

# Sexual Harassment in the Workplace

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## Avoidance Training Success

### Reason #1

- Gives managers and employees a better understanding of appropriate behavior.
- Sends message that inappropriate conduct will not be tolerated.

**In 90% of cases, when violators are clearly told the behavior is not tolerated, it will stop.**

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## Avoidance Training Success

### Reason #2

- Managers become aware they can be held personally liable.
- Empowers employees by giving them information on what to do if harassed.

**Training Works.**

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## Tangible Costs



- Liability Insurance Premiums
- Settlement Costs
- Average Jury Award: \$1,000,000
- Winning plaintiffs entitled to: back pay, front pay, damages for injury including emotional distress, punitive damages, attorneys fees/costs
- Average cost of defense against lawsuit is \$200,000 to \$300,000
- Individual liability (assault, rape, etc.)

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## Sexual Harassment & Punitive Damages

- The basis of defense in harassment suits is simple.
  - An employer can prove that it has exercised "reasonable care" to prevent and promptly correct any sexually harassing behavior; and
  - The employee plaintiff unreasonably failed to take advantage of any preventative or corrective opportunities provided by the employer, or otherwise unreasonably failed to avoid harm.
- Then, the employer will not be liable for the hostile work environment to that point.

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## \$tate Court Cost\$



- **Invasion of Privacy** – Questions about sex life = an unreasonable intrusion into personal life.
- **Assault & Battery** – Touching employee w/o permission.
- **False Imprisonment** – Forced to stay in supervisor's office and unable to avoid advances.
- **Intentional Infliction of Emotional Distress** – Continued unwelcome conduct even though employee told him to stop.
- **Loss of Consortium** – Stress = no sex w/ spouse.
- **Wrongful Discharge** – Employer's actions didn't stop, forcing employee to quit job.

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## Workshop Goals

- What is sexual harassment?
- Do you have to wait for a complaint to be filed?
- What should you do when you receive a complaint?
- Conducting investigations.
- How to prevent sexual harassment.

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## What is Sexual Harassment?

- Title VII of the Civil Rights Act of 1964, as amended, made it illegal to discriminate against individuals based upon race, color, religion, sex, or national origin.
- Sexual Harassment is a legal concept arising from common law decisions to address sexual discrimination.

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## EEOC Definition

Unwelcome sexual advances, requests for sexual favors, and other verbal or physical conduct of a sexual nature constitutes sexual harassment when submission to or rejection of this conduct explicitly or implicitly affects an individual's employment, unreasonably interferes with an individual's work performance, or creates an intimidating, hostile, or offensive work environment.

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## Two Kinds of Sexual Harassment

1. Quid Pro Quo
2. Hostile Environment

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## Quid Pro Quo

### "This for That"



Unwelcome sexual advances or requests for sexual favors or other verbal or physical conduct of a sexual nature which explicitly or implicitly is made a term or condition of an individual's employment, or making submission to or rejection of such conduct, explicitly or implicitly, the basis for employment decisions.

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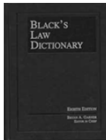
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## Definitions



- Supervisor – An individual qualifies as an employee's supervisor if:
  - The individual has authority to undertake or recommend tangible employment decisions affecting the employee; or
  - The individual has authority to direct the employee's daily work activities.
- Tangible Employment Actions – Actions that significantly change another employee's employment status.

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## Vicarious Liability

- Standard of liability based on two principles:
  1. Supreme Court holds that an employer is always liable for a supervisor's harassment if it culminates in a tangible employment action.
  2. Employers should be encouraged to prevent harassment and employees should be encouraged to limit the harm from harassment.

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## Employee Must Show:

- The employee belongs to a protected class.
- The employee was subjected to unwelcome sexual harassment: advances, requests for favors, and other verbal or physical conduct of a sexual nature which were unsolicited, undesirable or offensive to the employee.
- The harassment was based on the employee's sex.
- The employee's reaction to the harassment affected tangible aspects of the employee's compensation, terms, conditions or privileges of employment. <sup>14</sup>

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## No Tangible Employment Action?

An employer may be able to avoid liability or limit damages by establishing an affirmative defense that includes two necessary elements:

1. The employer exercised reasonable care to prevent and promptly correct any harassing behavior, and
1. The employee unreasonably failed to take advantage of any preventive or corrective opportunities provided by the employer or to avoid harm otherwise.

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## Hostile Environment

- Not as clearly identifiable.
- Occurs when unwelcome sexual conduct unreasonably interferes with an employee's job performance or creates a hostile, intimidating, or offensive work environment even though the harassment may not result in tangible or economic job consequences.

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## Standard of Liability

- Two major factors determine liability regarding Hostile Environment.
- The employer "knew or should have known" about the harassment.
- The employer failed to take appropriate corrective action.

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## "Reasonable Person" Standard



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## Hostile Environment Behavior

- Repeated sexual innuendo, obscene/off-color jokes, slurs, lewd remarks and language/offensive comments.
- Sexual content in faxes, letters, notes, e-mail, graffiti.
- Sexual propositions, insults, and threats.
- Sexually-oriented demeaning names.
- Persistent unwanted sexual/romantic overtures/attention.
- Leering, whistling, sexually suggestive sounds/gestures.
- Display of pornographic pictures/calendars/cartoons/ etc.
- Coerced or unwelcome touching (patting, kissing, brushing against, pinching, stroking, massaging, squeezing, fondling, or tickling).
- Subtle or overt pressure for sexual favors.

