

Know Your Rights: Sexual Harassment

Sexual Harassment Defined:

- Definition:
 - o Sexual harassment is a **form of gender discrimination**.
 - o It includes, but is not limited to, unwelcome sexual advances; requests for sexual favors; and verbal or physical conduct of a sexual nature when it affects an individual's employment, unreasonably interferes with an individual's work performance, or creates an intimidating, hostile, or offensive work environment.
 - o The harassing conduct **must be unwelcome**.
 - o The harassing conduct **need not be of a sexual nature**, and can include offensive remarks about a person's sex.
- Quid Pro Quo: When a manager or other authority figure offers, explicitly or implicitly, to give the employee something (*e.g.*, a raise or promotion) in return for that employee's satisfaction of a sexual demand.
 - o **Elements of Claim:** (1) Plaintiff is a member of a protected class; (2) Adverse action was taken against Plaintiff; (3) Plaintiff refused to submit to the express or implied sexual demands of a superior; (4) Evidence of causation.
 - o To demonstrate an implied conditioning of job benefits on submitting to sexual advances, Plaintiff can rely on causation evidence, *i.e.*, Plaintiff can show that the employer's treatment of Plaintiff became hostile once sexual advances were rebuffed or ignored.
- Hostile Work Environment: Harassing conduct becomes so severe or pervasive to create a work environment that a reasonable person would consider intimidating, hostile, or abusive.
 - o **Elements of Claim:** (1) Plaintiff is a member of a protected class; (2) Plaintiff has been subjected to unwelcome harassment; (3) The harassment was based on membership in a protected class; (4) The harassment is severe or pervasive enough to affect a term, condition, or privilege of employment.
 - o Courts look to the "totality of the circumstances" when evaluating whether behavior rises to the level of a hostile work environment.
 - o Solely verbal conduct can establish a hostile work environment if it is so severe or pervasive that tolerating it becomes an implicit condition of employment.
- Not Covered: Teasing, offhand comments, or isolated incidents. However, these can become illegal when they are so frequent or severe that they create a hostile or offensive work environment, or when they result in an adverse employment action (*e.g.*, getting fired or demoted).
- Identity of the Harasser:
 - o The harasser can be a **man or woman**.
 - o The **harasser and the victim can be of the same sex**.
 - o The harasser can be the victim's supervisor or co-worker, an agent of the employer, or even a non-employee (*e.g.*, a customer of the employer's).
- Identity of the Victim:
 - o The **victim does not need to be the one harassed**, but rather anyone who is affected by the offensive conduct.
 - o The **victim need not be damaged economically or discharged** to bring a claim.

Examples of Sexual Harassment:

- Actual or attempted sexual assault;
- Unwanted pressure for sexual favors;
- Unwanted deliberate touching (*e.g.*, a neck massage, hugging, kissing, patting, or stroking);
- Hovering, leaning over, cornering, or pinching;
- Unwanted sexual looks or gestures (*e.g.*, staring a person up and down);
- Unwanted letters, telephone calls, or materials of a sexual nature (*e.g.*, personal gifts);
- Unwanted pressure for dates;
- Unwanted sexual teasing, jokes, remarks, or personal questions about social or sexual life;
- Whistling, catcalling, howling, making kissing sounds, smacking lips, or making sexually-suggestive facial expressions (*e.g.*, winking, blowing kisses, or licking lips);
- Sexual gestures with hands or through body movements;
- Sexual comments, including about women generally;
- Sexually-suggestive signals, innuendos, or stories;
- Turning work discussions into sexual topics;
- Telling lies or spreading rumors about a person's personal sex life;
- Touching or rubbing oneself sexually.

Relevant Statutes:

- **Title VII of the Civil Rights Act of 1964**, 42 U.S.C. § 2000e-1 *et seq.*
 - o Applies to employers with **15 or more employees**.
 - o No individual liability.
 - o **Procedural Requirements:** As a prerequisite to initiating litigation, charges must be filed with the EEOC within 180 days of the alleged discriminatory act. However, in states or localities where there is an antidiscrimination law and an agency authorized to grant or seek relief (*i.e.*, “deferral states”), a charge must be presented to that state or local agency. In such jurisdictions, you may file charges with the EEOC within 300 days of the discriminatory act, or 30 days after receiving notice that the state or local agency has terminated its processing of the charge, whichever is earlier. It is best to contact EEOC promptly when discrimination is suspected.
 - o For a list of “deferral states,” please see: <https://www.thelaw.com/law/list-of-state-fair-employment-practices-agencies.330/>.
- The **D.C. Human Rights Act (DCHRA)**, D.C. Code § 2-1401.01 *et seq.*
 - o Applies to **all employers**.
 - o Individual liability: “[A] high level official of [the employer] who exercise[s] extensive supervisory, management, and administrative authority over the corporation” can fall within the DCHRA’s definition of “employer” for liability purposes. *See Purcell v. Thomas*, 928 A.2d 699, 715 (D.C. 2007).
- For a chart listing workplace discrimination statutes by state, please see: <http://www.ncsl.org/documents/employ/Discrimination-Chart-2015.pdf>.
- To learn more about protections against employment discrimination in your state, please see: <http://www.nolo.com/legal-encyclopedia/employment-discrimination-in-your-state-31017.html>.

