

# Internal Investigations in Light of #MeToo

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- Compliance hotlines – how to deal with different issues that come up on hotlines, including #MeToo and whistleblower/compliance issues.
- Considerations in implementing investigations – legal liability vs. company values vs. compliance environment
  - E.g., gap between current law and public expectations re #MeToo
- Legal considerations in investigations (incl. ethics considerations, e.g. Upjohn and attorney-client privilege protections)



- Future perspectives – Where is the compliance world going?  
Broader perspective on investigations/compliance beyond finding the facts
  - How regulators look at a company's compliance investigations and efforts to correct problems (indications of a well-controlled environment or not?)
  - Sometimes employees have concerns but don't want a full compliance investigation – how to help the employee and maintain proper controls within the company
  - How to address compliance issues that are raised after the company has a DPA or has publicly acknowledged a sexual harassment/#MeToo problem and said they had fixed the problem

# Standards of Liability for Sexual Harassment



- **Hostile Environment**

- **Federal:** “In order to establish a prima facie case of sexual harassment resulting in the creation of a hostile work environment, the plaintiff must demonstrate that: (1) she belongs to a protected group, (2) she was the subject of unwelcome sexual harassment, (3) the harassment was based on her sex, (4) the harassment affected a term, condition, or privilege of employment, and (5) the employer knew or should have known of the harassment and failed to take remedial action.” *Fair v. Guiding Eyes For the Blind, Inc.*, 742 F. Supp. 151, 155 (S.D.N.Y. 1990).
- **New York:** Elements identical to federal law. *See Town of Lumberland v. New York State Div. of Human Rights*, 229 A.D.2d 631, 636 (N.Y. Sup. Ct. App. Div. 1996).
- **New Jersey:** A “plaintiff has the burden to demonstrate that the complained-of conduct (1) would not have occurred but for the employee’s gender; and it was (2) severe or pervasive enough to make a (3) reasonable woman believe that (4) the conditions of employment are altered and the working environment is hostile or abusive.” *Griffin v. City of E. Orange*, 139 A.3d 16, 24-25 (N.J. 2016) (emphasis and internal quotation marks omitted).

# Standards of Liability for Sexual Harassment



- **Quid Pro Quo:**

- **Federal:** To make out a prima facie case of quid pro quo harassment under Title VII, “a plaintiff must present evidence that she was subject to unwelcome sexual conduct, and that her reaction to that conduct was then used as the basis for decisions affecting the compensation, terms, conditions or privileges of her employment.” *Kariban v. Columbia University*, 14 F.3d 773, 777 (2d. Cir. 1994).
- **New York:** “Quid pro quo harassment occurs when unwelcome sexual conduct . . . is used, either explicitly or implicitly, as the basis for employment decisions affecting compensation, terms, conditions, or privileges of the complainant’s employment[.]” *Father Belle Comm. Center v. New York State Div. of Human Rights on Complaint of King*, 221 A.D.2d 44, 50 (N.Y. Sup. Ct. App. Div. 1996).
- **New Jersey:** “Quid pro quo sexual harassment occurs when an employer attempts to make an employee’s submission to sexual demands a condition of his or her employment. It involves an implicit or explicit threat that if the employee does not accede to the sexual demands, he or she will lose his or her job, receive unfavorable performance reviews, be passed over for promotions, or suffer other adverse employment consequences.” *J.T.’s Tire Serv., Inc. v. United Rentals N. Am., Inc.*, 985 A.2d 211, 215 (N.J. Super App. Div. 2010).

