#MeToo –
SEXUAL HARASSMENT IN THE
21ST CENTURY

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I. TITLE VII OF THE CIVIL RIGHTS ACT

Title VII of the Civil Rights Act of 1964 bars employers from discriminating against their employees on the basis of sex, race, color, national origin, and religion. The restrictions apply to employers with fifteen or more employees. The restrictions also apply to the federal, state, and local governments.

Title VII forbids discrimination in any aspect of employment. This includes discrimination in hiring and firing; compensation, assignment, or classification; transfer, promotion, layoff, or recall; job advertisements; recruiting; testing; use of company facilities; training programs; benefits; pay, retirement plans, and disability leave; and more.

The law covers intentional discrimination (disparate treatment) and job policies that disproportionately affect persons of a certain race or color and that are not related to the job and the needs of the business (disparate impact). Currently, Title VII does not protect employment rights based on sexual orientation. Many states have their own discrimination and harassment laws that may include more protected classes – such as marital status and sexual orientation.

A. What Does Title VII Say?

This law states that it is unlawful employment practice for an employer "...to discriminate against any individual with respect to his compensation, terms, conditions, or privileges of employment, because of such individual's race, color, religion, sex, or national origin." 42 U.S.C. §2000e-2.

Specifically as it relates to sexual harassment, Title VII prohibits unwelcome sexual advances, requests for sexual favors, and other verbal or physical conduct of a sexual nature when submission to or rejection of this conduct explicitly or implicitly affects an individual's employment, unreasonably interferes with an individual's work performance or creates an intimidating, hostile or offensive work environment.

There are two types of sexual harassment claims: "quid pro quo" and "hostile work environment." Quid pro quo means "this for that." In this context, it involves expressed or implied demands for sexual favors in exchange for some benefit (e.g., a promotion, pay increase) or to avoid some detriment (e.g., termination, demotion) in the workplace. Quid pro quo harassment is perpetrated by someone who is in a position of power or authority over another (e.g., manager or supervisor over a subordinate). A clear example of quid pro quo harassment would be a supervisor threatening to fire an employee if he or she does not have sex with the supervisor.
Hostile work environment harassment arises when speech or conduct is so severe and pervasive that it creates an intimidating or demeaning environment or situation that negatively affects a person’s job performance. Unlike quid pro quo harassment, this type of harassment can be perpetrated by anyone in the work environment, including a peer, supervisor, subordinate, vendor, customer or contractor. Hostile work environment situations are not as easy to recognize, given that an individual comment or occurrence may not be severe; demeaning behavior may occur that is not based on sex; and, there may be long periods between offensive incidents. Examples of conduct that might create a hostile work environment include inappropriate touching, sexual jokes or comments, repeated requests for dates, and a work environment where offensive pictures are displayed.

B. Stating a Case under Title VII

As set forth in McDonnell Douglas Corp. v. Green, 411 U.S. 792 (1973), the basic allocation of burdens and order of presentation of proof in a Title VII case is as follows: First, the plaintiff has the burden of proving by the preponderance of the evidence a prima facie case of discrimination. Second, if the plaintiff succeeds in proving the prima facie case, the burden shifts to the defendant "to articulate some legitimate, nondiscriminatory reason for the employee's rejection." Id. at 802. Third, should the defendant carry this burden, the plaintiff must then have an opportunity to prove by a preponderance of the evidence that the legitimate reasons offered by the defendant were not its true reasons, but were a pretext for discrimination. Texas Dept. of Community Affairs v. Burdine, 450 U.S. 248 (1981).

To establish a prima facie case of quid pro quo sexual harassment, the plaintiff must show:

1. That he/she is a member of a protected class;

2. That he/she was the subject of unwelcome sexual harassment in the form of sexual advances or a request for sexual favors;

3. That the unwelcome harassment or advance was based on sex;

4. That submission to the unwelcome advance was an express or implied condition for receiving job benefits or that the refusal to submit to a supervisor's sexual demands resulted in a tangible job detriment; and

5. That the employer was responsible for the supervisor's conduct.

In order to establish a prima facie case of sexual harassment under a hostile work environment theory, an employee must prove:

1. That he/she belongs to a protected group;
2. That he/she was the subject of unwelcome sexual harassment;
3. That the harassment was based on sex;
4. That the harassment was sufficiently pervasive to effect a term, condition, or privilege of employment; and
5. That the employer knew, or should have known, about the harassment and failed to take prompt, corrective action.

