

# DISTRICT LIABILITY FOR WORKPLACE LOCKER ROOM TALK

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## EEOC SEXUAL HARASSMENT STATISTICS

### Charges Alleging Sexual Harassment (FY 2010 - FY 2015)

	FY 2010	FY 2011	FY 2012	FY 2013	FY 2014	FY 2015
Receipts	7,944	7,809	7,571	7,256	6,862	6,822
Monetary Benefits (Millions)*	\$41.2	\$45.1	\$43.0	\$44.6	\$35.0	\$46.0

\*Does not include monetary benefits obtained through litigation.

[https://www.eeoc.gov/eeoc/statistics/enforcement/sexual\\_harassment\\_new.cfm](https://www.eeoc.gov/eeoc/statistics/enforcement/sexual_harassment_new.cfm).

## **“LOCKER ROOM TALK” IN THE NEWS**

- ❑ “Donald Trump defended his lewd and sexually aggressive comments as ‘locker room’ talk three times during Sunday’s presidential debate.” CNN (10/9/16).
- ❑ “The Fall of Roger Ailes: He made Fox News his ‘locker room’ – and now women are telling their stories.” The Washington Post (7/22/16).
- ❑ In 2013, EEOC announced in a press release, “EEOC Sues Battaglia Distributing Company for Racial Discrimination ... Company Defended Racial Slurs in the Workplace as ‘Locker Room Talk,’ Federal Agency Charged ... the agency’s investigation discovered that despite repeated complaints, supervisors not only let the use of offensive racial terms go undisciplined, they used them regularly themselves and described the use as locker room talk.”
- ❑ What we know from the 2013 EEOC case, “Locker Room Talk” is not a defense to claims of harassment.

## **RECENT HEADLINE— “FOX SETTLES WITH GRETCHEN CARLSON OVER ROGER AILES SEX HARASSMENT CLAIMS” NEW YORK TIMES (09/6/16)**

- ❑ “Specialists in employment law described the \$20 million payout to Ms. Carlson — a figure confirmed by a person briefed on the agreement — as among the largest-known settlements for a single-plaintiff sexual harassment suit.”
- ❑ “The evidence that Ms. Carlson had against Mr. Ailes was damning, according to another person with knowledge of the settlement: For a year and a half, she had recorded her meetings with Mr. Ailes on her mobile phone.”
- ❑ “Most of the remarks that she attributed to Mr. Ailes in her lawsuit — including lines like, ‘I think you and I should have had a sexual relationship a long time ago, and then you’d be good and better and I’d be good and better’ — were taken straight from those recordings.”

**RECENT HEADLINE — “LAURIE LUHN SAYS ROGER AILES SEXUALLY HARASSED HER FOR 20 YEARS: ‘I WENT THROUGH SUCH HELL’” ABC NEWS (11/18/16)**

- ❑ “Laurie Luhn worked for Roger Ailes, the former chairman and CEO of Fox News, for more than two decades and she says for much of that time, she was harassed, intimidated and pressured by him into performing sexual favors.”
- ❑ “‘I went through such hell for so many years. I finally felt safe when... I saw that other women were speaking up,’ Luhn told ABC News ‘20/20.’”
- ❑ “Luhn said she was desperate for a job and Ailes invited her for an interview with his firm. At the meeting, she said, he asked her questions that felt more personal than professional.”
- ❑ “‘You’re going to do whatever I tell you to do at any time. Do you understand that?’ Luhn said. ‘And he explained that it was like the military, that if he gave an order I was to follow through.’”
- ❑ “‘I wrote a letter to the legal counsel at Fox News,’ she said. ‘I just said that I’d been harassed the whole time I’d been at Fox and that I’d done my job... and I received no response.’”

**RECENT HEADLINE — “HIGH SCHOOL PRINCIPAL ACCUSED OF SEXUAL HARASSMENT FOUR TIMES” NEW YORK POST (11/11/16)**

- ❑ “A Queens high-school principal who has already cost the city more than \$500,000 in lawsuit settlements is being accused — for the fourth time — of sexually harassing another staffer whom he wanted to ‘conquer,’ according to a new complaint.”
- ❑ “Last year, the city settled with teachers Maria Catenacci and Sally Maya for \$275,000 total and also for an undisclosed amount in 2012 with an assistant principal who accused Kwait of discriminating against her for being pregnant.”

## FEDERAL LAW

### Title VII of the Civil Rights Act of 1964 (“Title VII”)

- ❑ It is unlawful for an employer “to fail or refuse to hire or to discharge any individual, or otherwise to discriminate against any individual with respect to his compensation, terms, conditions, or privileges of employment, because of such individual’s ... sex...” 42 U.S.C. § 2000e-2(a) (1).