# Sexual Harassment and Consensual Relationships



- **Federal:** “[V]oluntary , romantic relationships cannot form the basis of a [Title VII] sex discrimination suit.” *DeCintio v. Westchester Cnty. Med. Ctr.*, 807 F.2d 304, 308 (2d. Cir. 1986).
- **New York:** “New York courts have held that employment decisions predicated upon the existence or termination of consensual romantic relationships do not give rise to claims of gender discrimination.” *Kahn v. Objective Sols., Int’l*, 86 F. Supp. 2d 377, 380-81 (S.D.N.Y. 2000).
- **New Jersey:** “Various cases recognize that a consensual sexual relationship between employees negates the elements of a hostile environment sexual harassment claim.” *J.M.L. ex rel. T.G. v. A.M.P.*, 877 A.2d 291, 295 (N.J. Super. App. Div. 2005).

# Defining “Consensual” – Easy Cases



- **Non-consensual:** “He ‘made it be known’ to Plaintiff that, if she did not have sex with him, she would receive poor reviews and be terminated.” *Mikolaenko v. New York Univ.*, No. 16 CIV. 413 (DAB), 2017 WL 4174928, at \*1 (S.D.N.Y. Sept. 7, 2017). Although she eventually “relented,” *id.*, the relationship was not consensual.
- **Consensual:** Even though the supervisor in *Souther v. Posen* “put things in motion,” the court easily found the relationship consensual. 523 Fed. Appx. 352 (6th Cir. 2013).
  - “The two had known each other and were friends for close to thirty years when the affair began.”
  - “They remained friendly during times when the affair was dormant.”
  - She trusted him “with her private information, including her banking information.”
  - During the entire affair, “she was sexually intimate with [the supervisor] and no one else.” The Sixth Circuit concluded: “Given the nature of the close and consensual relationship, no jury could find Minard’s advances unwelcome.”



# Defining “Consensual” – Hard Cases



- Campus police officer Giordano claimed that Chief Jackson conditioned her employment on sexual favors. “She claims she submitted initially ‘because he told her that was the only way she could get the job,’ and throughout her first year on the job, when the demands continued, because of her provisional status and comments from Jackson such as ‘you can always find another job at another Security Agency.’” Jackson denied the allegations.
- The college investigated. After interviewing Giordano and Jackson, in addition to twenty-one other employees, the investigator “found evidence of an intimate relationship between the parties, but no evidence of coercion or retaliation in response to Giordano’s rejection of Jackson’s advances.”
- Did the college win? No: “That the exact nature of the relationship between the parties is disputed does not defeat plaintiff’s claim that Jackson’s attention was unwelcome.” Giordano survives summary judgment.
  - *Giordano v. William Paterson Coll. of New Jersey*, 804 F. Supp. 637 (D.N.J. 1992) (internal quotation marks and alterations omitted).



# Defining “Consensual” – Hard Cases



- CEO pursued employee for the entire employment relationship. He subsidized her apartment, traveled with her, and eventually slept with her multiple times. After he fired her, she sued him for sexual harassment and battery, among other claims.
- The jury finds for the CEO on the battery claim and for the employee on the harassment claim. The defense argues that these verdicts are inconsistent, because the CEO won on the question whether he “intentionally touched Plaintiff in an offensive way without her consent.” This finding, according to the defense, means that the relationship was consensual.
- The court rejects the argument: “While Plaintiff needed to prove that Wey’s conduct towards her was **non-consensual** in order to prevail on her battery claim, the correct inquiry for her sexual harassment claims is whether Plaintiff by her conduct indicated that the alleged sexual advances were **unwelcome**, not whether her actual participation in sexual intercourse was voluntary or consensual.”
  - *Bouveng v. NYG Capital LLC*, 175 F. Supp. 3d 280, 312 (S.D.N.Y. 2016) (emphasis added) (internal quotation marks and alterations omitted).

