

SEXUAL HARASSMENT AND VIOLENCE in the WORKPLACE:

The Role of Advocates, Counselors and Medical Professionals
in Obtaining Remedies for Victims

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Sexual Harassment Is Unlawful

- ▶ **Title VII of the Civil Rights Act of 1964** prohibits discrimination on the basis of race, color, sex, national origin and religion in hire, all terms and conditions of employment, termination; prohibits retaliation against those who complain or assist in complaining; **sexual harassment is a form of sex discrimination; (*not unlawful pre-1965; not recognized by Supreme Court until 1986*)**

Title VII of the Civil Rights Act of 1964: 50th Anniversary of EEOC

- ▶ Pre-Title VII: legal to discriminate or retaliate; “12 Years a Slave”; “The Butler”; “Mad Men”
- ▶ Established U.S. Equal Employment Opportunity Commission (EEOC) to investigate charges of discrimination and eventually to sue companies (all statutes: Title VII, Americans with Disabilities Act, Age Discrimination in Employment Act, Equal Pay Act), labor organizations (all statutes), and state and local governments (ADEA and EPA)

More Sexual Harassment Complaints

- ▶ Sex discrimination claims are 30.5% of charges in FY2012; 29.5% in FY2013
- ▶ (nearly 100,000 charges overall in FY2012 and FY2013; compare 76,000+ in FY2006);
- ▶ Sexual harassment was 13% of *charges* in FY2013
- ▶ Sexual harassment *lawsuits* are 25% of EEOC national litigation docket; 30–35% of San Francisco District Office’s litigation in recent years (large agricultural and service industries)

VIOLENCE IS VIOLENCE

- ▶ Sexual violence in the workplace is violence; *sexual violence is a form of sexual harassment*
- ▶ Need for movement to address workplace sexual assault by supervisors, co-workers
- ▶ Domestic Violence: target abusers, criminal justice
- ▶ Sexual Harassment: target is company for \$\$ and changes

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VIOLENCE IS VIOLENCE and CONTROL IS CONTROL

- ▶ **Balance of Power**
- ▶ **Domestic violence:** spouse v. spouse; husband with \$\$, job, immigration status, language capacity, control over children, remedy: conviction, safety, no real \$\$
- ▶ **Non-work related sexual assault:** perpetrator v. victim; immigration status, language, remedy: conviction, safety, no real \$\$ unless tort action and there is \$\$

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It's All About Power

- ▶ Sexual assault and harassment illustrate the disparity of power – **and predators know this**
- ▶ Employee v. Supervisor (she depends on him)
- ▶ ***Employee v. Company***
- ▶ Employee: needs job, limited English, limited education, fear of retaliation
- ▶ Company: has money, connections, holds the livelihood card, may employ victim's family, controls the conditions of work, can fire her and siblings, etc.; ***enables the predator***

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Remedies

- ▶ \$\$ for victims of harassment or retaliation : back pay, reinstatement, compensatory damages (emotional distress, pain and suffering), punitive damages
- ▶ \$\$ for those who were retaliated against as witnesses
- ▶ Caps on damages up to \$300,000
- ▶ Termination of harasser; bar future hiring
- ▶ New company policies to encourage complaints without fear of retaliation (as part of court order); training of supervisors and employees

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Parties

- ▶ Victim or harasser may be man or woman
- ▶ Victim and harasser may be of same sex
- ▶ Harasser can be supervisor, agent of employer, co-worker, or third party
- ▶ Victim can be someone not directly targeted but nevertheless affected by the hostile work environment

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What is Sexual Harassment?

