

# Sexual Harassment in the American Workplace

by Beverly A. Williams, Esq.\*



Until recently, the absence of reports in the media about sexual harassment left the impression that the blight had been eradicated or at least substantially reduced. Recent high-profile, salacious allegations of misconduct at Uber, Fox News platforms, in Silicon Valley and law firms, signal that sexual harassment remains a significant stain on the American workplace.

Thanks to the courage of women like Wendy Walsh, Gretchen Carlson and others, the public now has a heightened awareness about sexual harassment. They stood up and complained about their mistreatment at the hands of executives and co-workers who held positions of power and authority. Walsh and Carlson (and the public at large) can thank their seasoned, media savvy employment attorneys, Lisa Bloom and Nancy Erika Smith for helping to raise awareness of the prevalence of workplace sexual harassment.

## A Sexual Harassment Primer

- Title VII of the Civil Rights Act of 1964 (Title VII)<sup>1</sup> is a federal law that prohibits workplace discrimination, including harassment and retaliation, because of race, color, sex, religion and national origin.
- Sexual harassment is a form of sex discrimination.
- Employers with 15 or more employees are covered by Title VII.<sup>2</sup>
- The harasser can be the victim's supervisor, a supervisor in another area, an agent of the employer, a co-worker, or a non-employee such as a client, customer, consultant or vendor.<sup>3</sup>
- Workplace harassment typically occurs when an employee's status or benefits are directly affected by intimidating, unwelcome conduct by a manager or person of authority.
- The victim does not have to be the person harassed, but can be anyone in the workplace or a work-related activity affected by the offensive conduct.<sup>4</sup>
- Unlawful harassment may occur without economic injury to, or discharge of, the victim.
- There are two types of sexual harassment:<sup>5</sup>
  1. Quid pro quo ("this for that" or "a favor for a favor") harassment is unwelcome sexual advances, requests for sexual favors as a condition of employment or to receive a benefit and other verbal or physical conduct of a sexual nature.

2. Hostile work environment is created when behavior alters the terms, conditions, and/or reasonable expectations of a comfortable work environment, or behavior that is discriminatory in nature.

➤ Notably, the victim and the harasser can be male or female, and the victim and harasser can be the same gender.

➤ Harassment does not have to be of a sexual nature, however, and can include offensive remarks about a person's gender, race, ethnicity, religion,

or other protected class.

For example, it's illegal to harass:

- A woman, by making offensive comments about women in general; or
- Catholics, Baptists, Muslims, or members of any other religion because of their religious practices and observances.<sup>6</sup>

## The Business Case for Preventing Harassment Generally

Employers, in all sectors, who focus on the bottom line and profitability or the achievement of organizational goals and objectives should not ignore the prohibitions of Title VII and similar state laws against harassment. The Equal Employment Opportunity Commission (EEOC), the federal agency charged with enforcing Title VII, has renewed its efforts to combat harassment in the workplace. According to the June 2016 Report of the Co-Chairs of the EEOC's Select Task Force on the Study of Harassment in the Workplace (Task Force Report), almost one third of the approximately 90,000 charges of discrimination filed with the EEOC included allegations of harassment.<sup>7</sup>

One of the EEOC's strategic enforcement priorities is "preventing harassment through systemic enforcement and targeted outreach."<sup>8</sup> The agency's goal is "to pursue systemic investigations and litigation and conduct a targeted outreach campaign to deter harassment in the workplace."<sup>9</sup> Accordingly, charges that involve harassment will receive priority treatment and receive a greater share of the agency's time and resources.<sup>10</sup>

In furtherance of these mandates, the EEOC issued the Proposed Enforcement Guidance on Unlawful Harassment (Guidance), a "companion piece to the Task Force Report."<sup>11</sup> The Guidance reaffirms the EEOC's position that employers have an affirmative duty to respond appropriately to complaints of conduct that could escalate to viable claims of harassment.

Significantly, filing charges of harassment with the EEOC may bring negative publicity, demoralize and embarrass employees, repel customers and clients, and adversely impact shareholder value. Remember, Gretchen Carlson reportedly received \$20 million and a public apology.

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1. Civil Rights Act of 1964 § 7, 42 U.S.C. § 2000e *et seq.* (1964).

2. 42 U.S.C. § 2000e(b)

3. *Harassment*, U.S. Equal Employment Opportunity Commission website: <https://www.eeoc.gov/laws/types/harassment.cfm>

4. *Ibid.*

5. 24 CFR 100.600 - Quid pro quo and hostile

environment harassment.

6. U.S. Equal Employment Opportunity Commission Questions and Answers: *Religious Discrimination in the Workplace*, January 31, 2011; [https://www.eeoc.gov/policy/docs/qanda\\_religion.html](https://www.eeoc.gov/policy/docs/qanda_religion.html)

7. Select Task Force on the Study of Harassment in the Workplace, Report of Co-Chairs, p. 2, June 2016, <https://www.eeoc.gov/eeoc/>

[task\\_force/harassment/report.cfm](https://www.eeoc.gov/eeoc/task_force/harassment/report.cfm)

8. U.S. Equal Employment Opportunity Commission Strategic Enforcement Plan FY 2013-2016, p.2 <https://www.eeoc.gov/eeoc/plan/sep.cfm>

9. *Ibid.*

10. *Ibid.*, p.4.

