



WORKPLACE JUSTICE

## SEXUAL HARASSMENT IN THE WORKPLACE

### What Is Sexual Harassment?

Sexual harassment is a form of sex discrimination. As a result, when it occurs on the job it violates the laws against sex discrimination in the workplace, including Title VII of the Civil Rights Act of 1964.<sup>1</sup> Title VII applies to workplaces with 15 or more employees.

Sexual harassment is unwelcome behavior that happens to workers because of their sex. But for her or his sex, a worker would not have been targeted.

It includes:

- Unwelcome sexual advances
- Requests for sexual favors, or
- Hostile verbal or physical conduct that targets based on gender, whether or not sexual overtures are involved.

Sexual harassment occurs when:

- A person's submission to or rejection of sexual advances is used as the basis for employment decisions about him or her, or submission to sexual advances is made a condition of his or her employment (*quid pro quo* harassment), or
- Sexual conduct or gender-based hostility is sufficiently severe or pervasive that it creates an intimidating, hostile, or offensive work environment (*hostile work environment* harassment).

Sexual harassment may or may not involve any physical contact, and words alone may be enough to constitute either type of harassment. Conduct that includes unwanted sexual touching, sexual assault, or rape is not only illegal sexual harassment, but is also a crime.

Sexual harassment need not be motivated by sexual desire. Non-sexual conduct directed at a worker because of his or her gender, such as offensive or derogatory comments about women in general, or hostile and derogatory remarks because a woman is not conforming to stereotypes about how women should behave, can constitute sexual harassment. The federal Equal Employment Opportunity Commission (EEOC) considers harassment and other discrimination based on gender identity and sexual orientation to be forms of gender-based harassment that violate Title VII.<sup>2</sup> Some courts have held this as well; this is an evolving area of the law.<sup>3</sup>

### Incidence and Prevalence

- Sexual harassment remains a widespread problem, affecting women in every kind of workplace setting and at every level of employment. Surveys indicate that at least one quarter of all women have experienced workplace sexual harassment.<sup>4</sup> In Federal Fiscal Year 2015, almost one-third of all charges filed with the EEOC involved harassment, and nearly a quarter of those harassment charges involved sexual harassment.<sup>5</sup>
- No occupation is immune from sexual harassment, but the incidence of harassment is higher in workplaces that have traditionally excluded women, including both blue collar jobs like construction,<sup>6</sup> and white collar ones like medicine and science.<sup>7</sup> Women working in industries with a high proportion of low-wage jobs, such as food service and agriculture, also report high incidences of sexual harassment.<sup>8</sup>
- Few victims of harassment formally make a complaint to their employers or file a charge with fair employment agencies. Indeed, according to surveys 70 percent to close to 90 percent do not.<sup>9</sup> Women are reluctant to make allegations of sexual harassment for a number of reasons, including fear of losing their jobs or otherwise hurting their careers, fear of not being believed, the belief that nothing can or will be done about the harassment, and



embarrassment or shame at being harassed.<sup>10</sup>

- Women experience harassment by supervisors, co-workers, and even customers and clients.<sup>11</sup> Men also experience sexual harassment, and the harasser can be the same sex as the victim.<sup>12</sup>

## Harms from Harassment

- Sexual harassment often has a serious and negative impact on victims' physical and emotional health, and typically the more severe the harassment, the more severe the reaction. The reactions frequently reported include anxiety, depression, sleep disturbance, weight loss or gain, loss of appetite, and headaches. Researchers have also found that there is a link between sexual harassment and Post-Traumatic Stress Disorder.<sup>13</sup>
- Harassment can also cause substantial financial harm for victims. Victims often try to avoid the harassing behavior by taking sick leave or leave without pay from work, or even quitting or transferring to new jobs. This results in a loss of wages.<sup>14</sup>
- Employers also suffer significant financial losses from the job turnover, use of sick leave, and losses to individual and workgroup productivity that result from unchecked harassment.<sup>15</sup>
- Harassment can poison the work atmosphere and negatively impact other workers who are not themselves harassed.<sup>16</sup>

## Employer Liability

Employers can be legally responsible for sexual harassment against their employees and liable to them for damages. When an employer is liable for harassment depends on the type of harassment, and who committed it.

Harassment by a high-level supervisor:

- If the harassment results in a tangible employment action against the victim of harassment (such as firing, demotion, or a pay cut), the employer is automatically responsible.<sup>17</sup>
- If the harassment does not result in a tangible employment action, then the employer can also be automatically liable unless it can show that (1) the employer exercised reasonable care to prevent and promptly correct any harassment, and (2) the employee unreasonably failed to take advantage of the company's preventive or corrective measures or to otherwise avoid harm.<sup>18</sup> The employer might make this showing if, for example, it had a system for reporting harassment that was communicated to the employee and the employee failed to make such a report.

