

Sexual Harassment

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*Questions and Answers for
Supervisors*

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PREFACE

This material was developed as part of a workshop for supervisors on the issues of sexual harassment in the workplace. It is intended to be an overview of the significant areas of a very complex topic and should not be viewed as an all inclusive discussion of this issue. The material contained herein is not intended to be, nor should it be construed as, legal advice. If legal advice or assistance is needed, you should consult a qualified attorney.

SEXUAL HARASSMENT

Is sexual harassment illegal?

Yes. Under Title VII of the Civil Rights Act of 1964, it is unlawful to discriminate against an individual with regard to terms and conditions of employment based on that individual's race, color, sex, religion, or national origin. Any adverse treatment in the workplace that is based on a person's gender is sex discrimination under Title VII.

Early court cases found sexual harassment to be unlawful sex discrimination under Title VII. These cases involved male supervisors who asked for sexual favors from female employees. A woman who did not give in to the demands of the supervisor would be terminated, forced to quit, or suffer some other adverse work related action. Some employers said that such actions were not the result of the employee being a woman but because she did not yield to the demands of the supervisor. The courts rejected this argument stating that such demands were not placed on male employees by those supervisors so, therefore, the action was based on the sex of the employee.

Is gender harassment the same as sexual harassment?

While both sexual harassment and gender harassment are prohibited under Title VII, there are some differences between the two. Sexual harassment involves some conduct of a sexual nature. Gender harassment is abusive conduct, that is not sexual in nature, but is based on an employee's gender. It can take the form of sexist slurs, negative stereotyping, abusive language, threatening or hostile acts, or other actions intended to demean an individual because of their gender. Statements such as, "Of course a woman couldn't understand this" or "This job is too hard for a woman to do" or jokes or pictures depicting women in subservient roles would be examples of gender harassment.

Exactly what is sexual harassment?

The Equal Employment Opportunity Commission (EEOC), the federal agency which enforces Title VII, defines sexual harassment as unwelcome sexual advances, requests for sexual favors, or other verbal or physical conduct of a sexual nature when:

- Submission to such conduct is made either explicitly or implicitly a term or condition of a person's employment;
- Submission or rejection of such conduct is used as a basis for employment decisions affecting that person;
- Such conduct has the purpose or effect of creating an intimidating, hostile, or offensive work environment; or

- Such conduct has the purpose or effect of unreasonably interfering with a person's work performance.

Sexual harassment falls into two categories. One category is *quid pro quo* which is a Latin phrase meaning something for something. This form of harassment occurs when the supervisor offers the individual something of value, such as a job or promotion, in return for sexual favors or other sexual conduct. This type of sexual harassment only occurs when a supervisor-subordinate relationship exists.

We generally think of *quid pro quo* harassment as being requests for sexual favors.

This, however, is not necessarily so. For example, it can involve adverse action against an employee because she refuses to wear revealing clothing to work or because she refuses to date a client. The key element in *quid pro quo* harassment is that something of value is offered, or taken away, based on the individual's acceptance or rejection of sexual conduct.

The other form of sexual harassment is hostile environment. Hostile environment sexual harassment is not a matter of offering something of value in return for sexual conduct. It involves situations where the workplace atmosphere is so sexually pervasive that it affects the employee's ability to work effectively or creates an abusive or intimidating environment.

A key word in the definition of sexual harassment is "unwelcome." By the EEOC definition, the conduct must be unwelcome before it is considered to be sexual harassment. If an employee is a willing participant in sexual conduct or in acceptance of such conduct, it would appear that there is no basis for a claim of sexual harassment. This, however, is not always the case as we shall discuss later.

Before there can be a claim of sexual harassment, three criteria must be met. The first criterion is behavior, either verbal or physical. The second is that the behavior must be sexual or gender based. The third criterion is that the behavior must be unwelcome. Unless all three criteria are present, there is no sexual harassment as defined by the EEOC.

What creates hostile environment sexual harassment?

Hostile environment sexual harassment is harassment that falls into the last two elements of the EEOC definition. It is unwelcome sexual advances, requests for sexual favors, or other physical or verbal conduct of a sexual nature that has the purpose or effect of creating an intimidating, hostile, or offensive work environment; or that has the purpose of unreasonably interfering with a person's work performance.

While *quid pro quo* harassment is based on a supervisor-subordinate relationship, hostile environment can be created by the employee's supervisor, other employees, or by outsiders. Here, the issue is not a matter of requiring some form of sexual conduct in exchange for

something of value. It is an atmosphere in the work setting that is so pervasive in its sexual nature that the employee finds it abusive and hostile to the extent that the employee cannot function effectively in her job. A hostile environment can be gender based as well as sexually based harassment.

