Sexual Harassment and Social Media Use

TASPA 2015 FALL CONFERENCE

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OCTOBER 5, 2015

A brief history

- 1964—The Civil Rights Act, including Title VII is passed. Initially, prohibited employment discrimination on the basis of race, religion, and national origin, but “sex” added as a last-minute amendment.

- 1975—Term “sexual harassment” coined by Cornell University activists.

A brief history, continued...

- 1980—EEOC issues guidelines defining sexual harassment as a form of discrimination.

- 1986—Supreme Court recognizes sexual harassment as a violation of Title VII in Meritor Svgs Bank v. Vinson.

- 1988—First class action sexual harassment suit (Jenson v. Eveleth).

A brief history, continued...

- 1991—Civil Rights Act amended to allow jury trials and increased damages in sexual harassment claims (originally, relief limited to reinstatement and backpay).


- 1993—S.Ct. declares that a victim need not show psychological harm or injury to prevail (Harris v. Forklift Systems).
A brief history, continued...

- 1998—Bill Clinton pays $850,000 to Paula Jones to settle her sexual harassment suit.
- 1998—S.Ct. defines employer liability: vicariously liable for hostile environment created by supervisor unless:
  - Reasonable care to prevent and correct
  - Employee failed to take advantage of preventive or corrective opportunities.

Where are we now?

WHAT ARE THE RELEVANT LAWS?
WHAT IS SEXUAL HARASSMENT ANYWAY?
WHAT ARE THE DEVELOPING AREAS OF THE LAW?
HOW SHOULD YOU REPORT/INVESTIGATE/RESPOND TO A CLAIM?
State and Federal Law

A number of laws prohibit sexual harassment:

- Title VII of the Civil Rights Act of 1964
- Texas Equal Rights Amendment
- Texas Labor Code, Ch. 21
- Title IX

Some impose criminal penalties (fines and jail terms):

- Texas Penal Code §39.03
- Tex. Civil Practice and Remedies Code, Ch. 106

District Policy DIA

- A district has an affirmative duty, under Title VII, to maintain a working environment free of harassment on the basis of sex, race, color, religion, and national origin. 42 U.S.C. 2000e, et seq.; 29 CFR 1606.8(a), 1604.11

- A district is responsible for acts of unlawful harassment by fellow employees and by nonemployees if the district, its agents, or its supervisory employees knew or should have known of the conduct, unless the district takes immediate and appropriate corrective action. 29 CFR 1604.11(d), (e), 1606.8(d), (e)
District Policy DIA

• “A public official commits a Class A misdemeanor if, while acting in his or her official or employment capacity, the official intentionally subjects another to unwelcome sexual advances, requests for sexual favors, or other verbal or physical conduct of a sexual nature, submission to which is made a term or condition of a person’s exercise or enjoyment of any right, privilege, power, or immunity, either explicitly or implicitly.”

Title IX Considerations

• Sexual harassment in education includes any unwanted and unwelcome sexual behavior that significantly interferes with a student’s access to educational opportunities.

• The Supreme Court has confirmed that schools have an obligation under Title IX to prevent and address harassment against students, regardless of whether the harassment is perpetrated by peers, teachers, or other school officials.
District Policy FB/FFH

- No person shall be excluded from participation in, denied the benefits of, or subjected to discrimination by any district that receives federal financial assistance, on the basis of sex.

- Sexual harassment of students is discrimination on the basis of sex under Title IX. *Franklin v. Gwinnett County Schools*, 503 U.S. 60 (1992)

- A district official who has authority to address alleged harassment by employees on the district’s behalf shall take corrective measures to address the harassment or abuse. *Gebser v. Lago Vista ISD*, 118 S.Ct. 1989 524 U.S. 274 (1998); *Doe v. Taylor ISD*, 15 F.3d 443 (5th Cir. 1994)

Who is Protected?

- Everyone is guaranteed the right to work/learn in an environment free from discrimination based on sex.

- Sexual harassment can take many forms:
  - Employee-employee, employee-student, student-student, student-employee, employee-vendor, vendor-employee, etc.
What exactly is sexual harassment?

It's a form of sex discrimination that includes:

- Unwelcome sexual advances
- Requests for sexual favors
- Sexually motivated physical, verbal, or nonverbal conduct
- Or other conduct or communication of a sexual nature

WHEN...

What exactly is sexual harassment, con’t.

- Submission to or rejection of the conduct is used as the basis for an employment action affecting the employee (Quid Pro Quo harassment); or

- The conduct is so severe, persistent, or pervasive that it has the purpose or effect of unreasonably interfering with the employee’s work performance or creates an intimidating, threatening, or hostile work environment.
Quid Pro Quo vs. Hostile Environment

- **Tangible employment action (quid pro quo)**
  - Someone with supervisory authority
  - Implicit or explicit
  - "I’ll give you x if you do y"
  - Promotion, compensation, work assignment
  - One instance is enough

- **Hostile environment**
  - Can be supervisor or coworker or non-employee
  - Work atmosphere
  - Frequency and severity
  - Interference with alters conditions of employment
  - Reasonable person standard
  - Verbal, physical, or visual

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Elements of a Hostile Environment Claim

- **Unwelcome harassment**

- **Based on sex**

- **That affects term, condition or privilege of employment by:**
  - Being sufficiently severe or pervasive to alter conditions of employment; and
  - Creating an abusive working environment as perceived by a reasonable person and the victim
Conduct must be unwelcome

“Hi—I got your note.”

