This Fact Sheet explains what unlawful workplace harassment is, the kinds of behavior that may be interpreted as harassment in the workplace, how a workplace environment can become “hostile,” how to avoid harassment of co-workers, how to deal with harassment if it arises, and what to do if you become involved in a harassment investigation. This publication was prepared by Chelsea Mesa, a partner in the law firm of Seyfarth Shaw. It emphasizes not only explicitly sexual and gender-based harassment but also harassment that is based on protected statuses other than sex.

Why Do Organizations Have Policies Against Workplace Harassment?

One important factor is the law. Over the last 40 years workplace harassment law has expanded dramatically, affecting both the scope of conduct covered and the recoveries that courts can award. A chronology of legal developments appears elsewhere in this Fact Sheet. The developing law has made it clear that employers must prevent and correct workplace harassment, and that an anti-harassment policy is key to those efforts.

Yet employers typically go far beyond the law to forbid harassing behavior that the law itself does not necessarily reach, in order to maintain the organization’s good reputation, promote employee morale and productivity, and take a moral stand against demeaning behavior.

Organizations increasingly are also taking stands against “bullying” or “abusive conduct,” whether or not that conduct reflects discrimination. Abusive conduct generally is defined as malicious conduct that a reasonable person would find hostile and unrelated to legitimate business interests.

Workplace harassment rises to an unlawful level whenever unwelcome conduct on the basis of gender or other legally protected status affects a person’s job. Both employers and employees have a responsibility to prevent and stop workplace harassment.

Sexual harassment. Sexual harassment is defined by the Equal Employment Opportunity Commission (EEOC) as unwelcome sexual advances, requests for sexual favors, and other verbal or physical conduct of a sexual nature when:

- submission to the conduct is made either explicitly or implicitly a term or condition of an individual’s employment, or
- submission to or rejection of the conduct by an individual is used as a basis for employment decisions affecting such individual, or
- the conduct has the purpose or effect of unreasonably interfering with an individual’s work performance or creating an intimidating, hostile, or offensive working environment.

The U.S. Supreme Court has identified two basic types of unlawful sexual harassment.

The first type involves a tangible employment action. An example would be a supervisor who fires a subordinate for refusing to be sexually cooperative. The imposition of this crude “put out or get out” bargain is *quid pro quo* (“this for that”). This kind of sexual harassment can be committed only by someone who can effectively make formal employment actions (such as firing, demotion, and denial of promotion) that will affect the victim.

A second type of unlawful sexual harassment is called *hostile environment*. Unlike a *quid pro quo*, which only a supervisor can impose, a hostile environment can result from the gender-based unwelcome conduct of supervisors, co-workers, customers, vendors, or anyone else with whom the victim interacts on the job. Behaviors that contribute to a hostile environment include:

- threats to impose a sexual *quid pro quo*;
- discussing sexual activities;
- telling off-color jokes;
- unnecessary touching;
- commenting on physical attributes;
- displaying sexually suggestive pictures;
● using demeaning terms;
● using indecent gestures;
● using crude language;
● sabotaging the victim’s work;
● engaging in hostile physical conduct; or
● granting job favors to those who participate in consensual sexual activity.

These behaviors can create liability if they are based on the affected employee’s gender and are severe or pervasive. Nonetheless, even if unwelcome conduct falls short of a legal violation, employers have moral and organizational reasons as well as legal incentives to address and correct that conduct at its earliest stages.

Gender-based harassment is not always sexual in nature. A man’s physical assault on a woman can be sexual harassment if the assault was based on the woman’s gender, even though there was nothing sexual about the assault itself. Or suppose that men sabotage the work of a female co-worker. Even if the men don’t engage in sexual behavior, such as telling off-color jokes or displaying pornographic photos on the walls, their behavior is unlawful harassment if their behavior is based on the co-worker’s gender.

**Harassment on bases other than sex.** *Quid pro quo* harassment happens with respect to sexual harassment, and perhaps religious harassment (if an employer requires an employee to participate in religious activities as a condition of employment). The *hostile environment* type of harassment can happen with respect to any offensive conduct based on any protected status, such as gender, race, color, religion, national origin, age, and disability. Federal law protects all of these statuses. State or local law often protects other statuses, such as sexual orientation.

In a hostile environment the same principles that apply to harassment based on gender apply to harassment based on other protected statuses. In each case, the questions are whether there was unwelcome conduct, whether the conduct was based on a protected status, whether the conduct was severe or pervasive enough to affect employment, and whether the employer will be liable.

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**When Does a Work Environment Become Hostile?**

To create a hostile environment, unwelcome conduct based on a protected status must be: (1) subjectively abusive to the person(s) affected, and (2) objectively severe or pervasive enough to create a work environment that a reasonable person would find abusive.

To determine whether behavior is severe or pervasive enough to create a hostile environment, a judge considers:

- the frequency of the unwelcome discriminatory conduct;
- the severity of the conduct;
- whether the conduct was physically threatening or humiliating, or a mere offensive utterance;
- whether the conduct unreasonably interfered with work performance;
- the effect on the employee’s psychological well-being; and
- whether the harasser was a superior in the organization.

Each factor is relevant—no single factor is required to establish that there is a hostile environment. Trivial, isolated incidents do not create a hostile work environment.

Courts have declined to find liability where women were asked for a couple of dates by co-workers, subjected to three offensive incidents over 18 months, or subjected to only occasional teasing or isolated crude jokes and sexual remarks.

Courts have upheld findings of unlawful harassment, however, where women were touched in a sexually offensive manner while in a confined work space, subjected to a long pattern of ridicule and abuse on the basis of their gender, or forced to endure repeated unwelcome sexual advances.

