

Sexual Harassment

COURSE DESCRIPTION

This continuing education course seeks to explain the basic definition of sexual harassment, to bring awareness to the various circumstances where sexual harassment may occur.

COURSE TITLE: Sexual Harassment

OBJECTIVES

Upon completion you should be able to:

1. Identify key terms.
2. Define sexual harassment as established in employment law.
3. Recognize different types of sexual harassment.
4. Review cases regarding workplace sexual harassment.
5. Describe the fundamentals of a sexual harassment policy.
6. Recognize when an investigation is needed.
7. Determine who should conduct a sexual harassment investigation.

INTRODUCTION

Sexual harassment is a form of discrimination that violates Title VII of the Civil Rights Act of 1964. This act is governed by the United States Equal Employment Opportunity Commission (EEOC). This course defines sexual harassment, identifies circumstances where sexual harassment may occur, and describes the importance of implementing a well-written sexual harassment policy.

KEY TERMS

Allegations:

The assertion, claim, declaration, or statement of a party to an action, made in a pleading, setting out what he expects to prove²

Alleged:

Stated; recited; claimed; asserted; charged²

Applicable:

Capable of or suitable for being applied⁹

Contingent:

1. likely but not certain to happen, possible; 2. not logically necessary;
3 a. happening by change or unforeseen causes; 3b. subject to chance or unseen effects⁹

Directive:

1. serving or intended to guide, govern, or influence; 2. serving to point direction⁹

Encompass:

1a. to form a circle about: ... ; 1b. to go completely around; 2. include, comprehend⁹

Employee:

A person in the service of another under any contract for hire, express or implied, oral or written, where the employer has the power or right to control and direct the employee in the material details of how the work is to be performed²

Equal Employment Opportunity Commission (EEOC):

Created by Title VII of the Civil Rights Act of 1964 and became operational July 2, 1965. The purposes of the Commission are to end discrimination based on race, color, religion, age, sex, national origin in hiring, promotion, firing, wages, testing, training, apprenticeship, and all other conditions of employment...¹⁰

Hostile:

1a. of or relating to an enemy; 1b. marked by malevolence; 1c. openly opposed or resisting; 2a. of or relating to the opposing party in a legal controversy²

Impede:

To interfere with or slow the progress of⁹

Jurisdiction:

1. the power, right, or authority to interpret and apply the law; 2a. the authority of a sovereign power to govern or legislate; 2b. the power or right to exercise authority⁹

Severe:

1a. strict in judgment, discipline, or government; 1b. of a strict or stern bearing or manner; 2. rigorous in restraint, punishment, or requirement; 3. strongly critical or condemnatory⁹

Statute:

1. a law enacted by the legislative branch of a government; 2. an act of a corporation or of its founder intended as a permanent rule⁹

Pervasive:

Pervading or tending to pervade (Pervade: to go through... to become diffused throughout every part)⁹

Prohibit(ed):

1. to forbid by authority; 2. to prevent from doing something⁹

Quid pro quo:

“The United States Supreme Court has stated that *quid pro quo* sexual harassment is not so much as basis for liability as it is a term to describe harassment that occurs when submission to unwelcome sexual advances and/or requests for special favors and/or other verbal or physical conduct or communication of a sexual nature is explicitly or implicitly made a condition of employment.”¹⁰

Workplace:

A place (as a shop or factory) where work is done⁹

SEXUAL HARASSMENT

“I swore never to be silent whenever and wherever human beings endure suffering and humiliation. We must always take sides. Neutrality helps the oppressor, never the victim. Silence encourages the tormentor, never the tormented.”
~ Elie Wisel

Black’s Law Dictionary defines sexual harassment as “a type of employment discrimination, includes sexual advances, requests for sexual favors, and other verbal or physical conduct of a sexual nature prohibited by federal law (Title VII of 1964 Civil Rights Act) and commonly by state statutes.”²

The purpose of defining sexual harassment as a type of discrimination was to end harassment and discrimination against women in the workplace. Today, the legal term of sexual harassment encompasses both women and men at their places of employment; it does not extend to situations outside of the workplace.⁷

