

Preventing Sexual Harassment

Definition of Sexual Harassment

- what sexually harassing behavior is
- when a workplace environment becomes sexually hostile
- how to tell if conduct is unwelcome

Employee Responsibilities for Preventing Sexual Harassment

- appropriate responses
- participating in an investigation

Chronology of Development of Sexual Harassment Law

This Fact Sheet. . .

explains what sexual harassment is under federal law and what it is not, the kinds of behavior that may be interpreted as sexual harassment in the workplace, how a workplace environment can become "sexually hostile," how to avoid sexual harassment of co-workers, how to deal with sexual harassment if it arises, and what to do if you become involved in a sexual harassment investigation.

This publication was prepared by David Kadue, an attorney with the Los Angeles office of Seyfarth, Shaw, Fairweather & Geraldson. It is current through December 31, 2000; includes new standards established by the Supreme Court; and emphasizes the unlawfulness of harassment that is not sexual in nature but is based on gender. This fact sheet provides accurate and authoritative information regarding sexual harassment but is not legal advice. For legal advice or other expert assistance, seek the services of a competent professional.

What is Sexual Harassment?

Sexual harassment at work occurs whenever unwelcome conduct on the basis of gender affects a person's job. It 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 simplified matters somewhat by explaining that there are

two basic types of unlawful sexual harassment. The first type involves harassment that results in a tangible employment action. An example would be a supervisor who tells a subordinate that he or she must be sexually cooperative with the supervisor or he or she will be fired, and who then indeed does fire the subordinate for not submitting. The imposition of this crude "put out or get out" bargain is often referred to as quid pro quo ("this for that"). This kind of unlawful sexual harassment can be committed only by someone who can make or effectively influence employment actions (such as firing, demotion, and denial of promotion) that will affect the victimized employee.

A second type of unlawful sexual harassment is referred to as 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 victimized employee interacts on the job. The behaviors that have contributed to a hostile environment have included:

- unfulfilled 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 or inappropriate terms, such as "Babe";
- using indecent gestures;
- sabotaging the victim's work;
- engaging in hostile physical conduct;
- granting job favors to those who participate in consensual sexual activity;
- using crude and offensive language

These behaviors can create liability only if they are based on the affected employee's gender and are severe or pervasive, as explained in the next section. 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. The conduct constituting sexual harassment is not always sexual in nature. One court held that a man's violent physical assault on a woman was sexual harassment because the assault was based on the woman's gender, even though there was nothing sexual about the assault itself. Suppose, for example, that men sabotage the work of a female co-worker because she is a woman. 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 sexual harassment because the behavior is based on the woman's gender.

When Does an Environment Become Sexually Hostile?

To create a sexually hostile environment, unwelcome conduct based on gender must meet two additional requirements: (1) it must be subjectively abusive to the person(s) affected, and (2) it must be 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, the finder of fact (a court or jury) considers these factors:

- 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. Relatively trivial, isolated incidents generally do not create a hostile work environment. For example, one work environment found no legal violation where a woman's supervisor, over the course of a few months, had asked her out on dates, called her a "dumb blonde," placed his hand on her shoulder, placed "I love you" signs in her work area, and attempted to kiss her. (Weiss s. Coca Cola Bottling Co.)

Hostile environment sexual harassment also was not found 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 or sexual remarks.

Sexual harassment was found, on the other hand, where women were touched in a sexually offensive manner while in confined workspace, subjected to a long pattern of ridicule and abuse on the basis of gender, or forced to endure repeated unwelcome sexual advances.

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

Is it Really Sexual 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 gender discrimination. Some courts state that men and women, as a general rule have different levels of sensitivity -- 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 15 percent would be insulted. The figures were reversed for the women responding. Differing levels of sensitivity have led some courts to adopt a "reasonable woman" standard for judging cases of sexual harassment. Under the standard, if a reasonable woman would feel harassed, harassment may have occurred even if a reasonable man might not see it that way.

Because the legal boundaries are so poorly marked, the best course of action would be to avoid all sexually charged conduct in the workplace. You should 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 sexual harassment, ask yourself these questions:

- Is this verbal or physical behavior of a sexual nature?
- Is this conduct offensive to persons who witness it?
- Is this behavior being initiated by only one of the parties who has power over the other?
- Does the employee have to tolerate that type of conduct in order to keep his or her job?
- Does the conduct make the employee's job unpleasant?

