



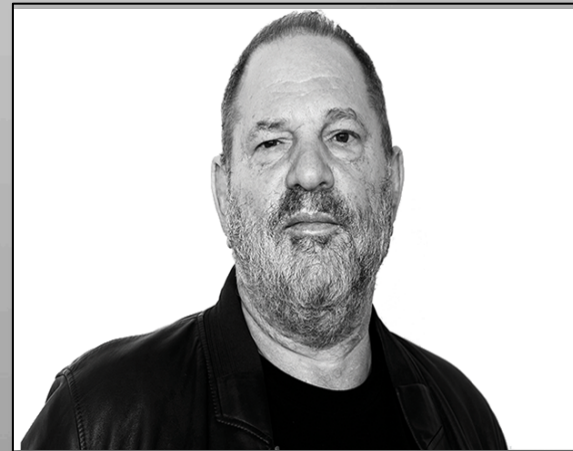
Unlawful Harassment In A Post Weinstein World: The Impact of The Weinstein Scandals On The Workplace; Claims; and The Courtroom

Agenda

- 1) Assessing the Impact of the Weinstein Effect On Workplace Harassment
- 2) The Impact of Weinstein On Claims And The Courtroom
- 3) Before Weinstein: Understanding the Law of Unlawful Harassment & Retaliation
- 4) Harassment Scandals: Is It Harassment? Retaliation? An Interactive Jeopardy Test

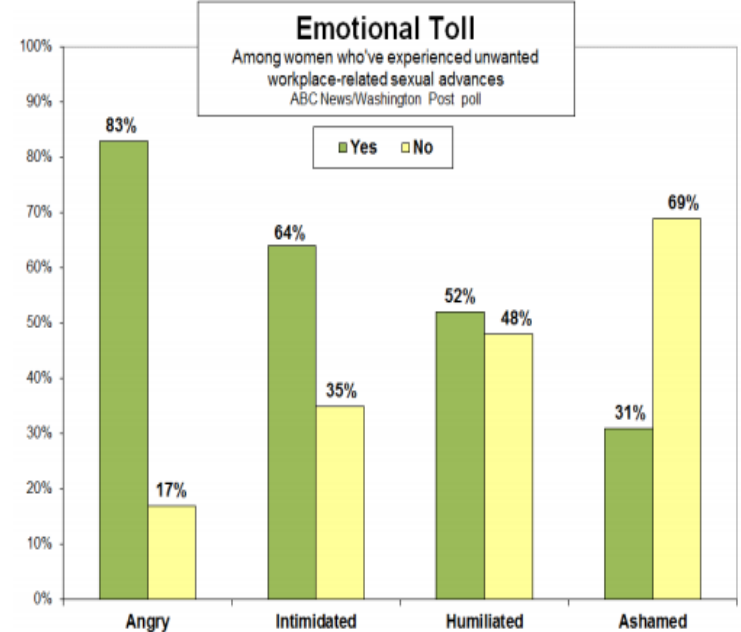
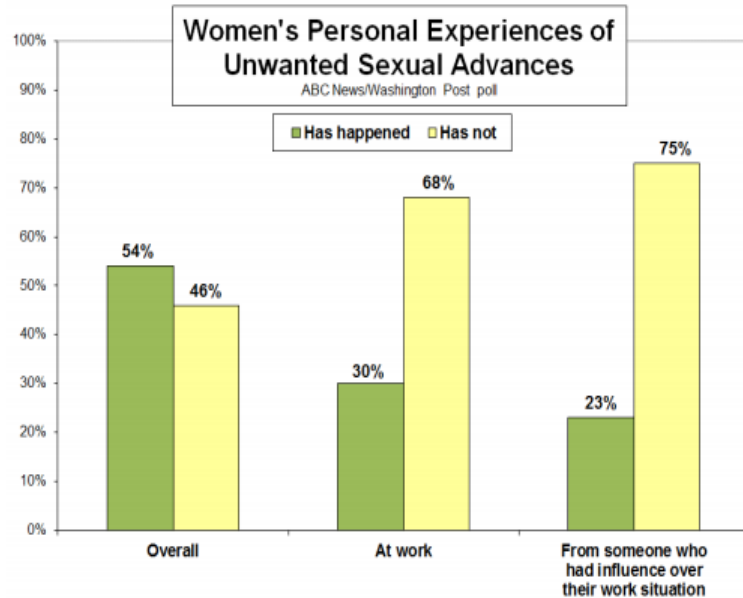
1) Assessing The Impact of The “Weinstein Effect”