- ▶ Unwelcome verbal or physical conduct of a sexual nature, including
- ▶ rape, assaults, battery,
- ▶ grabbing, touching, fondling
- ▶ sexual advances, requests for sexual favors, demeaning terms, etc.
- ▶ *Must be severe or pervasive enough to alter an employee's working conditions that it*
- ▶ *creates intimidating, hostile or offensive work environment*

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Sexual Harassment

- ▶ **Quid Pro Quo:** conditioning certain terms of employment, e.g. hire, keeping a job, promotion, getting more hours to work, etc. based on sexual favors
- ▶ No employer defense to quid pro quo harassment (tangible employment action)

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Sexual Harassment by Supervisor

- ▶ **Affirmative Defense:** employer must show
- ▶ 1) that it took steps to deter harassment (policies, training, awareness) and once made aware, took prompt and corrective action (up to and including termination of harasser), AND
- ▶ 2) that claimant failed to notify the employer or use company's preventive measures
- ▶ CA State law: strict liability for supervisor harassment (no defense) (same in WA, HI, etc.)

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Sexual Harassment by Non-Supervisor

- ▶ Non-supervisor can include co-workers or third parties
- ▶ Claimant must show that
 - 1) employer knew or should have known about the harassment and
 - 2) failed to take prompt and corrective action to stop the harassment and to deter future harassment

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Key Issues in EEOC Investigation

- ▶ Did harassment occur??
- ▶ Did Charging Party (CP) complain to a supervisor? HR?
- ▶ Did the employer fail to protect the employee from harassment? Why?
- ▶ Is harasser the top official? No where for CP to go?
- ▶ Did employer or its agents threaten CP if and/or after she complained???

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Proving Harassment

- ▶ **Charging Party: is she credible?** (Do not assume that CP is lying.)
- ▶ Emotionally upset?
- ▶ Crying?
- ▶ Describes details? Physical touching, grabbing? Frequency?
- ▶ Verbal harassment? What was said?
- ▶ Any threats by harasser? Manager? Co-workers? Human Resources? Discouraged from complaining?

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Credibility & Sexism

- ▶ “Jose sexually assaulted me in the back of the shed”
- ▶ “Are you sure Maria? Jose’s a family man. No one has ever complained about him. No one ever saw him attack you or say those things about you. But, weren’t you late for work yesterday? Jose would never do such a thing. He’s been with us since he was a teenager. He hired you (and he can fire you) and your sister”.
- ▶ *(You’re a liar, Maria)*

Credibility & Sexism

- ▶ “Help! Help! Jose’s got a gun, and he just shot someone in the back of the warehouse! There’s blood everywhere!”
- ▶ “Are you sure Maria? Jose’s a family man. No one has ever complained about him. No one ever saw him attack you. But, weren’t you late for work yesterday? Jose would never do such a thing. He’s been with us since he was a teenager. He hired you (and he can fire you)”
- ▶ (*You’re a liar, Maria*)

Credibility & Sexism

- ▶ “Help! Help! Jose’s got a gun, and he just shot someone in the back of the warehouse! There’s blood everywhere!”
- ▶ “Omigosh! Are you okay, Maria??? Who else is working there? Is anyone else hurt? Get everybody to safety!!! Hurry up!! Somebody, call the police!! Get an ambulance!!”
- ▶ **WHY IS THE RESPONSE SO DIFFERENT?**

Proving Harassment

- ▶ Post-Traumatic Stress??
- ▶ Any physical injuries? What? Medical treatment?
- ▶ Need ongoing medical or psychological treatment??
- ▶ Evidence buttresses credibility to establish liability and damages (every little bit helps; see, *EEOC v. Tanimura & Antle*)
- ▶ This evidence could also support claim for compensatory damages (emotional distress, pain and suffering)

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Proving Harassment

- ▶ **Harasser:** is he credible? Who supports his story? Any prior complaints of harassment?
- ▶ **What did company do??** Was harasser previously disciplined or not? Position in company – supervisor, manager, co-worker, owner? Company officials ill-trained to handle issue?
- ▶ **Note:** during EEOC investigation agency will obtain personnel file and records of previous complaints