If the answer to these questions is "yes," put a stop to the conduct.

How Can You Tell if Conduct is Unwelcome?

Only *unwelcome* conduct can be sexual harassment. Consensual dating, joking, 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 ("come here Babe and give me some of that") are so crude and blatant that the advance itself shows its unwelcomeness. In a more typical case, however, the welcomeness 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. A woman who shakes her head "no" and walks away when asked for a date has made her response clear.

Ambiguous Rejection

Matters are more complicated when an offended employee fails to communicate clearly. All of us, for reasons of politeness, fear, or indecision, sometimes fail to make our true feelings known. A woman asked out for a "romantic" dinner by her boss may say, "Not tonight, I have a previous commitment" when what she really means is "no way, not ever." The invitation is not inherently offensive, and the response leaves open to question whether the conduct was truly unwelcome.

Soured Romance

Sexual relationships among employees often raise difficult issues as to whether continuing sexual advances are welcome. Employees have the right to end such relationships at any time 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

- 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; and
- Participated with other in vulgar language and sexual horseplay in the workplace.

For these reasons, if you find gender-based conduct or sexually oriented 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 gender. 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?

You and your employer share a stake in maintaining a harassment-free work environment. Many organizations have written policies, distributed to all employees, that contain examples, that contain examples of prohibited conduct and describe procedures for handling complaints. These policies may forbid conduct that falls short of unlawful sexual harassment. It's important to learn about your own employer's policy.

Retaliation against any employee who reports sexual harassment or who cooperates when the employer investigates a claim of sexual harassment is prohibited. The employer will want to conduct a prompt and thorough investigation of all complaints, and matters will be kept as confidential as possible.

Employer policies typically provide that any employee found to have violated the policy will be subject to discipline, up to and including immediate discharge, and that the complaining employee will be told whether action has been taken, even if not told specifically what was done.

Respond Appropriately When You Encounter Sexual Harassment

If you experience sexual 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. Before you report a problem, you might want to try some self-help techniques, using the DO's and DON'Ts listed below. If you do follow these self-help suggestions, remember that sexual 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. 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, with even more internal reports resulting in either discipline or counseling.

Participating in an Investigation

All employees have a responsibility to cooperate fully with the investigation of a sexual 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 employee, the complaining one, or merely a potential witness, bear in mind that confidentiality is crucial. Two people have their reputations on the line, and you may or may not know all the facts. In the typical situation, the employer will keep the information it gathers as confidential as possible, consistent with state and federal laws, 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 sexual 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 employee 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

If you are making the complaint, the investigator will need to know all the details,

unpleasant though they will be to recount. The investigator has a duty to be fair to everyone involved and needs as much information as possible. Be prepared to give the following information:

- The names of everyone who might have seen or heard about 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 employees are questioned and information is gathered.

As the Accused

If you are the person accused of sexual harassment, you must remember that you have a duty to cooperate in the investigation, regardless of whether you believe the allegations to be 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 course of the investigation. You must remember that you are not to retaliate against the person who make the complaint or against anyone who participates in any way in the investigation. You must treat them in the same fair and 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 sexual harassment occurred. Indeed, retaliation against a complainant may violate the law even if the underlying complaint of harassment cannot be substantiated.

You should expect to be asked to confirm or deny each of the specific allegations against you. It is possible that the allegations are gross exaggerations or downright 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 be motivated to exaggerate or fabricate the charges. The investigator might need to talk to you several times while other employees are questioned and information is gathered.

As a Potential Witness

You may be asked to provide details concerning alleged sexual 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 of sexual misconduct, can fairly 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 sexual 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 sexual 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 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, sexual harassment complaints often involve one-on-one situations where it is difficult to determine the truth. More over, two people can have totally different perceptions of the same incident. The best you can do in such a situation is to avoid further situations where your words or conduct can be used as evidence of sexual harassment.