Liability for Harassment:

- Liability for Harassment by “Alter Ego” of Employer: An employer is always liable for unlawful harassment whenever the harasser is of a sufficiently high rank such that he/she “may be treated as the organization’s proxy.” *Faragher v. City of Boca Raton*, 524 U.S. 775, 789 (1998). Examples of “alter ego” employees include: Owners; Presidents; Partners; and Corporate Officers.
- Liability for Harassment by a Supervisor:
 - o **Ellerth/Faragher Burden-Shifting Framework**: In *Burlington Industries, Inc. v. Ellerth*, 542 U.S. 742 (1998), and *Faragher v. City of Boca Raton*, 524 U.S. 775 (1998), the Supreme Court held that employers are subject to vicarious liability for unlawful harassment by supervisors. The Court held that **the employer is always liable for a supervisor’s harassment if it culminates in a tangible employment action**. However, if it does not, the employer may avoid liability or limit damages by establishing both of the following:
 - (1) The employer exercised reasonable care to prevent and correct promptly any harassing behavior (such as by establishing an effective reporting policy); and
 - (2) The employee unreasonably failed to take advantage of any preventative or corrective opportunities provided by the employer or to otherwise avoid harm.
 - o **Definition of Supervisor**: A colleague with immediate (or successively higher) authority over the employee.
 - In determining whether the harasser is a “supervisor,” courts look at (1) whether the harasser has authority to undertake or recommend tangible employment decisions affecting the employee; or (2) whether the individual has authority to direct the employee’s daily work activities.
- Liability for Harassment by a Co-Worker or Non-Employee: The employer is liable for harassment by non-supervisory employees or non-employees over whom it has control (e.g., independent contractors or customers on the premises), if it knew, or should have known, about the harassment, and failed to take prompt and appropriate corrective action.

Noteworthy Cases:

- *Meritor Savings Bank, FSB v. Vinson*, 477 U.S. 57 (1986): Supreme Court recognized that sexual harassment is a violation of Title VII.
- *Harris v. Forklift Systems, Inc.*, 510 U.S. 17 (1993): Supreme Court ruled that a plaintiff does not need to prove concrete psychological harm in a Title VII sexual harassment case.
- *Oncale v. Sundowner Offshore Services, Inc.*, 523 U.S. 75 (1998): Supreme Court ruled that same-sex sexual harassment is actionable under Title VII.
- *Burlington Industries, Inc. v. Ellerth*, 542 U.S. 742 (1998) and *Faragher v. City of Boca Raton*, 524 U.S. 775 (1998): See above under “Liability for Harassment by a Supervisor.”
- *Kolstad v. American Dental Ass’n*, 527 U.S. 529 (1999): Supreme Court ruled that punitive damages could be imposed under Title VII without a showing of egregious discrimination.
- *Crawford v. Metro. Govt. of Nashville and Davidson County, Tenn.*, 555 U.S. 271 (2009): Supreme Court ruled that Title VII’s anti-retaliation provision extended to an employee who spoke out about harassment when answering questions during employer’s investigation of co-worker’s complaints.
- *Kaytor v. Elec. Boat Corp.*, 609 F.3d 537 (2d Cir. 2010): Second Circuit ruled that sex-neutral hostile acts, including threats, could be construed as retaliation for ignoring sexual comments and overtures, and therefore must be considered as part of the hostile work environment.

Know Your Rights: Retaliation

- Under Title VII, it is unlawful to retaliate against an individual for engaging in protected activity.
- Examples of Protected Activity:
 - o Filing or being a witness in an EEOC charge, complaint, investigation, or lawsuit;
 - o Communicating with a supervisor or manager about harassment;
 - o Answering questions during an employer's investigation of alleged harassment;
 - o Refusing to follow orders that would result in discrimination;
 - o Resisting sexual advances;
 - o Intervening to protect others.
- Examples of Retaliation:
 - o Terminating or demoting an employee;
 - o Reprimanding an employee;
 - o Giving a performance evaluation that is lower than it should be;
 - o Engaging in verbal or physical abuse;
 - o Threatening to make, or actually making, reports to authorities (*e.g.*, reporting immigration status or contacting the police);
 - o Increasing scrutiny of the employee;
 - o Spreading false rumors about the employee;
 - o Treating the employee's close acquaintance(s) negatively;
 - o Making the person's work more difficult (*e.g.*, changing the employee's work schedule to conflict with the employee's family obligations).
- Relevant Statutes: Title VII; DCHRA; Other state human rights statutes (see above for links)
- Elements of a Retaliation Claim: (1) Plaintiff engaged in protected activity; (2) Plaintiff was subject to an adverse action by his/her employer after engaging in the protected activity; and (3) There was a causal connection between the protected activity and adverse action.

Know Your Rights: Working Outside the U.S.

- **Non-U.S. Citizens:** Employee who are not U.S. citizens are not protected by Title VII when employed outside the U.S. or its territories. In such a situation, you should consult your embassy to determine whether EEOC laws for other countries exist and are applicable to your situation.

- **U.S. Citizens Employed Outside the U.S.:** U.S. citizens employed outside the U.S. by a U.S. employer, or by a foreign company controlled by a U.S. employer, are protected by Title VII.
 - o **Definition of U.S. Employer:** An employer is considered a “U.S. employer” if it is incorporated or based in the U.S., or if it has sufficient connections with the U.S.
 - To determine whether a company has sufficient contacts with the U.S., courts look at the company’s principal place of business, and the nationality of the company’s dominant shareholders and management.
 - o **Definition of U.S.-Controlled Employer:** Whether a foreign company is considered “controlled” by a U.S. employer will depend on the interrelation of operations, common management, centralized control of labor relations, and common ownership or financial control of the two entities.

- **Foreign Laws Defense:** U.S. employers are not required to comply with Title VII if adherence to that requirement would violate a law of the country where the workplace is located. However, a U.S. employer cannot transfer an employee to another country in order to disadvantage that employee because of his/her sex.

- **Where to File:** An individual alleging a Title VII violation outside the U.S. should file an EEOC charge with the district office closest to his/her employer’s headquarters.