Sexual Harassment: A Primer

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In practice, the vast majority of the time the question of liability for sexual harassment arises in the employment context. Additionally, liability may exist for sexual torts committed by volunteers of non-profit or similar organizations. The victim may or may not be an employee of the corporation. For example, victims of sexual abuse committed by doctors and clergy are frequently patients or congregation members. The relationship between the organization, the perpetrator/person in authority, and the victim dictates what liability is possible. Potential civil liability may derive from federal and state statutes, as well as common law torts.

Title VII (Civil Rights Act of 1964, as amended)

I. Federal Employment Statute Prohibiting Sexual Harassment in Employment
   a. Need minimum 15 employees to be considered "employer"
   b. Plaintiff must file charges within 300 days of conduct complained of; Provided that an act contributing to the claim occurred within the filing period, the entire time period of the hostile environment—even those events occurring more than 300 days prior to the filing of a charge-- may be considered by a court for the purposes of determining liability. *AMTRAK v. Morgan*, 536 U.S. 101 (2002).
   c. Cap on compensatory (i.e., non-economic) and punitive damages varying on size of employer.
      i. Largest employer = $300,000 (in addition to economic damages and attorneys' fees)
   d. Fee shifting claim, i.e., award of attorneys' fees and costs to "prevailing" plaintiff

II. Elements:

   a. He or she was subjected to unwelcome harassment;
      i. "To be actionable as sexual harassment, the unwelcome treatment need not be based on unwelcome sexual advances, requests for sexual favors or other verbal or physical conduct of a sexual nature… Instead, words or conduct demonstrating 'anti-female animus' can support a sexual harassment claim based on a hostile work environment. In other words… a plaintiff can proceed on a claim when the work environment is hostile because it is 'sexist rather than sexual.'" *Passananti v. Cook Cty.*, 689 F.3d 655, 664 (7th Cir. 2012)(internal citation and quotation omitted)

   b. The harassment was based on gender
      i. Traditional sexual harassment, i.e., sexual advances, comments, touching, etc.
      ii. Misconduct that is not necessarily sexual can contribute to a claim of gender-based harassment. *Passananti*, 689 F.3d at 664; *Haugerud v. Amery School Dist.*, 259 F.3d 678 (7th Cir. 2001)
      iii. "[I]nappropriate conduct that is inflicted on both sexes, or is inflicted regardless of sex, is outside the statute's ambit. Title VII does not cover the 'equal opportunity' or 'bisexual' harasser, then, because such a person is not discriminating on the basis of sex." *Holman v. Indiana*, 211 F.3d 399, 403 (7th Cir. 2000)

iv. Sex discrimination consisting of same-sex sexual harassment is actionable under Title VII. *Oncale v. Sundowner Offshore Servs.*, 523 U.S. 75, 82, 118 S. Ct. 998, 1003 (1998)
v. Discrimination on the basis of sexual orientation is a form of sex discrimination. *Hively v. Ivy Tech Cmty. Coll. of Ind.*, 853 F.3d 339, 341 (7th Cir. 2017)
vi. Gender based epithets: "We do not hold that use of the word "bitch" is harassment "because of sex" always and in every context, just as we did not hold that it never is… Our precedents have made clear that the use of the word in the workplace must be viewed in context. … But we do reject the idea that a female plaintiff who has been subjected to repeated and hostile use of the word "bitch" must produce evidence beyond the word itself to allow a jury to infer that its use was derogatory towards women. The word is gender-specific, and it can reasonably be considered evidence of sexual harassment." *Passananti*, 689 F.3d at 666 (internal quotation and citation omitted)