These examples simply illustrate how severe or pervasive discriminatory conduct must be to be legally actionable (and how blurred the line between lawful and unlawful conduct sometimes is). Given this uncertainty, prudent employers address incidents of unwelcome gender-based conduct long before they approach the level that might create a hostile environment.

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**Is It Really Harassment?**

Hostile environment cases are often difficult to recognize. The particular facts of each situation determine whether offensive conduct has “crossed the line” from simply boorish or childish behavior to unlawful harassment. One factor to consider is the reasonable sensitivities of the person affected. Courts have recognized that people of different races, cultures, or genders have varying sensitivities to certain conduct. For example, sexual conduct that does not offend most...
reasonable men might offend most reasonable women. In one study, two-thirds of the men surveyed said they would be flattered by a sexual approach in the workplace, while only 15 percent would be insulted. The figures were reversed for the women responding. Varying levels of sensitivity have led some courts to adopt a standard for judging cases of sexual harassment that considers the reaction of a reasonable person belonging to the protected group in question.

Because the boundaries are so poorly marked, the best course of action is to avoid all conduct in the workplace that is potentially offensive on the basis of a person’s protected status. Be aware that your conduct might be offensive to a co-worker and govern your behavior accordingly. If you’re not absolutely sure that behavior is harassment, ask yourself:

- Is this verbal or physical behavior of a sexual nature?
- Is the conduct offensive to the people who witness it?
- Is the behavior being initiated by the party who has power over the other?
- Might an employee feel compelled to tolerate that type of conduct in order to remain employed?
- Might the conduct make an employee’s job environment unpleasant?

If the answer to any of these questions is “yes,” put a stop to the conduct.

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comments, and touching, for example, are not harassment if they are welcomed by the persons involved.

Conduct is *unwelcome* if the recipient did not initiate it and regards it as offensive. Some sexual advances are so crude and blatant that the advance itself shows its unwelcomeness. Similarly, use of a racist epithet or display of a noose (to suggest lynching) is so obviously offensive that no additional proof of unwelcomeness is needed. Often, however, the welcoming of the conduct will depend on the recipient’s reaction to it.

**Outright rejection.** The clearest case is when an employee tells a potential harasser that conduct is unwelcome and makes the employee uncomfortable. It is very difficult for a harasser to explain away offensive conduct by saying, “She said no, but I know that she really meant yes.” A second-best approach is for the offended employee to consistently refuse to participate in the unwelcome conduct.

**Ambiguous rejection.** Matters are more complicated when an offended employee fails to communicate clearly. All of us, for reasons of politeness, fear, embarrassment, or indecision, sometimes fail to make our true feelings known.

**Soured romance.** Sexual relationships among employees often raise difficult issues as to whether continuing sexual advances are still welcome. Employees have the right to end these relationships without fear of retaliation on the job, so that conduct that once was welcome is now unwelcome. However, because of the previous relationship, it is important that the unwelcomeness of further sexual advances be made very clear.

**What not to do.** Sending “mixed signals” can defeat a case of sexual harassment. Complaints of sexual harassment have failed because the victim:

- invited the alleged harasser to lunch or dinner or to parties after the supposedly offensive conduct occurred;
- flirted with the alleged harasser;
- wore sexually provocative clothing and used sexual mannerisms around the alleged harasser; or
- participated with others in vulgar language and horseplay in the workplace.

For these reasons, if you find conduct offensive, you should make your displeasure clearly and promptly known. Remember that some offenders may be unaware of how their actions are being perceived. Others may be insensitive to the reactions of fellow workers. Tell the harasser that the behavior is not acceptable and is unwelcomed by you. At the very least, refuse to participate in the behavior.

Even if you do not find the conduct personally offensive, remember that some of your co-workers might, and avoid behavior that is in any way demeaning on the basis of a protected status such as gender, race, or religion. In determining if your own conduct might be unwelcome, ask yourself these questions:

- Would my behavior change if someone from my family was in the room?
- Would I want someone from my family to be treated this way?
Employee Responsibility for Preventing Workplace Harassment

The Antiharassment Policy

You and your employer share a stake in maintaining a harassment-free work environment. It is important to learn about your written policy. A typical policy will contain these basic elements:

- a prohibition of described harassing conduct, often with examples that in themselves do not necessarily rise to the level of unlawful conduct;
- a statement of who is protected by the policy and who must abide by it;
- a warning that all employees, regardless of rank, must comply with the policy;
- a procedure that authorizes complaints of harassment through alternative channels of communication, to ensure that complaints can be investigated impartially as well as promptly;
- assurances that complaints will be investigated discreetly, preserving confidentiality to the extent that the needs of the investigation will permit;
- a provision that individuals found to have engaged in inappropriate conduct will be subject to discipline, up to and including dismissal; and
- a prohibition against retaliation by anyone against any employee who reports harassment or who cooperates with the investigation of that report.

All of these provisions serve the purpose of encouraging people to come forward—without fearing retaliation or sensing futility—to report information that will permit the organization to address perceptions of inappropriate conduct.

Avoiding Offense: Seven Risk Areas

Situations that evolve into harassment lawsuits have tended to arise in common recurring factual scenarios. Here are seven scenarios to avoid:

1. Vulgar language—Many cases involve the use of vulgar language, such as racist or sexist epithets. While the mere utterance of an offensive epithet does not violate the law, it can contribute toward a hostile work environment and thus run afoul of virtually any antiharassment policy.

