

#MeToo: Revisiting Sexual Harassment in the Post-Weinstein Era

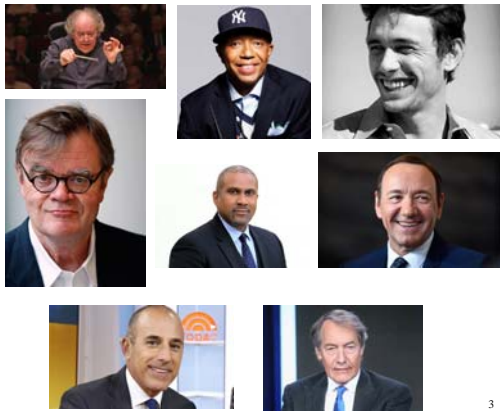
Arizona Paralegal Association
2018 Annual Legal Conference

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Legal Landscape

- n Courts have 40+ years of experience in assessing sexual harassment claims (Rogers case, 1972)
- n Supreme Court has further refined legal analysis of sexual harassment claims (Faragher, Ellerth, Oncale cases, 1998)

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Legal Landscape

- n Courts have not (yet) demonstrated a tendency to change their analysis of sexual harassment claims

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Legal Landscape



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Two Types of Sexual Harassment

- n “Tangible action” harassment
- n “Hostile environment” harassment

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“Tangible Action” Harassment


- n Basing an employment decision upon an individual’s acceptance or rejection of a sexual advance or sexual conduct
 - Hiring and firing decisions
 - Transfer, promotion, and demotion decisions
 - Discipline and discharge decisions

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“Tangible Action” Harassment


100



“Tangible Action” Harassment

If  then **W-2** Wage and Tax Statement

111

“Tangible Action” Harassment

If  then **W-2** Wage and Tax Statement

If no  then 

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“Hostile Environment” Harassment

- n Verbal or physical conduct based on sex
- n Unwelcome to the victim
- n Offensive to a reasonable person
- n Pervasive

133

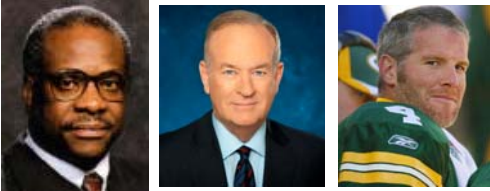
Verbal or Physical Conduct Based on Sex

- n Remarks, jokes, discussions

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Verbal or Physical Conduct Based on Sex

- n Remarks, jokes, discussions



155

Verbal or Physical Conduct Based on Sex

n Physical contact

166

Verbal or Physical Conduct Based on Sex

n Physical contact



177

Verbal or Physical Conduct Based on Sex

n Physical contact



188

Verbal or Physical Conduct Based on Sex

n Physical contact



199

Verbal or Physical Conduct Based on Sex

n Physical contact



200


Verbal or Physical Conduct Based on Sex

n Photos, magazines, calendars

211

Verbal or Physical Conduct Based on Sex

n Photos, magazines, calendars



222

Verbal or Physical Conduct Based on Sex

n Photos, magazines, calendars



VICTORIA'S SECRET

233

Verbal or Physical Conduct Based on Sex

n Photos, magazines, calendars



VICTORIA'S SECRET



244

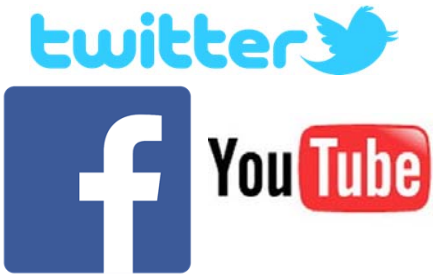
Verbal or Physical Conduct Based on Sex

n Electronic communication

255

Verbal or Physical Conduct Based on Sex

n Electronic communication



266

Verbal or Physical Conduct Based on Sex

n A mean or angry boss is not necessarily engaging in "sexual" harassment

277

Verbal or Physical Conduct Based on Sex

n A mean or angry boss is not necessarily engaging in "sexual" harassment



288

Verbal or Physical Conduct Based on Sex

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299

Verbal or Physical Conduct Based on Sex

n A mean or angry boss is not necessarily engaging in "sexual" harassment



300

Verbal or Physical Conduct Based on Sex

- n A mean or angry boss is not necessarily engaging in “sexual” harassment
- n #MeToo alert: Common basis for summary judgment