Expect Adequate Remedial Action

If the employer finds that sexual harassment did occur (or even some inappropriate action falling short of sexual harassment), expect the employer to take some 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 acts of harassment. If you, as the complaining party, feel that the harasser is retaliating against you for complaining or continuing to harass you, you should immediately use the employer's procedures to report the conduct so that the employer can take further action as appropriate.

If the employer does not have enough evidence to reach a conclusion about harassment, it still might take other actions, such as separating the parties, holding training sessions on preventing sexual harassment, or having the affected employees certify that they have read again and fully understand the employer's policy against sexual harassment.

Note: Many organizations forbid conduct that falls short of unlawful sexual harassment and do impose discipline for conduct that comes to their attention as the result of a sexual harassment complaint, even if the conduct does not violate the law or the

organizations harassment policy. For example, a manager who makes sexual advances to subordinates might be disciplined for exercising poor judgment, even if the sexual advances were welcomed; and an employee who engages in a single incident of offensive gender-based 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 sexual harassment is not admission, therefore, that any unlawful harassment has occurred.

The DO's and DON'Ts of Sexual Harassment

Do

- Admit that a problem exists
- Tell the offender specifically what you find offensive
- Tell the offender that his or her behavior is bothering you
- Say specifically what you want or don't want to happen, such as "please call me by my name not Honey," or "please don't tell that kind of joke in front of me."

Don't

- Blame yourself for someone else's behavior, unless it truly is inoffensive
 - Choose to ignore the behavior, unless it is truly inoffensive
 - Try to handle any severe or recurring harassment problem by yourself -- get help.
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Development of the Law of Sexual Harassment

1964...

The Civil Rights Act of 1964 becomes law. Title VII prohibits employment discrimination on the basis of race, color, religion, national origin, and sex. There is no mention of sexual harassment in the law or its legislative history.

1974...

A female employee claims she was retaliated against for rejecting her boss's sexual advances. There was no sex discrimination, a trial court decides. The male supervisor, the court says, merely solicited his subordinate because he found her "attractive" and then retaliated because he felt "rejected." Barnes v. Train, 13 FEP Cases 123 (D.D.C.)

1976...

The humiliation and termination of a female employee by her male supervisor because she rejected his sexual advances, if proven, would be sex discrimination, a court rules,

because it was an artificial barrier to employment placed before one gender and not the other. *Williams v. Saxbe*, 413 F. Supp. 654, 12 FEP Cases 1093 (D.D.C.)

1977...

Reversing the 1974 *Barnes v. Train* case, appealed under a different name, U.S. appeals court rules that a female employee was retaliated against for rejecting sexual advances of her boss; this is sex discrimination in violation of Title VII. *Barnes c. Costle*, 561 F.2d 983, 15 FEP Cases 345 (D.C. Cir.)

1980...

The Equal Employment Opportunity Commission (EEOC), the agency that enforces Title VII, issues guidelines interpreting the law to forbid sexual harassment as a form of sex discrimination. 29 C.F.R. §1604.11

1981...

For the first time a U.S. court endorses the EEOC's position that Title VII liability can exist for 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.)

1983...

An employer that forbade sexual harassment is held liable for the sexist name-calling of a female air traffic controller because it failed to take corrective action when the employee complained. *Katz v. Dole*, 709 F.2d 251, 31 FEP Cases 1521 (4th Cir.)

1985...

Physical violence can be sexual harassment, U.S. appeals court says, even if the conduct is not overly sexual: all that is necessary is that the unwelcome conduct be on the basis of the victim's gender. *McKinney v. Dole*, 765 F.2d 1129, 38 FEP Cases 364 (D.C. Cir)

1986...

Addressing the sexual harassment issue for the first time, U.S. Supreme Court rules that a women who allegedly had sex with her boss a number of times, because she feared losing her job if she did not, could sue for sexual harassment. The question is not whether the employee's conduct was voluntary but whether the boss's conduct was unwelcome, the Court explains. An employer can be held liable for sexual harassment committed by supervisors if it knew or should have known about the conduct and did nothing to correct it, the Court adds. *Meritor Savings Banks v. Vinson*, 477 U.S. 57, 40FEP Cases 1822

1988...

When male construction workers hazed three female colleagues, even if the conduct

was not specifically sexual in nature, it was gender-based harassment prohibited by the law, a U.S. appeals court finds. *Hall v. Gus Construction Co.*, 842 F.2d 1010, 46 FEP Cases 57 (8th Cir.)