- Media blitz has increased awareness of harassment and triggered a wave of newly reported incidents of harassment, even though many are years old
- Increased sensitivity to potential harassment in workplace
- Wave of reported harassment claims implicates virtually every institution, profession, and employer in America
 - Hollywood
 - The Media
 - The NFL
 - Wall Street & Corporate America
 - Even the Judiciary



The Media Blitz And Increased Awareness Has Motivated Women In The Workplace To Report

ABC/WASHINGTON POST: OCTOBER 2017



Celebrities Accused of Sexual Misconduct

- **Entertainment:**

- Chef **Mario Batali**
- Chef **John Besh**
- Singer **Nick Carter**
- Comedian **Louis C.K.**
- Cinefamily Execs **Hadrian Belove** and **Shadie Elnashai**
- Actor **Richard Dreyfuss**
- Film Producer **Adam Fields**
- Director/Producer **Gary Goddard**
- Casting Employee **Andy Henry**
- Actor **Dustin Hoffman**
- Actor **Robert Knepper**
- Showrunner **Andrew Kresiberg**
- Pixar and Disney Animation Chief **John Lasseter**
- Actor **Jeremy Piven**
- Filmmaker **Brett Ratner**
- Comedy Festival Organizer **Gilbert Rozon**
- Producer **Chris Savino**
- Actor **Steven Seagal**
- Def Jam Records Mogul **Russell Simmons**
- Actor **Tom Sizemore**
- Actor **Kevin Spacey**
- Actor **Jeffrey Tambor**
- Actor **George Takei**
- Writer/Director **James Toback**
- “Mad Men” Creator **Matthew Weiner**
- Producer **Harvey Weinstein**
- Actor **Ed Westwick**

- **Media, Publishing and Business**

- Billboard Magazine Exec **Stephen Blackwell**
- Penguin Random House Art Director **Guisepppe Castellano**
- New Republic Publisher **Hamilton Fish**
- Journalist **Mark Halperin**
- Artforum Publisher **Knight Landesman**
- NPR News Chief **Michael Oreskes**
- Amazon Exec **Roy Price**
- PBS and CBS Host **Charlie Rose**
- NYTimes White House Reporter **Glenn Thrush**
- Webster PR CEO **Kirt Webster**
- Rolling Stone Publisher **Jann Wenner**
- New Republic Editor **Leon Wieseltier**
- NBC News Booker **Matt Zimmerman**
- NBC “Today” Show Anchor **Matt Lauer**
- Former Host of “A Prairie Home Companion” **Garrison Keillor**

- **Sports**

- Former Eagles QB **Donovan McNabb**
- International Olympics Committee Member **Alex Gilady**
- Former South African Soccer Association President **Danny Jordaan**
- Former NFL Quarterback **Warren Moon**

- **Politics**

- Former President **George H.W. Bush**
- U.S. Rep **John Coyners**
- Minnesota Lawmakers Sen. **Dan Schoen** and Rep. **Tony Cornish**
- British Defense Secretary **Michael Fallon**
- U.S. Sen. **Al Franken**
- Kentucky House Speaker **Jeff Hoover**
- U.S. Senate Candidate Roy Moore
- Staffer for John Bel Edwards **Johnny Anderson**

In The Headlines

- “Top Appeals Court Judge Steps Down After Accusations of Sexual Harassment”
 - Judge Alex Kozinski of the 9th Circuit Court of Appeals steps down days after at least 15 women alleged they were subjected to his inappropriate sexual conduct or comments
- “Retired NFL Star Warren Moon Is Sued For Sexual Harassment”
 - Plaintiff Wendy Haskell accused Moon of forcing her to stay in his bed during business trips, wear skimpy clothing to bed, and threatened her job when she refused, alleging “his prior assistant accepted the same arrangement”



How is the Weinstein effect impacting the workplace?