c. The harassment was sufficiently severe or pervasive so as to alter the conditions of the employee's environment and create a hostile or abusive working environment
i. No one event need be particularly severe. A series of less severe acts can constitute a pervasively discriminatory environment.
ii. One severe act can be enough. "Breaking the arm of a fellow employee because she is a woman . . . easily qualifies as a severe enough isolated occurrence to alter the conditions of her employment." *Smith v. Sheahan*, 189 F.3d 529, 534 (7th Cir. 1999)
iii. In *Baskerville v. Culligan Int'l Co.*, 50 F.3d 428, 430 (7th Cir. 1995), the court described the challenges in deciding where to draw the line: "On one side lie sexual assaults; other physical contact, whether amorous or hostile, for which there is no consent express or implied; uninvited sexual solicitations; intimidating words or acts; obscene language or gestures; pornographic pictures. On the other side lies the occasional vulgar banter, tinged with sexual innuendo, of coarse or boorish workers. . . . It is not a bright line, obviously, this line between a merely unpleasant working environment on the one hand and a hostile or deeply repugnant one on the other. . ."
iv. The work environment must be both objectively and subjectively offensive, i.e., one that a reasonable person would find hostile or abusive, and one that the victim in fact did perceive to be so.
1. "We have emphasized, moreover, that the objective severity of harassment should be judged from the perspective of a reasonable person in the plaintiff's position, considering "all the circumstances." *Oncale v. Sundowner Offshore Servs.*, 523 U.S. 75, 81, 118 S. Ct. 998, 1003 (1998)
v. "In same-sex (as in all) harassment cases, that inquiry requires careful consideration of the social context in which particular behavior occurs and is experienced by its target. A professional football player's working environment is not severely or pervasively abusive, for example, if the coach smacks him on the buttocks as he heads onto the field-even if the same

behavior would reasonably be experienced as abusive by the coach's secretary (male or female) back at the office. The real social impact of workplace behavior often depends on a constellation of surrounding circumstances, expectations, and relationships which are not fully captured by a simple recitation of the words used or the physical acts performed. Common sense, and an appropriate sensitivity to social context, will enable courts and juries to distinguish between simple teasing or roughhousing among members of the same sex, and conduct which a reasonable person in the plaintiff's position would find severely hostile or abusive." *Oncale v. Sundowner Offshore Servs.*, 523 U.S. 75, 81-82 (1998)

vi. Example: In *Boumehdi v. Plastag Holdings, LLC,* 489 F.3d 781 (7th Cir. 2007), the Seventh Circuit reversed summary judgment for an employer based on the plaintiff's evidence that her supervisor had made "at least eighteen sex-based comments" to her over the course of ten months, including "that women do not belong in the pressroom and think they know everything," as well as comments directed at the plaintiff based on how she should dress or how she was positioned. *Id*. at 786. The court oncluded that the supervisor's comments were both severe and pervasive enough to survive summary judgment. See *id*. at 789.

d. There is a basis for employer liability.

i. Co-worker harassment is a negligence standard: if the employer knew or should have known about an employee's acts of harassment and fails to take appropriate remedial action. Negligent either in discovering or remedying the harassment.

1. Generally, the law does not consider an employer to be apprised of the harassment "unless the employee makes a concerted effort to inform the employer that a problem exists." *Hrobowski v. Worthington Steel Co.*, 358 F.3d 473, 478 (7th Cir. 2004), quoting *Silk v. City of Chicago*, 194 F.3d 788, 807 (7th Cir. 1999) (internal quotation omitted).
2. "Generally, for constructive notice to attach, the notice must 'come to the attention of someone who ... has under the terms of his employment ... a duty to pass on the information to someone within the company who has the power to do something about it.' *Young v. Bayer Corp.*, 123 F.3d 672, 674 (7th Cir. 1997). Once that person learns of the sexual harassment, the employer is considered to be on notice even if the victim never reported the harassment." *Nischan v. Stratosphere Quality, LLC*, 865 F.3d 922, 931-32 (7th Cir. 2017)
3. Employer can be charged with constructive notice where the harassment was sufficiently obvious.

ii. Supervisor Harassment: An employer is subject to vicarious liability to a victimized employee for an actionable hostile environment created by a supervisor with immediate (or successively higher) authority over the employee.