1990...

The EEOC issues a policy statement saying that sexual favoritism can be sexual harassment. Isolated incidents of consensual favoritism do not violate Title VII, but sexual favoritism does violate the law if advances are unwelcome or favoritism is so widespread that it has become an unspoken condition of employment, the EEOC says.

1991...

A sexually hostile environment violating Title VII is found where women were a small minority of the work force and crude language, sexual graffiti, and pornography pervaded the workplace. Title VII is "a sword to battle such conditions," not a shield to protect preexisting abusive environments, the court declares. *Robinson v. Jacksonville Shipyards*, 760 F. Supp. 1486, 57 FEP Cases 971 (M.D. Fla.)

A court finds that because male and female sensibilities differ, the appropriate standard to use in sexual harassment cases is that of a "reasonable woman" rather than a "reasonable person." The conduct in question – a man's unsolicited love letters and unwanted attention might seem inoffensive to the average man, but might be so offensive to the average woman that creates a hostile environment, the court rules. *Ellison v. Brady*, 924 F.2d 872, 54 FEP Cases 1346 (9th Cir.)

The Senate Judiciary Committee conducts hearings on the nomination of Judge Clarence Thomas to Associate Justice of the United States Supreme Court. One issue is whether, while he was chairman of the EEOC Thomas sexually harassed a female assistant Anita Hill. The alleged conduct occurred in private, Hill did not officially report it, and she continued to see Thomas even after she changed jobs. Although some senators believed Hill's charges, the Senate gave Thomas a seat on the Court. The hearings brought the issue of workplace sexual harassment out in the open and sparked debate over just what harassment is and what should be done about it

The Civil Rights Act of 1991 becomes law, providing for jury trials and for increased damages in Title VII.

1992...

Sexual harassment returns to front-page status with reports of the Navy's Tailhook scandal. The Navy investigated allegations that women attending a convention of naval

personnel at a Las Vegas hotel were forced to run through a gauntlet of male personnel and subject themselves to unwelcome touching. The investigation led to the discipline of several high-ranking naval officers for permitting the situation to occur.

1993...

In its second decision on sexual harassment in employment, the Supreme Court rules that a discriminatorily abusive work environment is unlawful even if it does not affect an employee's psychological well-being. It is enough if (1) the employee subjectively perceives a hostile work environment as a result of gender-based conduct and (2) the conduct was severe or pervasive enough to create an objectively hostile environment -- one that a reasonable person would find hostile. *Harris v. Forklift Systems*, 114 S. Ct. 367, 63 FEP Cases 225

A mining company in northern Minnesota is found liable in the first successful sexual harassment lawsuit by a class of 100 women victimized by sexual harassment. *Jensen v. Eveleth Taconite Co.*, 61 FEP Cases 1252 (D. Minn.)

The fact that a woman posed nude for two motorcycle magazines does not affect her claim that she found workplace conduct to be offensive, she acquiesced to unwanted sexual advances at work. *Burns v. McGregor Electronics Industries*, 968 F.2d 959, 61 FEP Cases 592 (8th Cir.)

1994...

In its third case involving sexual harassment in employment, the Supreme Court holds that provisions of the Civil Rights Act of 1991 regarding jury trials and damages do not apply to cases that arose before the 1991 Act took effect. *Landgraf v. USI Film Products*, 64 FEP Cases 820

A state high court rules that an employee who quits then sues for "constructive discharge" (to hold the employer responsible for terminating employment even though the employee quit) must prove that the employee informed the employer of intolerable conditions and gave it a chance to correct them before resignation. *Turner v. Anheuser-Busch, Inc.* 7 Cal. 4th 1238, 1248-50 (Cal.)

1995...

The Congressional Accountability Act makes Congress itself comply with workplace standards it has imposed on other employers and creates an office of compliance to

enforce those standards, including prohibitions against sexual harassment, for the benefit of the thousands of employees of Congress and related legislative agencies. 2 U.S.C. §§ 1301-1438

A federal district court dismisses the reverse discrimination suit of a male supervisor who was fired for participating in an office party in which a female subordinate received as a birthday gift. The court holds it was not discriminatory for the male supervisor to be held to a higher standard as to conduct that led to only a "slap on the wrist" for the female subordinate. *Castleberry v. Boeing Co.*, 880 F. Supp. 1435 (D. Kan.)

