



*The Women's Bar Association  
of the State of New York*

*presents*

*Convention 2021  
Continuing Legal Education Series*

**#meThree? Navigating Conflicting  
Standards in Sexual Harassment**

May 22, 2021  
9:00 am - 10:30 am

Presenter: Elizabeth A. Ledkovsky, Esq.

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# #meThree?

## Navigating Conflicting Standards in Sexual Harassment Law

PRESENTED BY  
ELIZABETH A. LEDKOVSKY  
MAY 22, 2021

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#METHREE

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# #METHREE

- Overview of three key laws prohibiting sexual harassment in NYS
  - Three definitions
  - Three legal standards
  - Three (*or more!*) venues for relief



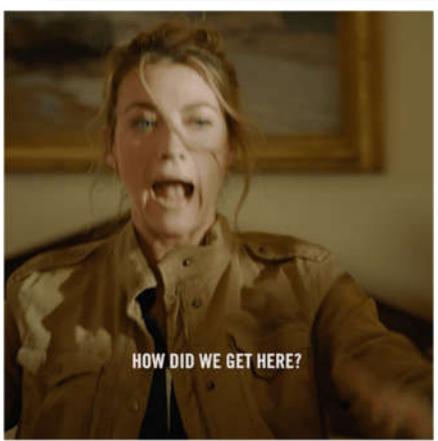
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## THREE TAKEAWAYS FOR NEW YORK PRACTITIONERS

1. Three major legal constructs for sexual harassment
2. Interplay and conflict among those three laws
3. Implications for effective representation

# HARASSMENT AS DISCRIMINATION

- A developing legal concept



HOW DID WE GET HERE?

## SEXUAL HARASSMENT AS A LEGAL DOCTRINE

“on the basis of sex”

- Title VII of the Civil Rights Act of **1964** \*
  - “sex” is a **protected class**
  - **1980**: EEOC declares Title VII includes Sexual Harassment
    - Guidance issued original criteria for how unwelcome conduct constitutes sexual harassment. *29 C.F.R. § 1604.1*

\* Pub. L. No. 88-352, title VII, §701 (1964), as amended through 1991 (codified at 42 U.S.C. § 2000e *et seq.*) <sup>7</sup>

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## LEGAL DOCTRINE

“on the basis of sex”

- Title VII Sexual Harassment
  - *Meritor Savings Bank v. Vinson*, 47 U.S. 57 (1986): recognized sexual harassment as a violation of Title VII and expressly held that such claims are actionable under Title VII.

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## LEGAL DOCTRINE

“on the basis of sex”

### ■ Title VII Hostile Work Environment

- *Harris v. Forklift Systems Inc.*, 510 U.S. 17 (1993): Reaffirmed *Meritor* standard which takes a middle path between making actionable any conduct that is merely offensive and requiring that conduct is **severe and pervasive**

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## LEGAL DOCTRINE

### ■ Title VII Vicarious Liability

- *Faragher v. City of Boca Raton.*, 524 U.S. 775 (1998) and *Burlington Industries, Inc. v. Ellerth*, 524 U.S. 742 (1998):
    - Employer strictly liable for harassment by a supervisor of a subordinate if it culminated in a **tangible employment action**
- BUT! An AFFIRMATIVE DEFENSE:
- Employer’s reasonable care to prevent/correct PLUS employee’s unreasonable failure to avail **negates liability.**

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## LEGAL DOCTRINE

“on the basis of sex”

- Title IX of the Educational Amendments of **1972\***
  - Gender Equity in access to education (and sports)
  - Overseen and enforced by U.S. Department of Education
    - Remedy: withhold federal funding for non-compliant educational institutions: public schools; post-secondary colleges & universities

\* Pub. L. No. 92-318, 86 Stat. 373 (1972) (codified at 20 U.S.C. § 1681 *et seq.*)

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## LEGAL DOCTRINE

Title IX

- **Private right of action**
  - *Cannon v. Univ. of Chicago*, 441 U.S. 677, 691 (1979): withholding of federal funds is **not** the only remedy (following Title VI)

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## LEGAL DOCTRINE

### Title IX

- **Sexual Harassment**

- *Alexander v. Yale Univ.*, 631 F.2d 178 (2d Cir. 1979): first civil action alleging sexual harassment under Title IX.
- *Franklin v. Gwinnett Cty. Pub. Schs.*, 503 U.S. 60, 73 (1992): sexual harassment of students may be remedied with money damages.

