

Table of Contents:
**Fujiwara and Brown Article, "Cause of Action for Post-
Ellerth/Faragher Title VII Employment Sexual Harassment
Claims"**

I. INTRODUCTION

1. Scope
2. Overview of related or alternative causes of action
3. Sexual harassment actions under state statute
4. Impact of state workers' compensation laws on sexual harassment claims
5. Common-law tort claims, generally
6. Assault and battery
7. False imprisonment
8. Defamation
9. Invasion of privacy
10. Tortious interference with an employment contract
11. Wrongful termination of at-will employment
12. Negligent hiring, retention, or supervision of employee who engaged in sexual harassment
13. Intentional infliction of emotional distress
14. Negligent infliction of emotional distress
15. Other actions under federal law
16. Claims based on activities than sex-related harassment
17. Title VII sex discrimination claim
18. Pregnancy Discrimination Act
19. Family and Medical Leave Act
20. Equal Pay Act
21. Constructive discharge under Title VII
22. Retaliation under Title VII
23. 42 U.S.C.A. 1983 Interface with Title VII
24. Federal Employers Liability Act interface with Title VII
25. 42 U.S.C.A. §1981 interface with Title VII
26. Title IX sexual harassment claims

II. SUBSTANTIVE LAW OVERVIEW

A. PRIMA FACIE CASE

27. In general
28. Relevance of "Quid Pro Quo" and "Hostile Work R Environment" prima facie tests post-Ellerth/Faragher
29. Elements of a traditional "Quid Pro Quo" theory of sexual harassment
30. Elements, traditional "Hostile Work Environment" theory of sexual harassment
31. Elements, post-Ellerth/Faragher prima facie elements
32. Elements, applying the post-Ellerth/Faragher two-prong legal analysis
33. Supervisory status
34. Coworker harassment
35. Conduct was harassing
36. Discrimination based on sex
37. Gender-based harassment
38. Same-sex sexual harassment theory
39. Objective reasonable woman/man standard
40. Sexual conduct unwelcome

41. Tangible employment action(s) analysis
42. Successful claims of tangible employment actions
43. "Tangible employment action" terminology
44. Constructive discharge claims as tangible employment actions
45. Causal link between harassing conduct and tangible employment action
46. Employer is vicariously liable
47. Hostile work environment analysis
48. Severe or pervasive harassing conduct
49. Employer's two-prong affirmative defense
50. First prong: employer's reasonable duty of care
51. Written anti-discrimination policies
52. Duty to promptly investigate, enforce written policy, and correct harassing behavior
53. Duty to correct serial harassers
54. Motion for summary judgment and/or motion for judgment
55. 2nd Prong: Employee's responsibilities
56. Employee's failure to complain
57. Employee's fears
58. Employee's delay in reporting
59. Employee's other unreasonable acts
60. Employer proves two-prong affirmative defense - no Title VII liability
61. Employer fails to prove both of the two-prongs in the affirmative defense - Title VII liability
62. Retaliation

B. DEFENSES

63. Defenses, generally
64. Defenses, harasser was not supervisor
65. Defenses, conduct was not harassing
66. Discrimination not based on sex
67. Welcome sexual conduct
68. Defenses, no tangible employment action was taken
69. Constructive discharge not a tangible employment action
70. Defenses, no causal connection between the tangible employment action and the acceptance or rejection of supervisor's harassing conduct
71. Defenses, harassing conduct was not severe or pervasive
72. Defenses, employer proves both prongs of affirmative defense
73. 1st Prong: Employer took reasonable care to prevent and correct promptly any harassing behavior
74. Employer satisfies 1st prong
75. 2nd Prong: Employee unreasonably failed to take advantage of these preventive or corrective opportunities or failed to avoid harm otherwise

C. PARTIES

76. Persons who may bring action
77. Persons against whom action may be brought

III. PRACTICE AND PROCEDURE

A. PROCEDURAL MATTERS

78. Generally
79. Filing a charge with Equal Employment Opportunity Commission
80. Continuing violation doctrine
81. Pleadings

B. PROOF

- 82. Burden of proof
- 83. Direct evidence
- 84. Pretext plus
- 85. Relevance
- 86. Harasser's prior bad acts
- 87. Plaintiff's sexual history
- 88. EEOC/Agency determinations
- 89. Plaintiff's proof
- 90. Defendant's proof

C. REMEDIES AND RECOVERY

- 91. Generally
- 92. Injunctive relief; reinstatement or front pay
- 93. Injunctive relief
- 94. Reinstatement
- 95. Front pay
- 96. Back pay
- 97. Damages
- 98. Attorneys' fees

IV. PRACTICE CHECKLISTS

- 99. Information from plaintiff
- 100. Information from defendant
- 101. Plaintiff's discovery
- 102. Defendant's discovery

V. APPENDIX

- 103. Sample case
- 104. Texts of statutory provisions
- 105. 20 U.S.C.A. §1681 (a)-(c) [Title IX-Education]
- 106. 28 U.S.C.A. §1367 [District Court, Jurisdiction] Supplemental Jurisdiction
- 107. 29 U.S.C.A. §206(d) [Equal Pay Act]
- 108. 29 U.S.C.A. §621 [Age]
- 109. 29 U.S.C.A. §2601 [FMLA]
- 110. 42 U.S.C.A. §1981 [Equal Rights Under the Law]
- 111. 42 U.S.C.A. §1983 [Civil Action For Deprivation of Civil Rights]
- 112. 42 U.S.C.A. §2000e [Title VII-Civil Rights Act]
- 113. 42 U.S.C.A. §2000e-2 [Unlawful Employment Practices]
- 114. 42 U.S.C.A. §2000e-5(g) & (k) [Enforcement Provisions]
- 115. 42 U.S.C.A. §2000e(k) [Pregnancy Discrimination Law]
- 116. 42 U.S.C.A. §3604 [Title VIII-FFHA]
- 117. Text of EEOC Guidelines on Sexual Harassment
- 118. 29 C.F.R. §1604.11 (Equal Employment Opportunity Commission, Guidelines On Discrimination Because Of Sex (Current Through August 22, 2003))
- 119. "EEOC Enforcement Guidance: Questions & Answers For Small Employers On Employer Liability or Harassment By Supervisors" (1999), 1999 WL 33305875 (E.E.O.C. Guidance)
- 120. Sample complaint