1996...

A federal court upholds the dismissal of a manager who was fired for disregarding his boss's order not to discuss an ongoing sexual harassment investigation with other employees. The court rejects the manager, in discussing the investigation with another employee, had been engaged in activity protected by the law. *Morris v. Boston Edison Co.*, 942 F. Supp. 65 (D. Mass.)

A federal court upholds the dismissal of a female employee who made unfounded harassment charges against a male manager after their romantic relationship had ended. The court rejects her argument that the company discriminated against her on the basis of gender by treating her more harshly than her ex-boyfriend. *Cerwinski v. Insurance Services Office*, 1996 WL 563988 (S.D.N.Y.)

A federal court throws out a sexual harassment claim based on a handful of sexually suggestive comments made over a three-month period. This behavior was not severe or pervasive enough to be unlawful harassment, even though the victimized employee subjectively perceived the behavior as harassing. *McKenzie v. Illinois Department of Transportation*, 92 F.3d 473, 167 Daily Lab. Rep. (BNA) E-1 (7th Cir.)

1997...

A U.S. appeals court rules that an employer need not always investigate, in a case of relatively mild verbal harassment posing no imminent threat of harm, where the complainant admittedly asked the employer to do nothing and keep the matter confidential. *Torres v. Pisano*, 73 FEP Cases 1771 (2d Cir.)

A U.S. appeals court rules that where an employer has an effective and well-

disseminated policy against sexual harassment, the employer cannot be held liable for hostile environment harassment unless the victim reports the harassment under the policy and the employer fails to remedy it; the company's knowledge of harassment will not be presumed even if the harassment is pervasive. *Farley v. American Cast Iron Pipe Co.*, 74 FEP Cases 217 (11th Cir.)

A U.S. appeals court rules that a sexual harassment investigation need not be perfect and that the employer need not take the action the complainant suggests, so long as the action is reasonably calculated to prevent harassment. *Knabe v. Boury Corp.*, 73 FEP Cases 1877 (3d Cir.)

1998...

The California Supreme Court Rules that an employer would have had "good cause" to fire an employee for sexual harassment even though a jury had ruled that the alleged misconduct did not occur, so long as the employer reached a conclusion "supported by substantial evidence gathered through an adequate investigation that includes notice of the claimed misconduct and a chance for the employee to respond." *Cotran v. Rollins Hudig Hall Int'l Inc.*, 75 FEP Cases 1074 (Cal.)

In its fourth case on sexual harassment in employment, the Supreme Court holds that men as well as women can bring sexual harassment claims and that Title VII applies to "same-sex" harassment. An oil platform worker alleged that male co-workers subjected him to sexual assaults and threatened him with rape. He quit and sued the company for failing to stop this conduct. The court holds that even though Title VII does not specifically protect men from gender-based harassment by other men, the general principles of sex discrimination and harassment do apply to that conduct. This does not mean that Title VII creates a "general civility code for the American workplace," for "social context," and "common sense" will still control whether particular gender-based conduct is severe enough to create a hostile environment for a reasonable person under the circumstances. *Onacle v. Sundowner Offshore Services, Inc.*, 76 FEP Cases 221

In its fifth and sixth cases addressing sexual harassment in employment, the Supreme Court creates a new rule for employer liability where a supervisor creates a hostile environment for a subordinate. Under this rule, an employer is liable for an actionable hostile environment created by a supervisor who has immediate (or successively higher) authority over the victimized employee if the harassment results in a tangible employment action, or a denial of promotion. The employer is also liable for a hostile environment created by a supervisor even where no tangible employment action has occurred, unless (1) the employer has taken reasonable care to prevent and correct sexual harassment, and (2) the employee unreasonably has failed to avoid harm. Proof that an employee failed to use the employer's complaint procedure usually will be enough to show an unreasonable failure by the employee to avoid harm. *Burlington*

Indus v. Ellerth, 77 FEP Cases 1; Faragher v. City of Boca Raton, 77 FEP Cases 14

1999...

