

Sexual Harassment (National)

Definition

Sexual harassment is a form of sex discrimination that violates **Title VII** of the *Civil Rights Act of 1964*. The essence of the claim is that it is unwelcome behavior of a sexual nature (*National R.R. Passenger Corp. v. Morgan*, 122 S.Ct. 2061 (2002)). Sexual harassment can be:

- Physical, including unwelcome touching or gesturing
- Verbal, including unwelcome requests for a date or sexual favors or lewd remarks or sounds
- Visual, including unwelcome exposure to sexual photos, cartoons, or drawings

Types of Claims

Sexual harassment claims come in two forms under Title VII.

Tangible employment action. In this type of case, the employee suffers a loss, such as a demotion or termination or gains a benefit, such as a promotion or a raise, in exchange for rejecting or accepting sexual favors.

Title VII liability occurs where a connection is established between the employee's acceptance or rejection of sexual favors and the employee's gain or loss; i.e., a tangible employment action (see the following paragraphs) occurs.

Hostile environment. In this type of case, the employee does not gain a benefit or suffer a loss, but is exposed to an environment in which harassing conduct is severe or pervasive, or both. The "hostile work environment" form of sexual harassment may include offensive language, jokes, gestures, comments, or even offensive pictures, calendars, or graffiti. Liability is determined by what type of conduct a "reasonable person" would think is offensive, intimidating, or hostile (*Burlington Industries, Inc. v. Ellerth*, 118 S.Ct. 2365 (1998) and *Faragher v. City of Boca Raton*, 118 S.Ct. 2275 (1998)).

A third type of claim, wrongful discharge, is sometimes made.

Wrongful discharge. This type of claim alleges a violation of public policy and is sometimes made where a plaintiff is barred from suing under federal or state discrimination law because the claim is not timely or where the employer is too small to be covered by Title VII or state human rights laws.

What Happens if There Is a Tangible Employment Action?

An employer is always liable for a supervisor's harassment that culminates in a tangible employment action, such as a termination or demotion. No affirmative defense is available in such cases. Employers are always held liable in this situation because an employer acts through its supervisors, and a supervisor's act constitutes an act of the employer. For a definition of "tangible employment action," refer to **Definition** in this section.

For example, if a supervisor conditions an employee's promotion on receiving a sexual favor and the employee refuses and then does not receive the promotion, the employer will be liable for the supervisor's actions, regardless of whether the employer knew what the

supervisor was doing. There is no defense for an employer when a supervisor's harassment causes a tangible job-related harm. The result is the same whether the employee rejects the demands and is subject to an adverse tangible employment action or submits to the demands and consequently obtains a tangible job benefit. The Supreme Court stated that there must be a significant change in employment status; it does not require that the change be adverse in order to qualify as tangible.

What Happens if There Is Not a Tangible Employment Action?

A defense is available to employers when the supervisor's sexual harassment (or any other unlawful harassment) creates an unlawful hostile environment, but does *not* result in a tangible employment action. In those cases, the employer can avoid liability if it proves both of the following:

- It exercised reasonable care to promptly prevent and correct any sexually harassing behavior; *and*
- The employee making the claim unreasonably failed to take advantage of any preventive or corrective opportunities provided by the employer or to avoid harm otherwise.

Supreme Court case law and the EEOC's guidelines make it very clear that in order to prove that the employer "exercised reasonable care to promptly prevent and correct any sexually harassing behavior" and to assert the affirmative defense, the employer must:

- Establish a policy to prevent sexual harassment (or any other unlawful harassment).
- Make all employees aware of the policy and how it works.
- Promptly and effectively address complaints of harassment.