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## Employer Liability

If an employer has knowledge of harassment and fails to correct it, the employer can be held liable for the creation of a hostile environment by:

- Supervisors
- Non-supervisory personnel
- Clients
- Vendors
- Contractors



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## Employer Liability (cont.)

An employer may be expected to know about or be held liable for the hostile environment if:

- There was a complaint to management.
- Management failed to establish a policy against sexual harassment.
- The harassment is openly practiced or well-known among employees.

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## **The Investigation**



**What do I do now?  
How do I do it?**



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## **First Things First**

- Respond Immediately.
- Separate employees from each other.
  - Leave (non-disciplinary, with pay)
  - Transfer
  - Schedule Change
  - Different Supervisor
- Document this action: Keep everything separate from employees' personnel files.
  - Exception: Disciplinary document related to decision.

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## **Retaliation**

Federal, state, and local laws prohibit retaliation against:

- Individuals who file complaints;
- Individuals who participate in an investigation; and
- Individuals who simply oppose discrimination.

"Protected activity" under EEO laws.

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## Sticky Situations

The alleged harasser should not have supervisory authority over the individual who conducts the investigation and should not have any direct or indirect control over the investigation.

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## You Initial Objectives

- Control your facial expression and tone of voice.
- Clearly identify each issue and concept presented.
- Accurately gather all relevant facts.
- Confirm Complainant believes the Agency will investigate objectively and fairly.
- Do not guarantee absolute confidentiality.

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## Planning the Investigation

- Determine who should conduct the investigation.
- Set up interview of accused and third-party witnesses.
- Set up secure, confidential investigation file.
- Review Policies and Procedures.

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## Conducting the Investigation

### Interviewing

- The Complainant
- The Alleged Harasser
- Talking with Third Parties



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## Complainant

- Focus: Who, what, when, where, and how/how often?
- Identify witnesses.
- Identify and obtain all documents.
- Identify others with similar concerns.
- Develop a chronology of events – both before and after the alleged conduct.
- Impact on Complainant – missed work, medical expenses due to harassment.

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## Complainant (cont.)

- If delay in raising issue, ask why.
- Review notes with Complainant for accuracy and completeness.
- Do not promise confidentiality – assure complaint taken seriously and no retaliation. Remain neutral.
- Memorialize statement – chronological format, list witnesses, documents, and damages claims. Have Complainant review and sign.

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## What To Do If . . .

- Complainant walks into the interview with a tape recorder and announces s/he is going to tape the interview.



- Complainant asks to bring a co-worker or an attorney to the interview.

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## Alleged Harasser

- Inform of complaint and investigation.
- Provide sufficient detail to allow accused to respond to each allegation with admission, explanation, or denial.
- Avoid naming other parties or witnesses unnecessarily.
- Get accused's version of the facts.
- Ask for witnesses and documents that support Accused's version.

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## Alleged Harasser (cont.)

- If denies, ask why would Complainant lie?
- If accused refuses to cooperate, advise:
  - Agency has a duty to investigate
  - Will be considered in reaching conclusion
  - Decision based on information from others
- Address confidentiality and retaliation policy.
- Offer opportunity to submit written statement or sign interview notes.

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## Third-Party/Witness

- Thank person for cooperating in investigation.
- Get witness to be as specific as possible.
- What did Complainant tell you? When?
- Did you see Complainant after incident? How did s/he appear?
- Did you tell anyone? Or report to authority?
- Are you aware of any prior incidents or complaints that may be relevant?
- Are there others with relevant information?<sup>34</sup>

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## No Witnesses?



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## Credibility Determinations

- **Inherent Plausibility:** Is the testimony believable on its face? Does it make sense?
- **Demeanor:** Did the person seem to be telling the truth or lying?
- **Motive to Falsify:** Did the person have a reason to lie?
- **Corroboration:** Is there witness testimony or physical evidence that corroborates the party's testimony?
- **Past Record:** Does the alleged harasser have a history of similar behavior?

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## The Report

Draft a thorough, even-handed report.

- Chronological
- Describe how/when you first learned of issue.
- Provide exact details of the complaint.
- List the documents reviewed.
- Describe the interviews.
- Distinguish between firsthand and knowledge and rumor.
- State conclusions and provide justification.

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## The Report (cont.)

- If sexual harassment occurred, recommend corrective action, which should:
  - Be reasonably calculated to prevent further harassment;
  - Not punish the victim; and
  - Be consist with past discipline in similar situations.
- Ensure no more incidents through follow-up with employee (and document).

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## Preventing/Limiting Liability

- Establish written sexual harassment policy that sets up a confidential complaint procedure.
- Disseminate and discuss policy with employees and document dissemination.
- Establish and implement an effective investigation process.
- Provide Sexual Harassment Avoidance training to employees.

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## **Preventing/Limiting Liability**

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- If complaint is made, conduct prompt, thorough, impartial investigation.
- Respond to all complaints.
- If policy violations found, take swift corrective action to prevent further harassment
- Communicate investigation results confidentially.
- Follow-up with Complainant and Offender and document follow-up.

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**Thank you for your attention**

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