In many ways, it is more difficult to determine a hostile environment situation than it is a *quid pro quo* harassment situation. In determining whether a situation is hostile environment sexual harassment, the approach used by the EEOC is to view the situation in its entirety. Some of the factors considered are:

- Was there verbal and/or physical conduct of a sexual or gender based nature;
- How frequently was it repeated;
- Whether the conduct was hostile and patently offensive;
- Whether the alleged harasser was a coworker, supervisor, or outsider;
- Whether others joined in perpetuating the harassment;
- Whether the harassment was directed at more than one individual;
- Was the conduct unwelcome;
- Did the conduct unreasonably interfere with the employee's work performance.

Hostile environment sexual harassment can exist even where the conduct is not directed to the complainant. The exposure to sexually orientated behavior directed toward others can also be sexual harassment. It is the overall pervasiveness and offensiveness of the situation that is critical in determining if there is sexual harassment.

Generally, verbal conduct requires repeated instances before it is viewed as sexual harassment. The isolated offensive statement or joke is normally not considered to be pervasive enough to create a hostile environment. Also, innocent social advances are not viewed as sexual harassment under most circumstances. Asking a co-employee to join a social group, or even asking for a date, would not be sexual harassment unless the requests persisted after the employee showed that she or he was not interested. Socially acceptable compliments to a coworker on the employee's appearance are also viewed as acceptable. However, the way in which the compliment is stated or the expression or other physical conduct of the person making the compliment can make it offensive.

While a single incidence of offensive verbal conduct is not sufficient to create a hostile environment, a single incident of offensive touching (intimate body areas, kissing, caressing buttocks, etc.) is all it takes to be considered sexual harassment.

Other factors that can contribute to a hostile environment include pinups, sexually explicit language, vulgar gestures, offensive jokes, and lewd looks and comments.

In determining if there has been sexual harassment, the perspective of the claimant must be considered. Whether a similarly situated reasonable person would have found the conduct offensive is often crucial in deciding if there has been sexual harassment. Under the current standard of assessing the existence of sexual harassment, it is not required that the complainant suffer psychological harm. As the Supreme Court has pointed out, "Title VII comes into play before the harassing conduct leads to a nervous breakdown."

What about the issue of welcome verses unwelcome conduct?

As was pointed out earlier, for sexual conduct to be harassment, it must be unwelcome. If an employee is freely and willingly participating in the conduct, there is no violation of the law. Workplace sexual conduct is unwelcome when:

- The employee does not solicit or initiate the conduct; and
- The employee regards the conduct as undesirable and offensive.

The question arises as to how an employer can determine if sexually oriented conduct in the workplace is unwelcome. An obvious sign is if the employee complains or protests about the conduct. Even though there may be a long delay from the time the conduct started until the employee complained, it still does not indicate that the conduct was welcome. The delay in complaining may have been the result of fear of retaliation. Any time an employer becomes aware of a complaint of sexual harassment, the employer should take immediate action to investigate the claim and stop any harassment that is discovered.

It must also be kept in mind that acceptance of sexual conduct does not always mean welcomeness. An employee may tolerate such behavior for fear of retaliation if a complaint is filed. It may finally reach the point where the employee can no longer deal with the situation and file a complaint or lawsuit. If it can be shown that the employer knew or should have known about the situation and took no action to stop it, the employer's liability is greatly increased.

Obviously, the best way to eliminate the question of whether such conduct is welcome or unwelcome is to prohibit all sexually orientated conduct in the workplace.

What if the employee joins in the conduct and then complains about it?

Employees may sometimes join in the sexual joking and banter and then later complain that it is offensive. While such actions on the part of the employee may indicate that the conduct is welcome, the employer and other employees should never rely on this assumption. Past use of sexually explicit language or innuendo cannot be used to show that such conduct is generally welcome. An employee, at one point, may participate in such activity but later stop. If the employee later complains that such conduct is no longer welcome and the conduct persists, it may be found to be sexual harassment. An

employee who was once willingly participating in such conduct may also later complain that it has now gone too far.

Another issue involved is the employee who occasionally uses vulgar or sexually explicit language. This does not necessarily indicate that such conduct is welcome. Such conduct by other employees can become escalated and more abusive until they reach the point of being no longer acceptable to the employee. It then could be viewed as sexual harassment.

Even though an employee has or is currently using sexual language or is engaging in other sexually orientated conduct in the workplace, it is never an excuse for an assault or for a supervisor to offer job benefits in exchange for sexual favors.

What is involved in determining if there has been sexual harassment?

As was mentioned earlier, for sexual harassment to occur, there must be three elements. There must be a behavior. The behavior must be sexually or gender oriented. The behavior must be unwelcome.

Behavior means either a verbal or physical action. Our thoughts do not come under this definition. We can think anything we want to, no matter how good or bad, but it is not a behavior until it manifests itself by some action on our part. This could be in something we say or in some gesture we make, but our thoughts by themselves do not create a harassment situation simply because no one knows what they are.