2. Work-related off-premises conduct—Many cases have involved dysfunctional office holiday parties or other off-premises gatherings at which alcohol was served. Some employees, loosening their inhibitions in these situations, have assumed that workplace rules no longer apply in what might seem to be a purely social setting. In fact, these settings often are best described as extensions of the workplace.

3. Touching—While physical touching can be consoling or otherwise effective in certain situations, “hands on” management often can go too far. A single incident of sexual touching can create liability. Ask yourself, is touching one’s fellow employees (beyond a handshake) really necessary?

4. Dating subordinates—Not every workplace romance has a happy ending. A supervisor dating a subordinate is particularly risky. Sometimes the romantic overtures themselves are offensive, sometimes the overtures are seemingly accepted and only later are claimed to have been unwelcome from the outset, sometimes a relationship ends with bad feelings between the parties, and sometimes the relationship creates perceptions of favoritism that lead to the hostility of co-workers.

5. Visual displays—Posters, graffiti, and other displays can be offensive on the basis of a protected status even when they are not directed at a particular individual, and even when they existed in the workplace before the individual’s arrival. Examples of displays leading to litigation have included sexually suggestive computer screen savers, restroom graffiti, cartoons, obscenely shaped objects, and nooses.

6. Talking dirty and telling jokes—Discussing sexual details, whether they be autobiographical or based on literature or the news, is not necessarily a matter of gender discrimination. And jokes can relieve workplace tension and build camaraderie. Nonetheless, sexual gossip and joking often are offensive, and reactions can divide along gender or racial lines. Sexual and ethnic humor often imply offensive stereotypes.

7. Email—In many recent cases the most powerful evidence of harassing behavior has come in the form of email communications, which often were created in the erroneous assumption that the communication would remain private or that they would disappear once deleted. Emails in fact can be accessible for long periods of time to the organization that owns the equipment on which they are sent or received.

Nine Excuses

Just as certain scenarios often lead to charges of harassment, there are certain standard (and often unpersuasive) responses to those charges. Here are some examples, and the fate that these responses often meet.

1. “She (or he) is hypersensitive; how could anyone be offended?” For the purposes of assessing harassment, conduct is viewed from the perspective of the offended party. If the party’s reaction was that of a reasonable
person of the party’s own sexual and ethnic background, then liability could follow even if the offender’s own closest associates would not find the conduct seriously wrong or even offensive.

2. “I treat everybody this way.” This excuse, while a good technical defense, creates the difficulty of portraying yourself as offensive to everyone. In any event, the lack of respect exhibited by an “equal opportunity offender” is going to run afoul of the typical antiharassment policy.

3. “No one ever complained before, so how can the conduct be offensive?” Some people do suffer in silence. They may have reasons to refrain from complaining, particularly when the offender is in a position of power. Unless the other party is initiating similar conduct, or otherwise affirmatively welcomes the conduct, there is no good reason to assume potentially offensive conduct is welcome.

4. “Boys will be boys.” Variants of this excuse include, “We work in a rough environment,” and “We were just treating her like one of the boys.” Although social context can affect the analysis of what is actionable conduct that is acceptable in coarse environments often is not acceptable at work, and a court applying the law or an official applying an antiharassment policy will demand some sensitivity to individual differences. Conduct is not necessarily appropriate just because most employees view it as traditional or natural.

5. “I didn’t mean any harm.” Having a good heart is not a defense to a charge of harassment. It is only a factor in assessing the degree of discipline. The analysis focuses on the impact felt by the party being offended, not the impact intended by the offender.

6. “No harm, no foul.” Variants of this excuse include, “All I did was hurt her feelings, and it’s not like I drove her crazy or anything.” The law and the organization’s policy protect the psychological benefits of employment. Respect for co-workers and maintaining good morale are vitally important even if they involve only “feelings.”

7. “I just read the policy again and I still don’t understand where you draw the line.” Harassment, like pornography, is not subject to a precise definition, but it is important to know it when you see it. Bottom line: don’t go near the line.

8. “I was only mentoring, trying to help with a personal crisis.” Perceptions of power in the workplace can convert the most voluntary of relationships into an implied condition of employment. Even the best intentions can be misunderstood.

9. “You cannot take that charge seriously; he (or she) is trying to hold us up.” Maybe yes, maybe no. Understand that all complaints of harassment must be investigated, even if that is annoying to the person accused. Employers must investigate and take appropriate action, no matter where the complainant and the accused stand in the organizational hierarchy. Retaliation is wrong even if the allegation of harassment was mistaken.

Employees who promptly report harassing conduct can help their organization as well as themselves. One comprehensive survey by the American Management Association reported that roughly two-thirds of internal reports result in some kind of discipline being imposed on the alleged harasser.

**Participating in an Investigation**

All employees have a responsibility to cooperate fully with the investigation of a harassment complaint. Investigations will vary from case to case, depending on a variety of circumstances. While not every investigation will follow the same format, in every case you need to keep certain things in mind.

**Keep it confidential.** First, whether you are the accused or the complainant, or merely a potential witness, bear in mind that confidentiality is crucial. People have their reputations on the line, and you may not know all the facts. In the typical situation, the employer will keep the information it gathers as confidential as possible, and both the accused and the complainant will have a chance to present their cases.

**Don’t be afraid to cooperate.** There can be no retaliation against anyone for complaining about harassment, for helping someone else complain, or for providing information regarding a complaint. The law protects employees who participate in any way in administrative complaints, and employer policies protect employees who honestly participate in in-house investigations. If you are afraid to cooperate, you should be very frank about your concerns when talking to the employer’s investigator.