## STATE LAW

### New Mexico Human Rights Act

- ❑ It is unlawful for “an employer, unless based on a bona fide occupational qualification or other statutory prohibition, to refuse to hire, to discharge, to promote or demote or to discriminate in matters of compensation, terms, conditions or privileges of employment against any person otherwise qualified because of ... sex ...”
- ❑ If the employer has fifteen or more employees, it is also unlawful “to discriminate against an employee based upon the employee's sexual orientation or gender identity.”

NMSA 1978, 28-1-7(A).

## SEXUAL HARASSMENT

- Sexual harassment is a form of sex discrimination that violates Title VII of the Civil Rights Act of 1964 and the New Mexico Human Rights Act.

## UNDERSTANDING SEXUAL HARASSMENT

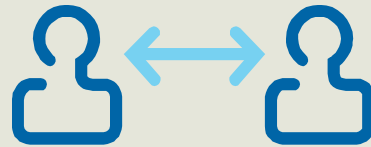
- Both victim and the harasser can be either a woman or a man.
- The victim and harasser can be the same sex.
- The harasser can be the victim's supervisor, a supervisor in another area, a co-worker, or someone who is not an employee of the employer, such as a client or customer.
- Although the law doesn't prohibit simple teasing, offhand comments, or isolated incidents that are not very serious, harassment is illegal when it is so frequent or severe that it creates a hostile or offensive work environment or when it results in an adverse employment decision (such as the victim being fired or demoted).

EEOC Guidance at: [www.eeoc.gov/laws/types/sexual\\_harassment.cfm](http://www.eeoc.gov/laws/types/sexual_harassment.cfm).

## IN THE SCHOOL CONTEXT

Sexual Harassment Can Occur Between:

- Supervisor – Employee
- Employee – Employee (Co-Workers)
- Employee – Student
- Student – Student



## TYPES OF WORKPLACE SEXUAL HARASSMENT

- Courts recognize two forms of workplace sexual harassment:
  - Hostile work environment
  - Quid pro quo
- Often cases involve a hybrid of the two. If there is quid pro quo, there is generally a hostile work environment.

## WHAT IS HOSTILE WORK ENVIRONMENT?

- Hostile work environment harassment occurs where sexual conduct has the purpose or effect of unreasonably interfering with an individual's work performance or creating an intimidating, hostile, or offensive working environment. See *Meritor Savings Bank, FSB v. Vinson*, 477 U.S. 57, 65 (1986).



## ELEMENTS (WHAT THE PLAINTIFF MUST PROVE) FOR HOSTILE WORK ENVIRONMENT

- The employee was subjected to unwelcome sexual harassment.
- The harassment occurred because of the employee's sex.
- The harassment was sufficiently severe or pervasive to create an abusive work environment affecting a term, condition, or privilege of employment.
- The employer knew, or should have known, of the harassment and failed to take remedial action.

See *Nava v. City of Santa Fe*, 103 P.3d 571 (2004).

## WHAT IS QUID PRO QUO?

### *Something For Something*



- Quid pro quo sexual harassment involves the conditioning of tangible employment benefits upon the submission to sexual conduct. See *Hicks v. Gates Rubber Co.*, 833 F.2d 1406, 1413 (10th Cir. 1987).

## ELEMENTS (WHAT THE PLAINTIFF MUST PROVE) FOR QUID PRO QUO

- The employee was subjected to unwelcome sexual harassment.
- The harassment was based on sex.
- The harassment altered the terms and conditions of employment.



## EXPOSURE TO LIABILITY IN QUID PRO QUO VERSUS HOSTILE WORK ENVIRONMENT CASES

- ❑ The standard for determining corporate (school district) liability due to a supervisor's sexual harassment depends on the type of sexual harassment that occurs.
- ❑ A plaintiff proceeding under a theory of *quid pro quo* harassment need not prove knowledge on the part of the School District employer. The employer is strictly liable for the supervisor's harassment.
- ❑ "This is logical. When a supervisor requires sexual favors as quid pro quo for job benefits, the supervisor, by definition, acts as the company." *Steele v. Offshore Shipbuilding, Inc.*, 867 F.2d 1311 (11th Cir. 1989).

## EXPOSURE TO LIABILITY IN QUID PRO QUO VERSUS HOSTILE WORK ENVIRONMENT CASES

- ❑ In a hostile environment case, liability exists where the corporate (school district) defendant knew or should have known of the harassment and failed to take prompt remedial action against the supervisor.
  - ❑ A defending employer in a hostile work environment case may raise the following affirmative defense to liability or damages:
    - ❑ That the employer exercised reasonable care to prevent and correct promptly any sexually harassing behavior; and
    - ❑ That the plaintiff employee unreasonably failed to take advantage of any preventive or corrective opportunities provided by the employer or to avoid harm otherwise.
- See *Burlington Industries, Inc. v. Ellerth*, 524 U.S. 742 (1998).