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Thus, it is important to be mindful that a harassment complaint may result in substantial monetary output for an employer. Consider how the cost of settlement, a loss at trial and attorney fees for the employer's counsel as well as attorney fees payable to the victim could affect the bottom line of a business.

## How to Avoid Harassment

- Adopt a comprehensive anti-harassment policy that contains a zero tolerance for harassment. A written sexual harassment policy should help employees know what conduct is not appropriate.
- Distribute the policy to every employee and maintain records that individuals have received the policy.
- Ensure that non-employee, third parties, i.e., clients, customers, consultants and vendors are aware of the policy.
- Apply the policy consistently.
- Every employee, including C-suite executives, should receive harassment training. No one should be exempt.
- Adopt a complaint procedure.
  - It should provide several ways to file a complaint, e.g. human resources, the victim's supervisor or a management employee that is not in the victim's chain of command and immediate dismissal for complaints made in bad faith.
  - If employees do not come forward to complain, anti-harassment policies and complaint procedures are worthless.
- Make it easy for employees to submit complaints by using varied means of communication.
- Investigate all complaints promptly and thoroughly using unbiased, objective investigators.
- Audit the anti-harassment policy and complaint procedure to ensure that the conduct has stopped and is not repeated.
- Immediately stop inappropriate language and conduct including unauthorized touching.
- Do not ignore formal or informal complaints of harassment.
- Do not protect offenders, especially repeat offenders.
- Do not guarantee confidentiality. The investigation may be used in litigation to demonstrate that appropriate measures were taken to address the complaint.
- Consider whether a "love contract" policy (in addition to the anti-harassment policy) will serve to limit sexual harassment complaints. A love contract is a document that consenting employees sign to confirm that they are in a voluntary, consensual, romantic relationship.
  - In its most recent Valentine's Day survey, CareerBuilder, the job search website, reports that workplace romantic relationships may be on the rise.<sup>12</sup>
  - Forty-one percent of employees have dated a coworker which is the highest percentage since 2007.<sup>13</sup>
  - One in five employees or 29 percent have dated someone in a higher position.

Finally, it is appropriate to address several misconceptions about sexual harassment.

11. Proposed Enforcement Guidance on Unlawful Harassment

12. *Number of Workers Reporting Office Romances at a 10-Year High, Finds Annual CareerBuilder Valentine's Day Survey*, CareerBuilder Press Release, February 9, 2017.

13. Ibid.

14. Fred C. Lunenburg, *Sexual Harassment: An Abuse of Power*, International Journal of Management, Business and Administration, Vol. 13, No. 1, p. 1 (2010).

## Sexual Harassment is Not:

### 1. Funny

Lewd, profane conduct and language and off-color jokes are not humorous. Sexual harassment is not a joke and is no laughing matter, especially for victims. Likewise, employers who do not take complaints of harassment of any type seriously will not find humor in the attendant financial and business consequences of unflattering media coverage, unfavorable litigation results and settlement amounts.

### 2. Easy for victims to avoid (and they do not have to do so).

Harassment can include offensive remarks about a person's gender or one of the other protected categories previously identified.

- For example, it's illegal to harass a woman, by making persistently, offensive comments about women in general, e.g., women are stupid or dumb or women are only good for one thing.
- Telling someone that his or her behavior is unwanted or offensive is an important first step in stopping harassment because it puts the person on notice, and gives the person the opportunity to change...**but it is not necessary.**

### 3. Conduct or behavior that must be endured or tolerated.

To avoid liability, employers should maintain a harassment-free work environment and respond promptly and appropriately to complaints.

### 4. Conduct or behavior that should be ignored by victims or coworkers.

Ridding workplaces of sexual harassment and any other form of illegal discriminatory conduct is everyone's responsibility. Men, as well as women, should speak up if they see or hear inappropriate conduct or commentary where they work or at work-sponsored events.

### 5. Limited to women. Men can be sexually harassed.

Many, if not most times, power is a factor in sexual harassment.<sup>14</sup> As women climb career ladders and shatter glass ceilings, they should take care not to abuse their power and authority.

## Conclusion

Everyone in the workplace, men and women, regardless of gender or sexual identity, executive and entry-level worker should adopt the following mantra: Treat people the way you want to be treated.

Before anyone engages in conduct in the workplace that may be unwelcome, and/or make someone uncomfortable, they should ask themselves whether they would want their loved ones, spouse, son, daughter, mother, father, grandmother or grandfather or grandchild to witness their behavior or be the victim of such behavior. Their conduct may constitute some form of actionable harassment. Hopefully, just the thought will serve as a deterrent.

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