**Answer the questions completely.**

**As the complainant**—The investigator will need to know all the details, unpleasant though they may be to recount. Be prepared to give the following information:

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**Respond Appropriately When You Encounter Workplace Harassment**

If you experience harassment or witness it, you should make a report to the appropriate official. You do not have to report the incident to your supervisor first, especially if that is the person doing the harassing.

Remember that harassment is an organizational problem, and the employer wants to know about it so it can take prompt and appropriate action to ensure that no further incidents occur, with the present victim or other employees, in the future. Report incidents immediately, especially if they are recurring.
Plaintiff's name should be inserted above.

• the names of everyone who saw or heard the offensive conduct;
• the names of everyone who may have had a similar experience with the alleged harasser;
• a chronology—when and where each incident occurred;
• the reasons why you did not report the incidents earlier (if you have delayed at all); and
• your thoughts on what the employer should do to correct the problem and maintain a harassment-free environment.

The investigator may need to talk with you several times while other information is gathered.

As the accused—You must cooperate in the investigation, regardless of whether the allegations are true or false. You will be expected to answer questions completely and honestly.

You may be asked not to communicate with certain individuals during the investigation. You are not to retaliate against the person who made the complaint or against anyone who participates in the investigation. You must treat them in the same even-handed manner you would if no complaint had ever been raised.

Failure to abide by these rules may result in discipline against you, even if the investigation shows that no harassment occurred. Indeed, retaliation against the complainant may violate the law even if the underlying complaint cannot be substantiated.

You should expect to be asked to confirm or deny each specific allegation against you. It is possible that the allegations are exaggerations or lies, but it is important to remain calm and keep your responses factual. You may be asked to provide any facts that might explain why the complainant would exaggerate or fabricate charges. The investigator might need to talk to you several times while other information is gathered.

As a potential witness—You may be asked to provide details concerning alleged harassment between other employees. You have a duty to respond truthfully to the questions concerning these allegations.

The natural tendency after an interview by an investigator is to share with co-workers the more interesting details. Remember that the employer's policy is to keep the interviews as confidential as possible. Gossip about allegations can unfairly damage the reputation of co-workers.

Keep the lines of communication open. The object of the employer’s investigation is to find out what happened. The investigator may conclude that harassment occurred, that it did not occur, or that it is impossible to tell what really happened.

As the complainant or as the accused, you have the right to know in general terms what the organization’s conclusion is, and you should ask if you are not told. Do not assume that the matter is settled until you have been told so directly.

If you are the complaining party, it is important to promptly report any new incidents of harassment that occur after your first talk with the investigator, and to tell the investigator about anything you may have forgotten or overlooked. Do not be discouraged by the fact that the employer takes time to act, and bear in mind that the more information you provide, the better chance there is for decisive action by the employer.

If you are the accused, do not be discouraged if the employer’s investigation fails to completely clear your name. It is not uncommon to conclude that there is no way to tell what really happened. Remember, harassment complaints often involve one-on-one situations where it is difficult to determine the truth. Moreover, two people can have totally different perceptions of the same incident. The best you can do in such a situation is to avoid future situations where your words or conduct could be used as evidence of harassment.

Expect adequate remedial action. If the employer finds that inappropriate conduct occurred, expect remedial action. A variety of disciplinary measures may be used, including:

- an oral or written warning;
- deferral of a raise or promotion;
- demotion;
- suspension; or
- discharge.

The action taken in any particular case is within the organization’s discretion. The precise nature of the discipline is often kept confidential to ensure that the privacy of individuals is protected. One aim of the action is to deter any future harassment. If you, as the complaining party, feel that the harasser is retaliating against you for complaining or is continuing to harass you, you should immediately report the conduct so that the employer can take whatever further action is appropriate.

If the employer lacks evidence to reach a conclusion about harassment, it still might take other actions, such as separating the parties, holding training sessions on preventing harassment, or having employees certify that they have read again and fully understand the anti-harassment policy.

Note: Many organizations forbid conduct that falls short of unlawful harassment, and also impose discipline for conduct that comes to their attention as the result of a harassment complaint, even if the conduct does not violate the law or the organization’s anti-harassment policy. For example, a manager who makes sexual advances to subordinates might be disciplined for exercising poor judgment, even if the advances were welcome; and an employee who engages in a single incident of offensive conduct might be disciplined for inappropriate conduct, even if the incident was not severe enough to create a hostile environment. The fact that an employer imposes discipline in response to a complaint of harassment is not an admission, therefore, that any unlawful harassment has occurred.
DEVELOPMENT OF THE LAW OF WORKPLACE HARASSMENT

1964...
The Civil Rights Act, Title VII, prohibits employment discrimination on the basis of race, color, religion, national origin, and sex, but does not mention harassment.

1967...
The Age Discrimination in Employment Act forbids employers to discriminate against individuals, over age 40, on the basis of their age, without mentioning harassment.

1968...
The Equal Employment Opportunity Commission (EEOC), enforcing federal antidiscrimination law, finds national origin discrimination where employer permitted employees to harass Polish-born co-worker with demeaning conduct and making him the butt of “Polish” jokes. Case No. CL 68-12-431EU, 2 FEP Cases 295

1980...
The EEOC interprets sexual harassment as a form of sex discrimination. 29 C.F.R. § 1604.11

1981...
A U.S. appeals court endorses the EEOC’s position that Title VII forbids sexual insults and propositions that create a “sexually hostile environment,” even if the employee lost no tangible job benefits as a result. Bundy v. Jackson, 641 F.2d 934, 24 FEP Cases 1155 (D.C. Cir.)

