

# Defining and Preventing Sexual Harassment Struggles

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*It's been said that the best defense is a good offense. This statement is especially true when talking about sexual harassment. The best way to keep your office out of legal trouble is to prevent sexual harassment from occurring.*

*A company can be found liable for sexual harassment of an employee if it knew or should have known of the harassment and failed to take prompt remedial action.*

*The more you know about the different types of sexual harassment and what constitutes sexual harassment, the better your chance of avoiding litigation.*

**What is sexual harassment?** Sexual harassment is generally defined as unwelcome sexual advances, requests for sexual favors and other verbal and physical conduct of a sexual nature when:

submission to or rejection of such advances, requests or conduct is either explicitly or implicitly a term or condition of the individual's employment;

submission to or rejection of such sexual advances, requests or conduct is used as a basis for making employment decisions which affect the individual; or

the sexual advances, requests or conduct in question have the purpose or effect of interfering with work or creating an intimidating, hostile or otherwise offensive work environment.

## **Types of sexual harassment**

There are three different forms of sexual harassment.

Quid pro quo harassment occurs when a person in the position to affect an employee's working conditions makes an unwelcome sexual advance or demand for sexual favors. Only supervisors or managers can engage in quid pro quo harassment.

Hostile environment harassment occurs when relentless or continuous unwelcome sexual conduct in the workplace interferes with an employee's work performance or creates an intimidating, hostile, abusive or offensive work environment.

In the recent case of *Harris v. Forklift Systems, Inc.*, the U.S. Supreme Court held, "To be actionable as 'abusive-work-environment harassment,' conduct need not seriously affect (an employee's) psychological well-being or lead the plaintiff to suffer injury."

Under this type of harassment, all circumstances must be reviewed to determine whether an environment is hostile or abusive. Some of the factors taken into consideration include the frequency of discriminatory conduct, its severity, whether it is physically threatening or humiliating or a mere offensive utterance, and whether it unreasonably interferes with an employee's work performance. The effect on the employee's psychological well-being is relevant in determining whether the plaintiff actually interpreted his or her environment as abusive, but the Supreme Court said that "while psychological harm, like any other relevant factor, may be taken into account, no single factor is required."

Single or isolated incidents of harassment will usually not create an abusive environment unless the incident or conduct is quite severe. Unlike quid pro quo harassment, the hostile environment claim generally requires proof of a pattern of offensive conduct.

For example, actions such as flirting, making innuendoes or using language that is merely trivial or annoying may not constitute a hostile environment.

Sexual favoritism is the last form of sexual harassment, and it occurs when employment opportunities or benefits are granted because of an individual's submission to an employer's sexual advances or requests for sexual favors. The employer may be held liable for sexual discrimination against other qualified persons who were denied the employment, opportunity or benefit.

### **What conduct constitutes sexual harassment**

The key to any sexual harassment complaint is that the sexual conduct must be unwelcome. In addition, conduct does not necessarily have to relate to sexual activity to constitute sexual harassment. Any treatment in the workplace that disadvantages a person only because that person is a man or a woman is prohibited by law.

Examples of verbal and physical conduct that may constitute sexual harassment include, but are not limited to:

- physical assaults;
- direct or implied threats that submission to sexual advances will be a condition of employment, work status, promotion or letters of recommendation (an example of this would be a supervisor who says, "Go out to dinner with me if you want that raise.");
- direct propositions of a sexual nature; subtle pressure for sexual activity, an element of which may be repeated and unwanted staring; a pattern of conduct intended to discomfort and/or humiliate, which includes comments of a sexual nature or sexually implicit statements, questions, jokes or anecdotes;

- a pattern of conduct that would discomfort and/or humiliate a reasonable person, which includes unnecessary touching, patting, hugging or brushing against a person's body, remarks of a sexual nature about a person's clothing or body, remarks about sexual activity or speculations about sexual experience; and
- a pattern of nonsexual conduct that would discomfort and/or humiliate a reasonable person, which includes abusive activity, vulgar or crude language, animosity or extreme rudeness directed only at employees of a certain gender.

Sexual harassment is defined by what is offensive to the "reasonable" victim. So, an alleged harasser cannot claim that there was no intention to harass and use that as a defense. As an employer, your focus should be on prevention of harassment.

### **Avoiding litigation**

The best thing an employer can do to avoid litigation is to create a clear policy to prevent sexual harassment. The major features of a good sexual harassment prevention policy are:

- a clear statement that sexual harassment will not be tolerated.
- a clear definition of sexual harassment;
- examples of potential sexual harassment, including reverse discrimination;
- a clear and open route for registering a complaint;
- a distinction between the three forms of sexual harassment (i.e., quid pro quo, hostile environment and sexual favoritism); and
- an emphasis that complaints are taken seriously, investigated and addressed with guarantees against retaliation.

Policies are most effective when they are clearly communicated and accompanied by training. The policy you choose should be integrated into future revisions of employee handbooks or office policy manuals. The handbooks or policies should be clearly worded. Training should be developed to increase the awareness of this policy and to emphasize the need to resolve such matters in the human relations department whenever possible.

If your company already has a sexual harassment policy in place, now may be the time to update it. If your company is currently relying upon regular grievance policies to cover sexual harassment, the owners must adopt and follow specific policies in order to shield the company from legal liability. It is when the employer fails to take action to prevent harassment or fails to respond to charges of sexual harassment that liability attaches.

The only way you can protect yourself from this potential liability is through clear policies, preventative training, professional investigations of complaints, and fair justice. While this legal issue is a complex and emerging one, it is not one to ignore. The challenges it presents should result in a more professional and equitable workplace for men and women.

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