

SEXUAL HARASSMENT/SEXUAL DISCRIMINATION

Sexual harassment is classified as a form of sexual discrimination under Title VII of the Civil Rights Act of 1964 and includes both verbal and physical conduct of a sexual nature.

SEXUAL HARASSMENT GUIDELINES/CHECKLIST OF TERMS AND CONCEPTS

- ___ The Equal Employment Opportunity Commission (EEOC) has adopted interpretive guidelines stating that harassment on the basis of sex - such as sexual advances for sexual favors - is behavior which is unwelcomed by the recipient and may be either physical or verbal in nature. Three criteria for sexual harassment are set forth:
 - ___ Submission to the sexual conduct is made either implicitly or explicitly a term or condition of employment.
 - ___ Employment decisions affecting the recipient are made on the basis of the recipient's acceptance or rejection of the sexual conduct.
 - ___ The conduct has the intent or effect of substantially interfering with an individual's work performance or creates an intimidating, hostile, or offensive work environment.
- ___ Decisions of various State and U.S. Courts have supported very broad interpretations of the kinds of behavior which may be the basis for a sexual harassment cause of action. While normal conversation and "by-play" intended for harmless joking was not classified as sexual harassment in early cases, more recent cases and expanded standards have created a greater likelihood that any comment, behavior, or material that contains a sexual reference may be deemed to be offensive to some individuals or groups of individuals may become a cause for action.
- ___ If the party who is subjected to sexual approaches, propositions, gestures, implications, innuendoes, stories, jokes, notes, cartoons or phrases, objects to same, the chances are greatly increased that the conduct could at least be perceived as an act of sexual harassment by that party, and may become a cause for action, even if that party participated in such by-play in the past.
- ___ Furthermore, if the party repeatedly makes his/her objections known with requests to "cut it out" or "leave me alone," etc., it further necessitates the supervisor to become involved in attempts to curtail the objected-to conduct.
- ___ The "unwanted" status of the action and the "persistency" by the acting party are two very aggravating characteristics which will increase vulnerability to sexual harassment charges and which will greatly increase degree of liability or wrongdoing. Management's awareness of sexual harassment, without corrective action, greatly increases management's vulnerability and liability.
- ___ "By-play" references to specific personal sexual attributes or specific personal sexual experiences are certainly likely to be identified as sexual harassment. Comments regarding physical body structure, virginity, etc., are highly likely areas for sexual harassment claims.
- ___ Examples of "verbal or physical conduct of a sexual nature" which may constitute harassment at the workplace include:
 - ... flashing of lewd or suggestive pictures or reading of pornographic material,
 - ... display of affection that is forward and not desired,
 - ... boisterous comments about sexual items/topics/actions/organs,
 - ... innuendoes about reputation - innuendoes about virginity,
 - ... unwelcome advances, or presentation of unwanted gifts which have sexual connotations,
 - ... requests for sexual favors,
 - ... the passing or posting of notes, cartoons, posters, or calendars which contain references to sex,
 - ... tying of sexual favors to employment,
 - ... tying of sexual favors to employment decisions (e.g., promotion),
 - ... intimidating conduct,
 - ... hostile conduct,
 - ... offensive conduct.
- ___ Double standards for males/females can lead to sexual harassment claims by individuals, such as where a company has "sexual suggestiveness" clothing standards for female but not for male employees, or where the record of past enforcement clearly indicates one-sidedness.
- ___ The following parties may be participants or "accused" parties, with accompanying liabilities, in sexual harassment incidents and cases:
 - ... companies and other employers (suppliers, customers, etc.),
 - ... individual supervisors,

SEXUAL HARASSMENT/SEXUAL DISCRIMINATION

- ... individual employees,
- ... labor unions,
- ... apprenticeship committees,
- ... joint consultation committees.

- ___ Those acting in either "individual" or "agency" capacities are both subject to the law.
- ___ Any of the above parties may be considered "parties to," "contributing parties," "accessories to," "condoning parties," etc., especially if there is an "awareness" or a "responsibility for awareness." A question often raised is, "COULD YOU, OR SHOULD YOU HAVE BEEN AWARE?", not just, "WERE YOU AWARE?"
- ___ Important questions in sexual harassment cases are: 1) Was the company, employer, union, supervisor, etc., aware of the alleged incident? If not, could they or should they have been? 2) Did they take IMMEDIATE OR PROMPT AND APPROPRIATE CORRECTIVE ACTION commensurate with their responsibility to all parties to correct or curtail the harassment?
- ___ Supervisors are strongly encouraged to pursue the following steps to reduce the liability of the company and the supervisor's personal liability in sexual harassment proceedings:
 - Document all incidents where sexual harassment is either explicitly or implicitly involved, and maintain extreme confidentiality. (Especially once objections are made.) Communicate upward to top-level managers and request assistance or guidance from top-level managers and EEO/Affirmative Action specialists and representatives whenever a potential problem situation arises. Do so promptly. Take some form of prompt, responsible, and appropriate action to "nip the problem in the bud." Maintain privacy and confidentiality in all such matters.