C. What Remedies Are Available?

Affected employees can file a discrimination complaint with the Equal Employment Opportunity Commission (EEOC). This commission is the agency that enforces many anti-discrimination laws. You usually have 180 days or six months from the date of the incident to file with the EEOC to preserve your rights.

After a complaint is filed, the EEOC contacts the employer and lets it know that a discrimination charge was filed. The employer is given an opportunity to respond and the EEOC conducts a further investigation.

The EEOC may attempt to settle the issue or they can direct the parties to a mediator. If the EEOC is unable to reach a settlement that both parties agree to, then the EEOC may file their own lawsuit at the federal level (if the defendant is a private employer).

The EEOC may also choose to simply dismiss the charge. In this case, or if the EEOC is unable to reach an agreement to settle the complaint, the EEOC will issue a notice called a "right-to-sue" letter letting the employee know of their rights in court.

An individual cannot file an action under Title VII in court until this administrative remedy has been exhausted. Failure to do so will result in the dismissal of the complaint.

Victims of discrimination may seek damages for lost wages and benefits as well as injunctive relief. Successful plaintiffs also are entitled to attorneys’ fees and costs. While plaintiffs can seek punitive damages and compensatory damages for pain and suffering, such damages are capped based on the size of the employer (15-100 employees – $50,000 limit; 101-200 employees – $100,000 limit; 201-500 employees – $200,000 limit; more than 500 employees – $300,000 limit).

D. Can an Employer Take Action against an Employee for Filing a Discrimination Charge or Speaking up about a Potential Title VII Violation?

Title VII prohibits employers from retaliating against an employee for filing a discrimination charge or speaking out against discrimination. It also
protects employees from retaliation if they choose to participate in an investigation, proceeding, or hearing on behalf of a co-worker.

E. Data from 2017

The EEOC reports that in 2017, a total of 84,254 charges were filed. This is down from a peak of 99,000+ charges in each of 2010, 2011, and 2012. Of the charges filed in 2017, more than 30 percent alleged sex discrimination or harassment; 38 percent of the charges alleged retaliation.

Additionally, the EEOC secured approximately $484 million for victims of discrimination in the workplace and filed 184 merit lawsuits against public and private employers. The EEOC also implemented changes to its charge handling process which reduced the number of active charges by 16.2 percent.

II. KENTUCKY CIVIL RIGHTS ACT

The Kentucky Civil Rights Act prohibits employers with eight or more employees from discriminating in employment on the basis of sex, including pregnancy, childbirth, or related medical conditions (KRS 344.010 et. seq.). Discrimination based on sex includes sexual harassment. Similar to Title VII, the KCRA does not expressly prohibit discrimination based on sexual orientation.

In addition to prohibiting sex harassment and discrimination, the Kentucky Civil Rights Act also prohibits discrimination on the basis of age, color, disability, familial status, national origin, race, religion, and tobacco smoking status. Like Title VII, the KCRA also prohibits employers from retaliating against an employee for opposing conduct declared unlawful by the Act. Unlike Title VII, however, supervisors may be held individually liable for retaliation under the Kentucky Civil Rights Act.

A. Similarities to Title VII

Because the language of KRS 344.040(1) tracks the language in Title VII of the Federal Civil Rights Act, 42 U.S.C. §2000e-2, Kentucky courts interpret the statute consistent with federal interpretation of Title VII. Meyers v. Chapman Printing Co., Inc., 840 S.W.2d 814, 821 (Ky. 1992). Thus, the elements of a prima facie case, as well as the use of the McDonnell Douglas burden-shifting framework, are the same under either the federal or the state law.

