee For
  - Asserting Rights Under Statute
  - Assisting Others Asserting Rights Under Statute
  - Filing A Charge
  - Testifying, Assisting, Or Participating In An Investigation, Proceeding, Or Hearing
- ⊙ Against The Law
- ⊙ Against Policy

# Retaliation

- ⦿ Underlying claim need not be valid but the right to make it is protected
  - Engaging in protected activity
  - Suffered a tangible job action
  - Causal connection between the two



# Retaliation

- ⦿ Reporting employee is not shielded from any corrective action
  - Be sure you can document the wrongdoing
  - Be sure the discipline is consistent with the crime

# Scenario

- Wanda's boss always makes remarks about Wanda's "sexy legs." Wanda complains. Wanda's boss then gives Wanda a "needs improvement" on her performance evaluation for lack of team work.





# Scenario

- ⦿ What steps do you take:
  - Overturn the performance evaluation and discipline/terminate the manager
  - Sustain the performance evaluation and discipline/terminate the manager
  - Promote Wanda



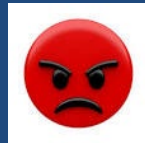
# Scenario

- ◎ Practical Impact of Retaliation:
  - Compromise ability to supervise effectively
  - Lose credibility as manager
  - Employee may perceive all negative actions as retaliatory
  - Employee may feel “bullet-proof”



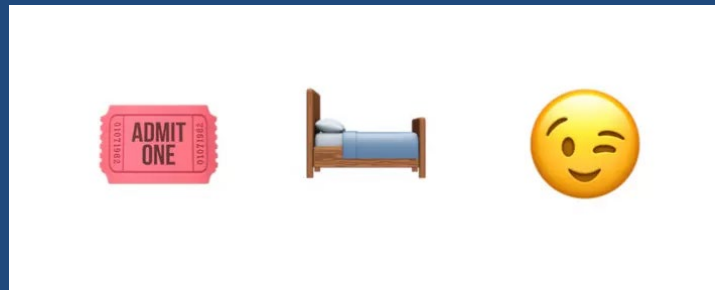
# Social Media

- Email/Texting/IM/Social Media
- Once It's Out There.....
  - Risks in Conducting Business Communications By Text
  - The Group Text
- More And More Cases Involve Texts/Postings/Tweets Etc.
- Ripe For Misunderstandings



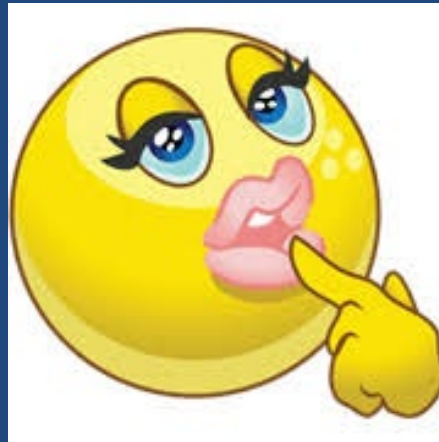
# Scenario

- The day shift communicates regularly by group text. Some texts are just about work, other are raunchy or politically charged. Some of the employees are friends outside of work and the group texts often continue after hours. Harvey and Ashley are co-workers and friends. Harvey sends suggestive emojis to Ashley.



# Scenario

- Ashley responds with her own emoji and then changes the subject.



- She then decides that Harvey's texting was inappropriate, makes her feel uncomfortable to work around him, and contacts HR.

# Scenario

- What are the employer's obligations here?
  - Nothing because this happened after work between co-workers so it's not the employer's problem.
  - Nothing because Ashley participated as a consenting adult in the suggestive texting with Harvey.
  - Counsel both of them for inappropriate texting.
  - Abolish use of group texting at work.

# Be Prepared for the Press

- In today's environment, we must be ready with a statement
- One spokesperson
- Get legal script review
- Management needs to be on the same page. No dissenters







# Final Pointers

- ⦿ **Message for All:**
- ⦿ Act Professionally
  - The Workplace Is Not Like The Rest Of The World
- ⦿ Respect Boundaries and Use Common Sense
  - Words, Actions, Personal Space
- ⦿ Don't Assume Everything Is OK
  - The World Is A Diverse Place
  - Not Everyone Thinks Like You
  - Not Everyone Has Your Same Boundaries/Sensibilities
- ⦿ Risk/Benefit Analysis
  - Can Be Sued Personally
  - Lose Job
  - Have To Explain Conduct To Family/Jury

# Final Pointers

## ◎ Message for Management:

- Review Discrimination/Harassment Policies
- Take All Complaints Seriously
- Managers Must Follow Through
- Prompt and Appropriate Investigation
- Remember Retaliation Is Unlawful

*Questions?*

*Thank you*