

HARASSMENT in the Workplace

**2003 Army-wide
Equal Employment Opportunity Workshop**

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ESSENTIAL IN PEACE, INDISPENSABLE IN WAR

EEOC'S 1980 Guidelines on Sexual Harassment

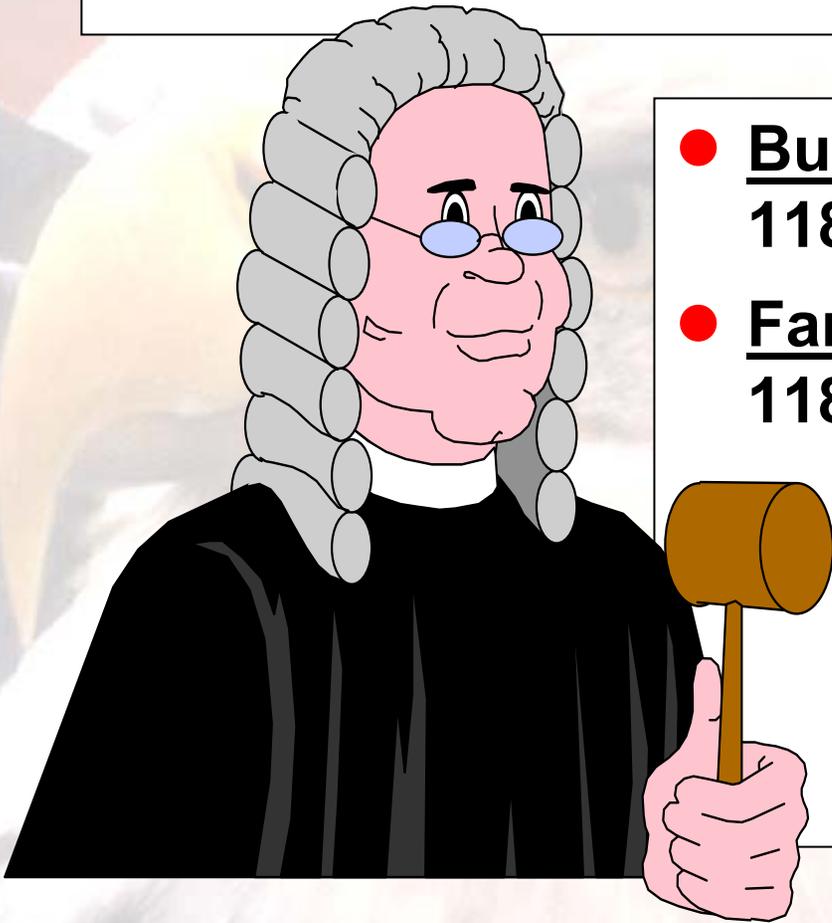
- **Conduct of Employer, Supervisors & Agents**
 - ✓ Agency is **LIABLE** regardless of whether or not acts were authorized or forbidden and regardless of whether Employer knew or should have known
- **Conduct Between Employees**
 - ✓ Agency is **LIABLE** when it knew or should have known **UNLESS** it took immediate and appropriate corrective action
- **Conduct of Non-Employees**
 - ✓ Agency **MAY BE LIABLE** depending on knowledge and control



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U.S. Supreme Court

- **Burlington Industries v. Ellerth**,
118 S. Ct. 2257 (1998)
- **Faragher v. City of Boca Raton**,
118 S. Ct. 2275 (1998)



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Basic Principles of Liability

- An Employer is **responsible** for the acts of its supervisors and managers.
- Employers should be encouraged to **prevent** harassment.
- Employees should be encouraged to **avoid or limit the harm** from harassment.



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EEOC Guidance

- Enforcement Guidance: Vicarious Employer Liability for Unlawful Harassment by Supervisors
- **18 June 1999**
- Applies to Unlawful Harassment on ALL Covered Bases - **race, color, religion, age, disability, sex (whether or not sexual), national origin or protected activity.**

Who Is A Supervisor?

- Supreme Court - Employer is liable for acts of a “supervisor with immediate (or successively higher) **authority** over the employee.”
- Vicarious liability is appropriate because supervisors’ ability to harass is **aided by the authority** delegated to them by the Employer.
- Determination based on **specific facts**.
- Controlled by **job function** - *not* by job title.