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## LEGAL DOCTRINE

### Title IX Sexual Harassment

- **Vicarious Liability**

- *Gebser v. Lago Vista Ind. School Dist.*, 524 U.S. 274 (1998): school is liable for money damages (teacher harassing student) if it was on notice by having **actual knowledge** of the discrimination but showed **deliberate indifference**.

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## LEGAL DOCTRINE

### Title IX Sexual Harassment

- *Davis Next Friend LaShonda D. v. Monroe County Bd. of Educ.*, 526 U.S. 629 (1999): school liable for damages (student harassing student) where discrimination was **severe, pervasive, and objectively offensive**, such that it effectively denied the victim equal access, school had **substantial control** over perpetrator, but showed **deliberate indifference** by reacting in a manner **clearly unreasonable** in light of known circumstances.

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## SEXUAL HARASSMENT AS A CONTROVERSIAL CONCEPT

### The Rise of OCR “Title IX Guidance”

- 1997: OCR Guidance declares that sexual harassment is prohibited discrimination under Title IX, in two forms:
  - Quid Pro Quo
  - Hostile Environment
- Suggested broader standards for institutional liability than the Court was soon to state in *Gebser* and *Davis...*

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## A CONTROVERSIAL CONCEPT

### Title IX “Guidance”

- **2001:** Post-*Davis*: **unwelcome conduct of a sexual nature** constitutes sexual harassment; essentially reaffirmed 1997 Guidance as appropriate under its regulatory powers, despite intervening jurisprudence
- **2011:** “*Dear Colleague*” Letter re: addressing off-campus incidents, student-on-student harassment, sexual violence, grievance procedures, preponderance of evidence standard, low(?) due process requirements...
- **2014:** “Q&A” re: investigating allegations of sexual violence

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## A CONTROVERSIAL CONCEPT

### BACKLASH

- **20-teens:** Multitude of federal lawsuits alleging due process violations
- **2016:** 21 Law professors issue an Open Letter condemning “OCR Overreach”
- **2017:** Trump appoints DeVos, takes on Title IX

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## A CONTROVERSIAL CONCEPT

### #metoo and “Time’s Up” movement

- 2017: Social media explosion
  - Response to Harvey Weinstein scandal
  - Political fallout (?) (from Al Franken to Andrew Cuomo...?)
- 2018 & 2019: Legislative responses
  - New York City & New York State pass sweeping reforms...

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## NEW YORK STATE REFORMS

### 2018 Executive Agenda

- Amend NYSHRL provisions re: workplace sexual harassment to expand protection for contractors, vendors, consultants, etc.
- Amend Labor Law to mandate sexual harassment prohibition policies and annual education/prevention training for all workers
- Restrict NDAs and mandatory arbitration

NY Labor Law 201-g; Executive Law § 296

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## NEW YORK STATE REFORMS

2019 Legislation, *inter alia*

- Expanded NYSHRL sexual harassment provisions to ALL employers
  - Extended statute of limitations for sexual harassment complaints
  - **Re-defined standard** for sexual harassment
  - **Elimination** of Faragher-Ellerth **defense**
  - **Add** punitive damages and mandatory attorneys' fees for prevailing party
- NY Executive Law § 296

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## MEANWHILE, BACK IN WASHINGTON...

2017

- U.S. Education Dept. Office for Civil Rights rescinds prior materials, except for 2001 Guidance

2018

- ED embarks on formal rulemaking. Controversy ensues.

