

DBA ENTERTAINMENT, ART & SPORTS LAW SECTION CLE

Sexual harassment and misconduct in the
sports and entertainment industries:
Redrawing the Lines

John Smart
January 24, 2018

OVERVIEW

I. What is Sexual Harassment

II. Harassment versus Misconduct

III. Case Studies: Points on a Spectrum

- Harvey Weinstein
- Matt Lauer
- Jeremy Piven
- Louis C.K.
- Kevin Spacey
- Mario Batali
- T. J. Miller
- Aziz Ansari
- James Levine

IV. Prevention and Response

Sexual Harassment's Origins

- Title VII (of the Civil Rights Act of 1964): prohibits discrimination on the basis of “race, color, religion, sex or national origin.”
- Sex discrimination expands to include sexual harassment claims involving a “hostile environment” (S.Ct. 1986) (*Vinson v. Meritor Savings Bank*).
- 31 years later...celebrities discover the law applies to them (at least in some contexts).
- Limitations Period: 300 days

TYPES OF SEX HARASSMENT

■ **Hostile Work Environment**

- Definition: Unwelcome sexual advances, requests for sexual favors, and other verbal or physical conduct of a sexual nature that tends to create a hostile or offensive work environment. Can be non-sexual if gender-based.
- Conduct so severe or pervasive that it alters the individual's employment conditions
- May involve “constructive discharge”

■ **Quid Pro Quo (“this for that”)**

- virtually unknown outside Hollywood since the 1960's
- “casting couch” claims

ELEMENTS OF HOSTILE WORK ENVIRONMENT HARASSMENT CLAIM

- HARASSMENT MUST BE “SEXUAL”
 - Conduct or message relates to sex; or
 - Relates to gender of victim.
- *Examples:*
 - Sending pornography to coworker
 - Comments regarding sexual issues or gender (“barefoot & pregnant”)
 - Propositions (not just asking for date)
 - Gestures/actions

ELEMENTS OF HOSTILE WORK ENVIRONMENT HARASSMENT

- COMMENT OR CONDUCT WAS UNWELCOME
 - What is the appropriate outside of work is not always appropriate in the workplace
 - Blurred lines resulting from lowering of the decorum bar
 - Tales of conquest
 - TV anecdotes
 - Jokes (nervous laughter)

ELEMENTS OF HOSTILE WORK ENVIRONMENT HARASSMENT

- WAS IT **OFFENSIVE**?

- Subjective Standard
 - Did the *recipient* think it was offensive?

- Objective Standard
 - Would most *people* view it as offensive?

ELEMENTS OF HOSTILE WORK ENVIRONMENT HARASSMENT

- Was it “**severe or pervasive**”
 - Frequency?
 - More than one event?
 - Is conduct physically or psychologically threatening?
 - Does conduct unreasonably interfere with employee’s work performance?
 - Less frequent, requires greater severity
 - More frequent, requires less severity

Who Can Commit Sexual Harassment?

- Supervisors
- Subordinates
- Co-workers
- Clients/customers
- Same-sex

QUID PRO QUO HARASSMENT

- Definition: sexual harassment in which satisfaction of sexual demands is made the condition of job benefits or continued employment or is used as a basis for employment decisions regarding the victim.
- Ever-present leverage of supervisor over coworkers means no overt threat is required.
- Other imbalance of power in nonsupervisory context.

Quid Pro Quo (cont.)

- What starts out consensual can later turn non-consensual
- Policy concerning consensual relationships
 - Discourage
 - Disclosure

Who can be liable for sexual harassment?

- Employers? Yes (Minimum of 15 employees per Title VII, TCHRA). Other states: CA: 1 Employee
- Individuals and Supervisors? Texas: No. Elsewhere: Maybe (NY, CA: Yes).
- Liability for Supervisor Harassment: Employer is always liable for supervisor harassment that results in tangible employment action. In absence of tangible employment action, employer can preclude liability by showing: (1) exercise of reasonable care to prevent and promptly correct harassing behavior; and (2) employee failed to take advantage of preventive/corrective opportunities.

Liability for Sexual Harassment

- Liability for co-worker harassment: employee complains about harassment and employer fails to take prompt, remedial action to remedy it.

This is not the proper means of addressing harassment.

Sexual Misconduct/Rape/Assault

- Sexual assault: unwanted or illegal sexual contact done without consent (or against one incapable of consent). Any type of sexual contact or behavior that occurs without the explicit consent of the recipient.
 - Broad spectrum of conduct, including rape, fondling, attempted rape, unwelcome sexual touching
 - Criminal and/or civil liability for the individual perpetrator

Sexual Misconduct/Rape/Assault (Cont'd)

- Alternative causes of action (outside Title VII or in absence of employment relationship):
 - Civil assault (placing another in fear of imminent bodily harm)
 - Battery (assault that results in actual physical touching)
 - Intentional infliction of emotional distress (Hoffman LaRoche v. Zeltwanger)
 - Negligent hiring/supervision (Waffle House v. Williams)

Sexual Assault versus Sexual Harassment?

