

Preventing Sexual Harassment: A Fact Sheet for Employees

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 work place, how a workplace environment can become “sexually hostile,” how to avoid sexually harassing 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 document was prepared by David Kadue, an attorney with the Los Angeles office of Seyfarth, Shaw, Fairweather & Geraldson. It is designed to provide accurate and authoritative information in regard to sexual harassment, but is not intended to render legal advice. If legal advice or other expert assistance is required, the services of a competent professional should be sought.

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 such conduct is made either explicitly or implicitly a term or condition of an individual’s employment, or
- submission to or rejection of such conduct by an individual is used as a basis for employment decisions affecting such individual, or
- 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.”

Under the law, there are two basic kinds of sexual harassment. The first is when an employee suffers or is threatened with some kind of “pocketbook” injury. A supervisor or someone else with authority over the victim makes a “put out or get out” demand - “submit to my sexual requests or you will be fired, demoted, intimidated, passed over for a promotion, or in some other way made miserable on the job.” This type of sexual harassment is called *quid pro quo*, meaning “this for that,” and can be committed only by someone in the corporate structure who has the power to control the victim’s job destiny.

The second kind of sexual harassment is called “hostile environment.” A supervisor, co-worker, or someone else with whom the victim comes in contact on the job creates an abusive work environment or interferes with the employee’s work performance through words or deeds *because of the victim’s gender*. A sexually hostile work environment can be created by:

- discussing sexual activities;
- unnecessary touching;
- commenting on physical attributes;
- displaying sexually suggestive pictures;
- using demeaning or inappropriate terms, such as “babe;”
- using unseemly gestures;
- ostracizing workers of one gender by those of another;
- granting job favors to those who participate in consensual sexual activity; or
- using crude and offensive language.

When Does an Environment Become Sexually Hostile?

To some extent, a sexually hostile environment is one of those things that brings to mind the saying, “you know it when you see it.” Relatively trivial, isolated incidents generally do not create a hostile work environment.

Factors considered by courts in determining whether behavior has become severe enough or pervasive enough to create a hostile environment include:

- whether the conduct was physical or verbal;
- how frequently the conduct was repeated;
- whether the conduct was hostile and p=blatantly offensive;
- whether the harasser was a co-worker or a supervisor;
- whether the harassment was by more than one person; and
- whether the harassment was directed at more than one person.

Hostile environment sexual harassment was not found in cases where women were asked for a couple of dates by co-workers, subjected to only three offensive incidents over 18 months, or subjected to only occasional teasing or isolated crude jokes and sexually explicit remarks.

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

Is it Really Sexual Harassment?

Hostile environment cases are the most difficult type of sexual harassment 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. Courts now recognize that men and women

have different levels of sensitivity - conduct that does not offend most men might offend most women. Studies show that two-thirds of men surveyed would be flattered by a sexual approach in the workplace, for example, and only 15 percent would be insulted. The figures are reversed for women. This difference in reaction has led many courts to adopt a “reasonable woman” standard for judging cases of sexual harassment, rather than a “reasonable person” point of view. 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 is to avoid all sexually offensive 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 the behavior you have experienced or witnessed is sexual harassment, ask yourself these questions:

- Is this verbal or physical behavior of a sexual nature?
- Is the conduct offensive to the person it is directed toward?
- Is there unequal power between the two parties?
- Is the behavior being initiated only by one of the parties?
- Does the employee have to tolerate that type of conduct in order to keep his or her job?
- Is the conduct so pervasive or offensive that it interferes with the employee’s job and makes his or her environment unpleasant?

If the answer to any of these questions is “yes,” the conduct may well be sexual harassment.

How can You Tell If Conduct Is Unwelcome?

Only *unwelcome* conduct can be sexual harassment. Consensual dating, joking, and touching, for example, do not amount to harassment under federal law if they are not unwelcome or offensive to anyone in the workplace.

Gender-based 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 his or her conduct is unwelcome and that the victim is offended or made uncomfortable. It is very difficult for a harasser to make a court believe “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” when asked for a date and walks away has made her response clear.

Ambiguous rejection. Matters are more complicated when an offended employee fails to communicate. 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 still welcome. Employees have the right to end such relationships at any time without fear of retaliation on the job. However, because of the previous relationship, it is important that the unwelcomeness of further sexual advances be made very clear.

What not to do. Sending “mixed signals” can defeat a case of sexual harassment. Complaints have failed because the victim:

- 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;
- participated with others in vulgar language and sexual horseplay in the workplace.