Sexual Harassment and Assault in the Workplace

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• Title VII is a federal statute that prohibits employers from discriminating against employees because of their sex.

• Sex discrimination includes sexual harassment.
Sexual Harassment

• Takes many forms
• Can be sexual in nature
• Requests for sexual favors
• Verbal and physical conduct of a sexual nature
• Sexual harassment does not need to be sexual in nature.

• For example, if a supervisor repeatedly demeans a woman because of her sex, this is sexual harassment.
• If a supervisor every day for several months calls a female subordinate demeaning names and says women should be in the kitchen and not at work, this would be sexual harassment.
• The courts interpret Title VII to require harassment to be severe or pervasive.

• These words are not in Title VII.

• They are a judicial gloss on the statute.
• If harassment is not severe or pervasive according to courts’ definition of this term, it does not count as sexual harassment as a legal claim.

• This does not mean that a person is not facing harassment.
• Infrequent teasing, offhand comments, or isolated incidents do not legally count as sexual harassment.
• It is a mistake to separate sexual harassment from other kinds of sex discrimination.

• The way we settle disputes is a problem.

• Title VII’s litigation-based remedy regime is not ideal for resolving problems.
• Our case law does not always define sexual harassment in the same way reasonable people would.
• The courts require a person to prove that harassment is severe or pervasive.

• These words are not in the statute.

• Title VII instead requires that the conduct adversely affect the “terms, conditions, or privileges” of employment.

• Or that the conduct deprives or tends to deprive a person of work opportunities or otherwise adversely affects her status as an employee.
• In the middle, some courts see a grey area.

• In this middle area, whether a plaintiff’s case gets to a jury very much depends on the judge viewing the case and the circuit where a person is litigating.
• Is the following behavior sexual harassment?

• A manager asked a female subordinate for dates, called her a “dumb blond,” put his hand on her shoulder several times, placed “I love you” signs in her work area and attempted to kiss her in a bar and twice attempted to kiss her in the office. All efforts were resisted by the employee.
• Meritor Savings Bank v. Vinson (1986)
• Harris v. Forklift Systems (1993)
• Clark County School Dist. v. Breeden (2001)
• Intersectionality
• Professor Kimberle Crenshaw
• Culture change often causes legal change.

• HR departments should focus on prevention rather than compliance.

• We should focus on harassment as part of a structure.

• For lawyers, does this system do what it is supposed to do? Should we change the severe or pervasive standard?
• Judges can clarify “severe or pervasive” and repudiate problematic cases.

• Congress can amend Title VII with a provision instructing the courts to construe it liberally.

• Congress can amend the “severe or pervasive” standard.