2020

- Final Rule: New regulations at 34 CFR Part 106

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## THREE TAKEAWAYS FOR NEW YORK PRACTITIONERS

1. The three major legal constructs for sexual harassment
  - When and where applicable
  - Definitions and standards of review
2. The interplay among those three laws
  - Where they intersect
  - Where they conflict
3. Implications for effective representation
  - When your client is an individual
  - When your client is an employer and/or an educational institution

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### TAKEAWAY I

# KEY LEGAL PROTECTIONS

IN NEW YORK STATE

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## SEXUAL HARASSMENT: THREE CONSTRUCTS THREE STANDARDS

### FEDERAL LAW

- Title VII: “objectively severe or pervasive”
- Title IX: “severe and pervasive”

### NYS HUMAN RIGHTS LAW

- “unlawful discriminatory practice ... subjects an individual to inferior terms, conditions, or privileges of employment because of the individual’s membership in one or more ... protected categories.”

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## TITLE IX FOR EMPLOYMENT CLAIMS?

### **Courts: Maybe, Maybe Not Not?**

- *Does Title VII preempt Title IX Employment Discrimination Claims?*
  - YES: 5<sup>th</sup> and 7<sup>th</sup> Circuits, & D-Conn & SDNY...
  - NO: 1<sup>st</sup>, 3<sup>rd</sup>, 4<sup>th</sup>, 6<sup>th</sup> and 8<sup>th</sup> Circuits, & D-Conn, SDNY, EDNY...
  - 2d Circuit applied Title IX analysis to Title VII claims

*Menaker v. Hofstra University*, 935 F. 3d 20 (2d Cir., 2019)

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KEY LAW I

# TITLE IX

IN NEWYORK STATE

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## TITLE IX FOR EMPLOYMENT CLAIMS?

**U.S. Education Department/OCR:**

**YES!!**

- Commentary to new regulations explicitly states that Title IX applies to employees of educational institutions receiving federal funding.

Nondiscrimination on the Basis of Sex in Education Programs or Activities Receiving Federal Financial Assistance, 85 Fed. Reg. 30,026, 30,439 (May 19, 2020) *available at*

<https://www.govinfo.gov/content/pkg/FR-2020-05-19/pdf/2020-10512.pdf>

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## TITLE IX: NEW REGULATORY STANDARDS

**Sexual harassment** is defined as “conduct on the basis of sex” that is in the nature of one or more of the following:

1. Quid pro Quo
2. Creation of a Hostile Environment
3. Sexual Violence

34 C.F.R. 106.30

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## TITLE IX: THE NARROW DEFINITIONS

1. **Quid pro Quo:** An employee conditioning provision of aid, benefit, or service on participation in unwelcome sexual conduct
2. **Hostile Environment:** Unwelcome conduct determined by a reasonable person to be so **severe, pervasive, and objectively offensive** that it effectively denies equal access to the education program or activity
3. **Sexual Assault or Violence:** As defined under the Clery Act and Violence Against Women Act (referencing FBI Uniform Crime Reporting system)

34 C.F.R. 106.30

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## TITLE IX: THE NARROW JURISDICTION

A complaint **must** be dismissed if the allegations:

- would not constitute sexual harassment **as defined** in section 106.30, **even if proven**; or
- did not occur in the school's program or activity (where it exercises **substantial control** over respondent AND context); or
- did not occur against a person in the United States.

34 C.F.R. §§106.44 & 106.45

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KEY LAW II

## TITLE VII

IN NEW YORK STATE

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## TITLE VII: THE PRIMA FACIE CASE

A prima facie sexual harassment claim must satisfy four elements:

1. Complainant belongs to a “protected class” and
2. Was subjected to unwelcome conduct **because** of that protected class, and
3. S/he subjectively felt the harassment caused an abusive environment; AND
4. A **reasonable** person would **objectively** view the conduct as abusive, *i.e.*, severe or pervasive, sufficiently to alter terms and conditions of employment (an **adverse employment action**).

*(Meritor, Harris)*

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## TITLE VII: BURDEN-SHIFTING

- Establishing a prima facie case creates a rebuttable presumption of discriminatory intent.
- Burden shifts to defendant, who may present a **legitimate, non-discriminatory reason** for adverse employment action.

*McDonnell Douglas Corp. v. Green*, 411 U.S. 792, 802-07 (1973).

- Remember, affirmative defense of *Faragher-Ellerth*, too!