To give an employer adequate notice of sexual harassment by a co-worker, the complaining employee must provide "enough information to raise a probability of sexual harassment in the mind of a reasonable employer." It is not enough simply to say that a co-worker is "staring" or "name-calling" or that he will not leave the complainant alone. Kunin v. Sears Roebuck & Co., 175 F. 3d 289, 79 FEP Cases 1350 (3d Cir.)

A female police officer was able to win a sexual harassment suit by relying, in part, on conduct she never witnessed, including harassment of other women and private "locker-room" talk by male police officers who used vulgar words to describe women. The court reasons this evidence was relevant to show the female officer was targeted for abuse because of her gender, and to show that the employer knew that its anti-harassment policy was ineffective. Hurley v. Atlantic City Police Dept., 174 F.3d 95, 79 FEP Cases 808 (3d Cir.)

A sexually harassed schoolteacher lost her case under the Ellerth/Faragher rule, because she misled investigators and did not report all the harassment that had occurred when she was interviewed. Scrivener v. Socorro Indep. Sch. Dist., 169 F.3d 969, 79 FEP Cases 429 (5th Cir.)

A male employee can sue for sexual harassment on the basis of gross behavior by his male co-worker even if the harasser is also vulgar to a female co-worker, even if much of his conduct is not sexual, and even if he is not gay. In so ruling, a U.S. appeals court reasons that pervasive harassment is actionable if the words and conduct of the harasser imply he is motivated by the victim's gender. Shepard v. Slater Steels Corp., 168 F.3d 998, 79 FEP Cases 311 (7th Cir.)

Responding to a complaint that a male employee made crude sexual remarks to a female subordinate, an employer avoided liability for sexual harassment by promptly giving him a written reprimand, suspending him without pay for a week, and bringing the harassment to a complete halt. A U.S. appeals court holds that this action was appropriate under the circumstances. Indest v. Freeman Decorating, Inc., 164 F.3d 258, 78 FEP Cases 1527 (5th Cir.)

2000...

The need to show unwelcome conduct

A female sales representative who's alleged foul sexual language lost her case because she herself used this type of language around co-workers and thus failed to show unwelcomeness. *Hocevar v. Purdue Frederick Co.*, 216 F.3d 745 (8th Cir.)

A female employee alleging unwelcome sexual advances lost her case when witnesses testified she seemed to enjoy spending time with the alleged harasser. *Stephens v. Rheem Mfg. Co.*, 220 F.3d 882, 886 (8th Cir.)

The need to show gender basis

A truly bisexual harasser does not act on the basis of gender, according to a U.S. appeals court. A husband and wife thus lost their case even though their joint supervisor solicited sex from both of them; an "equal opportunity harasser" does not discriminate because of gender. *Holman v. Indiana*, 211 F.3d 399 (7th Cir.)

According to one controversial U.S. appeals court opinion, foul language did not support a sexual harassment claim where the language was used in front of and to describe both men and women. *Hocevar v. Purdue Frederick Co.*, 216 F.3d 745 (8th Cir.)

Soured romance not necessarily a case of sexual harassment

While soured office romances often do lead to claims of sexual harassment, the "fact that two people do not get along after their office romance sours is not sexual harassment," a U.S. appeals court rules. *Place v. Abbott Labs.*, 215 F.3d 803 (7th Cir.)

A female harassed by her male co-worker after their consensual sexual relationship went sour did not suffer gender-based harassment; rather, the harassment showed "contempt" as a result of the "failed relationship." *Succar v. Dade County Sch. Bd.*, No.99-13681 (11th Cir.)

Sexual content not necessary to show gender basis

A female employee won her case of sexual harassment because the unwelcome conduct

-- including sabotage of work and personal isolation was based on animosity towards her because of her gender, even though it was not sexually explicit. *Pollard v. E.I. DuPont de Nemours Co.*, 213 F.3d 933 (6th Cir.)

Employers must take effective remedial measures, and can be responsible for non-employee's conduct

A sexual harassment plaintiff prevailed where the employer failed to investigate allegations of co-worker harassment, and was liable even for behavior by non-employees, because employees encouraged the harassment. *Slayton v. Ohio Dept. of Youth Serv.*, F.3d 669 (6th Cir.)