B. Remedies Available

Unlike Title VII, the KCRA has a five-year statute of limitations and allows employees to choose to either file an administrative charge with the Kentucky Commission on Human Rights (or a local commission) or immediately file suit in court. While plaintiffs who elect to first file in court are prohibited from later seeking redress through the administrative process, a recent decision by the Supreme Court of Kentucky allows
plaintiffs who first file an administrative charge to effectively take two bites of the same apple.

In Owen v. Univ. of Ky., 486 S.W.3d 266 (Ky. 2016), the Supreme Court ruled that the plain language of the statute does not require a plaintiff to elect a procedural avenue to pursue a claim. The Court noted that "there is nothing remaining in the statute to bar claims filed in circuit court, despite final and appealable orders dismissing the exact same claim filed in the administrative agency." Therefore, if a Kentucky plaintiff files an employment discrimination claim in an administrative proceeding, and does not succeed, they can then file the same action in a judicial proceeding.

Because KRS 344.450 limits damages to the "actual damages sustained," punitive damages are not recoverable in cases under the Kentucky Civil Rights Act. Employees may recover actual and compensatory damages as well as reasonable attorneys' fees.

III. SEXUAL ORIENTATION UNDER TITLE VII

A. The EEOC Position

While Title VII of the Civil Rights Act of 1964 does not explicitly include sexual orientation or gender identity in its list of protected bases, the EEOC interprets the statute's sex discrimination provision as prohibiting discrimination against employees on the basis of sexual orientation and gender identity.

Over the past several years the Commission has set forth its position in several published decisions involving federal employment. You can find summaries of the decisions on the EEOC website, at https://www.eeoc.gov/federal/reports/lgbt_cases.cfm.

These decisions explain the legal basis for concluding that LGBT-related discrimination constitutes sex discrimination under Title VII, and give examples of what would be considered unlawful. In so ruling, the Commission has not recognized any new protected characteristics under Title VII. Rather, it has applied existing Title VII precedents to sex discrimination claims raised by LGBT individuals. The Commission has reiterated these positions through recent amicus curiae briefs and litigation against private companies. Importantly, these protections apply regardless of any contrary state or local laws.

The Commission has obtained approximately $6.4 million in monetary relief for individuals, as well as numerous employer policy changes, in voluntary resolutions of LGBT discrimination charges under Title VII since data collection began in 2013. A growing number of court decisions have endorsed the Commission's interpretation of Title VII.

Some examples of LGBT-related claims that the EEOC views as unlawful sex discrimination include:
1. Failing to hire an applicant because she is a transgender woman.

2. Firing an employee because he is planning or has made a gender transition.

3. Denying an employee equal access to a common restroom corresponding to the employee's gender identity.

4. Harassing an employee because of a gender transition, such as by intentionally and persistently failing to use the name and gender pronoun that correspond to the gender identity with which the employee identifies, and which the employee has communicated to management and employees.

5. Denying an employee a promotion because he is gay or straight.

6. Discriminating in terms, conditions, or privileges of employment, such as providing a lower salary to an employee because of sexual orientation, or denying spousal health insurance benefits to a female employee because her legal spouse is a woman, while providing spousal health insurance to a male employee whose legal spouse is a woman.

7. Harassing an employee because of his or her sexual orientation, for example, by derogatory terms, sexually oriented comments, or disparaging remarks for associating with a person of the same or opposite sex.

8. Discriminating against or harassing an employee because of his or her sexual orientation or gender identity, in combination with another unlawful reason, for example, on the basis of transgender status and race, or sexual orientation and disability.

B. The Circuit Split and the EEOC, Department of Justice Face-Off

On April 4, 2017, the Seventh Circuit Court of Appeals held *en banc* that Title VII prohibits sexual orientation discrimination. This was the first federal appellate court to do so. *Hively v. Ivy Tech Community College*, 853 F.3d 339 (7th Cir. 2017). The Court held that a policy that discriminated on the basis of sexual orientation did not affect every woman, or every man, but it was based on assumptions about the proper behavior for someone of a given sex. Therefore, it fell within the prohibition against sex discrimination under Title VII of the Civil Rights Act of 1964, if it affected employment in one of the specified ways.