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Proving Harassment

- ▶ **Corroboration through Witnesses:** co-workers, supervisors, actual eyewitnesses?
Note: Most egregious harassment happens “behind closed doors”.
- ▶ **counselors, doctors: what was observed? What did claimant say? Injuries? Treatment?**
- ▶ **parents, spouse, other relatives,,**
- ▶ **Other harassed individuals? Did CP complain to anyone about the harassment? What was said? Evidence could support victim’s credibility.**

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Proving Harassment

- ▶ **EEOC v. Footaction:** harasser twice threatened to break 17-year-old’s neck if she reported harassment;
- ▶ **Mother:** learned of harassment after she found teen curled up in fetal position on the couch after the 2nd neck-snapping threat (after harasser put hand’s on teen’s neck); got teen to talk; reported to EEOC; confirms that something traumatic occurred

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Proving Harassment

- ▶ **Cops:** Was police report filed? (non-conclusive); Note: less than 10% of sexual assault crimes are reported;
- ▶ ***EEOC v. Willamette Tree*:** protective order issued barring employer's inquiry into immigration status, reasons for not contacting the police and history of sexual activity)

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Proving Harassment; Criminal investigation and standard

- ▶ **Compare:** "beyond a reasonable doubt" v. "by a preponderance of the evidence, i.e. 51%"
- ▶ ***EEOC v. Harris Farms*:** 3 Rapes by supervisor at gunpoint;
- ▶ Deputy sheriff: "victim is lying"; "I don't believe her"
- ▶ Jury: "we believe her and here's \$1 million"

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Hurdles in Proving Harassment

- ▶ **Charging Party:** may be afraid to tell parents, spouse, relatives, friends, co-workers;
- ▶ stigma; shame; peer pressure; fear that co-workers will tease;
- ▶ need the job to support family; other retaliation
- ▶ actual threats of physical harm
- ▶ Immigration status; fear of deportation for her and family;

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Hurdles in Proving Harassment

- ▶ afraid that spouse or boyfriend may not believe her and may harm her or others;
- ▶ Other hurdles???
- ▶ It takes a lot of courage to come forward
- ▶ *Just because she doesn't tell someone right away doesn't mean she's lying; threats of retaliation or retaliation may chill her out*

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RETALIATION

- ▶ 38% of all charges in FY2012; 41.1% in FY2013; 41% in FY2014
- ▶ **Nearly 100% of sexual harassment lawsuits also have retaliation claim**
- ▶ Issue: does the adverse action, e.g. termination, demotion, threats to harm or other activity *discourage a reasonable employee to file a claim??*

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RETALIATION

- ▶ ***PROTECTED ACTIVITY***
- ▶ 1) **opposed to a practice reasonably believed to be unlawful discrimination**
- ▶ e.g. complaining, threatening to file a charge, picketing in opposition, refusing to obey discriminatory order; refusing sexual advances
- ▶ See *Crawford v. Metropolitan Authority* (employee's description during investigation of harasser's acts was also opposition to harassment)

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RETALIATION

- ▶ *EEOC v. Fry's Electronics* (Seattle 2012)
- ▶ Top performing Chinese-American supervisor fired two weeks after he reports complaint of Latina teenage employee that she is receiving sexting messages from Asst. Store Manager; Latina eventually fired; company destroys records of prior sexual harassment complaints against Asst Store Manager AND Store Manager who is investigating the harassment!!
- ▶ \$2.3 million settlement; \$100,000 sanctions against Fry's for destroying records

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RETALIATION

- ▶ *EEOC v. National Food Corp* (E.D. WA)
- ▶ EEOC alleged that an egg farm worker, single mother, was forced to perform oral sex on supervisor (in the barn) weekly for 7 years, and subsequently fired
- ▶ 4 employees who complained to Manager about harassment were fired;
- ▶ Settlement: \$650,000 (May 2013)