The second element is that the behavior must be sexually or gender based. Even though a person's actions, appearance, or words may be obnoxious and repulsive to us, they cannot be considered part of a sexual harassment situation unless they are sexually or gender based.

The third element is unwelcomeness of the behavior. Even though the first two elements are there, it still is not sexual harassment if the behavior is invited and welcomed by the recipient.

In the absence of any one of these elements, there is no sexual harassment.

Can there be same sex harassment?

This is an area in which there had been much disagreement with some Circuit Courts saying yes and others say no. However, in 1998, the United States Supreme Court in *Oncala v. Sundowner Offshore Services, Inc.*, in a reversal of a decision by the Fifth Circuit Court of Appeals, determined that same sex harassment could be violation of Title VII. This decision further pointed out that the harassment did not have to be homosexual in nature.

What is an employer's liability for sexual harassment?

There can be a tremendous liability for employers in the area of sexual harassment depending on who the harasser is and what actions the employer takes to eliminate harassment.

Quid pro quo harassment is potentially the most damaging for an employer. The stance on this is that the employer is liable for the actions of its supervisors and managers even though the other managers had no knowledge of the harassing behavior.

In hostile environment situations, the employer's liability begins when the employer knows or should have known of the harassing conduct. Hostile environment harassment can result from the actions of managers or supervisors, fellow workers, or outsiders. Liability can be eliminated or reduced if the employer takes quick action to control, investigate, and eliminate the harassment. A well written and consistently applied policy on sexual harassment can also reduce the liability under hostile environment harassment.

Where harassment may be the result of actions of outsiders such as vendors, clients or service people, the employer needs to take action to control and eliminate the employee's exposure to the harassing action. In some cases, this could even mean having the harassing individual removed from the premises.

Can I be personally liable for sexual harassment?

The courts are not consistent on this issue. Some courts contend that the liability is only with the employer. Other courts say that managers and supervisors may be personally liable for their harassing conduct when they are acting as agents for the employer.

Managers and supervisors, however, can be held directly liable for their sexually harassing behavior in situations where it is found to be a common law tort such as assault, battery, or intentional infliction of emotional distress. Employees and others engaging in harassing conduct may also be held liable for such conduct.

How costly can sexual harassment be?

If an employer is found to be responsible for sexual harassment under Title VII, the employer can be required to rehire the employee if the employee was fired or forced to quit, pay back wages to the employee for the period the employee was out of work, and pay for the employee's attorney and expert witness fees. The employer can also be ordered to pay compensatory and punitive damages. The Civil Rights Act of 1991 set a cap on compensatory and punitive damages of \$50,000 for employers with 15 to 100 employees; \$100,000 for employers with 101 to 200 employees; \$200,000 for

employers with 201 to 500 employees; and \$300,000 for employers with more than 500 employees. It should be noted that these caps are per victim and not per lawsuit.

In some states, there is no cap on the amount of award that can be given under state anti-discrimination law. There have been instances of multimillion dollar awards given under some states' laws.

While the dollar cost to the employer in sexual harassment cases is significant, there are also many hidden costs and losses usually associated with sexual harassment situations. Included among these are low employee morale, employee absenteeism, loss of good employees, and harm to the employer's reputation.

What can an employer do to control sexual harassment?

Employers should take active steps to eliminate sexual harassment in the workplace.

It is better to prevent a sexual harassment claim than to try to defend one in court. Actions that an employer should take include:

- Developing a well written policy on sexual harassment;
- Communicating the policy to all supervisors and employees;
- Training supervisors and employees on sexual harassment issues;
- Establishing an effective complaint procedure;
- Taking all claims of sexual harassment seriously and quickly investigating them;
- Documenting investigations;
- Maintaining confidentiality during and after the investigation;
- Determining if relief is necessary for the claimant during the investigation;
- Acting immediately to remedy the situation if it is determined that there has been sexual harassment;
- Taking steps to ensure that there is no retaliation against an employee who has filed a sexual harassment claim in good faith.

In almost all sexual harassment situations, the claimant is only trying to have the harassment stopped. If the employer quickly investigates claims and takes prompt appropriate action to eliminate any sexual harassment, that usually is the end of the matter. It is when the employer ignores the complaint or delays taking action that the employee seeks relief outside of the work setting. This is what leads to the high dollar lawsuits.

What should be included in a sexual harassment policy?

An effective sexual harassment policy should contain the following:

- A statement that sexual harassment will not be tolerated in the workplace;
- A definition of sexual harassment;

- A well defined procedure for filing a complaint of sexual harassment;
- A statement that all claims will be taken seriously and investigated;
- Assurance that the employer will attempt to keep all investigations confidential;
- A statement that no adverse action will be taken against an employee who files a complaint of sexual harassment in good faith;
- A statement that an employee who engages in sexual harassment shall be subject to discipline, up to and including termination.