- With all the publicity, what is actually happening at work?
 - Increased Reporting
 - Increase in EEOC Charges Filed
 - Rise In Related Equal Pay Act, Pregnancy, and Gender Discrimination Claims
- But Will We Start Seeing “Harassment Fatigue”?
 - Polling shows that many have begun to “grow weary” of these reported scandals, desensitizing many to the issue
 - Consider EEOC June 2016 Report:
 - “Compliance training is not training to change your mind. It is training to keep your job.” –Jonathan Segal



How is the Weinstein effect impacting the workplace?

- Recent Media Attention has also Generated other Adverse Consequences.
 - Media coverage highlights increased reports of sexual misconduct, but does not explain **WHAT** constitutes sexual harassment
 - According to one Instamor survey, nearly 1 in 5 men still don't believe sexual harassment is a terminable offense
 - Sexual harassment training is frequently met by employees with apathy or ridicule, and for some, the current media blitz will only serve to heighten these feelings
- With Increased Whistleblowing come other Unanticipated Consequences:
 - Misdiagnosed Harassment
 - Rise of Retaliation Claims
 - Rise of Defamation Counter Suits (Not Every Claim Is True)
 - Aziz Ansari – Anonymous Plaintiff – Now Supposed to Infer “No” From Non-Verbal Gesture

2) Assessing The Impact Of The “Weinstein Effect” On Claims And The Courtroom

- Courts reluctant to grant summary judgment
- Courts invoking the Weinstein “Casting Couch” and “Futile Gesture” Doctrine
- States Enacting New Legislation Requiring Harassment Training and Expanding Rights and Remedies for Harassment Claims
 - Virginia - HB 653 Employers; sexual harassment training; penalty.
 - Requires every employer with 15 or more employees to conduct sexual harassment training for all new employees and additional training for all supervisors and managers within one year of assuming their supervisory positions. Any employer who violates these requirements is subject to a civil penalty not to exceed \$100 for each violation and is placed on a DOL watchlist
- States moving to eliminate confidentiality clauses
 - If confidentiality is eliminated, will more employers litigate and go to trial?
- Anticipated Rise of Retaliation and Defamation Claims



States Enacting New Legislation

- States Proposing New Laws To Prohibit Confidential Settlement Agreements/Non-Disclosure Agreements:
 - Arizona
 - New York;
 - New Jersey;
 - Pennsylvania;
 - California
- What Is The Argument? Violation of Public Policy!
 - “Secret settlements in sexual assault and related cases can jeopardize the public — including other potential victims — and allow perpetrators to escape justice just because they have the money to pay the cost of the settlements... This bill will ensure that sexual predators can be held accountable for their actions and ideally prevent them from victimizing others.”
 - **Sen. Connie Leyva (CA) –*Los Angeles Times***

Rise of Defamation Claims

- **Filmmaker Brett Ratner** (*The Revenant, Rush Hour, and X-Men: The Last Stand*):
 - Filed lawsuit “a few hours” after a woman made “deliberately false and malicious accusations” of rape published in the *Los Angeles Times*
 - Woman posted on Facebook:
 - Ratner “was a rapist on at least one night in Hollywood about 12 years ago” when he “preyed on me as a drunk girl [and] forced himself upon me”
- **Geoffrey Rush**: Australian actor, suing Australian newspaper over “slurs, innuendo, and hyperbole” following sexual harassment reports
 - Paper compared Rush to Harvey Weinstein and Kevin Spacey
- **Seattle Sheriff**: Filed defamation lawsuit against ex-deputy for accusing him of sexual assault after a dinner outing in 2014
 - Complaint made public by *The Seattle Times* less than a week before the Sheriff’s Election
 - According to Sheriff’s Complaint the “Deputy’s malicious intent is substantiated by his more than 15 year habit and routine practice of targeting superiors with false complaints”

What About Litigation Privilege?

Public Controversies?