The Seventh Circuit's decision, however, is contrary to the Eleventh Circuit's ruling in *Evans v. Georgia Regional Hospital*, 850 F.3d 1248, 1250 (11th Cir. 2017), in which a split panel held that Title VII does not prohibit sexual orientation discrimination. The court ruled that it was bound by prior Eleventh Circuit precedent. The *Evans* appellant sought *en banc* review from the court, but the request was denied. The United

In another case currently pending in the U.S. Court of Appeals for the Second Circuit, *Zarda v. Altitude Express*, 855 F.3d 76 (2d Cir. 2017), the appellant (through his estate) contends that his employer fired him because of his sexual orientation. A three-judge Second Circuit panel ruled that the appellant had no claim for sex discrimination under Title VII. But, in May of 2017, the Second Circuit agreed to review the case *en banc*.

The Second Circuit then asked the U.S. Equal Employment Opportunity Commission (the federal agency tasked with enforcing Title VII) to file an *amicus* brief in the case. The EEOC argued that sexual orientation discrimination claims "fall squarely within Title VII's prohibition against discrimination on the basis of sex." Among other reasons, the EEOC's brief states that any line drawn "between sexual orientation discrimination and discrimination based on sex stereotypes is unworkable and leads to absurd results."

The U.S. Department of Justice then filed its own *amicus* brief in direct opposition to the EEOC (even though the Second Circuit had not asked for the DOJ's input). The DOJ argued that this issue has been "settled for decades" and that Title VII does not prohibit sexual orientation discrimination "as a matter of law." The DOJ went on to state that the question of whether "sexual orientation discrimination should be prohibited by statute, regulations, or employer actions" is one of "policy" and "[a]ny efforts to amend Title VII's scope should be directed to Congress rather than the courts." The court heard oral arguments in the case in late September 2017, with the EEOC and DOJ completely at odds.

The Sixth Circuit will address a transgender employee's claim of sex discrimination in *EEOC v. R.G. & G.R. Harris Funeral Homes*. Briefing on the appeal is complete, but a decision has not yet been rendered. The case arises from a decision by the United States District Court for the Eastern District of Michigan in which the EEOC brought a discrimination action against R.G. & G.R. Harris Funeral Home, Inc. ("the Funeral Home") asserting two claims against the Funeral Home. First, it asserted a Title VII claim on behalf of the Funeral Home's former Funeral Director/Embalmer Stephens, who is transgender and is transitioning from male to female. The EEOC asserted that the Funeral Home's decision to fire Stephens was motivated by sex-based considerations, in that the Funeral Home fired Stephens because Stephens is transgender, because of Stephens's transition from male to female, and/or because Stephens did not conform to the defendant employer's sex- or gender-based preferences, expectations, or stereotypes. Second, the EEOC asserted that the Funeral Home engaged in an unlawful employment practice in violation of Title VII by providing a clothing allowance/work clothes to male employees but failing to provide such assistance to female employees because of sex.
The Funeral Home filed a Motion to Dismiss, which the Court denied, concluding that the EEOC's complaint states a Title VII claim against the Funeral Home on behalf of Stephens. The Court noted that transgender status is not a protected class under Title VII, and opined that if the EEOC's complaint had alleged that the Funeral Home fired Stephens based solely upon Stephens's status as a transgender person, then the Court would agree with the Funeral Home that the EEOC's complaint failed to state a claim under Title VII. But the Court held that since the EEOC's complaint also asserted that the Funeral Home fired Stephens "because Stephens did not conform to the [Funeral Home's] sex- or gender-based preferences, expectations, or stereotypes," then the claim would survive under Title VII because the EEOC alleged that Stephen's failure to conform to sex stereotypes was the driving force behind the termination. EEOC v. R.G. & G.R. Harris Funeral Homes, Inc., 100 F.Supp.3d 594, 595 (E.D. Mich. 2015).

The United States Supreme Court has not yet ruled on the issue, while several bills aimed at expanding Title VII to specifically address this issue have been proposed already.