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KEY LAW III

# NYSHRL

IN NEW YORK STATE

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## A NEW NEW YORK STANDARD

- Harassment is an unlawful discriminatory practice when it subjects an individual to **inferior terms, conditions or privileges of employment** because of the individual's membership in one or more of these protected categories.
- Must be **above a level of** what reasonable victims of discrimination with the same protected characteristic(s) would consider **petty slights or trivial inconveniences** to give rise to liability.
- Failure by a target of harassment to complain does not immunize employers from liability: **NO *Faragher-Ellerth!***

Executive Law § 296 (1)(h)

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## WHITHER NEW YORK?

### Still uncharted territory!

- NY always followed Title VII: *see Forrest v. Jewish Guild for the Blind*, 3 N.Y.3d 295 (2004)
- Decisions coming out now are based on facts occurring 5 years ago.
  - Judges have declined to apply the new legislation, reciting instead the familiar “severe or pervasive” analysis.
  - *Golston-Green v. City of New York*, 184 A.D.3d 24, 41 (2d Dept. 2020), noting the amendment to Exec. Law s. 296 but stating “This amendment ... only applies to claims filed after ... October 11, 2019.”

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### TAKEAWAY II

# INTERSECTIONS & CONFLICTS

IN NEW YORK STATE

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## INTERPLAY AMONG SEXUAL HARASSMENT LAWS

### CONTRASTS RE: APPLICABILITY

- Title IX applies **only** to Federally funded **educational** institutions
- Title VII is enforced against all employers with **15 or more** employees
- ALL NY employers bound by NYSHRL prohibiting sexual harassment

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## IF TITLE IX APPLIES

- Title VII and NYSHRL will certainly apply as well.
- Despite OCR's pronouncement, NY courts may defer to Title VII until splits are resolved.
- Notwithstanding:
  - A claim failing under Title IX might succeed under Title VII...
  - A claim that fails under Title VII might still succeed under NYSHRL!

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## COMPETING PROCESSES

Title IX's implied private right of action permits a plaintiff to commence court action without pursuing an administrative complaint

### IN CONTRAST:

- Title VII requires “exhaustion of administrative remedies”
  - Complaint must be filed with EEOC within 180 days
  - Issuance of “Right to Sue” letter

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## COMPETING PROCESSES

Title IX – **No** administrative requirement

Title VII – **Exhaustion** of administrative remedies

### IN CONTRAST:

- NYS requires “election of remedies”
  - Filing a complaint with DHR precludes lawsuit unless annulled or dismissed for administrative convenience or as untimely.

*NY Exec. Law § 297*

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TAKEAWAY III

# IMPLICATIONS FOR THE FIELD

IN NEW YORK STATE

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## THREE PERSPECTIVES FOR NEW YORK PRACTITIONERS

1. Representing a Complainant/Victim
2. Representing a Respondent/Accused Perpetrator
3. Representing an Employer

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# EFFECTIVE REPRESENTATION

## When your client is an individual Complainant

### CONSIDER:

#### ■ PROCESSES

Which venues are available?

- OCR? EEOC? DHR? **All of them?**
- Court? Which court? Federal District or State Supreme?
  - Any conditions precedent or bars to filing a complaint or commencing an action?

Statutes of limitations (180 days to 3 years)?

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# EFFECTIVE REPRESENTATION

### CONSIDER:

#### ■ DAMAGES AVAILABLE

- Title VII compensatory and punitive damages **CAPPED** (\$300 K MAX)  
*Civil Rights Act of 1991 - §1983a(b)*
- Title IX: **NO** punitive damages, but **NO CAP** on compensatory!
- NYSHRL now allows for punitive damages as well
- Attorneys' fees, costs and interest.