- [Volpe v. Paniccioli](#), (N.Y. Sup. Ct. Sup. Cty. Nov. 15, 2017), court denied sexual harassment plaintiff's motion to dismiss the defendant's counterclaim for defamation, holding that Plaintiff waived litigation privilege by:
 - Delivering copy of a report/complaint to the press;
 - Making out-of-court statements, including those made at press conferences and in press releases; and
 - Directing her husband to send defamatory email on her behalf
- **Massachusetts Court** dismissed Plaintiff's defamation claim against Bill Cosby for his public denial of Plaintiff's claims, finding that Plaintiff, by telling *The NY Daily News* in 2014 that Cosby raped her in 1974, "***thrust herself to the forefront of the controversy***" and would have to meet the highest standard in a defamation case: actual malice
 - Requires Plaintiff to prove that Cosby's denial and attack on Plaintiff's credibility was made with "knowledge of falsity" or reckless disregard for the truth

3) Before Weinstein: Understanding the Law of Unlawful Harassment

- Harassment is unwelcome conduct that rises to the level of a quid pro quo or a hostile work environment and is based on a protected characteristic such as race, sex, disability, religion, age, color, national origin, or even association (Iona College)
- Unwelcome? Uninvited?
- Difference: intent versus perception
- Both a subjective standard and “reasonable person” standard: evaluating the severity of conduct from perspective of a “reasonable person” in claimant’s position.
- Either Quid Pro Quo or Hostile Work Environment
- Inappropriate vs. Harassing Conduct



Hostile Work Environment

Conduct That Unreasonably Interferes With Job Performance – Hostile or Offensive Work Environment

Factors Defining Hostile or Abusive Environment

- Frequency & Severity of Discriminatory Conduct
- Physically Threatening
- Humiliating
- Renders Employee Unable To Perform Their Job
- Psychological Injury or Harm



Employer Liability: Title VII Harassment

- **Employers Are Always Liable For A Supervisor's Harassment - If It Results In Tangible Employment Action**
- A Supervisor or Other Person Acting With the Authority of The Company Can Cause A Tangible Employment Action:
 - Termination
 - Demotion
bonuses
 - Unacceptable performance reviews
 - Undesirable reassignment
 - Denial of pay raises or
- Who Qualifies As a Supervisor?
Vance v. Bell State University (June 24, 2013) clarifies:
 - Authority To Undertake Or Recommend Tangible Employment Decisions Affecting The Employee – Authority to Hire or Fire
 - No Longer Merely Authority to Direct Employees' Daily Work – Unless Reassignment Would Result in Tangible Employment Action

**Tangible
Employment
Action:** Usually
Inflicts Direct
Economic Harm

Defining Severity of Conduct

- Anti-Discrimination Statutes Are Not A General Civility Code
- Federal Law Does Not Prohibit Simple Teasing, Off-Hand Comments, or Isolated Incidents That Are Not “Extremely Serious”
- Must Be “Sufficiently Offensive So As To Alter The Conditions of The Victim’s Employment”



VS.



Conditions of Employment Are Altered When The Harassment Culminates In **A Tangible Employment Action** Or is Sufficiently Severe Or Pervasive To Create **A Hostile Work Environment**

SOCIAL MEDIA HARASSMENT:

Is The Company Liable For After Work (& Offsite) Social Media Harassment?

Blakey v. Continental Airlines, Inc., 751 A.2d 538 (N.J. 2000) – a first "Cyber Harassment" case

- Tammy Blakey, the first female captain to fly an Airbus, filed Complaint alleging sexual harassment by co-pilots.
- After filing her lawsuit, co-workers posted messages on Company Internet bulletin board, stating that Blakey's allegations were false and that she was motivated by greed and that female pilots who brought sex discrimination lawsuits were looking for favorable treatment.
- Blakey sued co-worker pilots and Continental for defamation, arguing that the Airline was liable for the hostile environment. Continental moved to dismiss the defamation claim and won. Blakey appealed.
- ISSUE: Whether the Company Internet forum should be considered part of the workplace.

What Result?

SOCIAL MEDIA HARASSMENT

Reversed and Remanded for Trial.

"The fact that the electronic bulletin board may be located outside of the workplace does not mean an employer has no duty to correct off-site harassment."

"Employers do not have a duty to monitor private communications of their employees. [BUT] employers do have a duty to take effective measures to stop co-employee harassment when the employer . . . Has reason to know [of such harassment.]"

Takeaway: If employers elect to have a presence on a social network, they should implement policies to monitor and prevent harassment.