IV. KENTUCKY STATE LAW LBGTQ PROTECTIONS

Kentucky does not have a statewide law that prohibits discrimination based on sexual orientation or gender identity in employment. Currently, the Kentucky Civil Rights Act ("KCRA") prohibits employment discrimination based on race, religion, national origin, sex, age and disability. The employment non-discrimination provisions of the KCRA apply generally to both public and private sector employers with more than eight employees. The Kentucky Human Rights Commission enforces the KCRA.

Public employment discrimination against state workers based on sexual orientation or gender identity is illegal under an executive order by Governor Steve Beshear (Democrat) in June 2008. Such discrimination was originally banned by Governor Paul Patton (Democrat) under an executive order issued by him in 2003. When Republican Governor Ernie Fletcher took office, however, he removed these protections in 2006. Thus, Beshear's order reinstates such protections. In February 2013, Berea Mayor Steve Connelly banned discrimination on the basis of actual or perceived sexual orientation via executive order. The order applies only to the town's 130 public employees.

Some of Kentucky's largest employers also ban sexual orientation discrimination through company policies, including Lexmark, the University of Kentucky, the University of Louisville, Toyota, Ford Motor Company, General Electric, PNC Financial Services, Yum! Brands and United Parcel Service.

In March 2017, Governor Bevin signed legislation that allows student organizations at the Commonwealth's public schools and colleges to bar gays, lesbians and transgender people from joining, opening a new front in a national battle over so-called religious freedom laws. The law, Senate Bill 17, will allow students to engage in religious activities and to express religious views in public schools and in their assignments. It would also allow teachers to include lessons about the Bible in discussions of religion and history. The legislation stems from a 2015 decision to remove references to Jesus Christ from a student production of "A Charlie Brown Christmas." The bill passed both the state Senate and state House with broad bipartisan support.

V. SOCIAL MEDIA IN THE AFTERMATH OF #ME TOO MOVEMENT

In the 21st century workplace, sexual harassment litigation has invaded the digital realm of social media. Along with the barrage of news reports of high profile sexual harassment claims accompanying the #MeToo movement came evidence of the prevalence of the use of digital platforms as the vehicle for the allegations of the harassment. Now that the use of social networking websites is so common that it is almost a norm, there is a corresponding increase in the risk of sexual harassment claims. Due to this risk employers must be aware of the unavoidable intersection between workplace life and social media. The platform of social media allows the lines between appropriate workplace behaviors inside the physical work environment to blur with afterhours or private behavior. As such, it is a reality of today that cannot be ignored by upper level management, corporate or in-house legal departments, human resources, supervisors and all other employees.

In fact, one could surmise that at this time or, if not, at some point in the near future, sexual harassment complaints based on social media usage will be more typical than direct harassment inside the physical confines of the work environment. As more and more employers have implemented robust policies and procedures to address the more direct harassment of the past there is an increase in potential that sexual harassment derived from social media usage may be overlooked.

Despite perceived differences between direct or in-office sexual harassment, social media incidents are usually similar in nature. Social media sexual harassment incidents would involve unwelcome sexual advances or behavior that could be expected to offend, humiliate or intimidate the employee. The use of social media platforms such as Twitter, YouTube or Facebook can be the source of complaint for any unwanted sexual comments, tweets, posts, advances, offensive photos, unsolicited requests for date(s). Social media or digital sexual harassment can come in many forms. Examples can include but are not limited to:
Although there is uncertainty for employers and employees created by digital media sexual harassment there are a number of steps that employers can take to reduce the risk associated with the trend. The following is a non-exhaustive list of methods for employers to consider incorporating into existing sexual harassment policies, procedures and training to address any gaps created by social media harassment claims.

A. Adopt new and or/review existing policies related to sexual harassment. Employers should ensure that any new or existing policy related to sexual harassment is broad enough to include digital communication as a vehicle for sexual harassment to occur.

B. Train and/or re-train employees, supervisors and management on sexual harassment policies, reporting requirements and investigation processes, incorporating social media concerns. Training and re-training sessions should be documented in writing with evidence maintained in every employee's personnel file.

C. Many employers sponsor their own social media outlets. When this is done the employer should authorize only certain employees to make posts and should regularly review the social media for any sexually inappropriate messaging, posts, photographs, videos, etc.