Individuals for Whom the Employer Is Liable

Whether an employer can be held liable for sexual harassment depends on a number of factors, including the harasser's status (i.e., there is more liability for supervisors who harass than for co-workers). An employer may be held liable for acts of sexual harassment committed by the following individuals:

- Its supervisors, whether or not the employer actually knew of the harassment, if there is a tangible job-related harm.
- Its supervisors, if the harassment creates an unlawful hostile environment but does not result in a tangible job-related harm, and the employer did not exercise reasonable care to prevent and promptly correct any harassment.
- Other employees, only if the employer knew or should have known of the harassment. For example, if an agent of the employer, such as a supervisor, is aware of the harassment by other employees, the employer "should have known" of the harassment.
- A third party entering the workplace, such as a customer or client, only if the employer knew or should have known of the harassment (*Rodriguez-Hernandez v. Miranda-Velez*, 132 F.3d 848 (CA-1, 1998); *Lockard v. Pizza Hut, Inc.*, 162 F.3d 1062 (CA-10, 1998)).

- A male supervisor against a male employee or a female supervisor against a female employee (*Oncale v. Sundowner Offshore Services, Inc.*, 118 S.Ct. 998 (1998)).

Same-Sex Harassment

Sexual harassment against a member of the same sex is just as illegal as sexual harassment against a member of the opposite sex (*Oncale v. Sundowner Offshore Services, Inc.*, 118 S.Ct. 998 (1998)). The harasser need not be homosexual and need not be motivated by sexual desire to be in violation of the law.

Ordinary socializing in the workplace, simple teasing or roughhousing, and male-on-male horseplay or inter-sexual flirting is not prohibited. The offensive conduct must be severe and pervasive in order to determine if there is Title VII liability.

The Supreme Court adopts what might be called a “common sense and context” approach. For example, a coach who slaps a football player on the buttocks as he heads onto the field *might not* be engaging in abusive behavior, but if the coach goes to his office and hits a male office clerk on the buttocks, the coach's conduct might be considered harassment.

Harasser outside Supervisory Chain of Command

In certain circumstances, an employer may be liable for harassment by a supervisor who does not have actual authority over the employee. This can occur when an employee reasonably believes that the harasser had such power. For example, the employee might have such a belief because the chains of command are unclear. The employee might also reasonably believe that a harasser was in a position to significantly influence employment decisions affecting him or her, even if the harasser is outside the employee's chain of command.

If the harasser had no actual supervisory power over the employee, and the employee did not reasonably believe that the harasser had such authority, the employer is liable only if it knew of the harassment and failed to stop it.

Harassment Victim Other Than the Employee

An employer may also be held liable for acts of sexual harassment even if the employee is not the person being harassed, but witnessed the offensive conduct and was affected by it (*Childress et al. v. City of Richmond et al.*, 134 F.3d 1205 (CA-4, 1998)). If the employer knew or should have known of the harassment and did not exercise reasonable care to prevent or correct sexually harassing behavior, the victim need not suffer economic injury, psychological injury, or discharge to bring a lawsuit (*Burlington Industries, Inc. v. Ellerth*, 118 S.Ct. 2365 (1998)).

Guidelines for Employers to Avoid Harassment

Claims

Know who qualifies as a supervisor. Employers are often exposed to unnecessary liability by failing to be aware of who is representing the company in a supervisory capacity. A supervisor is any individual who is able to:

- Undertake or recommend tangible employment actions; *and/or*
- Direct an employee's daily work activities.

Use reasonable care. Reasonable care by an employer is found where the employer establishes, disseminates, and enforces an antiharassment policy with:

- A clear explanation of prohibited conduct provided periodically to every employee
- Assurance that employees who make complaints of harassment or provide information related to such complaints will be protected against retaliation
- A clearly described complaint process that provides accessible avenues of complaint
- Assurance that the employer will protect the confidentiality of harassment complaints to the extent possible
- A complaint process that provides a prompt, thorough, and impartial investigation
- Assurance that the employer will take immediate and appropriate corrective action when it determines that harassment has occurred
- Other measures to ensure effective dissemination of the policy and complaint procedure, including posting them in central locations and incorporating them into employee handbooks

Enact an effective complaint procedure. An effective complaint procedure is found where an appropriate response by management is taken, such as a thorough investigation of all complaints and taking action to correct any and all offensive conduct in a timely manner along with other reasonable steps to prevent and correct harassment.