Businesses with Facebook pages may disable the ability for employees (or others) to "like" the page or post messages.

Race, Color, and National Origin Harassment: It's Not Just About Sex

- **Title VII** prohibits employer actions that discriminate or harass, **by motivation or impact**, because of race, color or national origin including:
 - Racial or Ethnic Ancestry
 - Physical Characteristics
 - Linguistic Characteristics
 - Race-linked Illness
 - Perception or belief
 - Employee Association
 - Subgroup or “Race Plus”
 - “Reverse” Race Discrimination
- **Hostile Work Environment Claims** also have been recognized for Disability Harassment under the ADA; Age Harassment under the ADEA; and Religion Harassment under Title VII

The Inevitability of Retaliation Claims Following Harassment Complaints

- So What Typically Happens After The Harassment Investigation Ends And The Dust Settles?
- Retaliation as a Percentage of Total EEOC Charges in 2016?: 46%
- What about 2017?: 49%

Source: Equal Employment Opportunity Commission



THE RETALIATION PROBLEM

- Burlington Northern v. White, 548 U.S. 43 (2006)
 - **Supreme Court Redefined Retaliation:** *“Any action that would dissuade a reasonable worker from making or supporting a charge of discrimination.”*
- Retaliation DOES NOT need to be a tangible employment action (i.e. firing, demotion, etc.) and it can include
 - Changes in job duties
 - Scheduling changes
 - Any Non- Act that would dissolve an ‘EE from filing a Complaint
- After Burlington, more Plaintiff’s are filing retaliation claims
- BUT don’t forget to document ALL reasons for termination or adverse action. As Supreme Court clarified in Univ. of Texas SW Med. Ctr. v. Nasser (June 2013),
 - Retaliation Must Be The “But For” Reason For The Adverse Employment Action
 - Not Simply A Motivational Factor

4) Harassment Scandals: Is It Harassment?

AN INTERACTIVE JEOPARDY TEST



WEINSTEIN

WHERE IN THE
WORLD IS
MATT LAUER?

"KEVIN
SPACEY"
CLAIMS

GARRISON
KEILLOR/CHARLIE
ROSE

POTPOURRI

\$100

\$100

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**WHEN “CASTING
COUCH” OFFER IS
ACCEPTED AND HIRING
FOLLOWS**

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[Answer](#)

WHAT IS QUID PRO QUO HARASSMENT?

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**PLAINTIFF'S CLAIM WHEN
"CASTING COUCH" OFFER OF
EMPLOYMENT IS REJECTED**

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[Answer](#)

WHAT IS DISCRIMINATORY FAILURE TO HIRE UNDER THE “FUTILE GESTURE” DOCTRINE?

United States v. Gregory, 871 F.2d 1239 (4th Cir. 1989)

(Plaintiff is not required to subject herself “to the humiliation of explicit and certain rejection” by engaging in the “futile gesture of formally applying for the position” and being rejected for it.)

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[Answer](#)

What Is Probable Harassment?

- 1) Unwelcome;
- 2) Subjectively Offensive;
- 3) Objectively Offensive;
- 4) Because of Sex?

BUT IS IT SO SEVERE AS TO ALTER
TERMS AND CONDITIONS OF
EMPLOYMENT?

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**ONLY THESE INDIVIDUALS CAN
CREATE AUTOMATIC LIABILITY
FOR HARASSMENT**

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[Answer](#)

**WHO ARE SUPERVISORS WITH
AUTHORITY TO HIRE & FIRE?
VANCE V BALL STATE, (2013)**

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**CLAIMS ARISING FROM
LOCKING DOOR ON
COWORKERS VIA DESK
BUTTON**

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[Answer](#)

**WHAT IS FALSE
IMPRISONMENT? POSSIBLE
ASSAULT AND BATTERY**

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INITIATING A RELATIONSHIP WITH A SUBORDINATE

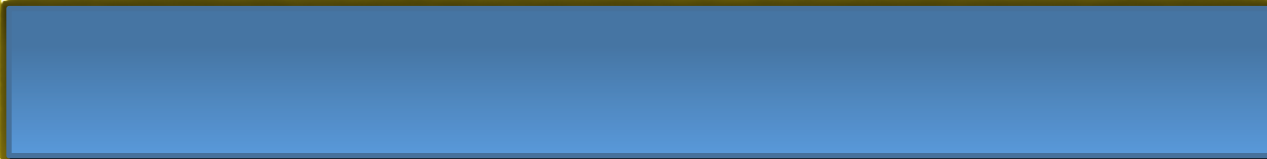
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[Answer](#)

NOT NECESSARILY HARASSMENT...