# Individual Liability: Federal vs. State



	Supervisory Liability	Aiding and Abetting Liability
Federal	X	X
New York	✓	✓
New Jersey	X	✓

# Individual Liability: Aiding and Abetting



- **New York:** A “defendant who actually participates in the conduct giving rise to a discrimination claim may be held personally liable as an aider and abettor under the [New York Human Rights Law], even if that defendant has neither an ownership interest nor the power to hire and fire.” *Perks v. Town of Huntington*, 251 F. Supp. 2d 1143, 1160 (E.D.N.Y. 2003) (internal quotation marks omitted).
- **New Jersey:** A plaintiff must show: “(1) the party whom the defendant aids must perform a wrongful act that causes an injury; (2) the defendant must be generally aware of his role as part of an overall illegal or tortious activity at the time that he provides the assistance; [and] (3) the defendant must knowingly and substantially assist the principal violation.” *Tarr v. Ciasulli*, 853 A.2d 921, 929 (2004) (internal quotation marks omitted).

# Individual Liability: Criminal



- **Criminal laws bearing on sexual harassment**

- **Sexual Abuse:** “A person is guilty of sexual abuse in the third degree when he or she subjects another person to sexual contact without the latter’s consent . . . .” N.Y. Penal Law § 130.55. *See also* 18 U.S.C. § 2242; N.J. Stat. § 2C:14-4.
- **Coercion:** “A person is guilty of criminal coercion if, with purpose unlawfully to restrict another’s freedom of action to engage or refrain from engaging in conduct, he threatens to . . . (1) Inflict bodily injury on anyone or commit any other offense, regardless of the immediacy of the threat[.]” N.J. Stat. Ann. § 2C:13-5. *See also* N.Y. Penal Law § 135.60.
- **Stalking:** A “person is guilty of stalking, a crime of the fourth degree, if he purposefully or knowingly engages in a course of conduct directed at a specific person that would cause a reasonable person to fear for his safety or the safety of a third person or suffer other emotional distress.” N.J. Stat. § 2C:12-10. *See also* 18 U.S.C. § 2261A.

# Jury Verdict and Settlement Amounts



- **Inghram v. UBS Financial Services**, 9:16-cv-36471 (Cir. Ct. Mo. 2011) – A sales associate sued her employer alleging that she was sexually harassed over a period of five years by a company vice president who routinely referenced his desire for sex, commented on the plaintiff's breast size, showed her sexually offensive emails, and later retaliated against her after she complained. At trial, the jury awarded her \$10.6 million. The award was later vacated after the case settled for an undisclosed sum.
- **Chopourain v. Catholic Healthcare West**, CIV S-09-2972 (E.D. Cal. 2012) – A former physician assistant filed suit against her employer claiming that she had been sexually harassed by her co-workers and supervisors over a two year period in which she was subjected to repeated sexual comments and unwanted sexual touching. She further alleged that she was retaliated against for complaining about the harassment. At trial, the jury awarded her \$168M, but the court reduced the award to approximately \$82 million. The award was then vacated following a negotiated settlement for an undisclosed sum.

# Jury Verdict and Settlement Amounts



- **Sanders v. Madison Square Garden**, 06-cv-589 (S.D.N.Y. 2007) – A former senior vice president at Madison Square Garden sued alleging that a company executive repeatedly harassed her by making sexual and sexist comments, and by soliciting her for sex. At trial, the jury awarded her \$11.6 million, and the case was then settled for \$11.5 million.
- **Carlson v. Ailes**, 2:16-cv-4138 (D.N.J.) (filed July 8, 2016) – Gretchen Carlson, a former television anchor for Fox News, filed suit against the then-CEO of Fox News, Roger Ailes, alleging that Ailes sexually harassed her over a period of years and ultimately fired her for refusing his sexual advances. The case was ultimately settled in September 2016 for approximately \$20 million.
- **Alford v. Aaron's Rents**, 08-cv-683 (S.D. Ill. 2011) – A sales representative sued her employer alleging that her co-workers and supervisor subjected her to a pattern of sexual harassment and unwanted sexual touching which culminated in her supervisor sexually assaulting her in a closet. At trial, the jury awarded her \$95 million, which the court later reduced to \$41.3 million. The case was then settled for an undisclosed sum.



# Questions ?



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