311

“Unwelcome” Conduct

322

“Unwelcome” Conduct



333

Consensual Conduct

344

Consensual Conduct

- n Mutual joking is not “harassment”
- n Consensual conduct is not unlawful

355

Consensual Conduct




366

Consensual Conduct




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Consensual Conduct



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Consensual Conduct

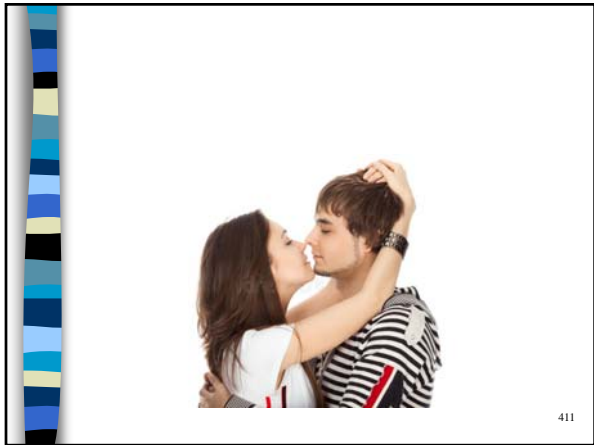


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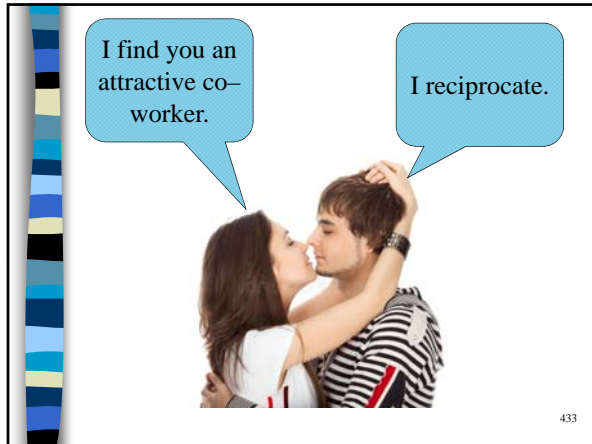
Consensual Conduct

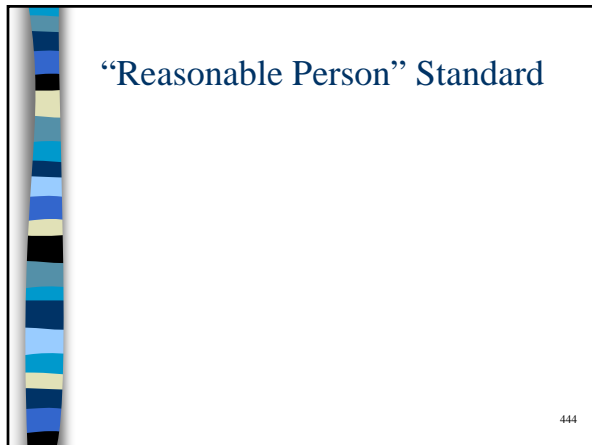
n Client's policy: "Reciprocal attraction between co-workers is not considered sexual harassment."

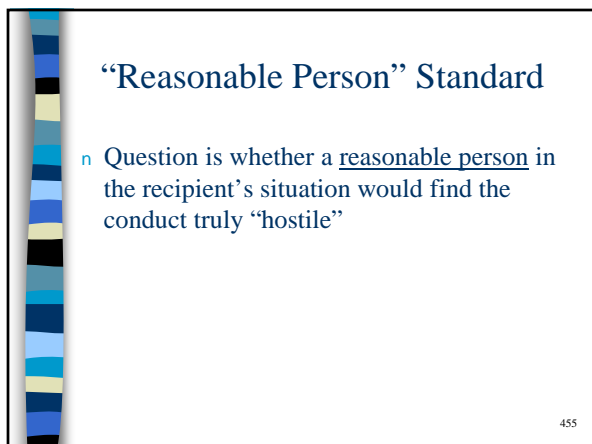
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“Reasonable Person” Standard



n Question is whether a reasonable person in the recipient’s situation would find the conduct truly “hostile”



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“Reasonable Person” Standard




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477

“Reasonable Person” Standard


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“Reasonable Person” Standard

n Note sex-based differences in perceptions of workplace conduct



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“Reasonable Person” Standard

n Question is whether a reasonable person in the recipient’s situation would find the conduct truly “hostile”

n #MeToo alert: Common basis for summary judgment

500

“Pervasive” Conduct

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“Pervasive” Conduct

- n Isolated incidents generally do not constitute unlawful “harassment”
- n Ongoing harassment is unlawful

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“Pervasive” Conduct

- n Isolated incidents generally do not constitute unlawful “harassment”
- n Ongoing harassment is unlawful



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“Pervasive” Conduct

- n #MeToo alert: Common basis for summary judgment

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Investigation/Remedial Action

- n Employers must investigate complaints of unlawful discrimination or harassment

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Investigation/Remedial Action

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Investigation/Remedial Action

- n Employers must investigate complaints of unlawful discrimination or harassment



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Investigation/Remedial Action

- n If unlawful discrimination or harassment has occurred, employer must take appropriate corrective measures

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Investigation/Remedial Action


- n If unlawful discrimination or harassment has occurred, employer must take appropriate corrective measures



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Investigation/Remedial Action

- n If unlawful discrimination or harassment has occurred, employer must take appropriate corrective measures



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Investigation/Remedial Action

n If unlawful discrimination or harassment has occurred, employer must take appropriate corrective measures

An illustration featuring three elements: a pink money bag with a green dollar sign, a small green house with a chimney, and a photograph of Donald Trump pointing upwards. A blue speech bubble next to the photo contains the text "You're fired!".

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Investigation/Remedial Action

n #MeToo alert: Common basis for summary judgment

622

Impact of #MeToo?

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Impact of #MeToo?

- n Defendants win a lot of sexual harassment cases on conclusion that conduct was not sufficiently “offensive” or “pervasive” to constitute actual “unlawful harassment”

644

Impact of #MeToo?


- Supervisor “sniffed me” and “rubbed up against me”
- Supervisor called plaintiff a “dumb blond” and then tried to kiss her (2X)
- “How about trying a ‘French maid’ costume for work?”
- “Baby doll, you and me belong in bed together”
- “You could strip, you know that?”

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Impact of #MeToo?

- “Baby doll, you and me belong in bed together”
- “I’ll bet you really moan and groan when you’re going at it”
- “Your elbows are the same color as your nipples”
- “You’ve got the sleekest ass in the office”
- “You castrating bitch”


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Impact of #MeToo?


n Will #MeToo movement affect judges' assessment of whether particular behavior is sufficiently "offensive" or "pervasive" to constitute actual "unlawful harassment"?

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Further questions?

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