**BUT STRICT LIABILITY IF
SUBORDINATE CLAIMS IT WAS
AND WINS**

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[Answer](#)

WHAT IS A CONSENSUAL RELATIONSHIP (NOT SEXUAL HARASSMENT)?

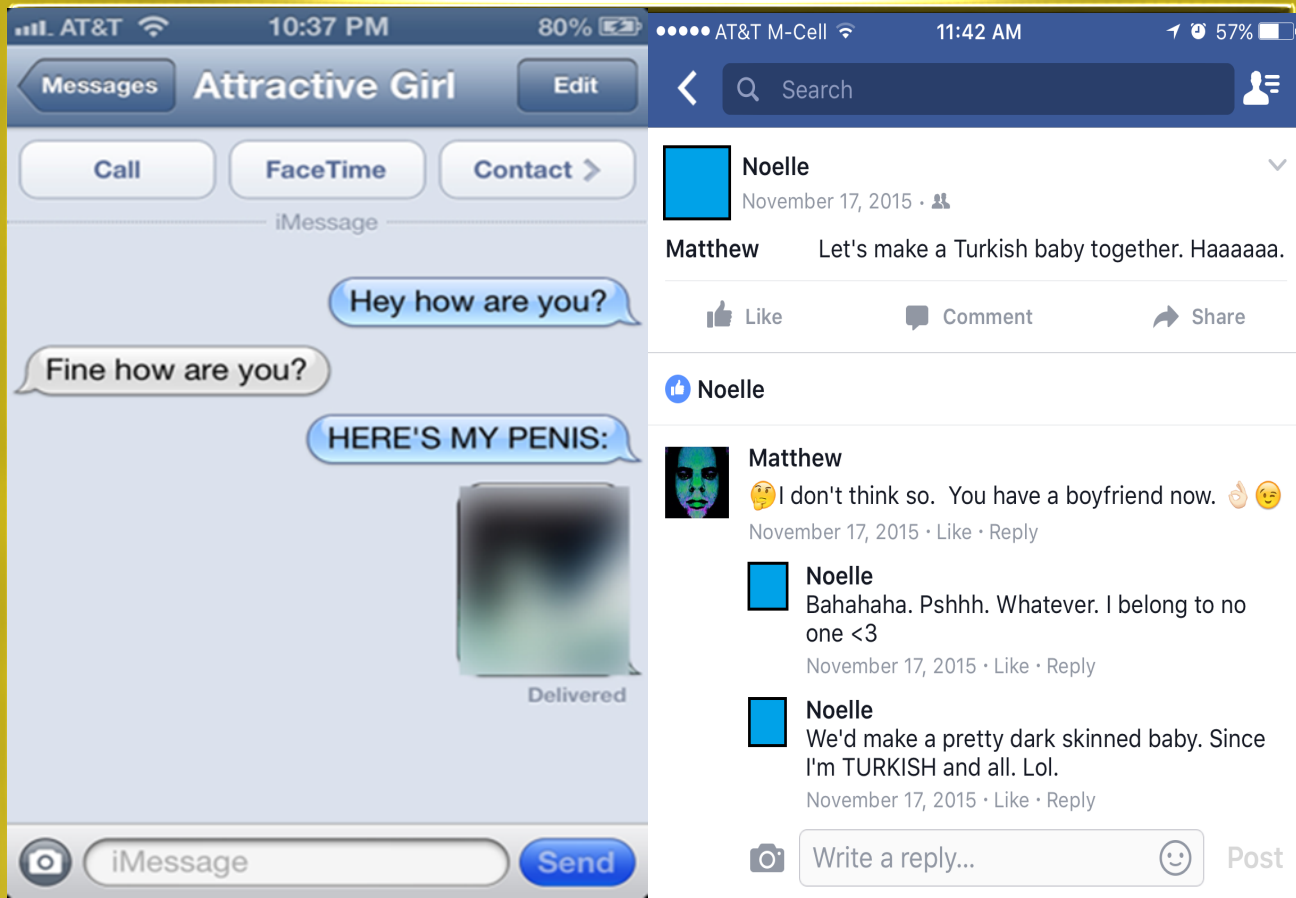
“ABUSE OF POWER” IS NOT NECESSARILY SEXUAL HARASSMENT