A female employee was permitted to pursue her sexual harassment claim even though the employer transferred her to end the harassment, because her new location was inconvenient and arguably left her worse off; remedial measures that make the victim worse off are necessarily "ineffective." *Hostetler v. Quality Dining, Inc.*, 218 F.3d 789, 810-11(7th Cir.)

An employer prevailed against a female electrician whose male co-workers harassed her, because the employer investigated promptly, redistributed the sexual harassment policy, and offered transfer to a different department. This response was reasonably given (a) the time elapsed between notice and response, (b) the options available to the employer, (c) the disciplinary steps taken, and (d) that the response ended the harassment. *Stuart v. GMC*, 217 F.3d 621, 633 (8th Cir.)

Employee must use avenues available

A male employee lost his case because his "off the record" discussion did not imply sexual harassment and he endured 15 unwelcome sexual propositions before finally reporting. *Casiano v. AT&T Corp.*, 213 F.3d 278, 286-87 (5th Cir.)

An employee lost her case because of her anonymous letter of complaint, which she then disavowed, was not a reasonable use of the sexual harassment policy. *Hill v. American General Fin.*, 218 F.3d 639,643 (7th Cir.)

Female store clerks lost their case because they failed to use designated avenues to complain to the designated person, and also failed to reasonably use Open Door Policy because they did not fully inform managers of harassment or request that action be

taken. *Mandray v. Publix Supermkts., Inc.*, 208 F.3d 1290, 1300 (11th Cir.)

A female employee lost her case because she assured supervisors that everything was fine and did not seek reassignment for herself or the harasser. *Coates v. Sundor Brands*, 164 F.3d 1361 (11th Cir. 1999)

Understanding Sexual Harassment

After having read this fact sheet, you should have a pretty good understanding of what sexual 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 sexual harassment. For more specific information, contact the human resources office.

Doesn't sexual harassment have to involve sexual advances or other conduct that is sexual in nature?

No. The 1980 EEOC Guidelines on Sexual Harassment do suggest that conduct constituting sexual harassment must be "conduct of a sexual nature," but it is just as wrong and just as unlawful to harass people with gender-based conduct of a nonsexual nature. Consider, for example, a man and a woman each holding the same kind of job in an organization. If their supervisor gives demeaning and inappropriate assignments (such as serving coffee, picking up dry cleaning, emptying a waste basket) to the woman, but not to the 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 but whether it was based on the victim's gender.

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

No. Sexual power plays by supervisors constitute the most widely publicized and easily understood form of sexual harassment. But harassment also occurs when supervisors, co-workers, or even non-employees create a hostile environment through unwelcome sexual advances or demeaning gender-based conduct. There have even been cases where a subordinate has sexually harassed a supervisor.

Regarding harassment by non-employees (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 still must take reasonable steps to address the situation once the matter comes to its attention.

Can sexual harassment occur without physical touching or a threat to the

employee's job?

Yes. The nature of sexual 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 nonsexual but gender-based conduct that creates a work environment that a reasonable person would consider hostile may amount to sexual harassment.

Don't men have a right to free speech? Can't they express their view that women belong in the kitchen, not in the shop?

The first Amendment protects some forms of expression, even in the workplace, but the verbal threats often involved in sexual harassment are not protected as free speech. For example, the First Amendment would not protect, as free speech, a supervisor's comment to a subordinate that she will lose her job if she does not sleep with her boss. Nor will the First Amendment protect conduct that offends and intimidates other employees to the point that their work is affected, creating a sexually hostile environment. Courts have not issued clear rulings as to when the First Amendment will protect an employee's political opinion regarding the roles of men and women in the workplace.

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

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

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

Some courts have held that individual employees cannot be liable under Title VII. Some state laws, however, do impose personal liability on individuals for perpetrating harassment. While employers often provide a legal defense for supervisors in a lawsuit, an employer may be entitled, after a court decision against it, to recover damages and legal expenses from a supervisor whose unauthorized conduct created the problem.

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 sexual harassment policy?

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 employer's 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 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 Supreme Court in *Ellerth* and *Faragher*, if the employer has an effective anti-harassment policy that the employee unreasonably fails to use, the employer may win the 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.