## CASE STUDY: WISNIEWSKI V. PONTIAC SCHOOL DIST., 862 F.SUPP.2D 586 (2012)-QUID PRO QUO CLAIM

### Background Facts:

- McAllister was one of the school district's police authority officers (PAOs).
- During the first several weeks Plaintiff admits she carried on a flirtation with McAllister. During this period, McAllister began to make sexual jokes and comments, first discreetly but later openly. The flirtation culminated in the parties having sexual relations in a patrol car.
- A month later, the parties again had sexual relations in a patrol car. This time, however, Plaintiff says she felt pressured and that the act was not fully consensual. Plaintiff does not allege that McAllister used force or the threat of force, although she says she felt as if her job was in jeopardy if she did not participate.
- After that, McAllister's comments became lewd and aggressive.
- Later, Plaintiff was among the 7 of 24 PAOS who were not recalled after a department wide layoff due to budget cuts.

## CASE STUDY: WISNIEWSKI V. PONTIAC SCHOOL DIST., 862 F.SUPP.2D 586 (2012)-QUID PRO QUO CLAIM

### Regarding whether Plaintiff was subjected to unwelcome sexual harassment:

- "A successful quid pro quo claim requires that the sexual advance or request was unwelcome."
- "[Plaintiff] had two sexual encounters with McAllister. [Plaintiff]'s claim of quid pro quo sexual harassment centers on her second sexual encounter with McAllister; she says the first was voluntary."
- "Although [Plaintiff] now asserts she felt pressured to perform the second act, she does not explain why her understanding of their relationship changed so dramatically. Further, [Plaintiff] has not advanced evidence to suggest she communicated to McAllister that a continued sexual relationship was unwanted."

## CASE STUDY: WISNIEWSKI V. PONTIAC SCHOOL DIST., 862 F.SUPP.2D 586 (2012)-QUID PRO QUO CLAIM

Plaintiff's claim of Quid Pro Quo also failed because:

- ❑ McAllister was not Plaintiff's supervisor. "[Plaintiff] says McAllister influenced her transfer from PNHS. Influence, however, is not authority. Because McAllister was not a 'supervisor' within the meaning of Title VII and did not control job benefit or detriments, his behavior cannot form the basis of a quid pro quo claim."
- ❑ There was no promise or threat. "Even if influence alone was sufficient, nothing in the record indicates McAllister made a threat or promise to induce Wisniewski to perform oral sex, which is the essence of a quid pro quo claim."
- ❑ "Finally, there is no causal link between her termination and the encounter with McAllister."

## CASE STUDY: ENGEL V. RAPID CITY SCHOOL DIST., 506 F.3D 1118 (2007)-HOSTILE WORK ENVIRONMENT

- ❑ During her employment with RCSD, Plaintiff regularly encountered the alleged harasser (Herrera), a non-supervisory co-worker. He began sexually harassing Plaintiff.
- ❑ Among other actions, Herrera asked Plaintiff "the color of her undergarments and commented on her buttocks. He once asked her to feel his penis. He also harassed other female co-workers."
- ❑ RCSD learned of Herrera's behavior when another RCSD employee, complained about him to her supervisor. After this complaint, Plaintiff "was asked by a supervisor if she had been harassed by Herrera. She said that she had been harassed and completed a written complaint describing the harassment."
- ❑ "In response, RCSD suspended Herrera ... and launched a panel investigation."

**CASE STUDY: ENGEL V. RAPID CITY SCHOOL DIST.,  
506 F.3D 1118 (2007)-HOSTILE WORK  
ENVIRONMENT**

- ❑ “The panel reported that the complaints against Herrera had been ‘carefully reviewed and verified,’ that the complaints were ‘credible,’ and that Herrera’s contrary explanation was ‘not believable.’ (*Id.* at 68). The conference review stated that Herrera’s conduct was unacceptable, and that it violated state and federal law.”
- ❑ “Herrera was allowed to return to work ... in the same department and location, but RCSD directed that he ‘undergo counseling to address these areas of concern.’” He could no longer have a master key, he was required to get advanced approval to leave his assigned building, and “when within his control, he was not to be alone with any female employee.”
- ❑ “RCSD advised Herrera that ‘any future complaints of harassment by you will result in your immediate termination of employment,’ and that ‘[i]f there are any additional instances of inappropriate conduct[,] whether it be touching, verbal or otherwise[,] your employment will be terminated.’”