1986...
Addressing sexual harassment for the first time, the U.S. Supreme Court rules that a woman who had sex with her boss because she feared losing her job can sue for sexual harassment. The question is not whether her conduct was voluntary, but whether the boss’s conduct was unwanted. An employer is liable for sexual harassment by supervisors if it knew or should have known about the conduct and did nothing to correct it, the Court adds. Meritor Sav. Bank v. Vinson, 477 U.S. 57, 40 FEP Cases 1822

1989...
Addressing age harassment, a U.S. appeals court assumes that the sexual harassment principles also apply to claims of harassment based on age over 40. Young v. Will Cty. Dep’t of Pub. Aid, 50 FEP Cases 1089, 1093 (7th Cir.)

1990...
The EEOC opines that sexual favoritism can be sexual harassment if advances are unwelcome or offensive. An employee subjected to daily sexual harassment can sue for disability-based harassment under the ADA. Flowers v. Southern Reg’l Physician Servs., Inc., 247 F.3d 229 (5th Cir.)

1991...
A sexually hostile environment is found where new female employees encountered crude language, sexual graffiti, and pornography. Robinson v. Jacksonville Shipyards, 760 F. Supp. 1486, 57 FEP Cases 971 (M.D. Fla.)

1993...
“Reasonable woman” standard
Because male and female sensibilities differ, a court holds that some conduct—a man’s uninvited love letters and unwanted attention—might not offend the average man, but might offend the average woman as to create a hostile working environment. Ellison v. Brady, 924 F.2d 872, 54 FEP Cases 1346 (9th Cir.)

1999...
Standard for hostile environment
In its second harassment case, the Supreme Court rules that a discriminatorily abusive work environment can be unlawful even if it does not affect psychological well-being. It is enough if (1) the employee subjectively perceives a hostile work environment, and (2) the conduct was so objectively severe or pervasive that a reasonable person would find a hostile work environment. Harris v. Forklift Sys., 510 U.S. 17, 63 FEP Cases 225

1998...
Same-sex harassment
In its third harassment case, the Supreme Court holds that Title VII applies to “same-sex” harassment.

2000...
Employee must use avenues available
A male employee loses his case because his “off the record” discussion did not imply harassment and he endured 15 unwelcome sexual propositions before reporting. Casiano v. AT&T Corp., 213 F.3d 278, 286–87 (5th Cir.)

2001...
Disability harassment
A U.S. appeals court becomes the first to rule that employees can sue for disability-based harassment under the ADA. Flowers v. Southern Reg’l Physician Servs., Inc., 247 F.3d 229 (5th Cir.)

An invitation to some sexual conduct does not excuse other unwelcome conduct
An assistant manager prevails where her supervisor touched her breasts; her speaking in “sexually suggestive terms” did not show she welcomed having her breasts touched. Beard v. Flying J, Inc., 266 F.3d 792 (8th Cir.)

2003...
Offensive sexual banter can create hostile environment
A U.S. appeals court upholds a jury verdict for a female shop employee subjected to daily sexual bantering by male co-workers, showing general hostility to the presence of women in the workplace. Ocheltree v. Scollon Prods., Inc., 335 F.3d 325 (4th Cir.) (en banc)

2004...
Constructive discharge
The Supreme Court holds that an employee may quit and sue as if she had been fired if she quit in reasonable response to aggravated sexual harassment. Pennsylvania State Police v. Suders, 542 U.S. 129

2005...
Sexual favoritism can create a hostile environment
The California Supreme Court permits women to work with their boss, by favoring his female lovers, sent a message that women are “sexual playthings,” thereby creating a workplace atmosphere demeaning to women, even though neither woman experienced an unwelcome sexual advance or hostile conduct based on her gender. Miller v. Department of Corr., 36 Cal. 4th 446

2006...
Retaliation ban broadened
The Supreme Court expands liability for retaliation by holding
that employers must not act against an employee who reports discriminatory treatment if the act might dissuade a “reasonable worker” from making or supporting a discrimination charge. Burlington N. & Santa Fe Ry. v. White, 548 U.S. 53

Employers must prevent third-party harassment

A U.S. appeals court upholds a jury verdict for a female prison guard whose employer failed to police the sexual behavior of male prison inmates in her presence. Freitag v. Ayers, 468 F.3d 528 (9th Cir.)

Mental disability harassment

A U.S. appeals court upholds a jury verdict for a depressed postal worker whose boss called him “crazy,” ridiculed his seeing a psychiatrist and using medication, and labeled him a risk to the workplace. Quiles-Quiles v. Henderson, 439 F.3d 1 (1st Cir.)

Veteran status harassment

A U.S. appeals court upholds a jury verdict for a police officer allegedly harassed for taking a long military leave. Wallace v. City of San Diego, 460 F.3d 1181 (9th Cir.)

2007...

National origin harassment

A claim of national origin harassment can proceed where a co-worker told an Indian-born worker this was America and he could go back where he came from. EEOC v. WC&M Enters., 479 F.3d 616 (6th Cir.)

Employer defense upheld

A hostile environment claim fails because the employer had a valid harassment policy, reasonably investigated, and imposed an adequate remedy—warning the alleged harasser, requiring counseling, and monitoring interactions—while the offended employee refused to give the remedy a chance. Baldwin v. Blue Cross/Blue Shield of Ala., 480 F.3d 1287 (11th Cir.)

2009...

Investigation witnesses are protected

The Supreme Court holds that the anti-retaliation provision of Title VII protects an employee witness who reported harassment during her employer’s internal investigation, even though she was not initiating a complaint herself. Crawford v. Metropolitan Gov’t of Nashville & Davidson Cty., Tenn., 555 U.S. 271

2010...