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RETALIATION

- ▶ 2) participating in proceedings related to employment discrimination complaint; investigations, trials, interviews, filing a charge with EEOC, cooperating with EEOC investigation, testifying in depositions, etc.
- ▶ *EEOC & Angelina Yu v. Southern Pacific* (\$175,000 for retaliatory termination after testifying in court for Latino employee denied promotion)
- ▶ *Thompson v. North American Stainless (fiance /co-employee of charge filer is covered by anti-retaliation provision)*

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EEOC Procedures

- ▶ Who can file a charge? All workers employed in an entity in U.S. and its possessions with 15 or more employees; US citizens working abroad for US companies
- ▶ Third parties (unions, church, relative, organization *including sexual assault program*)
- ▶ Commissioner's charge
- ▶ Charge must be filed as prerequisite to federal court lawsuit and state court lawsuit in California

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EEOC Procedures; immigration status issues

- ▶ Title VII makes no distinction based on immigration status, i.e. undocumented workers are protected and can file charges of discrimination (*EEOC & Castrejon v. Tortilleria "La Mejor"*);
- ▶ EEOC will not ask status
- ▶ EEOC will fight company inquiries into immigration status during litigation
- ▶ EEOC is specifically designated as an agency that can certify for a U-Visa where charging party or witness is victim of "serious crime activity"
- ▶ Raise questions of immigration status with Regional Attorney or Trial Attorney

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EEOC Procedures: TIMELINESS

- ▶ A charge must be filed within 180 days of the discriminatory act (300 days in jurisdictions that have a fair employment practice agency)
- ▶ In **termination** cases, clock starts when employee is notified of termination
- ▶ In harassment cases involving a continuing pattern of harassment (no meaningful break in the harassment), at least one act must occur within the last 180 days (or 300 days with a FEPA) (see *EEOC v. Harris Farms*; rape in 1993, charge filed in 1999)

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TIMELINESS, EQUITABLE TOLLING: *EEOC v. Willamette Tree*

- ▶ Farm worker raped with shears to throat at first and repeatedly raped in the fields; told that she if she told anyone about the rapes that she, co-employee relatives and family in Mexico would be killed; failed to file EEOC charge within 300 days; missed deadline by 62 days
- ▶ Can she still pursue claims after deadline?
- ▶ Court grants equitable tolling citing *Stoll v. Runyon* (9th Cir. 1999)

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EEOC Investigation After Charge is Filed

- ▶ Company receives charge in 10 days
- ▶ EEOC can obtain statements, interview witnesses, visit the facility, review documents
- ▶ Employer has opportunity to present its side of the story (Request for Information)
- ▶ CAVEAT: Communications with *EEOC investigator are not confidential* privileged communications; might be disclosed in litigation; but in litigation, *CP and EEOC Trial Attorney* have confidential attorney-client privilege

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Temporary Restraining Order

- ▶ EEOC can seek **Temporary Restraining Order** to “maintain status quo”, see *EEOC v. Sako Corporation*; *EEOC v. Saipan Grand Hotel* (prevention termination and deportation of key witness); *EEOC v. Evans Fruit* (TRO and injunction given after court finds that claimants and witnesses were intimidated)
- ▶ Fact that EEOC is investigating becomes matter of public record.

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EEOC Investigations

- ▶ EEOC can subpoena employer’s records, have access to officials and interviews; employer must cooperate with EEOC
- ▶ EEOC can enforce subpoena in federal court; granted 99% of the time; existence of confidential investigation becomes a matter of public record; may encourage other victims or witnesses to step forward

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EEOC Investigations: Are there Other Victims?

- ▶ EEOC can also investigate whether there are other “similarly situated” victims of discrimination or harassment and obtain \$ for them
- ▶ If you believe that other individuals have been harassed and/or retaliated against, alert the EEOC; we can investigate!