Harassment by a low-level supervisor, co-worker or third party:

- The employer is liable if the employer was negligent in allowing the harassment to occur—meaning that the employer knew or should have known about the harassment and failed to take immediate and appropriate corrective action.<sup>19</sup> This standard also applies to harassment by lower-level supervisors who have the authority to direct daily work activities (like determining work schedules and day to day work assignments), but not the authority to hire, fire, set pay, make promotions or demotions, reassign to significantly different work responsibilities, or take other tangible employment actions.<sup>20</sup>

When a plaintiff demonstrates the employer is liable for sexual harassment, she is entitled to be made whole through back pay (if she lost her job or had her pay cut as a result of the harassment) and monetary compensatory damages. In some cases, punitive damages are also available. Title VII caps total damages awards at \$50,000 to \$300,000, depending on the size of the employer, though uncapped damages are sometimes available under state law. Victims of harassment are also entitled to a trial by jury.<sup>21</sup>

1 See 42 U.S.C. 2000e-2; Meritor Savings Bank v. Vinson, 477 U.S. 57 (1986).

2 In Baldwin v. Dep't of Transportation, EEOC Appeal No. 0120133080 (July 15, 2015), the EEOC held that a claim of discrimination on the basis of sexual orientation necessarily states a claim of discrimination on the basis of sex under Title VII. See also U.S. EQUAL EMPLOYMENT OPPORTUNITY COMM'N (EEOC), WHAT YOU SHOULD KNOW ABOUT EEOC AND THE ENFORCEMENT PROTECTIONS FOR LGBT WORKERS, available at [https://www.eeoc.gov/eeoc/newsroom/wysk/enforcement\\_protections\\_lgbt\\_workers.cfm](https://www.eeoc.gov/eeoc/newsroom/wysk/enforcement_protections_lgbt_workers.cfm) (last visited Nov. 11, 2016).

3 See U.S. EEOC v. Scott Medical Health Ctr., No. 2:16-cv-00225-CB (W.D. Pa. Nov. 4, 2016) (denying defendant employer's motion to dismiss, finding that sexual orientation discrimination is a type of discrimination "because of sex," which is barred by Title VII); EEOC, EXAMPLES OF COURT DECISIONS SUPPORTING COVERAGE OF LGBT-RELATED DISCRIMINATION UNDER TITLE VII, [https://www.eeoc.gov/eeoc/newsroom/wysk/lgbt\\_examples\\_decisions.cfm](https://www.eeoc.gov/eeoc/newsroom/wysk/lgbt_examples_decisions.cfm) (last visited Nov. 11, 2016).

4 Langer Research, ABC News/Washington Post Poll: One in Four U.S. Women Reports Workplace Harassment (Nov. 16, 2011), available at <http://www.langerresearch.com/wp-content/uploads/1130a2WorkplaceHarassment.pdf>.

5 EEOC, SELECT TASK FORCE ON THE STUDY OF HARASSMENT IN THE WORKPLACE, REPORT OF CO-CHAIRS CHAI R. FELDBLUM & VICTORIA A. LIPNIC (June 2016), available at [https://www.eeoc.gov/eeoc/task\\_force/harassment/report.cfm](https://www.eeoc.gov/eeoc/task_force/harassment/report.cfm) [EEOC SELECT TASK FORCE REPORT]; EEOC CHARGES ALLEGING SEXUAL HARASSMENT FILED WITH THE