Lying is not a protected activity

The court upholds the dismissal of a retaliation claim by a hospital chaplain fired for complaining about her boss. Not all complaining activity is protected: an employee cannot make false charges, lie to an investigator, or defame co-workers simply because the investigation is about sexual harassment. Hatmaker v. Memorial Med.Ctr., 619 F.3d 741 (7th Cir.)

Excessive staring can be harassment

An administrative assistant was permitted to proceed with a sexual harassment claim based upon the physical behavior of the supervisor with whom she shared an undersized office for three months: he stared at her in a sexual way and then unsatisfactorily fired her. Kelley v. The Conco Cos., 196 Cal. App. 4th 191

2011...

Employee’s retaliation claim can cite protest by close associate

The Supreme Court holds that a fired employee can claim he was retaliated against because his fiancée filed her own EEOC charge against the couple’s mutual employer. Title VII’s ban on retaliation covers any employer action to dissuade “a reasonable worker” from protesting discrimination, and a reasonable worker (the fiancée here) could be so dissuaded by firing the worker’s close associate (in this case, her beau). Thompson v. North Am. Stainless, LP, 562 U.S. 170

Harassment is unlawful only if based on protected status

A U.S. appeals court holds that “mean-spirited, crude, and insulting” behavior is not necessarily unlawful. The court rejects a Hispanic employee’s harassment claim to the extent it depended on harassment directed against his African-American co-workers. Hernandez v. Yellow Transp., Inc., 670 F.3d 644 (5th Cir.)

Sexually offensive behavior is not necessarily sexual harassment

A California court rejects the sexual harassment claim of a construction worker whose boss called him “bitch” and threatened him with homosexual sodomy. The “mere fact that words may have sexual content is not sufficient to establish sexual harassment.” Rather, the conduct must reflect the complaining employee’s protected status, such as gender. Kelley v. The Conco Cos., 196 Cal. App. 4th 191

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Development of the Law of Workplace Harassment  continued from page 9

Employer’s response must be reasonable, if not perfect
An employer’s response to harassment complaints must be reasonable in light of: (i) the promptness of the investigation, (ii) whether the offenders were disciplined, and (iii) whether the response stopped harassment. Some harassment claims here could go to trial because supervisors failed to act soon enough upon reports of racial slurs and pranks. EEOC v. Xerox Corp., 639 F.3d 658 (4th Cir.).

Social media postings do not show workplace conduct is welcome
An employee can sue for crude sexual workplace comments even through her MySpace page featured a sexually graphic joke video. Sharing jokes with friends online is “vastly different than being propositioned for sex by a supervisor at work.” EEOC v. Management Hosp. of Racine, Inc., 666 F.3d 422 (7th Cir.).

2012...

Legal protection against anti-gay harassment is now widespread

Not all complaints are protected
A Syrian-born Muslim doctor who perceived religious and ethnic harassment at his hospital loses his retaliation claim because his internal complaints mentioned disrespectful departmental management, not his religion or national origin. Jajeh v. County of Cook, 678 F.3d 560 (7th Cir.).

Single incident of harassment, if severe, can support a lawsuit
A U.S. appeals court upholds a jury verdict for a teenage restaurant server whose manager “graped” her buttocks as she was working: “even one act” of harassment can be actionable if it is “egregious.” EEOC v. Management Hosp. of Racine, Inc., 666 F.3d 422 (7th Cir.).

Delay in complaining dooms suit
Five employees suing for a supervisor’s buttlaping, breast-fonding, and crude sexual comments lose their case because they delayed reporting “to build up evidence,” and because the employee promptly demoted the harasser upon receiving a complaint. Crawford v. BNSF Ry. Co., 665 F.3d 978 (8th Cir.).

2013...

“Supervisor” defined
The Supreme Court holds that an employee claiming her harasser was a supervisor—thereby enhancing employer liability—must show he had power to take “tangible employment actions” as to her. Vance v. Ball State Univ., 133 S. Ct. 2434

Complaints should be specific
A security officer loses her sexual harassment case because her complaint to management about a third-party harasser was simply that he made “bothering” phone calls. The employer was not on notice of a need to act until she later mentioned the offensive conduct was sexual in nature. Medina-Rivera v. MVM, Inc., 713 F.3d 132 (1st Cir.).

Sniffing and staring can be actionable
A leasing manager can pursue a claim she was fired for complaining about two male maintenance workers who sniffed her repeatedly over four days, during which one, wearing shorts, also stared at her for several minutes. The context indicated their sexual motivation and their conduct was pervasive enough to create a hostile environment. Royal v. CCC&R Tre Arboles, 736 F.3d 396 (5th Cir.).

Workplace context can matter
A correctional officer loses her harassment case against a state prison because pictures and suggestive materials displayed by prison inmates were not severe or pervasive enough to create a hostile environment. Some socially deviant behavior is expected in an all-male prison. Daniels v. California Dep’t of Corr. & Rehab., 121 FEP Cases 404 (E.D. Cal.).

2014...

“Anti-bullying” training
California, which already requires biennial supervisory training regarding sexual harassment, passes a law requiring that the training also cover “abusive conduct,” defined as conduct that a reasonable person would find offensive, hostile, and unrelated to legitimate business interests. Examples include insults, epithets, conduct a reasonable person would find humiliating, and sabotage of work product. Cal. Gov’t Code §12950.1(b), (g)(2)

Title VII bans anti-gay workplace bias
A U.S. appeals court upholds a jury verdict for African-American chauffeurs subjected to company-paid performances by a white woman wearing a black gorilla suit and making sexually degrading comments, all to mock Texas Juneteenth holiday celebrating freedom from slavery. Henry v. Corpar Servs. Hous., Ltd., 625 F. App’x 607 (5th Cir.).

