

SEXUAL HARASSMENT IN THE WORKPLACE



PRESENTED BY:

Brandon Carey
OSSBA STAFF ATTORNEY



TWO LAWS CURRENTLY APPLY



TITLE IX

- Prohibits sexual harassment in education programs that receive federal funds.

TITLE VII

- Prohibits discrimination and harassment in employment based on race, color, national origin, sex, and religion.



**For employee - employee
sexual harassment, which
law applies and when?**

WHICH LAW APPLIES?

- This determination was much easier prior to the new Title IX regulations. However, the new regulations define sexual harassment somewhat differently than Title VII.
- Furthermore, the Title IX regulations don't contain a carve out for employee-employee issues, which means that a district could be accused of violating Title IX if certain processes aren't followed.

COMMENTARY TO NEW TITLE IX REGULATIONS



- “These final regulations require all recipients with actual knowledge of sexual harassment in an education program or activity of the recipient against a person in the U.S. to respond promptly in a manner that is not deliberately indifferent, **irrespective of whether the complainant and respondent are students or employees.**”

p. 1261

COMMENTARY TO NEW TITLE IX REGULATIONS



“The Department appreciates support for its final regulations, **which apply to employees.**”

p. 1510

DEFINITION OF

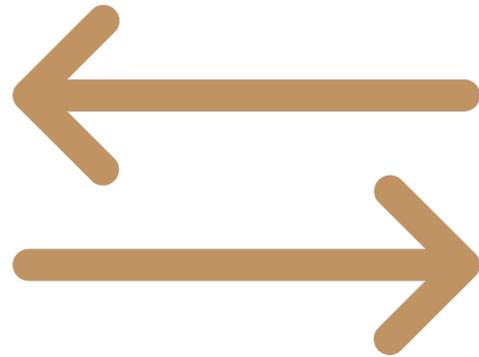
SEXUAL HARASSMENT UNDER TITLE VII

29 U.S.C 1604.11



Unwelcome sexual advances, requests for sexual favors, and other verbal or physical conduct of a sexual nature constitute sexual harassment when (1) submission to such conduct is made either explicitly or implicitly a term or condition of an individual's employment, (2) submission to or rejection of such conduct by an individual is used as the basis for employment decisions affecting such individual, or (3) such conduct has the purpose or effect of unreasonably interfering with an individual's work performance or creating an intimidating, hostile, or offensive working environment.

"Something for Something"



Employment decision based on submission to conduct of a discriminatory nature.

HOSTILE WORK ENVIRONMENT



Unwelcome verbal or physical conduct based on sex that is **sufficiently severe or pervasive** to **alter the conditions of the victim's employment** and create an abusive working environment.

HOSTILE WORK ENVIRONMENT



- In other words, the employee was subjected to unwelcome **sex-based conduct**, including comments, touching, materials, or other behavior of a discriminatory nature.



**Were the alleged sexual
advances or actions
"welcome"?**

SUFFICIENTLY SEVERE OR PERVASIVE

Must consider all relevant circumstances:

- the frequency;
- severity;
- whether it was physically threatening or humiliating, or a mere offensive utterance; and
- whether it unreasonably interferes with an employee's work performance."

SUFFICIENTLY SEVERE OR PERVASIVE

- Sexual assault is **ALWAYS** severe enough on its own.
 - Sexual contact without consent, which includes unwanted kissing or touching.

Retaliation occurs when employers treat applicants, employees or former employees, or people closely associated with these individuals, less favorably for:

- reporting discrimination;
- participating in a discrimination investigation or lawsuit (for example, serving as a witness), or;
- opposing discrimination (for example, threatening to file a charge or complaint of discrimination).

DEFINITION OF

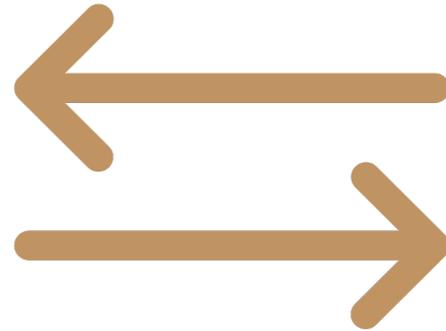
SEXUAL HARASSMENT UNDER TITLE IX

DEFINITION OF SEXUAL HARASSMENT



Sexual harassment means conduct on the basis of sex that satisfies one or more of the following:

“Something for Something”



An employee of the recipient conditioning the provision of an aid, benefit, or service of the recipient on an individual's participation in unwelcome sexual conduct; or

HOSTILE ENVIRONMENT

- Unwelcome conduct determined by a reasonable person to be so **severe, pervasive and objectively offensive** that it **effectively denies a person equal access to the recipient's education program or activity**; or

HOSTILE ENVIRONMENT - SEVERE

- “The more severe the conduct, the less the need to show a repetitive series of incidents; this is particularly true if the harassment is physical.”
- Physical conduct of a sexual nature often qualifies as severe
- Treatment that is humiliating, threatening or violent heightens the severity of the incident.