1. Under Title VII, a supervisor is one with "the power to directly affect the terms and conditions of the plaintiff's employment." *Nischan v. Stratosphere Quality, LLC*, 865 F.3d 922, 930 (7th Cir. 2017), citing *Jajeh v. Cty. of Cook*, 678 F.3d 560, 568 (7th Cir. 2012). This power includes "the authority to hire, fire, promote, demote, discipline or transfer a plaintiff." *Id.*
    a. A supervisor need not have hiring or firing authority in order to create liability *for failing to respond* properly to a harassment complaint. *Lambert v. Peri Formworks Sys., Inc.*, Case No. 12-2502 (7th Cir., 7/24/13).
2. No affirmative defense is available when the supervisor's harassment culminates in a "tangible employment action."
    a. Constructive discharge = tangible employment action? *Pennsylvania State Police v. Suders*, 542 U.S. 129 (2004): The *Faragher/Ellerth* defense is unavailable if a supervisor or manager engaged in an "official act" like a demotion or reduction in pay that contributed to the intolerable work environment. When an official act does not underlie the constructive discharge, the employer has the chance to defend itself using the affirmative defense.
3. When no tangible employment action is taken, a defending employer may raise an affirmative defense to liability. *Burlington Indus. v. Ellerth*, 524 U.S. 742 (1998); *Faragher* v. *Boca Raton,524 U.S. 775 (1998).*
4. The *Faragher/Ellerth* defense comprises two necessary elements:
    a. That the employer exercised reasonable care to prevent and correct promptly any sexually harassing behavior, and
        i. dissemination of anti-harassment policy
        ii. complaint procedures in place
        iii. training of the workplace
        iv. investigate
        v. remediate
    b. That the plaintiff employee unreasonably failed to take advantage of any preventive or corrective opportunities provided by the employer or to avoid harm otherwise

III. Immunity from Punitive Damages: *Kolstad v. American Dental Ass'n*, 527 U.S. 526 (1999)
    a. No liability for discriminatory employment decisions of managerial agents where these decisions are contrary to the employer's good faith efforts to comply with Title VII
    b. An employer's conduct with regards to other complaints and investigations of harassment is relevant to prove this affirmative defense. See, e.g., *Alford v. Aaron Rents, Inc.*, No. 3:08-cv-683 MJR-DGW, 2010 U.S. Dist. LEXIS 67790, at *81 (S.D. Ill. May 17, 2010).

Equal Protection Clause of the 14th Amendment/§1983

When the employer is governmental, a claim for sexual harassment may also be brought under the Equal Protection Clause of the 14th Amendment via §1983. The analysis of the claims under Title VII and §1983 are largely the same. Key differences include

1. No charge required.
2. 2 year statute of limitation.
3. No cap on damages.
4. Individual Liability in addition to employer liability
    a. "Under Color of Law": To be liable under Section 1983, an individual defendant must have acted under "color of law." To establish that a defendant acted under color of law in a sexual harassment context, a plaintiff must show that the defendant held some form of authority over the plaintiff, such as the power to control the circumstances of her employment. *Valentine v. City of Chi.*, 452 F.3d 670, 682-83 (7th Cir. 2006).
    b. Personal involvement required: "Unless he or she caused or participated in the alleged constitutional deprivation, an individual cannot be held liable in a Section 1983 action. *Zimmerman v. Tribble*, 226 F.3d 568, 574 (7th Cir. 2000). To be personally liable, 'supervisors must know about the conduct and facilitate it, approve it, condone it, or turn a blind eye for fear of what they might see. In other words, they must act either knowingly or with deliberate, reckless indifference.' *Gossmeyer v. McDonald*, 128 F.3d 481, 495 (7th Cir. 1997). '[S]upervisory liability can be established if the conduct causing the constitutional deprivation occurs at the supervisor's direction or with the supervisor's knowledge and consent.' *Jones v. City of Chi.*, 856 F.2d 985, 992-93 (7th Cir. 1988)." *O'Leary v. Kaupas*, No. 08 C 7246, 2012 U.S. Dist. LEXIS 531, at *40 (N.D. Ill. Jan. 4, 2012)
    c. Qualified immunity defense: It was clearly established in the Seventh Circuit since at least 1986 that sexual harassment under color of law in the workplace constitutes gender discrimination in violation of the equal protection clause. *See, e.g., Nanda v. Moss*, 412 F.3d 836, 844 (7th Cir. 2005). Therefore, most defendants are not entitled to qualified immunity for sexual harassment.
5. To hold municipal bodies liable, must also satisfy *Monell* standard of liability.