NOTE: (See the MARC Checklist for RESPONSE TO SEXUAL HARASSMENT INCIDENTS.)

- ___ Employees (male or female) working in "non-traditional" areas often perceive themselves as potential targets of alleged sexual harassment. Comments such as the following prompt such perceptions and have no part in the supervisor's phraseology-vocabulary. These comments greatly increase the likelihood that complaints regarding alleged sexual harassment will be found to have validity.
 - ... "He/She asked for it when he/she took the job."
 - ... "They knew it would be that way when they took the job."
 - ... "Boys will be boys and girls will be girls."
 - ... "What kind of man/woman would want a job like that anyway?"
 - ... "He/She made his/her own bed, now they will have to sleep in it."
 - ... "What do they expect?"
 - ... "Everyone knows it's always been that way."
- ___ The law requires the employer or its agent to take PREVENTIVE ACTION to prevent sexual harassment before and whenever incidents or alleged incidents occur. Employers are expected to confront the individuals involved, as quickly as possible, in a confidential manner, to:
 - ... clearly, straightforwardly, "affirmatively," and confidentially raise the subject,
 - ... express strong disapproval for actions which may be offensive or intimidating,
 - ... develop appropriate sanctions,
 - ... impress employees of their right to raise and how to raise the issue of harassment,
 - ... develop methods to sensitize all concerned,
 - ... inform all employees and supervisors that severe sanctions will be imposed for sexual harassment violators, up to and including the possibility of termination of employment.
 Employers should deal with all parties involved on a private and confidential basis.
- ___ The law requires employers to take CORRECTIVE ACTION that is "immediate and appropriate" when sexual harassment occurs. Ignorance of the activity on the part of supervision is a poor defense, even if the specific acts complained of were forbidden by the employer.
- ___ An excellent practice during job evaluations, job performance counseling, or disciplinary sessions is to privately ask each individual the following question (and document the answer): "Is there anything bothering you about this job?"
- ___ Remember, not only lawsuits and expensive settlements are involved in sexual harassment situations. Also at stake are:
 - ... company, supervisor, employee reputations,
 - ... loss of customers (customer relationships) and loss of suppliers (supplier relationships).

SEXUAL HARASSMENT/SEXUAL DISCRIMINATION

___ It is also important to remember that sexual relationships between consenting parties (employees), while perfectly acceptable to those participating, may be offensive to other employees or may be seen as linked to job promotion, advancement, etc. Parties other than the participants in the relationship may, therefore, feel sexually harassed. Participants in consenting types of relationships may be causing each other to neglect their personal job performance obligations through visiting or absence from the assigned work area. Supervisors should take private and confidential steps to address directly the job performance deficiencies caused by any such activities.

EEOC OFFICIAL TEXT

The EEOC has issued official guidelines which define sexual harassment as a form of sex discrimination under Title VII of the Civil Rights Act of 1964. They are: (Official Text)

Section 1604.11 Sexual harassment.

- a) **Harassment on the basis of sex is a violation of Section 703 of Title VII.* Unwelcome sexual advances, requests for sexual favors, and other verbal or physical conduct of a sexual nature constitute sexual harassment when, (1) submission to such conduct is made either explicitly or implicitly a term or condition of an individual's employment, (2) submission to or rejection of such conduct by an individual is used as the basis for employment decisions affecting such individual, or (3) such conduct has the purpose or effect of unreasonably interfering with an individual's work performance or creating an intimidating, hostile, or offensive working environment.**
- b) **In determining whether alleged conduct constitutes sexual harassment, the Commission will look at the record as a whole and at the totality of the circumstances, such as the nature of the sexual advances and the context in which the alleged incidents occurred. The determination of the legality of a particular action will be made from the facts, on a case by case basis.**
- c) **Applying general Title VII principles, an employer, employment agency, joint apprenticeship committee or labor organization (hereinafter collectively referred to as "employer") is responsible for its acts and those of its agents and supervisory employees with respect to sexual harassment regardless of whether the specific acts complained of were authorized or even forbidden by the employer and regardless of whether the employer knew or should have known of their occurrence. The Commission will examine the circumstances of the particular employment relationship and the job functions performed by the individual in determining whether an individual acts in either a supervisory or agency capacity.**
- d) **With respect to conduct between fellow employees, an employer is responsible for acts of sexual harassment in the workplace where the employer (its agents or supervisory employees) knows or should have known of the conduct unless it can show that it took immediate and appropriate action.**
- e) **An employer may also be responsible for the acts of non-employees, with respect to sexual harassment of employees in the workplace, where the employer (its agents or supervisory employees) knows or should have known of the conduct and fails to take immediate and appropriate corrective action. In reviewing these cases, the Commission will consider the extent of the employer's control and any other legal responsibility which the employer may have with respect to the conduct of such non-employees.**
- f) **Prevention is the best tool for the elimination of sexual harassment. An employer should take all steps necessary to prevent sexual harassment from occurring, such as affirmatively raising the subject, expressing strong disapproval, developing appropriate sanctions, informing employees of their right to raise and how to raise the issue of harassment under Title VII, and developing methods to sensitize all concerned.**
- g) **Other related practices: Where employment opportunities or benefits are granted because of an individual's submission to the employer's sexual advances or requests for sexual favors, the employer may be held liable for unlawful sex discrimination against other persons who were qualified for but denied that employment opportunity or benefit.**