Bowling v. Shinseki, (S.D. GA 2014):

Summary judgment for employer where
“it is clear that Plaintiff did not take offense to the [supervisor’s] comments until after [supervisor’s] wife sent a threatening text message, which coincidentally marked the end of all personal messages.”

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"SEXTING" AFTER HOURS



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Answer

WHAT IS POTENTIAL HOSTILE WORK ENVIRONMENT?

THE WORK ENVIRONMENT INCLUDES
SOCIAL MEDIA & AFTER HOURS TEXTS
(if employer has notice):

Blakely v. Continental Airlines, (N.J. 2000)

Martin v. MCAP Christiansburg, LLC, 143 F. Supp. 3d 442,
(W.D. Va. 2015) (precluding summary judgment where employee
complained of co-worker's drunken weekend texts and late night
calls.)

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- **SAME SEX PHYSICAL CONTACT;**
- **POSSIBLE SEXUAL ASSAULT;**
- **MALE SUPERVISOR BULLYING
MALE SUBORDINATE;**
- **SUGGESTING PLAINTIFF WAS
HOMOSEXUAL;**

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[Answer](#)

WHAT IS POTENTIAL SAME-SEX HARASSMENT?

Oncale v. Sundowner Offshore Services, Inc.,
523 U.S. 75, 118 S. Ct. 998 (1998)

Title VII does not bar claim of discrimination “because of sex” merely because plaintiff and defendant, or person charged with acting on behalf of defendant, are of the same sex.

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MAKING LEWD AND SEXUALLY EXPLICIT COMMENTS TO MEN AND WOMEN ALIKE

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[Answer](#)

WHAT IS “NOT SEX HARASSMENT,” OR NOT “BECAUSE OF” SEX?

Dick v. Phone Directories Co., 397 F.3d 1256,
1263 (10th Cir. 2005)

"Rather, the critical issue in determining whether harassment is because of sex is whether members of one sex are subjected to a disadvantage to which the other sex is not."

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**HARASSING A
“MASCULINE”
WOMAN AND
MAKING
DEROGATORY
COMMENTS B/C
SHE “ACTS LIKE A
MAN”**



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[Answer](#)

WHAT IS “GENDER STEREOTYPE” HARASSMENT OR DISCRIMINATION?

Price Waterhouse v. Hopkins, 490 U.S. 228 (1989) - Illegal gender stereotype discrimination where partners referred to female candidate as “macho,” as “overcompensating for being a woman,” and needing “a course at charm school.”

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**HARASSMENT IS NOT JUST
ABOUT SEX**

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[Answer](#)

**WHAT IS “TRUE” (*e.g.*, Title VII
Race; National Origin; Gender;
Religion; Disability; ADEA Age)?**

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“I put my hand on a woman’s bare back. I meant to pay her back after she told me about her unhappiness and her shirt was open and my hand went up it about six inches. She recoiled. I apologized”



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[Answer](#)

WHAT IS NOT SUFFICIENTLY SEVERE OR PERVASIVE?

SEE EEOC POLICY GUIDANCE ON SEXUAL HARASSMENT:

“Unless the conduct is quite severe, a single incident or isolated incidents of offensive sexual conduct or remarks generally do not create an abusive environment.” (Citing Scott v. Sears, Roebuck and Co., 798 F.2d 210, 214, 41 EPD ¶ 36,439 (7th Cir. 1986))

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[Answer](#)

**WHAT IS MISUNDERSTANDING SEX
HARASSMENT!?
FLIRTATION ≠ HARASSMENT (ALSO A
POTENTIAL DEFAMATION LAWSUIT)**

Bowling v. Shinseki, (S.D. GA 2014):

Summary Judgment where Plaintiff initially viewed conduct as “innocent flirting” and “was not too bothered by the comments because [she] really just didn’t care and [] was not offended.”