Illinois Human Rights Act

I. Introduction:
   a. Employer need only have 1 employee to be covered by IHRA with respect to claims of sexual harassment.
   b. Employee must file charges within 180 days of misconduct, subject to continuing violation doctrine of *Morgan.* .
   c. The Act provides liability against the individual harasser, as well as the employer.

II. Sexual Harassment is separately actionable. **Need not be based on gender!**
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III. Under Section 2-102(D) of the Human Rights Act (775 ILCS 5/2-102(D)) employers are strictly liable for sexual harassment committed by their managerial or supervisory staff regardless of whether the alleged harasser was the actual manager or supervisor of the victim of the harassment. *See Feleccia and Sangamon County Sheriff's Department*, 2003 ILHUM Lexis 26, 10-11 (September 2003)
   a. "[T]here is no safe harbor" for an employer where managerial and supervisory employees commit sexual harassment. *See Cunningham and Wal-Mart Stores, Inc.*, ____ Ill.HRC Rep. (1992CF0496, April 16, 1998)

IV. The Illinois Human Rights Act also addresses gender discrimination/sexual harassment in the school setting. This material does not cover this aspect of the IHRA.

Title IX: Sexual Harassment in Education

Title IX of the Education Amendments of 1972 provides, inter alia, "No person in the United States shall, on the basis of sex, be excluded from participation in, be denied the benefits of, or be subjected to discrimination under any education program or activity receiving Federal financial assistance…" 20 U.S.C. § 1681(a)

The Supreme Court has set a high bar for plaintiffs seeking to hold schools and school officials liable for student-on-student harassment. School officials are given broad latitude to resolve peer harassment and are liable only in "certain limited circumstances." *Davis v. Monroe Cty. Bd. of Educ.*, 526 U.S. 629, 643. A peer-harassment plaintiff must demonstrate that the harassment was discriminatory, the school officials had "actual knowledge" of the harassment, the harassment was "so severe, pervasive, and objectively offensive that it ... deprive[s] the victims of access to educational opportunities," and officials were "deliberately indifferent" to the harassment. *Id.* at 650. The Court made clear that "courts should refrain from second-guessing the disciplinary decisions made by school administrators." *Id*. at 648.

Sexual Torts by Those in Healthcare

- *Hoover v. University of Chicago Hosps.,* 51 Ill. App. 3d 263 (Ill. App. 1977) (stating that an employee physician who sexually assaulted a patient could not be found to be acting within the scope of his employment).

- It is professional negligence on the part of a psychologist, psychiatrist, psychotherapist, etc. to engage in any sexual involvement with a patient. See *Corgan v. Muehling,* 143 Ill. 2d 296 (Ill. 1991); *Horak v. Biris*, 130 Ill.App.3d 140 (1985) (mishandling of transference phenomenon considered malpractice).

  See also Sexual Exploitation in Psychotherapy Act, 740 ILCS 140/1, et al.

- An Illinois court has strongly suggested that such negligence could be considered within the scope of employment. *St. Paul Fire & Marine Ins. Co. v. Downs*, 247 Ill. App. 3d 382, 391 (1993) "[A] psychotherapist who engages in sexual relations with a patient could not be said, as a matter of law, to have acted outside the scope of his employment." *Id* at 391. "The sexual misconduct of a therapist could be viewed as inside the scope of treatment under the guise of therapy." *Id* at 392.

- Intentional infliction of emotional distress. See *Pavlik v. Kornhaber*, 326 Ill.App.3d 731 (1st Dist. 2001). Appellate court reversed trial court's dismissal of IIED claim against organization of which offending therapist was a principal.

Sexual Torts by Clergy

- Clergy malpractice: This cause of action has been soundly rejected by the courts of Illinois. See *Baumgartner v. First Church of Christ, Scientist,* 141 Ill. App. 3d 898, 490 N.E.2d 1319, 96 Ill. Dec. 114 (Ill. App.), *appeal denied,* (Ill.), *cert. denied,* 479 U.S. 915, 93 L. Ed. 2d 290, 107 S. Ct. 317 (1986).