Racist performances unlawful
A U.S. appeals court upholds a jury verdict for African-American chauffeurs subjected to company-paid performances by a white woman wearing a black gorilla suit and making sexually degrading comments, all to mock Texas Juneteenth holiday celebrating freedom from slavery. Henry v. Corpar Servs. Hous., Ltd., 625 F. App’x 607 (5th Cir.).

Bosss, too, protected from harassment
A U.S. appeals court permits an African-American female supervisor, to proceed to trial on claims that upper management permitted her male subordinates to create a hostile environment based on a combination of sex, race, and national origin discrimination. Stewart v. Rise, Inc., 791 F.3d 849 (8th Cir.).

IT worker protected in refusing to undercover co-worker’s harassment claim
An IT director can pursue a retaliation claim that he was fired for refusing his employer’s directive to “scrub” the computer of the alleged harasser. Lindsey v. Clatskanie People’s Univ. Distl., 140 F. Supp. 3d 1077 (D. Or.).

Executive’s kiss can create liability
A supermarket worker can pursue a sexual harassment claim based on a senior vice president’s forcible attempt to “kiss the bride” two days before her wedding. The company, though responding quickly, could still be liable as the VP was a high official. Barlow v. Piggly Wiggly Ala. Distrib. Co., 128 FEP Cases 95 (N.D. Ala.).

Porn displays can cause liability
A female jailer can pursue a claim of a sexually hostile environment based on a male supervisor’s refusal to remove pornographic magazines and pin-ups from an office shared by all employees. Mosley v. City of E. St. Louis, 128 FEP Cases 919 (S.D. Ill.).
Vulgar banter alone is not actionable

A Department of Motor Vehicles worker subjected to unwanted sexual language about the appearance of female customers loses her harassment claim because the language was not based on the worker’s sex. “Vulgar banter” is not enough to trigger liability under Title VII. **Saile v. N.Y. State Department of Motor Vehicles,** Docket No. 5:13-CV-1384 (ATB) (N.D.N.Y.)

Failure to report texts dooms claim

An employer escapes liability because a female employee offended by her supervisor’s explicit texts did not report them. Her subjective fear of retaliation did not excuse her failure to report. **McKinnish v. Brennan,** 128 FEP Cases 658 (4th Cir.)

2016...

California employers must have written harassment policies; additional requirements for management training

The April 1, 2016 amendments to the California FEHA regulations require: (1) Mandatory anti-harassment policy — Every California employer must have a harassment, discrimination, and retaliation prevention policy that (a) is in writing; (b) lists all current protected categories under the Fair Employment & Housing Act; (c) specifies that employees are protected from illegal conduct from any workplace source, including third parties who are in the workplace; (d) creates a confidential complaint process that ensures a timely response, impartial investigation by qualified personnel, documentation and tracking, appropriate remedial actions and resolutions, and timely closure; (e) informs employees about several avenues of complaint other than to a direct supervisor; (f) requires supervisors to report any complaints of misconduct to a designated company representative; and (g) makes clear that employees will not be exposed to retaliation as a result of making a complaint or participating in any workplace investigation.

(2) Recordkeeping — The amendments also include a two-year record retention requirement for all sexual harassment training materials. Among these materials would be sign-in sheets and course materials, including questions and written answers exchanged in connection with training done by webinar. (3) New definitions — The amended regulations define several terms regarding gender discrimination (such as gender expression, gender identity, transgender, and sex stereotyping). The new amendments to the FEHA regulations, however, do not alter substantive law against workplace discrimination and harassment.

Evidence of subconscious bias revives claim

The U.S. Court of Appeals in the First Circuit found that conduct not based on sexual desire, including evidence of stereotyping, can form basis for sex-based harassment claim. **Burns v. Johnson,** 829 F.3d 1 (1st Cir.)

Employer liable for “cat’s paw” bias

The Second Circuit Court of Appeal’s recent decision in Vasquez, a sexual harassment case, “broadens the scope of liability for employers” by recognizing the “cat’s paw” doctrine—holding employers liable for job bias when nonbiased supervisors making decisions to fire/discipline employee(s) were influenced to do so by another worker who harbored discriminatory or retaliatory intent against the employee. **Vasquez v. Empress Ambulance Serv., Inc.,** 835 F.3d 267 (2d Cir.)

Employer can learn plaintiff’s visa status as part of EEOC investigation

Addressing a novel issue, the Fifth Circuit Court of Appeals ruled that workers must disclose if they sought or obtained immigration benefits in connection with an EEOC investigation; this could impact rights of women who are victims of crime in employment and other contexts. **Cazorla v. Koch Foods of Miss., L.L.C.,** 838 F.3d 540 (5th Cir.)

Written policy may be insufficient to shield employer from Title VII liability

A Louisiana school board clerk may pursue a sexual harassment claim based on her male supervisor’s alleged conduct because a jury could find the board didn’t take reasonable steps to prevent harassment. **Pullen v. Caddo Par. Sch. Bd.,** 830 F.3d 205 (5th Cir.)

Sixth Circuit upholds same-sex harassment verdict

Despite acting to investigate a workplace harassment complaint, an employer may still be held liable under Title VII if there’s evidence it didn’t investigate timely or take adequate measures to protect the complaining employee from further potential harassment while it investigates. **Smith v. Rock-Tenn Servs., Inc.,** 813 F.3d 298 (6th Cir.)