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“two [women] said that while they were working for Rose at his residences or were traveling with him on business, he emerged from the shower and walked naked in front of them”

The Washington Post

Arts and Entertainment

CBS and PBS drop Charlie Rose following allegations of unwanted sexual advances

By J. Freedom du Lac, Elsie Izadi and Ben Terris November 21, 2017

PBS said Tuesday it was parting ways with Charlie Rose, and CBS announced it fired the 75-year-old broadcaster for “extremely disturbing and intolerable behavior” following an [extensive Washington Post report](#) that detailed his alleged unwanted sexual advances toward women.

Hours later, CBS Evening News reported three other women alleged they were subjected to “unwanted sexual contact” from Rose while working at CBS News.

His firing was announced by CBS News President David Rhodes, who wrote in a midday memo to the network’s staff that it was “effective immediately.”

“Despite Charlie’s important journalistic contribution to our news division, there is absolutely nothing more important, in this or any organization, than ensuring a safe, professional workplace — a supportive environment where people feel they can do their best work,” Rhodes wrote. “We need to be such a place.”

PBS terminated its relationship with Rose and canceled distribution of his programs “in light of yesterday’s revelations,” spokeswoman Jennifer Rankin Byrne said in a statement. Rose’s namesake interview program is produced by Charlie Rose Inc., an independent television production company.

“PBS expects all the producers we work with to provide a workplace where people feel safe and are treated with dignity and respect,” Byrne said.

Rose — best known for his award-winning interview program on PBS — had co-hosted “CBS This Morning” since the show’s launch in 2012 and was a contributing correspondent for the network’s Sunday night news magazine, “60 Minutes.”

CBS News suspended Rose on Monday, shortly after The Post’s story published. Bloomberg TV terminated its rebroadcast agreement with Charlie Rose.

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Answer

WHAT IS RUDE & RIDICULOUS- BUT NOT NECESSARILY HOSTILE WORK ENVIRONMENT HARASSMENT?

Lorenz v. Fed. Exp. Corp., No. 7:10-CV-00487, 2012 WL 4459570 (W.D. Va. Aug. 17, 2012) (Turk, J.)

Summary judgment, even though co-worker “stood with his legs apart and stroked his g*****s while plaintiff stood across from him” and “grinded his front side into plaintiff’s backside in the courier checkout room.”

“Title VII is not a general civility code because if that were the case we would be litigating past sundown in ever so many circumstances.”

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**WHEN
DETERMINING
PUNISHMENT –
AND FIRING
HARASSER
WITHIN 24
HOURS**



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[Answer](#)

**WHAT IS “CONSIDER PRECEDENT
& MAKE SURE IT FITS THE
CRIME”? (OR BE SURE TO
CONDUCT INVESTIGATION)**

**Don't risk exposure to defamation
claims based on failure to
investigate; lack of due process**

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DAILY DOUBLE

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[Answer](#)

WHAT IS POTENTIAL HARASSMENT...DEPENDING ON WHETHER “UNWELCOME”?

“The gravamen of any sexual harassment claim is that the alleged sexual advances were ‘unwelcome.’”

Meritor Sav. Bank, FSB v. Vinson, 477 U.S. 57, (1986)

“The plaintiff's response to the advances provides evidence of un-welcomeness.” **Briggs v. Waters, 484 F. Supp. 2d 466, 478 (E.D. Va. 2007)**

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**AL FRANKEN
RESIGNS OVER
PHOTO FROM
2006**



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[Answer](#)

- **WHAT IS TIME BARRED?**
OR
- **WHAT IS NOT SUFFICIENTLY SEVERE OR
PERVASIVE?**

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DAILY DOUBLE

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[Answer](#)

WHAT IS TITLE VII RETALIATION?

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[Answer](#)

What Is Negligence?

OR

**What is imputable to the
employer?**

OR

**What is knew or should have
known?**

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Free Drink at the Bar!!!

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Free 300 Points from:



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Anonymous
complaint,
after the fact,
alleging
unwanted
sexual contact
without
objection.



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[Answer](#)

What is Defamation?

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Free Appetizer at the Bar

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