Sexual harassment is far more common in the workplace than most people realize, and it “occurs when one employee makes continued, unwelcome sexual advances, requests for sexual favors, and other verbal or physical conduct of a sexual nature, to another employee, against his or her wishes.”⁶ Employers who allow sexual harassment to flourish in the workplace may pay a high price in terms of poor employee morale, low productivity, and lawsuits.¹²

LEGAL CATEGORIES OF SEXUAL HARASSMENT

There are two major categories of sexual harassment: *quid pro quo* and hostile environment. However, there are many different kinds of conduct that may be perceived as sexual harassment. These include verbal remarks or comments, and visual such as gestures, pictures, and physical contact.⁵ It would be wise to note that it only takes a single act of inappropriate sexual behavior to warrant a claim against the accused.

Quid pro quo is a Latin term meaning “this for that”; i.e., “you do something for me and I’ll do something for you,” type of exchange. Problems arise when law prohibits the exchange. *Quid pro quo* sexual harassment occurs when an employee’s job, position, promotion, or some other benefit of employment is contingent upon some form of sexual favor or conduct requested by his/her employer and is against the employee’s wishes. For example, a supervisor may request that his secretary have sex with him in order to receive a raise; or a manager may request sexual favors in exchange for a promotion. The supervisor/manager has then abused his/her authority to extort sexual consideration from the employee through a form of intimidation and has placed the employee in an offensive or hostile work environment.

Hostile work environment sexual harassment occurs when “an employee is subjected to unwelcome sexual advances, requests for sexual favors, and/or other verbal or physical conduct or communication of a sexual nature that is sufficient to create an intimidating, hostile, or offensive working environment.”¹⁰ As examples, the display of explicit or pornographic pictures in the work area or comments such as, “You look delicious in that dress. The contour of your body reminds me of a fine work of art.” This type of harassment may even go as far as unwelcome touching or rubbing such as caressing the shoulders or touching the buttocks.

TYPES OF SEXUAL HARASSMENT

It is not surprising that sexual harassment comes in many forms. Each situation is different and depends on the victim’s perception of sexual harassment and hostile work environment. The following examples of sexual harassment and hostile environment are not all-inclusive.

- **Verbal** – Examples of verbal sexual harassment include requests for sexual favors, threats against a person, inappropriate comments about a person or co-worker in the presence of another person, offensive words about clothing, and telling jokes with sexual overtones⁵.

Example: Caroline is waiting in line to use the copying machine along with several of her male coworkers. The men begin discussing how provocative Becky's new outfit is and how it accents her breasts. This conversation makes Caroline very uncomfortable, so much so that she decides to leave the copy area and wait until later to complete the photocopying.

- **Written** – Examples of written forms of sexual harassment include communications in the form of a letter, memo, note, e-mail, text message, or any other written form of communication that implies or requests sexual favors. This includes sexually explicit cartoons, clippings, or off-color jokes.⁵

Example: A group of coworkers, both male and female, has enjoyed sending off-color jokes to each other for months via e-mail. Most of the jokes contain cartoon characters performing some type of sexual act. One member of the group decides to start e-mailing a few of the jokes to other coworkers, just for laughs. The e-mail reaches an employee who finds the content of the joke embarrassing and inappropriate for a work environment. The employee takes the email to his supervisor to complain.

- **Physical** – Examples of physical forms of sexual harassment include assault, impediment of movement, inappropriate touching of a person or a person's clothing, kissing, hugging, patting, stroking, etc.⁵

Example: Valerie is leaving for her lunch break. As she opens the door to exit the office, David reaches the door to enter. Valerie excuses herself and begins moving through the doorway. At the same time, David moves and draws himself closer to the center of the entrance. This causes Valerie to turn slightly to the right to squeeze by him. David purposefully turns to his left, causing his lower body to rub up against Valerie's left thigh area. David not only impeded Valerie from exiting through the doorway, but he also engaged in inappropriate touching.