- "Illinois courts have refused to create a legally recognized duty between clergymen and their congregation. . . Without such a duty imposed by law, there can be no claim for negligent infliction of emotional distress or for breach of a fiduciary duty." *Maryland Casualty Co. v. Havey*, 887 F. Supp. 195, 200 (C.D. Ill. 1995). See also *Dausch v. Rykse*, 52 F.3d 1425, 1438 (7th Cir. 1994); *Amato v. Greenquist*, 287 Ill.App.3d 921 (1st Dist. 1997)

- Vicarious Liability of Church
  a. The United States Court of Appeals for the Seventh Circuit has specifically stated that sexual misconduct by a member of the clergy is generally beyond the scope of employment of the cleric. *Dausch v. Rykse,* 52 F.3d 1425, 1436 (7th Cir. 1994). *See also Mt. Zion State Bank & Trust v. Central Illinois Annual Conf. of the United Methodist Church,* 198 Ill. App. 3d 881, 556 N.E.2d 1270, 1275-76, 145 Ill. Dec. 368 (Ill. App. Ct. 1990)(finding sexual abuse or molestation to be beyond the scope of a pastor's duties).

- Direct/independent liability of the Church, i.e., negligent hiring, retention, supervision, etc.
  a. Lawsuits against some religious institutions claim that the church's structure is so strictly hierarchical and its control over its elders and members so absolute, that each level of the organization, from top to bottom, should be treated as the alter ego of the other.
  b. *Parks v. Kownacki*, 305 Ill.App.3d 449 (5th Dist. 1999) §317 imposes a duty upon church to exercise reasonable care in preventing pastor-employer from molesting 16-year old girl it knew was living at the rectory. See also *Dausch* at 1436-1437 re: possibility for liability under §317 against Church when inquiry is limited to examination of church's decision to employ minister in purely secular capacity and alleged failure to supervise his purely secular activities.
  c. Negligent supervision
     i. *Graham v. McGrath*, 363 F.Supp.2d 1030, 1035 (S.D. 2005) Plaintiff claimed he was sexually molested by priest as a child-member of the congregation. Federal district court declined to find negligent supervision a possible cause of action against the Church because the Church owed no duty to the plaintiff. Court determined that Church did not owe duty to protect plaintiff from criminal acts of third parties because clergy-congregation member not one of the special relationships set forth in §314A of the Restatement (Second) of Torts.
     ii. Appellate court reinstated a claim of negligent supervision against a church brought by a husband and wife who sued alleging that during the course of marital counseling, the reverend entered into a sexual relationship with the wife which exacerbated their marital problems. *Bivin v. Wright*, 275 Ill.App.3d 899 (5th Dist. 1995)

- "[I]f a complaint alleges that the psychological services that were provided were 'secular' in nature or that the cleric held himself out to be providing the services of a psychological counselor", tort claim for professional malpractice is possible. *Dausch* at 1433. "Tort claims for behavior by a cleric that does not require the examination of religious doctrine are cognizable." *Id*. Claim is then for professional malpractice by a psychological counselor, not clergy malpractice.

Miscellaneous

- *Padilla v. d'Avis*, 580 F.Supp. 403 (N.D. Ill. 1984)(city's alleged failure to supervise the employee, a physician alleged to have committed sexual assaults during gynecological exams at city health facility, constituted the requisite state action underlying potential §1983 liability)

- *Doe v. Goff*, 306 Ill.App.3d 1131 (1999), court affirmed trial court's summary judgment on the plaintiff's claim that the defendant, the Boy Scouts of American, was liable as a voluntary custodian for a Boy Scouts volunteer's molestation of the plaintiff during a Boy Scouts camping trip.

- 735 ILCS 5/13-202.2(b) provides a special rule regarding the statute of limitation in childhood sexual abuse cases. This statute also applies to a non-abuser to toll the statute of limitations when the non-abuser had a duty to protect the child-victim. *Hobert v. Covenant Children's Home*, 309 Ill. App. 3d 640, 644 (3rd Dist. 2000)