“Unwelcome”

- Gravamen of any sexual harassment claim
- Evaluated from the perspective of the harassee
- Voluntary does not mean welcome
- In matters involving employee-student harassment, “welcomeness” makes no difference: All sexual advances are prohibited!
- Practical advice: Be as conservative and careful as possible
Hostile Environment Analysis

- Whether an environment is “hostile” requires an analysis of several factors:
  - The frequency/pervasiveness of the discriminatory conduct
  - The severity of the conduct
  - Whether the conduct is physically threatening or intimidating
  - Whether the conduct unreasonably interferes with the employee’s work performance

EXAMPLES OF CONDUCT CONTRIBUTING TO SEXUAL HARASSMENT (verbal)

- Making sexual comments about a person’s clothing, body, or looks
- Making suggestive sounds
- Telling jokes of a sexual nature
- Forwarding jokes of a sexual nature
**EXAMPLES OF CONDUCT CONTRIBUTING TO SEXUAL HARASSMENT (verbal)**

- Calling a person a name: hunk, doll, babe, honey, sexy, hottie
- Turning work discussions to sexual topics
- Talking about sex life, including one’s own; Asking personal questions about sex life
- Asking about sexual fantasies, preferences, orientation, or history

**EXAMPLES OF CONDUCT CONTRIBUTING TO SEXUAL HARASSMENT (nonverbal)**

- Staring at someone in a suggestive way
- Following a person for no work-related reason
- Sexual and/or derogatory comments about men/women on coffee mugs, hats, clothing, etc.
- Displaying sexually suggestive posters, calendars, and screensavers
EXAMPLES OF CONDUCT CONTRIBUTING TO SEXUAL HARASSMENT (nonverbal)

- Making facial expressions winking, throwing kisses, or licking lips in a suggestive way
- Making sexual gestures with hands and/or body movements
- Giving letters, gifts, and/or materials of a sexual nature
- Invading a person’s body space; standing closer than appropriate or necessary for the work being done

EXAMPLES OF CONDUCT CONTRIBUTING TO SEXUAL HARASSMENT (physical misconduct)

- Massaging a person’s neck, shoulders, etc.
- Touching a person’s clothing, hair, body
- Hugging, kissing, petting, or stroking
- Touching or rubbing oneself sexually around or in the view of another person
EXAMPLES OF CONDUCT CONTRIBUTING TO SEXUAL HARASSMENT (physical misconduct)

- Patting, goosing, caressing, or fondling
- Tearing/pulling/ yanking a person’s clothing
- Exposing oneself

What constitutes sexual harassment?

- A few comments (even if offensive) will not, without more, be considered sexual harassment

BUT...

- Repeated comments, especially intimate statements about a person’s physical traits, may constitute sexual harassment especially if made by a person in a supervisory position
  - Pattern
  - Gravity of incident may negate pattern
Developing Law: LGBT Issues

- Several courts and the EEOC have allowed harassment claims based on sexual orientation to proceed on a theory of gender stereotyping.

- According to the EEOC, "As a practical matter, discrimination motivated by sexual orientation will often be motivated by some sort of gender-based preference, assumption, expectation, norm or stereotype."

- The recent Supreme Court same-sex marriage ruling indicates that it would support the EEOC’s interpretation.
Developing Law: Social Media Considerations

- **Facebook posts** (Yancy v US Airways)
- **Text Messages** (Cherry v Shaw, Phillips v. Donahoe, Fry)
  - “Textual harassment” Using a mobile phone to repeatedly send unsolicited text messages to another person. May be a form of sexual harassment, abuse, or bullying.
- **Twitter, LinkedIn, etc.**
- Even if posts occur away from the workplace, they could still create a hostile environment.

Hall of Shame: How Not to Respond

“Ms. Rios received numerous **text messages** of a sexual nature from the harasser over the course of approximately two years. When she had finally had enough, she asked the harasser to stop. He did not. When she complained to her supervisors at various levels, the reaction was mixed, but decidedly unhelpful. Some supervisors referred her to other resources and took no steps to investigate or remedy the situation. Another [supervisor] attempted to intervene and was fired. During the investigation of her complaint, the store manager took the opportunity to tell Ms. Rios that her performance was lacking and that ‘unproductive communications’ could get you fired.”

- The defendant ultimately settled this case for $2.3 million
### Addressing Social Media-Based Harassment

- There is little guidance from the EEOC and courts regarding employer’s ability to regulate employee harassment on social media.