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Resolving Charges

- ▶ Dismissal: “insufficient evidence to support a finding of a violation at this time”
- ▶ Employee gets Notice of Right to Sue and has 90 days to file suit in Federal court (may vary for state law suits)
- ▶ Equitable tolling of deadline might apply if victim is so traumatized by the sexual violence (*Stoll v. Runyon*)

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Resolving Charges; Litigation

- ▶ Letter of Determination: reasonable cause to believe that a violation has occurred
- ▶ Conciliation: negotiation between the company and the EEOC and the charging party; EEOC is a party; confidential voluntary settlement
- ▶ If conciliation fails, then EEOC can sue
- ▶ EEOC v. X Company, on behalf of the charging party

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LITIGATION

- ▶ EEOC can obtain relief for the charging party and the **class of similarly situated workers** even if they did not file charges
- ▶ Settlement authority rests with Regional Attorney (does amount of \$ service the public interest and reasonably compensate victims?)
- ▶ **Intervention**: CP has a right to intervene in the lawsuit and bring Title VII claims and related state claims (unlimited damages)

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Competencies of Medical Staff

- ▶ **Language:** victims describe harm better in first language; health professional must be linguistically competent or have a qualified interpreter; interpreter must be sensitive
- ▶ Might not literally translate
- ▶ Difficult to describe assault in graphic terms

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Cultural Competencies

- ▶ Immigrants: victims have factors of vulnerability: non-white, immigrant, non-English speaking, retaliation, needs the job, few alternatives
- ▶ Immigrant Workers less likely to complain in some industries: service, agriculture, rural; same employer of husband
- ▶ See *Frontline/PBS Documentary "Rape in the Fields"*
<http://video.pbs.org/video/2365022047/>

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EEOC Cases

- ▶ ***EEOC v. Tanimura & Antle***: Salinas, CA and Yuma, AZ; farm worker forced to have sex with hiring official in order to pick crops on 2 different seasons: \$1.855 million settlement (1999)
- ▶ ***EEOC v. Sizzler USA***: assistant chef constantly propositioned by co-worker and threatened with bodily harm for complaining; employer failed to take corrective action despite harassment in front of manager; \$300,000 settlement; Redwood City, CA (2008)

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EEOC Cases

- ▶ ***EEOC v. Iowa AG and DeCoster Farms***: (Iowa): Mexican females at poultry plant were raped by their supervisors, threatened with termination and further harassment; settlement \$1.525 million (2002)
- ▶ Sought ***Temporary Restraining Order*** to prevent retaliation, termination, other retaliation in order to conduct investigation

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EEOC Cases

- ▶ ***EEOC v. Harris Farms***: (Coalinga, CA) Mexican mother of 5 raped at gunpoint (twice in the fields and once in her house) by supervisor who threatened to kill her husband if she reported rapes; jury verdict for nearly \$1 million (2005) see “The Green Motel”, *Ms. Magazine*
- ▶ ***EEOC v. Rivera Vineyards***: (Coachella, CA); farm workers subjected to sex segregation and constant sexual harassment including rape; \$1.1 million settlement (2005)

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EEOC Cases

- ▶ ***EEOC v. National Food Corp*** (E.D. WA); single mother egg farm worker forced to perform oral sex on weekly basis for several years on supervisor in her house; co-workers who alerted manager of harassment were fired; \$650,000 settlement (2013)
- ▶ ***EEOC v. River Point Farms*** (D. Ore.); farm worker subjected to spousal violence from co-employee husband who was encouraged by supervisor to kill her, harassed by supervisor, \$150,000 settlement (2013)

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EEOC Cases

- ▶ *EEOC v. Wilcox Farms*: (Willamette Valley, Oregon); farm worker subjected to ongoing sexual harassment including propositions, groping; supervisor put hand down her panties; worker complained to management and was promptly fired in retaliation
- ▶ Settlement, consent decree: \$260,000 (2009)

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EEOC Cases

- ▶ *EEOC v. ABM* (E.D. Cal.); 21 Latina janitors were sexually harassed by supervisors on a regular basis; including propositions for sex, grabbing, groping, one rape and retaliation (including termination)
- ▶ Consent Decree: \$5.8 million (2010)

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