- EEOC FY 2010 - FY 2015, [https://www.eeoc.gov/eeoc/statistics/enforcement/sexual\\_harassment\\_new.cfm](https://www.eeoc.gov/eeoc/statistics/enforcement/sexual_harassment_new.cfm) (last visited Nov. 11, 2016).
- 6 Although women make up only 2.6 percent of workers in construction and extraction occupations, a U.S. Department of Labor study found that 88 percent of women construction workers experience sexual harassment at work. NAT'L WOMEN'S LAW CTR., *WOMEN IN CONSTRUCTION: STILL BREAKING GROUND* 2, 8 (2014), available at <https://nwlc.org/resources/women-construction-still-breaking-ground/>.
  - 7 Jagsi, R. et al., *Sexual Harassment and Discrimination Experiences of Academic Medical Faculty*, 315 J. AM. MEDICAL ASS'N 2120 (May 17, 2016), available at <http://jama.jamanetwork.com/article.aspx?articleid=2521958> (almost one-third of medical academic faculty responding to survey had experienced workplace sexual harassment); Clancy, K.B.H., et al., *Survey of Academic Field Experiences (SAFE): Trainees Report Harassment and Assault*, 9 PLoS ONE 7 (2014), available at <http://journals.plos.org/plosone/article?id=10.1371/journal.pone.0102172> (sixty-four percent of survey respondents reported they had personally experienced sexual harassment in the scientific fieldwork setting).
  - 8 RESTAURANT OPPORTUNITIES CTRS. UNITED, *THE GLASS FLOOR: SEXUAL HARASSMENT IN THE RESTAURANT INDUSTRY* (Oct. 2014), available at [http://rocunited.org/wp-content/uploads/2014/10/REPORT\\_TheGlassFloor\\_Sexual-Harassment-in-the-Restaurant-Industry.pdf](http://rocunited.org/wp-content/uploads/2014/10/REPORT_TheGlassFloor_Sexual-Harassment-in-the-Restaurant-Industry.pdf) (survey found that two-thirds of women workers and over half of men workers had experienced some form of sexual harassment from management; nearly 80% of women and 70% of men experienced some form of sexual harassment from co-workers; and nearly 80% of women and 55% of men experienced some form of sexual harassment from customers); HUMAN RIGHTS WATCH, *CULTIVATING FEAR: THE VULNERABILITY OF IMMIGRANT FARMWORKERS IN THE US TO SEXUAL VIOLENCE AND SEXUAL HARASSMENT* (May 2012), available at <https://www.hrw.org/report/2012/05/15/cultivating-fear/vulnerability-immigrant-farmworkers-us-sexual-violence-and-sexual> (documenting pervasive sexual harassment and violence among immigrant farmworker women); Waugh, I.M., *Examining the Sexual Harassment Experiences of Mexican Immigrant Farmworking Women*, 16 VIOLENCE AGAINST WOMEN 237, 241 (Jan. 2010), available at <http://vaw.sagepub.com/content/16/3/237.abstract> (eighty percent of female farmworkers in California's Central Valley reported experiencing some form of sexual harassment).
  - 9 Seventy percent of respondents surveyed in a recent poll said they did not report the sexual harassment they experienced at work to their employer. Huffington Post & YouGov, *Poll of 1,000 Adults in United States on Workplace Sexual Harassment* (Aug. 2013), available at [http://big.assets.huffingtonpost.com/toplines\\_harassment\\_0819202013.pdf](http://big.assets.huffingtonpost.com/toplines_harassment_0819202013.pdf); EEOC SELECT TASK FORCE REPORT, *supra* note 5, at 16; U.S. MERIT SYSTEMS PROTECTION BOARD, *SEXUAL HARASSMENT IN THE FEDERAL WORKPLACE: TRENDS, PROGRESS, AND CONTINUING CHALLENGES* 30, 33 (1995), available at <http://www.mspb.gov/netsearch/viewdocs.aspx?docnumber=253661&version=253948> [SEXUAL HARASSMENT IN THE FEDERAL WORKPLACE] (12 percent of victims reported harassment to supervisors; six percent took more formal action).
  - 10 See Fitzgerald, L.F., et al., *Why Didn't She Just Report Him? The Psychological and Legal Implications of Women's Responses to Sexual Harassment*, 51 J. SOCIAL ISSUES 117, 122 (1995); Cortina, L.M. & Berdahl, J.L., *Sexual Harassment in Organizations: A Decade of Research in Review*, 1 THE SAGE HANDBOOK OF ORGANIZATIONAL BEHAVIOR 469, 484 (J. Barling & C.L. Cooper eds., 2008).
  - 11 See 29 C.F.R. §1604.11(e).
  - 12 See *Oncale v. Sundowner Offshore Serv., Inc.*, 523 U.S. 75 (1998).
  - 13 Cortina, L.M. & Leskinen, E.A., *Workplace Harassment Based on Sex: A Risk Factor for Women's Mental Health Problems*, in VIOLENCE AGAINST WOMEN AND MENTAL HEALTH 139 (C. Garcia-Moreno & A. Richer-Rössler eds, 2013) (citing Dansky, B.S. & Kilpatrick, D.G., *EFFECTS OF SEXUAL HARASSMENT*, in SEXUAL HARASSMENT: THEORY, RESEARCH, AND TREATMENT 152 (W. O'Donohue ed., 1997)); Cortina & Berdahl, *supra* note 10, at 481.
  - 14 For example, one analysis found sexual harassment cost federal employees \$4.4 million between 1992 and 1994. SEXUAL HARASSMENT IN THE FEDERAL WORKPLACE, *supra* note 9, at 26.
  - 15 For example, the federal government lost \$327 million due to harassment from 1992 to 1994. *Id.*
  - 16 Cortina & Berdahl, *supra* note 10, at 481 ("job related-correlates include impaired team relationships, increased team conflicts, lowered team financial performance, lowered justice perceptions, cognitive difficulties (e.g., distraction) , and over-performance demands"). Decreased work group productivity was the largest single cost to the federal government in its 1990s survey of sexual harassment. SEXUAL HARASSMENT IN THE FEDERAL WORKPLACE, *supra* note 9, at 25-26.
  - 17 *Burlington Indus., Inc. v. Ellerth*, 524 U.S. 742, 765 (1998); *Faragher v. City of Boca Raton*, 524 U.S. 775, 807-08 (1998); EEOC, *ENFORCEMENT GUIDANCE ON VICARIOUS LIABILITY FOR UNLAWFUL HARASSMENT BY SUPERVISORS* (June 18, 1999), available at <https://www.eeoc.gov/policy/docs/harassment.html>.
  - 18 *Id.*
  - 19 See *Ellerth*, 524 U.S. at 759; *Faragher*, 524 U.S. at 799; 29 C.F.R. §1604.11(d).
  - 20 *Vance v. Ball State Univ.*, 133 S. Ct. 2434 (2013).
  - 21 42 U.S.C. §1981a (b), (c).