**CASE STUDY: ENGEL V. RAPID CITY SCHOOL DIST.,  
506 F.3D 1118 (2007)-HOSTILE WORK  
ENVIRONMENT**

- ❑ After his return, Herrera once said hello to Plaintiff in the hallway and tried to strike up a conversation. On another occasion, he spoke to her over the school’s intercom system. Plaintiff testified that when she was in the same room with him, he continued to look her “up and down,” such that she felt he was “undressing [her] with his eyes.”
- ❑ After reporting his “continued leering,” Herrera was suspended without pay, but this time was not threatened with termination. Instead, restrictions were re-imposed and he was told, “[a]ny future complaints of conduct of harassment or violation of the aforementioned terms and conditions will result in additional administrative action, up to and including the termination of your employment.”
- ❑ According to Plaintiff, the leering continued, and she “would come home crying from work every night due to stress.” Ultimately, she resigned.

## CASE STUDY: ENGEL V. RAPID CITY SCHOOL DIST., 506 F.3D 1118 (2007)-HOSTILE WORK ENVIRONMENT

- ❑ Under all of the circumstances presented in this case, the court declined to dismiss the case, and instead ruled the adequacy of RCSD's second remedial action, and its potential liability for a continuing hostile work environment, presents a genuine issue for decision by a factfinder.
- ❑ "Significantly in our view, RCSD's decision to respond to Herrera's continued harassment by decreasing, rather than increasing, its threatened sanctions may reasonably be viewed as contributing to a negligent response. The reasonableness of an employer's response to repeated sexual harassment 'may well depend upon whether the employer progressively stiffens its discipline, or vainly hopes that no response, or the same response as before will be effective.'"

## EEOC SELECT TASK FORCE ON THE STUDY OF HARASSMENT IN THE WORKPLACE (JUNE 2016)

### Recommendations Regarding Workplace Leadership and Accountability:

- ❑ Employers should ensure that where harassment is found to have occurred, discipline is prompt and proportionate to the severity of the infraction. In addition, employers should ensure that where harassment is found to have occurred, discipline is consistent, and does not give (or create the appearance of) undue favor to any particular employee.
- ❑ Employers should hold mid-level managers and front-line supervisors accountable for preventing and/or responding to workplace harassment, including through the use of metrics and performance reviews.
- ❑ If employers have a diversity and inclusion strategy and budget, harassment prevention should be an integral part of that strategy.

## EEOC SELECT TASK FORCE ON THE STUDY OF HARASSMENT IN THE WORKPLACE (JUNE 2016)

### Recommendations Regarding Harassment Prevention Policies and Procedures:

- Employers should adopt and maintain a comprehensive anti-harassment policy (which prohibits harassment based on any protected characteristic, and which includes social media considerations) and should establish procedures consistent with the principles discussed in this report.
- Employers should ensure that the anti-harassment policy, and in particular details about how to complain of harassment and how to report observed harassment, are communicated frequently to employees, in a variety of forms and methods.

## EEOC SELECT TASK FORCE ON THE STUDY OF HARASSMENT IN THE WORKPLACE (JUNE 2016)

### Recommendations Regarding Harassment Prevention Policies and Procedures:

- Employers should offer reporting procedures that are multi-faceted, offering a range of methods, multiple points-of-contact, and geographic and organizational diversity where possible, for an employee to report harassment.
- Employers should be alert for any possibility of retaliation against an employee who reports harassment and should take steps to ensure that such retaliation does not occur.
- Employers should periodically "test" their reporting system to determine how well the system is working.

## EEOC SELECT TASK FORCE ON THE STUDY OF HARASSMENT IN THE WORKPLACE (JUNE 2016)

### Recommendations Regarding Harassment Prevention Policies and Procedures:

- Employers should devote sufficient resources so that workplace investigations are prompt, objective, and thorough. Investigations should be kept as confidential as possible, recognizing that complete confidentiality or anonymity will not always be attainable.
- Employers should ensure that where harassment is found to have occurred, discipline is prompt and proportionate to the behavior(s) at issue and the severity of the infraction. Employers should ensure that discipline is consistent, and does not give (or create the appearance of) undue favor to any particular employee.
- In unionized workplaces, the union should ensure that its own policy and reporting system meet the principles outlined in this section.

## EEOC SELECT TASK FORCE ON THE STUDY OF HARASSMENT IN THE WORKPLACE (JUNE 2016)

### Other Areas of Recommendation:

- Recommendations Regarding the Prevalence of Harassment in the Workplace.
- Recommendations Regarding Anti-Harassment Compliance Training.
- Recommendations Regarding Workplace Civility and Bystander Intervention Training.
- Recommendations Regarding General Outreach.
- Recommendations Regarding Targeted Outreach to Youth.
- Recommendation Regarding an It's on Us campaign.

## IF YOU USE NMSBA POLICY SERVICE

Applicable Policies to Examine Against these Standards and Recommendations:

- A-0250 © AC  
NONDISCRIMINATION / EQUAL OPPORTUNITY
- A-0300 © ACA  
SEXUAL HARASSMENT

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