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# EFFECTIVE REPRESENTATION

## When your client is an individual Respondent

### CONSIDER:

- DUE PROCESS
  - Current Title IX regulations emphasize presumption of innocence, fairness of investigation and impartiality of decision makers
- PERSONAL LIABILITY?
  - NONE under Federal law
  - POTENTIAL for under NYS law

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# EFFECTIVE REPRESENTATION

## When your client is an EMPLOYER

### CONSIDER DEFENSES

- Title IX
  - Depending on the Court, Title VII preemption?
  - Jurisdictional issues
  - No showing of severe AND pervasive conduct
  - Evidence that Employer did not have **ACTUAL** notice of offensive conduct **and/or** was not **deliberately indifferent**

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# EFFECTIVE REPRESENTATION

## When your client is an EMPLOYER, CONSIDER DEFENSES

- Title VII
  - Failure to Exhaust Administrative Remedies  
MUST be timely asserted; *see Fort Bend County, Texas v. Davis*, 587 U.S. \_\_\_\_ (2019).
  - *Faragher-Ellerth* (Plaintiff failed to use internal processes)
  - Legitimate basis for adverse action (if *prima facie* case presents)

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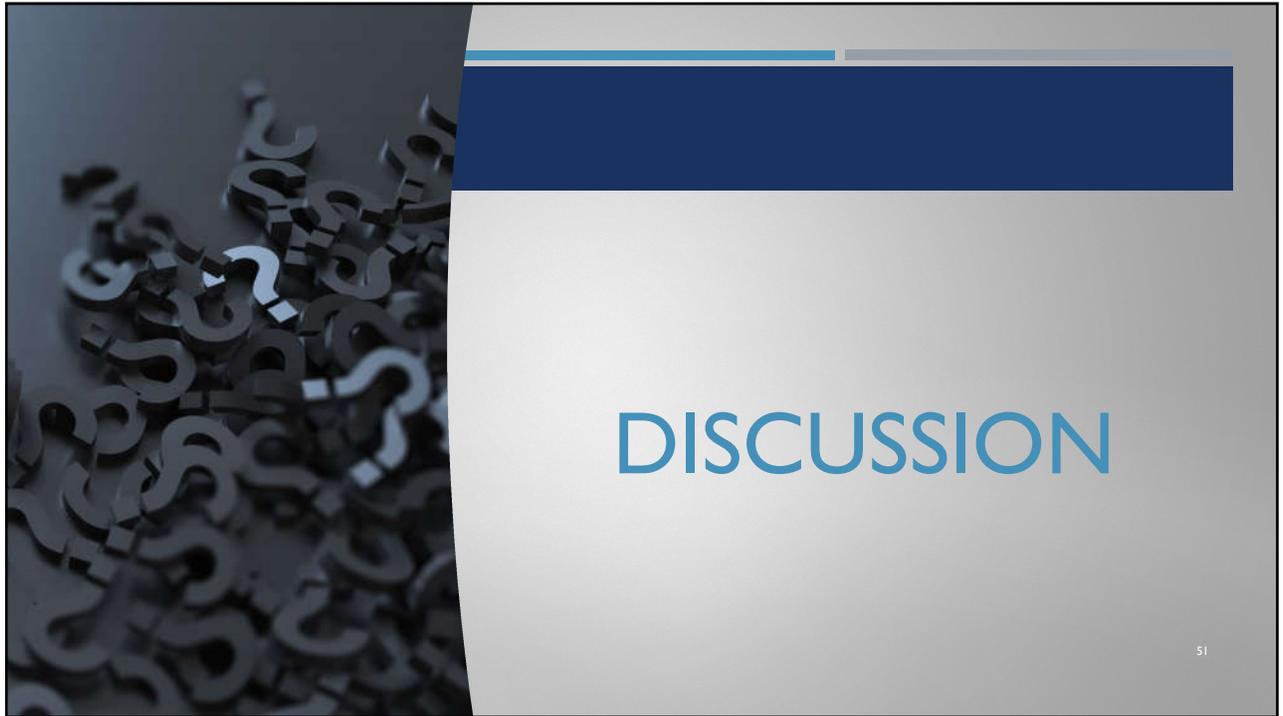
# EFFECTIVE REPRESENTATION

## When your client is an EMPLOYER, CONSIDER DEFENSES

- NYS Human Rights Law
  - Election of Remedies: a DHR complaint preempts lawsuit absent dismissal
  - **NO** *Faragher-Ellerth*
  - “Petty slights or trivial inconveniences”??

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