HOSTILE ENVIRONMENT - SEVERE



- Non-repetitive comments and jokes, that are not accompanied by other conduct, are usually not sufficiently severe to create a hostile environment.
- Conduct that is mean, hateful, rude, or insulting, but is not repetitive or pervasive, generally does not rise to the level of being severe

HOSTILE ENVIRONMENT - PERVASIVE



Pervasiveness hinges on how widespread, openly-practiced, prevalent and/or distributed the conduct is. Unwelcome sex- or gender-based conduct that is well-known among students or employees can qualify as pervasive.

HOSTILE ENVIRONMENT - PERVASIVE



- Conduct that occurs in public spaces is more pervasive than conduct that occurs in private.
- Online, electronic or social media postings and conduct, which often spread rapidly and widely, heighten the pervasiveness by which offensive and unwelcome content can be disseminated.

To determine whether conduct is objectively offensive, many factors may be considered, including:

- Age and relationships of the claimant and respondent
- Number of persons involved
- Frequency
- Severity
- Humiliation
- Intimidation
- Abuse
- Etc.

(3) SEXUAL ASSAULT, DATING VIOLENCE, DOMESTIC VIOLENCE OR STALKING



(3) “Sexual assault” as defined in 20 U.S.C. 1092(f)(6)(A)(v), “dating violence” as defined in 34 U.S.C. 12291(a)(10), “domestic violence” as defined in 34 U.S.C. 12291(a)(8), or “stalking” as defined in 34 U.S.C. 12291(a)(30).

SEXUAL ASSAULT

Sexual assault - An offense that meets the definition of rape, fondling, incest or statutory rape as used in the FBI's Crime Reporting System:

- Rape
- Fondling
- Incest
- Statutory rape

DOMESTIC VIOLENCE

A felony or misdemeanor crime of violence committed by:

- a current or former spouse or intimate partner of the victim,
- a person with whom the victim shares a child,
- a person who is cohabitating with, or has cohabitated with, the victim as a spouse or intimate partner,
- a person similarly situated to a spouse of the victim under the domestic or family violence laws of the jurisdiction in which the crime of violence occurred, or
- any other person against an adult or youth victim who is protected from that person's acts under the domestic or family violence laws of the jurisdiction in which the crime of violence occurred.

DATING VIOLENCE

Violence committed by a person who is or has been in a social relationship of a romantic or intimate nature with the victim. Must consider the following factors:

- The length of the relationship,
- The type of relationship,
- The frequency of interaction between the persons involved in the relationship.

Dating violence includes, but is not limited to, sexual or physical abuse or the threat of such abuse.

Engaging in a course of conduct directed at a specific person that would cause a reasonable person to:

- 1 Fear for the person's safety or the safety of others, or
- 2 Suffer substantial emotional distress.

Retaliation occurs when employers treat applicants, employees or former employees, or people closely associated with these individuals, less favorably for:

- reporting discrimination;
- participating in a discrimination investigation or lawsuit (for example, serving as a witness), or;
- opposing discrimination (for example, threatening to file a charge or complaint of discrimination).

DIFFERENCES

HOSTILE ENVIRONMENT



TITLE VII

- Severe *or* pervasive
 - In other words, it can be either severe or pervasive. It does not need to be both.

TITLE IX

- Severe, pervasive, *and* objectively offensive.
 - It must be all three. One of the three is not a hostile environment under Title IX.