Assault

- Fondling of genitalia and intimate body parts
- Exposure of genitalia, intimate body parts
- Penetration of another's body part by perpetrator's body part or object

Harassment

- Pervasive jokes or comments
- Creepiness (looks, staring)
- Suggestive body language
- Propositions or lewd suggestions

Speaking of Creepiness

Harvey Weinstein

The man who started it all. Too many allegations to list: 84 accusers.

Typical scenario: **“let’s meet at my hotel room to discuss your future in pictures.”**

Mix of assault/rape (lesser known actresses), unwanted propositions (celebs) and sexual harassment (production crew).

Matt Lauer

Allegations: gave a sex toy to colleague; exposed himself to a female employee by “dropping his pants,” questioning female producers about who they’d slept with, and playing the game “f___, marry or kill.”

Consequence: Terminated by NBC; divorce.

Harassment?

"Even though my situation with Matt was consensual, I ultimately felt like a victim because of the power dynamic." - Ex-Intern.

The most powerful man at NBC

Louis C.K.

Allegations: Invited 2 female comedians to his hotel room, undressed and pleasured himself in their presence; allegedly pleasured himself during call with another comedian; asked another actress if he could masturbate in her presence.

Harassment?

Criminal?

Consequences: lost HBO series, Netflix special, lost FX relationship.

Note: Made near perfect apology

Jeremy Piven

Allegation by 3 actresses (1 porn star, 1 Playboy model and 1 extra from Entourage) each claiming some form of assault or indecent exposure.

Example: an Entourage extra claims that in 2009, Piven forcibly pushed her up against a wall in a dark hallway, grabbing her breasts and genitals, during a break from filming on the HBO series.

Result: Current TV series cancelled; HBO relationship severed, despite passing lie detector test.

Full denial; no apology.

“Look. All this can be yours.”

James Levine

Director Emeritus of The
Metropolitan Opera.
Served as Music Director
for 40 years.

Accused by 3 men of
sexual abuse dating
back to the 1960s, 2 of
whom were underage at
time of alleged assaults.
Rumors of misconduct
since 1980s.

Relationship with Met
now suspended.

“Admit it. You love my hair.
You want to touch it.” – Fake News Quote

Mario Batali

TV Chef accused by multiple women of sexual harassment. Unwelcome touching, questions about sex lives of staff, questions about their underwear, etc.

Apologized to “the people I have mistreated and hurt.”
Stepped down from own hospitality group and “The Chew.”

Offered recipe with apology in online newsletter.

Anyone want a
cinnamon roll?

Kevin Spacey

Accused by at least 24 men of sexual misconduct or assault, including with then-14-year-old actor Anthony Rapp in 1986.

Spacey apologized for “what would have been deeply inappropriate drunken behavior.”

Fired from hit Netflix series "House of Cards" and replaced in Ridley Scott's completed film "All the Money in the World."

Why isn't the “gay shield” working for me?

T.J. Miller

Comedian and star of Silicon Valley sitcom.

Accuser who dated him in college: “He just tried a lot of things without asking me, and at no point asked me if I was all right. He choke[d] me, and I kept staring at his face hoping he would see that I was afraid and [that he] would stop... I couldn't say anything.”

Accuser made complaint a year later to campus police. Miller claims it was an attempt to break up his relationship with Kat Miller (after expulsion from GW comedy troop). Importance of clear communication.

We made need to set some ground rules before we begin getting freaky.

Aziz Ansari

Comedian, Male feminist, star of Master of None, formerly, Parks & Recreation.

They meet at an Emmy after-party; they flirt by text days later; she goes to his apartment for drinks; they go for dinner and drinks at a fancy restaurant; they go back to his house for more drinks; she gets fully naked on kitchen counter; they have oral sex; he asks for intercourse and she declines; they watch tv and make out some more; she becomes uncomfortable she asks to leave; he calls her an Uber and she leaves.

Sexual assault? Hardly.

Bad date or sexual misconduct?

“Wait? Verbal Cues? What?”

Results of #MeToo Movement

- **Positives?**
 - Increased awareness of right to workplace free of harassment
 - Increased fairness in casting decisions
 - Decrease in work-related harassment due to Publicized consequences
 - Increased recognition of imbalance of power in supervisory relationships
- **Negatives?**
 - Collateral damage (Piven, Miller, Ansari)
 - Confusion regarding current day sexual mores
 - Goodnight kiss or sexual assault?
 - Failure to pick up on “verbal cues”
 - Consent contracts/apps
 - Backlash in hiring decisions?

PREVENTING HARASSMENT LIABILITY

- Company Policy (zero tolerance?)
- Training
- Complaint Procedure (Mandatory Reporting by Victims and Witnesses)
- Full and Fair Investigations (Lauer-overnight decision)
 - Confidential – Statements made to a supervisor or HR in an investigation must be **confidential** (otherwise, no one will participate in the process).
- Taking Corrective Action When Necessary
 - Prompt
 - Thorough
 - Effective
- Nondisclosure Agreements



John Smart, Partner
Bell Nunnally & Martin LLP
jsmart@bellnunnally.com
214-740-1474