D. Use technology against technology. We now live in an age where many employees are just as likely to use a text, social media post or snap-chat exchange to communicate with a co-employee as they are to do so via face to face verbal or non-verbal communication. Additionally, the prevalence of smartphone possession in the workplace renders complete control over social media usage not feasible. Nonetheless, there are methods employers can consider for using technology itself to reduce the risk that technology has created. For instance, human resources and corporate legal departments should consult with any in-house or outside information technology departments or consultants about the possibilities of using filtering technology to block access to social media sites while employees are at the workplace. In the alternative to blocking access many IT departments and professionals can implement software or methods to determine whether employees are accessing social media sites while at the workplace.
VI. CONDUCTING EFFECTIVE SEXUAL HARASSMENT INVESTIGATIONS IN THE #ME TOO AGE

In the new age of sexual harassment following the #MeToo movement it is essential that employers review both their sexual harassment policies and the process of reviewing and investigating employee complaints of sexual harassment. When performing any such review there should be a focus on assuring that the investigation process is amenable to social media claims of harassment. Many step by step guides exist for conducting a thorough sexual harassment investigation. For example, the U.S. Equal Employment Opportunity Commission provides a list of "Best Practices for Employer and Human Resources/EEO Professionals" related to claims of sexual discrimination and harassment. However, with the evolution of sexual harassment recognition we see today there is probably not any true one-size fits all remedy. The type of investigation and the breadth of the investigation are likely to be affected by a number of factors including but not limited to: (1) the source of the complaint; (2) the type of complaint; (3) the size of the employer; and (4) the type of business that the employer operates.

While the specifics of any investigation of workplace sexual harassment depends on the nature of the circumstances that exist, any investigation should consider the following steps.

A. Timely Reporting

In order to have effective sexual harassment policies that encourage adequate investigation it is essential that employees and supervisors recognize the necessity of timely reporting allegations of sexual harassment. Typically an employer's sexual harassment policy will require that such complaints be reported to the human resources department. However, it is probably advisable, in order to assure all complaints are appropriately investigated, that an alternative source to the human resources department be designated for reporting of sexual harassment in the event that a complaining employee(s) does not feel a report to HR will ensure an investigation.

B. Commencing the Investigation

Claims of workplace sexual harassment should mandate that any investigation begin as soon as possible. Any delays following receipt by an employer of a report of sexual harassment can be used to infer that the employer failed to take the complaint seriously. This can be the case even if the employer has both great policies regarding sexual harassment as well as a thorough investigation process.

C. Determine Who is the Investigator(s)

Most sexual harassment policies designate the individual(s) responsible for investigating complaints of sexual harassment. Oftentimes the investigator or investigation team will be internal and conducted by employees. However, this is unlikely to be sufficient in all cases of alleged
sexual misconduct. Because of this employers should always be cognizant that the selection of investigator meets the substance of the complaint as there could be many complaints for which an "internal" investigation only by employees may be insufficient in ensuring a thorough investigation.

D. Document, Document, Document

Every step of the investigation process needs to be documented in writing. This includes any witness interviews and statements. Written statements of witnesses should be signed and contemporaneously dated where possible. Poor documentation can cast doubt in a courtroom even if the investigation was otherwise spot on.

E. EEOC Guidelines!

Any investigation should ensure that, at a minimum, the Equal Employment Opportunity Commission's own guidelines are met. The EEOC Guidelines provide a step by step Guide for employer evaluation of complaints of harassment that would be applicable to sexual harassment complaints. They are actually very specific as to the steps, specifics of the investigation and even corrective actions and remedial measures to address complaints.


F. Consistency

Investigations should be consistent. That means an investigation should be conducted for all complaints, whether they appear minor or major at the surface. Also, the investigation process should be consistent as to procedure for similar complaints/circumstances. Finally, the outcomes should be consistent for similar investigation results.

At the end of the day conducting thorough investigations of all complaints of sexual harassment benefit everyone involved in the workplace by ensuring prompt resolution, better work environment for all employees and reduced risk of loss associated with claims in litigation either without any investigation or a poor investigation.