Co-workers’ ejections not enough for harassment claim

A former Interior Department secretary in Minnesota didn’t adequately plead a sexual harassment claim by describing separate incidents in which two male co-workers spoke with her while sexually aroused. Eighth Circuit says incidents occurred over time, didn’t involve actual touching, and weren’t all sexual. **Biomker v. Jewell,** 831 F.3d 1051 (8th Cir.)

Female trucker has sexual harassment claims revived

A female truck driver who claims she was sexually harassed by a male driver during a multiday trip can pursue claims against her former employers; employers may be liable under Title VII for harassment of an employee by a co-worker that occurs outside the workplace during non-business hours, especially where employees work together in confined work spaces such as trucks making long-haul deliveries. **Nichols v. Tri-Nat’l Logistics, Inc.,** 809 F.3d 981 (8th Cir.), rehe’g denied (Feb. 11)

Charges Alleging Sexual Harassment: FY 2011–2016*

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**Does not include monetary benefits obtained through litigation.
Understanding Workplace Harassment

Having read this Fact Sheet, you should have a pretty good understanding of what workplace harassment is, how to prevent it, and what to do if you see it. For review and general guidance, here are some of the most commonly asked questions about harassment. For more specific information, contact the human resources office.

Q. Doesn't sexual harassment have to involve sexual advances or other conduct sexual in nature?

A. No. It is just as unlawful to harass people with gender-based conduct of a nonsexual nature. Consider, for example, a supervisor who gives demeaning and inappropriate assignments (such as serving coffee, picking up dry cleaning, emptying a wastebasket) to a woman subordinate, but not to a man, because of the woman's gender. That conduct, if sufficiently severe or pervasive, could amount to harassment on the basis of sex even though the assignments are not sexual in nature. The key question here is not whether the unwelcome conduct was sexual in nature but whether it was based on the victim's gender.

Q. Isn't sexual harassment limited to situations where supervisors make sexual demands on subordinates?

A. No. Sexual power plays by supervisors constitute the most easily understood form of sexual harassment. But harassment also occurs when supervisors, co-workers, or even nonemployees create a hostile environment through unwelcome sexual advances or demeaning gender-based conduct.

Regarding harassment by nonemployees (clients, customers, vendors, consultants, independent contractors, and the like), the employer's ability to police unwelcome conduct may be more limited than with employees. For example, it is easier to investigate and discipline an employee than a customer. The employer, however, must take reasonable steps to address the situation once the matter comes to its attention.

Q. Can harassment occur without physical touching or a threat to the employee's job?

A. Yes. Harassment may be purely verbal or visual (pornographic photos or graffiti on workplace walls, for example), and it does not have to involve any job loss. Any conduct based on a protected status that creates a work environment that a reasonable person would consider hostile may amount to harassment.

Q. Can voluntary sexual conduct create harassment for others?

A. Sometimes. A few courts have held that sexual horseplay or sexual affairs, even though welcome to all the participants, can create an environment hostile to third parties on the basis of their gender. Here as elsewhere, a good rule of thumb is, "when in doubt, cut it out."

Q. Isn't there a right to free speech?

A. The First Amendment protects some forms of expression, even in the workplace, but the verbal threats and name calling often involved in harassment are not protected as free speech. For example, the First Amendment would not protect, as free speech, a supervisor's threat to a subordinate that she will lose her job if she does not sleep with her boss. Nor will the First Amendment protect verbal conduct that offends and intimidates other employees to the point that their work is affected, creating a hostile environment.

Q. Is sexual harassment of men, either by women or by other men, unlawful?

A. Yes. Although sexual harassment generally is perpetrated by men against women, any form of unwelcome sexual advance against employees of either gender may be the basis for a case of unlawful sexual harassment.

Q. Can individuals be legally liable for harassment, or just employers?

A. Courts generally hold that individual employees cannot be liable under Title VII. Some state statutes, however, do impose personal liability on individuals for perpetrating harassment, and harassers are personally liable under common law theories of liability in tort. While employers often provide a legal defense for employees in a lawsuit, an employer may be entitled to recover damages and legal expenses from an employee whose unauthorized conduct created the problem.

Q. What about harassment of employees by clients or customers or vendors?

A. Employers have a duty to take reasonable steps to protect employees from discriminatory harassment inflicted by third parties, such as customers. Employers do not have the same power to influence customers that employers have to influence employees, but must take whatever reasonable steps they can to prevent and correct harassment inflicted on employees by third parties.

Q. I'm so mad at the person who harassed me and at my employer that I just want to sue. Should I even bother to complain under my employer's antiharassment policy?

A. Yes. You owe it to your employer and to your co-workers to report through the organization's channels to give the employer a chance to solve the problem promptly, before others are affected. A prompt complaint is also something that you owe yourself, even if your sole concern is to sue your employer. If you fail to use internal procedures, the defense team will be sure to use that fact to argue that (1) the conduct complained of never occurred, (2) the conduct was not really unwelcome, (3) the conduct was not severe or pervasive enough to create a hostile work environment, or (4) the employer cannot be held responsible for preventing or correcting harassment that it did not know about.

Furthermore, under the 1998 decisions by the U.S. Supreme Court in Faragher and Ellerth, if the employer has an effective antiharassment policy that the employee unreasonably fails to use, the employer may win a hostile environment lawsuit on that ground alone. Failing to complain can be particularly harmful to your legal interests if you claim that harassment forced you to quit. It is hard to blame your employer for forcing you off the job if it could have corrected the conduct but was never given the opportunity to do so.