- **Nonverbal** – Examples of nonverbal forms of sexual harassment include "elevator eyes" where an individual purposefully scans another person's body from head to toe, or fixedly stares at portions of a person's body.⁵

Example: Sharon has had her eye on coworker, Steven, who is married. She flirts with him on a daily basis, but Steven ignores her advances. Steven feels very uncomfortable around Sharon and goes out of his way to avoid crossing her path. However, there are occasions where avoiding Sharon is impossible. Sharon often begins a slow deliberate walk towards him when she sees him coming down the hallway. When she meets up with him, Sharon proceeds to gradually scan Steven's body up and down, stopping at his eyes to see his reaction, all while licking her lips in a seductive manner.

- **Visual** – Examples of visual forms of sexual harassment include posters, drawings, pictures, screensavers, or e-mails of a sexual nature.⁵

Example: A lack of office space prompts Eric to move into Jerry's office. Jerry doesn't mind sharing an office; in fact there is enough room in the office for shared

space without interfering with either of their work areas. After a few weeks, Eric feels comfortable enough to start bringing in posters and pictures that advocate and depict gay rights. Jerry is uncomfortable with the posters and pictures, but doesn't say anything until Eric goes too far and displays a calendar of scantily clad men on his desk, in Jerry's direct view.

- **Favoritism** – When an employee is promoted or reaps some type of employment benefit due to a personal relationship s/he has with his/her supervisor, other employees may feel that they are at a disadvantage because they do not have a relationship with that supervisor. “Courts have started to accept employee claims that welcomed sexual conduct can create a hostile working environment due to the effect it has, not on the employee(s) involved directly in the welcome conduct, but on the employees who are left out.”¹⁰
- **Same Sex Harassment** - “In 1998, the U.S. Supreme Court held that same-sex harassment is actionable where the harasser has targeted the victim on the basis of the victim's sex.” This includes a homosexual employee who makes unwanted sexual advances towards employees of the same gender, or an employee who is harassed by the same gender for not being “masculine/feminine” enough.⁶ Keep this fact in mind, “The employee harassing another employee can be an individual of the same sex. Sexual harassment does not imply that the perpetrator is of the opposite sex”.⁶

NEWSWORTHY SEXUAL HARASSMENT CASES

1. On December 20, 2008, The New York Times published an article by David W. Chen entitled “Sexual Harassment Claims Arise after Official Quits.” A lawsuit was filed in February 2009 after “the commissioner of the city's Department for the Aging resigned for ‘personal reasons’.” Commissioner Edwin Méndez-Santiago's former secretary, Ms. Santos, filed a federal lawsuit alleging sexual harassment and discrimination. Méndez-Santiago is accused of sending over 4,000 e-mail messages to Ms. Santo that were sexual and sometimes violent in nature.

Ms. Santo began working for Méndez-Santiago in 2004. She indicted that Mr. Méndez-Santiago would make “frequent sexual remarks and rated the physical appearance of female employees, saying that one was so loathsome that he had lost his appetite.” “According to complaints filed with the state Human Rights Division and in federal court,” Ms. Santo was subjected to Méndez-Santiago's sexual relationships with other female employees because her desk was positioned right outside his office door.

Threats made via e-mail began when Ms. Santo repeatedly refused Méndez-Santiago's sexual advances. Ms. Santo felt she could no longer work in that type of environment, which left her with no other alternative but to quit.⁴

2. On January 12, 2009, Howard Beck's article “Driver Sues Curry for Sexual Harassment” was published in the New York Times. Beck wrote, “A man who worked

for three years as Eddy Curry's driver is suing Curry, alleging sexual harassment and a failure to pay him tens of thousands of dollars." The lawsuit filed against Curry "described two incidents in which Dave Kuchinsky claimed Curry dropped his pants and made lewd and suggestive remarks."

"Curry said the allegations were "absolutely false; just incredible." In this case, whether the allegations are factual or not, the lawsuit poses a question of doubt.¹

3. Adam Liptak of the New York Times published the story "Court Expands Ability to Sue in Sexual Harassment Investigations" on January 26, 2009. The Supreme Court ruled in favor of employees who are retaliated against for complaining about being harassed.