- Take prompt and effective corrective action to stop the harassing activity, such as counseling employees, asking them to remove offensive posts, checking in with the victim, reassigning if feasible.

### Student Sexual Harassment and Social Media

**TEACHER INVESTIGATION**

- **SUSPECT IS A TEACHER AT HEFNER MIDDLE SCHOOL**
- **POLICE SAY VICTIM WAS 12 WHEN TEXTS BEGAN**
- **WARRANT: SEVERAL VIDEOS AND PHOTOS EXchanged**
Use of Electronic Media with Students

- Know your District’s policy—some Districts ban all electronic communication with students; others define who, what, where, when and how.

- Generally, only certified/licensed individuals may communicate electronically with students while secretaries, bus drivers, janitors, cafeteria workers, etc., are prohibited from such communication.

- Know your DH(LOCAL) policy and employee handbook provisions.
Use of Electronic Media with Students

- Limit communications to instruction-related subject matter
- Do not communicate directly with any student between 10 p.m. and 7 a.m.
- Do not communicate with students through a personal social network page
- Upon request, provide information regarding the method(s) of Electronic Media used to communicate with student
- Upon request from a parent or student, discontinue communicating with the student through electronic communication
- Some districts limit communications with students only to licensed professionals

Speaking of Technology....

- E-mail is not private
- The Internet is not private
- Harassment and/or misconduct can occur by e-mail and social media just as it can by verbal, written, or physical conduct.
- Deleted e-mail isn’t really gone forever.
Accountability—Public Conduct

- Responsible for public conduct even when not acting as district employee

- Same professional standards for public use of Electronic Media as any other public conduct

- Subject to disciplinary action, up to and including termination, if use of Electronic Media:
  - Violates state or federal law or district policy
  - Interferes with ability to effectively perform job duties

- Employees who set up personal Websites/Webpages do so at their own risk.

District reporting procedures (DIA Local)

- “An employee who believes that he or she has experienced prohibited harassment should immediately report the alleged acts...”
District reporting procedures

- Who is the appropriate person to whom to report sexual harassment?
  - Immediate supervisor
    - (if immediate supervisor is the alleged harasser, do not have to report to immediate supervisor)
  - Campus principal
  - Title IX coordinator
  - Title VII coordinator
  - A report against the Title IX coordinator may be made to the Superintendent
  - A report against the Superintendent may be made to the Board

Reporting (Student is the Victim)

- Policy FFH (Local) – employees shall not tolerate harassment of students and shall make required reports (non-delegable duty to report suspected abuse/neglect)

- Any employee who receives notice that a student has or may have experienced prohibited harassment is required to immediately report the alleged acts to:
  - Campus Principal
  - IX Coordinator/Superintendent
Failure to Report: Possible Consequences

- Enables potentially unlawful conduct to continue
- Defeat of litigation claims (if victim fails to report)
- Discipline for failure to comply with Board Policy
- Exposes District to potential litigation
- Exposes you to personal liability

Do not fear retaliation!

District policy prohibits retaliation against any employee or student who, in good faith:

- makes a claim alleging to have experienced discrimination or harassment
- makes a report that another may have experienced discrimination or harassment
- serves as a witness, or
- otherwise participates in an investigation
District reporting procedures

- **Take all reports seriously. Do not say:**
  - “Oh, that’s just Jill. She treats all the men that way.”
  - “You’re just being sensitive today.”
  - “I have worked with him for 20 years. I know he wouldn’t do that.”
  - “Men will be boys.”
  - “Lighten up.”
  - “She was just joking.”
  - “Be flattered that someone finds you attractive.”

Investigations

- Upon receipt of a complaint of alleged harassment, the school official must determine whether the allegations, if proven, would constitute prohibited conduct. If so, then an investigation will be undertaken.
Investigations

- The investigation may consist of personal interviews of the alleged victim and alleged harasser, witnesses, and others who have knowledge of the surrounding circumstances.


- Do not promise anonymity or to not investigate a claim.

Appeals

- *Appeal:* A complainant who is dissatisfied with outcome of investigation may appeal through grievance policies (DGBA), beginning at the appropriate level.
Why this is important:

- A district is responsible for acts of unlawful harassment by fellow employees and by nonemployees if the district, its agents, or its supervisory employees knew or should have known of the conduct, unless the district takes immediate and appropriate corrective action. 29 CFR 1604.11(d), (e), 1606.8(d), (e)

Prevention

- Behave professionally
- Be familiar with the right of every person to work in an environment free of harassment
- Be prepared to assert rights
- Be familiar with the District’s harassment policies
- Train on the policies
- Be aware of what behavior is acceptable or unacceptable
Words of Wisdom

- Keep it clean
- Apply the grandma standard
- What would a spouse/significant other think of the behavior
- Take every complaint seriously
- What may be welcome at one point can change--Don’t mix business and pleasure.

“From now on, you’re Curious-but-Respectful-of-Boundaries George.”