Train employees to use reasonable care. Reasonable care by an employee is found where the employee makes a good-faith effort to avoid the harm of harassment and utilizes internal complaint procedures in a prompt and reasonable manner. Failure to complain might be considered reasonable if the employee reasonably believes that using the complaint mechanism entails a risk of retaliation.

Good Sense Helps Prevent Claims

Federal law does not prohibit simple teasing, offhand comments, or isolated minor incidents, but in order to prevent claims of sex-harassment, employers and supervisors should train all personnel to:

- Avoid using sex-related humor or references that can later be used as evidence of sexual bias.
- Avoid keeping suggestive portraits or pictures in their work stations.
- Avoid sexual references.

Posting Notices

Employers with 15 or more employees are required to post conspicuous notice regarding the employer's prohibition of sex discrimination, as well as other types of discrimination prohibited by Title VII. Please see the [national Notices \(Posting\)](#) section. Please see the [state Notices \(Posting\)](#) section.

Training

Establish a training program to raise awareness of diversity issues in the workplace. In order to be cost effective, many professional training programs include instruction on topics such as sexual harassment, race discrimination, gender discrimination, and national origin discrimination. In the event of a lawsuit alleging discrimination, evidence of a mandatory

diversity training program is an excellent means of establishing an employer's good-faith efforts to prevent discrimination in the workplace.

Discipline

Discipline employees consistently, regardless of sex, and maintain thorough documentation of any disciplinary measures taken. In this regard, employers should take special care to comply with and uniformly apply their human resources policies and procedures regarding discipline. Failure to comply with and consistently apply established policies regarding discipline can be used as evidence of discrimination. Please see the [national Discipline](#) section. Please see the [state Discipline](#) section.

Also, employers should take immediate and reasonable steps to stop any discriminatory conduct by supervisors or other employees. For example, speak directly with the individual who is engaging in discriminatory conduct, warn him or her that such conduct is unacceptable and, if the discriminatory conduct is severe, consider taking formal disciplinary action against the employee.

Investigations

Conduct a thorough investigation prior to any final decision to discharge an employee for poor performance. Someone who has knowledge of Title VII's legal requirements and who is not the employee's immediate supervisor should conduct the investigation. For example, prior to discharging an employee, the employer's human resources representative should talk to all persons who have knowledge of the facts, including the employee, and determine that there is no bias in the decision to discharge and, perhaps more important, that other employees with similar performance issues have not received more favorable treatment (*Goodwin v. MCI Communications Corp.*, 134 F.3d 382 (CA-10, 1998)).

In the past, if an employer hired a third party (attorney or consultant) to conduct a sexual harassment investigation and prepare a report for the employer, the report was subject to all the disclosure and consent requirements of the *Fair Credit Reporting Act (FCRA)*. However, FCRA now specifically excludes this type of investigation from the requirement that employers provide employees with a notice and obtain a signed authorization before obtaining such a report, as long as the investigation and report do not deal with the employee's credit worthiness and the report is only disclosed to the employer or its agent, i.e., attorney.

Even though this type of report is now exempt from the notice and disclosure requirements, if adverse action is taken against the employee based on the investigation and report, the employee must be given a summary of the information that formed the basis for the adverse action. The employer is not required to disclose the sources of the information contained in the summary, which allows the employer to protect the identity of those who were interviewed as part of the investigation.

How to Handle Claims of Discrimination

If a current employee files a claim of discrimination, the employer should not confront the employee and ask why he or she filed the claim. Confrontation can result in a subsequent claim of discriminatory retaliation. Please see the [national Civil Rights](#) section.

Keep any knowledge of the employee's claim confidential and investigate the claim by having a human resources representative speak with the employee's immediate supervisor. The employer should also consider obtaining an attorney to assist in the investigation and to defend against the claim.