A sexual harassment internal investigation was being conducted against Gene Hughes, the Employee Relations Director for a Nashville school system. During the investigation into the claim, several individuals were questioned. One questioned was Ms. Crawford who told of several incidents of sexually harassing conduct such as "louche (dubious; shady; disreputable) goings-on" involving "gross clowning" and "sexually obnoxious". "Mr. Hughes seemed to think it is amusing to grab his genitals and ask Ms. Crawford to show him her breasts." Ms. Crawford was not one of the employees who initiated the sexual harassment claim.

At the end of the internal investigation, Mr. Hughes received an oral reprimand. Ms. Crawford and two other individuals were fired by the school district. Ms. Crawford was fired for embezzlement, a claim she denied and that was not investigated by the authorities. She believed she was fired because she discussed incidents of sexual misconduct during Mr. Hughes' investigation. Ms. Crawford sued, charging that her firing was retaliatory.

The United States Court of Appeals for the Nashville district dismissed Ms. Crawford's case. However, the Supreme Court reversed that decision. "The Supreme Court, in its second major ruling on retaliation in three years, has made it clear that if employers are going to punish anyone, it must be the employees who break the law – not the ones who speak out against them."

The Supreme Court ruling was issued in hopes of encouraging more employees to speak up against sexual harassment acts towards them.⁸

4. On February 23, 2009, Kate Murphy published a story for The New York Times. The headline read, "Plea Deal Ends Sexual Abuse Case Against Federal Judge In Texas." Former Federal Judge Samuel B. Kent would have been the first district judge to be tried on federal sexual harassment charges. He was facing five counts involving inappropriate sexual behavior with employees. Instead of facing those charges, Kent announced he was retiring from the bench and pleaded guilty to one count of obstruction of justice. Kent's attorney, Dick DeGuerin, is quoted as stating, "A trial would have been embarrassing and difficult for all involved."

In this case, Kent's former case manager filed a formal complaint stating that Kent had begun harassing her in 2003. After an investigation, the Fifth Circuit Court officially reprimanded him. Kent was accused of forcing himself on his case manager and his secretary, groping them and forcing their faces into his groin area "Kent's former case manager's attorney said his client is very relieved this first step is over and feels vindicated that he admitted the sexual contact was not consensual."¹¹

FUNDAMENTALS OF A SEXUAL HARASSMENT POLICY

Every workplace should have a written sexual harassment policy in place. It either should be in the employee handbook or posted it in various areas throughout the work environment. The policy should be written in plain English, avoid using legal terms that may be misinterpreted, clearly define sexual harassment, and the consequences that will be imposed if an employee is found guilty of sexual harassment. The policy should outline the internal procedures employees can take if they feel they are being sexually harassed. The purpose of a well-written policy is to encourage employees to speak up if they are being sexually harassed and to discourage the harasser from engaging in such behavior.

The following elements should be considered in the design of a sexual harassment policy.

- "A statement that sexual harassment is unlawful and prohibited."¹⁰
- "A definition of sexual harassment in understandable terms, including examples."¹⁰
- "The policy should strongly state that sexual harassment will not be tolerated."³
- A statement that the policy is applicable to all employees and management personnel."³
- A clearly defined directive to employees to report any problems involving perceived sexual harassment.⁶ The procedure should provide an alternative for the employees to bypass their immediate supervisors⁷ should a supervisor be the harasser.¹⁰
- "A statement that complaints will be promptly investigated, will be as confidential as possible, and will not result in retaliation for filing or taking part in the investigation of the complaint."¹⁰
- "The policy should state that violations of the policy will result in discipline, up to and including, immediate discharge."³
- "An endorsement by top management."¹⁰

If a company does not have a sexual harassment policy, it is recommended that one be drafted and reviewed by an attorney. A company's structure and personnel will play a considerable part in drafting the policy. The policy will slightly vary from one company to another.⁶

Lastly, the sexual harassment policy should be disseminated to all employees and the policy must be enforced.¹⁰

WHEN IS AN INVESTIGATION NEEDED?