HOSTILE ENVIRONMENT



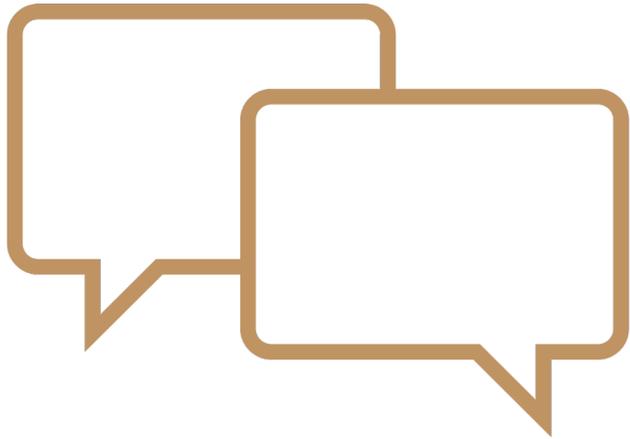
TITLE VII

- Must alter the conditions of the victim's employment and create an abusive working environment.

TITLE IX

- Must effectively deny a person equal access to the recipient's education program or activity.

COMMENTARY TO NEW TITLE IX REGULATIONS



“A complainant may be ‘attempting to participate’ in the recipient’s education program or activity in a broad variety of circumstances that do not depend on a complainant being, for instance, enrolled as a student or employed as an employee.”

p. 709

34 C.F.R. § 106.8(B)



The notification of policy “must state that the requirement not to discriminate in the education program or activity extends to admission (unless subpart C of this part does not apply) **and employment**, and that inquiries about the application of title IX and this part to such recipient may be referred to the recipient's Title IX Coordinator, to the Assistant Secretary, or both.

CLERY ACT DEFINITIONS



The Clery Act definitions aren't individually defined in the Title VII definition, although any of those instances could create a hostile environment under Title VII.

Title VII Liability



An employer is always liable for a supervisor's harassment if it culminates in a tangible employment action.

- Supervisor of immediate or successively higher authority (i.e., in chain of command), or employee reasonably believes individual has such power.

Title VII Liability

If no tangible employment action, the employer may be able to avoid liability or limit damages by establishing an affirmative defense that includes two necessary elements:

- the employer exercised reasonable care to prevent and correct promptly any harassing behavior, and
- the employee unreasonably failed to take advantage of any preventive or corrective opportunities provided by the employer or to avoid harm otherwise.

Title IX Liability



- K-12: For K-12, liability or notice differs depending on whether the allegation is being investigated by OCR or a lawsuit is filed in federal court.
- Postsecondary: For Postsecondary, liability or notice is the same regardless of the forum.

K-12 for OCR Complaint

- **Any employee** of the school district that has notice of prohibited sex-based conduct in the institution's "education program or activities."

Postsecondary for OCR Complaint or Lawsuit for K-12/Postsecondary

- Title IX Coordinator, or
- any official of the recipient who has authority to institute corrective measures on behalf of the recipient (e.g., Director, Assistant Director).



**So, how do we know
which law to use?**

NOTICE



If a responsible employee has notice, the allegation must be immediately reported to the Title IX Coordinator, regardless of whether it involves employees or students.

TITLE IX COORDINATOR



Title IX coordinator must contact alleged victim and:

- explain how to file a formal Title IX complaint, and
- offer supportive measures, **regardless of whether a complaint is filed.**

After the Title IX Coordinator contacts the alleged complainant, one of several things may occur:

- Formal complaint
- No formal complaint
- Delay in filing complaint

FORMAL COMPLAINT



If a formal complaint is filed, the Title IX coordinator must make a jurisdictional determination.

- 1** If jurisdiction, investigate under Title IX
- 2** If no jurisdiction, determine whether have jurisdiction under Title VII

NO FORMAL COMPLAINT



If the complainant does not want to make a formal complaint, either:

- 1 determine whether the Title IX coordinator should file a formal complaint on behalf of the alleged victim; or
- 2 investigate under Title VII

DELAY IN FILING FOR COMPLAINT



If the complainant does not quickly determine which route to pursue, either:

- 1** determine whether to file on behalf, or
- 2** begin Title VII investigation and incorporate into Title IX investigation if later files.

EXAMPLES

WORDS



An employee alleges that his coworker walked up to him and explicitly detailed what sexual acts she would like to perform with him. He has since felt extremely uncomfortable at work.

Would this be sufficiently severe *and* pervasive as to constitute harassment under Title IX?

SOCIAL MEDIA



An employee alleges that her coworker sent her a private Facebook message that contained a doctored photo of her engaging in sexual acts.

Would this be sufficiently severe *and* pervasive as to constitute harassment under Title IX?

PHYSICAL CONTACT



An employee alleges that her supervisor has, on two occasions, walked up behind her and grabbed her rear end.

Would this be sufficiently severe *and* pervasive as to constitute harassment under Title IX?

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