In designing a complaint procedure, it is important to have more than one route for an employee to follow in making a complaint. If all complaints must be made through the employee's supervisor, the whole procedure breaks down if the supervisor is the alleged harasser. It is also a good practice to have one route of complaint where the complaint is made directly to a female manager or official.

While the employer should attempt to keep all investigations of sexual harassment complaints confidential, complete assurance of confidentiality should not be given. Realistically, even though the employer takes all reasonable steps to assure such confidentiality, absolute confidentiality cannot be guaranteed.

It is also important to determine exactly what actions will be taken when a complaint is filed. Advance planning on how to deal with a complaint of sexual harassment can make the investigation move much more smoothly and rapidly, thus reducing the employer's liability. Things to consider include:

- Who will conduct the investigation;
- How will it be conducted;
- What statements will be made to the complainant, the alleged harasser, and anyone else questioned during the investigation.;
- What steps will be taken to help ensure confidentiality;
- Who will be responsible for making the final determination as to whether there has been sexual harassment.

What initial steps should be taken when a sexual harassment claim is filed?

As was pointed out earlier, take every complaint seriously and let the employee know that this is the policy. Take time immediately to meet with the complainant and provide assurance that all attempts will be made to keep the investigation as confidential as possible. Also assure the complainant that it is the employer's policy to prevent retaliation for complaints filed in good faith. Ask the employee to provide a written statement of the complaint but don't require it if the employee does not want to give one.

In talking with the complainant, try to gather facts and information that will help with the investigation. Don't make judgments at this point. The role of the investigator should be neutral with the goal being to find out "who, what, when, where, why, and how."

Let the complainant know that swift action will be taken to investigate the complaint and that immediate action will be taken to remedy any misconduct that is found. Also let the employee know that she or he may be liable for defamation if any false or malicious statements are made during the investigative process.

It is a good practice to ask the employee if some form of relief is needed while the investigation is being conducted. This could be in the form of separation of the complainant and alleged harasser, immediate removal of offensive items, or offering to pay for counseling for the employee.

How should the investigation be conducted?

The actual investigation is a very sensitive process. Care must be taken to assure that it is handled as discretely as possible. The investigator, and anyone who is questioned in the process of the investigation, must understand the importance of confidentiality and the potential for personal liability for defamation of character if any false or malicious statements are made.

Because of the importance of this phase of the sexual harassment process, it is recommended that investigations be conducted by someone experienced in the investigative process. This could be a staff attorney or management person trained in internal investigation techniques.

The role of the investigator must be a neutral one. No assumption of guilt or innocence should be made prior to all the facts being gathered.

During the investigation, a number of individuals will usually be interviewed. In addition to the complainant and the alleged harasser, others who might have first hand knowledge of the situation, such as supervisors and coworkers, will also be interviewed. It is important that the investigator ask questions that are designed to get facts. Asking leading questions or indicating an opinion about the alleged harasser's guilt or innocence can greatly affect the accuracy of the investigation. It is also important for the investigator to separate answers based on feelings from those that are a statement of actual fact.

As with all personnel activities, documentation of the investigation is important. A complete accurate record needs to be kept of all phases of the investigation. This will be used in making a final determination and for possible later reference if there are any repercussions of the decision resulting from the investigation.

What happens after the investigation?

If it is determined that there has been sexual harassment, appropriate disciplinary action needs to be taken against the harasser. If the harassment was not severe, the steps taken might include formal reprimanding and counseling with the employee. In this situation, the employee should also be told that no further incidents will be tolerated and that, if they occur, the employee will be subject to immediate termination.

Where the harassment has been severe, the disciplinary step would probably be discharge of the harasser. Somewhere in between these two extremes are other levels of discipline that would meet varying levels of severity of harassment. As with all discipline, it is important that the employer try to “make the punishment fit the crime.”

Once a decision has been made on what action is to be taken, the employee filing the complaint should be notified of the action. The complainant should again be advised of the importance of continued confidentiality.

While there may be a tendency to use an employee who is guilty of harassment as an example to let other employees know that harassment will not be tolerated, to do so would be an increased liability to the employer. The investigation and results should remain confidential.

A final word

Sexual harassment is not about a loving, caring relationship. It is not about respect and admiration of fellow employees. It is about power and control over others. It is about trying to enhance one's self image by demeaning others and attacking their dignity.

Control of sexual harassment in the workplace is important to protect the employer from the potential costs that come with related lawsuits. It is, however, more important to control sexual harassment so that no employee will have to put up with such degrading behavior - so that each employee will be treated with the level of dignity and respect we all deserve as human beings.