“Employers are required to conduct an investigation when they ‘know or should have known’ of the alleged sexual harassment in the workplace.”³ Therefore, it would be wise for employers to routinely monitor the behavior of their employees, paying close attention to any type of improper behavior, comments, and even e-mails that may be construed as a form of sexual harassment. Should the employer feel a specific type of conduct is inappropriate, it should be investigated, even if a complaint has not been made. “Such a duty may arise if the sexual harassment is so pervasive in the workplace that the employer ‘should have known’ one of the goals is to prevent sexual harassment and claims of sexual harassment.”

Should a victim make a claim against the accused harasser, the employer should act quickly, as “some jurisdictions require an investigation be assigned within 48 hours of receiving a complaint.”³ Therefore, the employer should act promptly upon receipt of a complaint in order to obtain the necessary facts needed to determine whether sexual harassment did or did not occur.

“A prompt investigation of a harassment claim, followed by appropriate remedial action, can help insulate an employer from harassment claims.”¹⁰

WHO SHOULD CONDUCT A SEXUAL HARASSMENT INVESTIGATION?

Trained investigators that understand the process and the objective for the investigation should conduct sexual harassment claims. Sexual harassment claims involve fact gathering and interviewing witnesses, all under the auspices of sensitivity and confidentiality. Therefore, the fewer investigators involved the better. It is important to minimize the likelihood of a breach of the claimant’s confidentiality so that there are no leaks that could potentially taint a thorough investigation. “The EEOC suggest a single investigator; it may be wise in case of sexual harassment to have one investigator of each gender present for all witness interviews.”³

CONCLUSION

All claims of harassment should be taken seriously and thoroughly investigated by a trained professional. If the accused is found guilty of sexually harassing the employee, remedial or disciplinary action should be taken, according to the severity (level) of the harassment. The penalty should fit the crime and apply equally to all employees regardless of gender, race, or religious beliefs, so that future harassment is prevented.¹⁰

The following chart has been added to provide statistical data regarding sexual harassment claims reported by the EEOC & FEPA from 1997 – 2008.¹³

**Sexual Harassment Charges
EEOC & FEPAs Combined: FY 1997 - FY 2008**

The following chart represents the total number of charge receipts filed and resolved under Title VII alleging sexual harassment discrimination as an issue.

The data in the sexual harassment table reflect charges filed with EEOC and the state and local Fair Employment Practices Agencies (FEPA) around the country that have a work sharing agreement with the Commission.

The data are compiled by the Office of Research, Information and Planning from data compiled from EEOC's Charge Data System and, from FY 2004 forward, EEOC's Integrated Mission System.¹³

| | FY 1997 | FY 1998 | FY 1999 | FY 2000 | FY 2001 | FY 2002 | FY 2003 | FY 2004 | FY 2005 | FY 2006 | FY 2007 | FY 2008 |
|------------------------------------|---------------|---------------|---------------|----------------|---------------|----------------|----------------|----------------|----------------|----------------|----------------|----------------|
| Receipts | 15,889 | 15,618 | 15,222 | 15,836 | 15,475 | 14,396 | 13,566 | 13,136 | 12,679 | 12,025 | 12,510 | 13,867 |
| % of Charges Filed by Males | 11.6% | 12.9% | 12.1% | 13.6% | 13.7% | 14.9% | 14.7% | 15.1% | 14.3% | 15.4% | 16.0% | 15.9% |
| Resolutions | 17,333 | 17,115 | 16,524 | 16,726 | 16,383 | 15,792 | 14,534 | 13,786 | 12,859 | 11,936 | 11,592 | 11,731 |
| Settlements (# and %) | 1,178 6.8% | 1,218 7.1% | 1,361 8.2% | 1,676 10.0% | 1,568 9.6% | 1,692 10.7% | 1,783 12.3% | 1,646 11.9% | 1,471 11.4% | 1,458 12.2% | 1,571 13.6% | 1,525 13.0% |

* Data has been omitted from the above chart for the purpose of this course. To see the complete chart and omitted data, visit The U.S. Equal Employment Opportunity Commission at <http://eoc.gov/stats/harass.html>.

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