

SEXUAL HARASSMENT:

- The Intersection of
Employment and Workers'
Compensation Law

LEGAL FRAMEWORK

- Quid Pro Quo
- Hostile Environment

HOSTILE WORK ENVIRONMENT

- Unwelcome conduct a reasonable person would find severely hostile and abusive
- Protects employee from behavior of coworkers, clients...
- Liability arises if employer knew or should have known

KEY ISSUE: WHAT IS A HOSTILE WORK ENVIRONMENT?

- Hostile:

- ◆ Female employee subjected to barrage of sexual vulgarities, offensive emails and groped by co-worker
- ◆ Male employee physically assaulted and threatened with rape by male coworker

■ Not Hostile:

- ◆ “A supervisor’s unprofessional managerial approach [is] not the focus of discrimination law”
- ◆ Supervisor “rude”
- ◆ Social Invitations to coworker
- ◆ “Personality conflicts”
- ◆ Single comment

DEFENSE TO HOSTILE CLAIMS

- Employer exercised reasonable care to prevent and promptly correct any harassing behavior

AND

- Employee unreasonably failed to take advantage of opportunities by employer to avoid harassment
- Burlington v. Ellerth, 524 U.S. 742 (1998)

A HOSTILE WORK ENVIRONMENT IS IN THE EYE OF THE BEHOLDER

- Courts have struggled to draw clear lines
- Factors Considered:
 - ◆ Frequency of unwelcome conduct
 - ◆ Nature of conduct
 - ◆ Is the conduct directed at the person?
 - ◆ Physical conduct?

Workers' Compensation – Sex is Optional

- Discrimination law - harassment tied to sex or protected status
- Harassment is multiple or repeated instances of disturbing or troubling conduct (Rivera v. ERSI 2013 R.I. Super. LEXIS 206)
- R.I.G.L. 28-34-2(36) “mental injury caused by emotional stress resulting from a situation of greater dimensions than the day-to-day emotional strain and tension which all employees encounter daily without serious mental injury” is compensable

Seitz v. L&R Industries Inc., 437 A.2d 1345 (1981)

Scenario 1

Christina is hired for a clerical position with public non-profit corporation. Six months after her employment starts her boss, Will, begins exchanging sexually graphic e-mails with her. Will details various sexual fantasies and advises her that their relationship is “animalistic sexual desires in its purest form.” To prove that point, the two have sex in parking lots and the agency’s building before the other employees start work. Ultimately, the Employer is informed of the relationship. Will is fired and Christina is placed on paid administrative leave and later sues. Is The Trust writing her a check? (Holmes v. North Texas Corporation (1/18/18))

Scenario 2

Tang interviews for an IT position with David, the Director of IT. During the interview he discusses personal matters including his view that Asian women are obedient, he employed two Thai au pairs at one time that did not wear sufficiently revealing swimsuits and asks whether she wanted him to teach her to golf. She is hired and works in another office and has limited contact with David. Six months after she is hired, she meets again with David for her review. He allegedly brings up the Thai au pairs and asks her what style swimsuit she prefers. He also asks her what dating websites she used. The meeting ends with Dave writing “assume” on a piece of paper and stated it could be broken down to “ass” “u” and “me.” He also allegedly gestured to her private area and said “this is your ass, this is my ass.”

A few months later Tang gets a negative job evaluation and is placed on a performance plan. She is ultimately fired. Is this a case?