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Supervisory Authority

- Authority to **undertake or recommend tangible employment decisions** affecting the employee (e.g., hire, fire, promote, discipline, reward)

OR

- Authority to direct the employee's **daily work activities** (i.e., authority to increase workload or assign undesirable tasks)
 - ✓ Not acting merely as an intermediary
 - ✓ Not confined to limited number of tasks (project leader)
 - ✓ May be acting temporarily

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Types of Harassment

- Quid Pro Quo vs. Hostile Environment 
- Harassment that **results in a Tangible Employment Action**
 - ✓ Strict Liability - No Defense
- Harassment that **does not result in a Tangible Employment Action**
 - ✓ Employer may be liable if conduct is so objectively offensive as to alter conditions of employment
 - ✓ Hostile Environment Claim requires a showing of severe or pervasive conduct

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Tangible Employment Action = Significant Change in Employment Status

- **Supervisor's use of official power demonstrated by:**
 - ✓ action requires an official act by the Employer
 - ✓ action is documented
 - ✓ action may be subject to higher level review
 - ✓ action may require official approval; official procedures
- **A tangible employment action usually inflicts direct economic harm (or provides direct benefit).**
- **A tangible employment action usually can be taken only by a supervisor or other person acting with the authority of the Employer.**



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Harassment culminating in a Tangible Employment Action

**NO AFFIRMATIVE DEFENSE AVAILABLE TO
EMPLOYER**

SAME ANALYSIS AS ANY DISCRIMINATION CLAIM

**IF TANGIBLE ACTION IS LINKED TO HARASSMENT,
AFFIRMATIVE DEFENSE IS LOST FOR ENTIRE
PATTERN OF MISCONDUCT.**

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Hostile Environment (No Tangible Employment Action)

- **Affirmative Defense** - Available to Employer
 - ✓ Gives Employers credit for **PREVENTIVE** efforts
 - ✓ Gives Victims a **DUTY** to react reasonably
- If proven by a preponderance of the evidence, Employer may:
 - Avoid Liability
 - Limit Damages

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Affirmative Defense

Two Necessary Elements

- **EMPLOYER** exercised *reasonable* care to *prevent* and promptly *correct* any harassing behavior
- AND**
- **EMPLOYEE** *unreasonably* failed to take advantage of any preventive or corrective opportunities provided by the employer or otherwise *unreasonably* failed to *avoid harm*.

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First Element: EMPLOYER'S DUTY

- **REASONABLE effort to PREVENT & CORRECT**
- **Depends on particular facts and circumstances**
- **At a minimum, due care includes training supervisors and managers to respond**
- **Due care requires appropriate response even in the absence of a complaint**
- **Due care requires that supervisors be supervised**
- **Due care includes maintaining records**
- **Formality of policies & procedures may vary**

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Policy and Complaint Procedure

- **Zero Tolerance of Harassment**
 - ✓ Clear explanation of prohibited conduct
- **Protection Against Retaliation**
- **Effective Complaint Process**
 - ✓ Clearly described and accessible
- **Assurance of Confidentiality**
- **Effective Investigative Process**
 - ✓ Prompt, thorough and impartial
- **Assurance of Immediate & Appropriate Corrective Action**
 - ✓ Remedial measures including discipline

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Second Element: EMPLOYEE'S DUTY

- Victim has a **duty** “to use such means as are reasonable under the circumstances to avoid or minimize the damages...”
- Employer must prove that Employee **unreasonably** failed to take advantage of any preventive or corrective opportunities provided by the employer or to avoid harm otherwise.
 - ✓ Failure to complain / delay in complaining
 - ✓ Reasonable fear of retaliation
 - ✓ Reasonable belief that complaint process is ineffective

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Standards for Affirmative Defense

- **Employer exercised reasonable care.**
Employee could have avoided all harm but did not.
- **Employer exercised reasonable care.**
Employee made reasonable effort to avoid harm.
- **Employer did not exercise reasonable care.**
(Failure to prevent OR Failure to Correct)
Employee could have avoided all harm but did not.
- **Employer exercised reasonable care.**
Employee could have avoided some harm but did not.

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