* The principles involved here continue to apply to race, color, religion or national origin.

(End of Official Text)

1989 EEOC GUIDELINES ON SEXUAL HARASSMENT

In following the ruling in Meritor Savings Bank v. Vinson, 477 U.S. 57 (1986), the EEOC issued the 1989 Detailed EEOC Memorandum of Standards for Evaluating Sexual Harassment Charges. These 1989 guidelines are not binding upon the courts. However, EEOC investigators are likely to utilize them in their investigations to determine whether charges have merit.

The following considerations are contained in the EEOC guidelines concerning the question of Title VII violations:

- ___ Actionable sexual conduct must be "unwelcome." The EEOC memorandum states that ..."the distinction between invited, uninvited-but welcome, offensive-but-tolerated and flatly rejected sexual advances may be difficult to discern."
- ___ The EEOC will look at the record "as a whole" and to the "totality of the pertinent circumstances," on a case-by-case-basis. No one factor alone determines whether a particular conduct is a violation.
- ___ The EEOC will consider the timeliness of any complaint, especially when there are questions of welcomeness or credibility.
- ___ A "contemporaneous" complaint is one which is made while the harassment is ongoing or shortly after it has ceased, and such a complaint would be helpful to the charging party's case. It is not a necessary element of a claim, however.
- ___ The EEOC stresses that occasional use of sexually explicit language by one who later files a claim will not necessarily demonstrate that sexual conduct of others was welcome. Similarly, evidence concerning a charging party's general character of past conduct towards other persons, other than the accused harasser, will be found to have "limited, if any, probative value."
- ___ The EEOC may find harassment occurred based solely on the alleged victim's allegations if such account is sufficiently detailed and internally consistent "so as to be plausible."
- ___ However, lack of corroborative evidence, when such evidence logically would be expected to exist will undermine the charging party's allegation.
- ___ The EEOC will evaluate the harasser's conduct from the objective standpoint of a reasonable person under similar circumstances, and if the challenged conduct would not substantially affect the work environment of a reasonable person, it is unlikely that a violation will be found.
- ___ The EEOC notes that unless the conduct is "quite severe," a single incident or isolated incidents of offensive sexual conduct generally will not be found to create an abusive environment. Generally, the showing of a pattern is required to sustain a hostile environment claim.
- ___ However, intentional touching of the charging party's intimate body areas is sufficiently offensive to alter the employee's working conditions and constitutes a violation.
- ___ The combination of both verbal and non-intimate physical conduct is an aggravating or exacerbating factor and would increase the likelihood of finding of a violation.
- ___ The EEOC will consider incidents of sexual harassment directed at employees other than the charging party relative to the hostile work environment claim.
- ___ EEOC investigators are likely to ask the following questions in non-physical harassment cases:
 - 1) Did the alleged harasser single out the charging party?
 - 2) Did the charging party participate?
 - 3) What was the relationship between the charging party and the alleged harasser?
 - 4) Were the remarks hostile and derogatory?
- ___ In considering whether or not the employer is liable for supervisory harassment, the EEOC will consider heavily whether the employer had a strong policy prohibiting sexual harassment which was strictly enforced.
- ___ The EEOC will consider agency liability theory in cases where the employer knew or could have known about harassment by a supervisor and failed to take prompt action.
- ___ The EEOC will consider whether or not the employer provided an internal complaint procedure and the history of use of same, including if there was retaliation for use of same.
- ___ The EEOC will encourage employers, in proven and known cases of harassment to do ..."whatever is necessary to end the harassment, make the victim whole by restoring lost employment benefits or opportunities, and prevent the misconduct from recurring."
- ___ Prompt and thorough investigative action by the employer, followed by appropriate warnings or disciplinary action that would be reasonably expected to discourage continuation of the misconduct will very likely be considered as mitigating factors and would reduce likelihood of finding a violation against the employer.