

# How To Prevent Employee-on Employee Harassment Claims: Everything You Need to Know About What You (Probably) Aren't Doing



## SCHOOL LAW SEMINAR - ASBA



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# Today's Topics



- Preventing harassment
- Handling complaints
- Avoiding retaliation claims
- Scenarios

# Sexual Harassment Statistics



- In FY2019, the Equal Employment Opportunity Commission (EEOC) received 7,514 claims of sexual harassment – 10.3% of all charges.

# Sexual Harassment Statistics



- Recent study found 66% of victims were not aware of their workplace's policies regarding sexual harassment
- AND
- 50.4% were not aware of who they should contact if being harassed

# Sexual Harassment Defined



- Sexual Harassment is
  - Unwelcome sexual advances, or
  - Requests for sexual favors, or
  - Verbal or physical conduct of a sexual nature . . .
- When submission is:
  - Made a term or condition of employment
  - Used as basis for employment decisions
  - Has the purpose or effect of unreasonably interfering with performance or creating intimidating, hostile or offensive working environment

# Unwelcome Sexual Conduct



- “Quid Pro Quo”
  - Often an offer to exchange sexual acts for a job, a promotion, additional benefits, or not being fired.
  - It doesn’t need to be an express statement, threat, or offer.
    - ✦ An employee might feel pressured to submit to a high-ranking supervisor’s advances.

# Hostile Work Environment



- A hostile work environment can occur when conduct creates an environment that is so uncomfortable that it affects the person's employment.
- Conduct that might create a hostile environment:
  - Vulgar comments
  - Offensive sexual jokes
  - Offensive touching, including friendly pats, squeezes or pinches
  - Posting pornographic photos
  - Suggestive looks and leering

# Hostile Work Environment



- Someone may have a claim even though he or she was not personally targeted by the harassment.
- If someone is forced to work in a hostile environment because of sexual conduct by others, he or she may have a claim.
- Example –
  - A manager who requests sexual favors from certain female subordinates, and those that comply are given better work schedules and promoted more quickly than those who do not.



# To Prove Hostile Work Environment, Employee Must Show:



1. The employee is a member of protected group.
2. Unwelcome harassment occurred.
3. There is a causal connection between the conduct and gender.
4. The conduct was severe and pervasive enough to affect a term, condition, or privilege of employment.
5. If harasser not a supervisor – show employer knew or should have known and failed to act.
6. If harasser a supervisor – absolute liability by employer.

# 1. Member of a Protected Group



- Everyone is a member of a protected group by virtue of their gender.
  - Men can be victims of sexual harassment as well.
- It doesn't matter whether the victim and the accused are of the same or different gender.

## 2. What is unwelcome?



- The alleged harassment is viewed from a reasonable person standard.
  - If a reasonable person would have thought it was harassment, then it's likely going to be harassment.
  - If the accuser is the only person who could reasonably think he or she was harassed, then it's unlikely to be considered harassment.
  - Consensual relationships and interactions

## 3. Causal Connection



- The alleged harassment must have occurred because of the person's gender.
- If the accused treats both men and women equally poorly, it's probably not sexual harassment.

## 4. Severe and Pervasive



- The more severe the conduct is, the less pervasive it needs to be.
- The more pervasive the conduct, the less severe it needs to be.
- Examples –
  - One instance of grabbing may be severe enough.
  - One offensive joke is unlikely to be severe or pervasive enough.
  - Offensive jokes every single day for two years may be pervasive enough.

## 5. Employer Liability



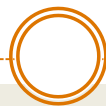
- An employer will likely be liable for “peer to peer” harassment if it knew or should have known about the harassment but failed to take prompt and immediate action.
- If the harasser is a supervisor then the employer is presumed to be liable.

# 5. Employer Liability



- If harassment by supervisor + tangible adverse employment action = strict liability for employer with no defense.
- If harassment by supervisor but NO tangible adverse employment action = presumed liability for employer but affirmative defense available.
- Affirmative defense = employer exercised reasonable care to prevent & promptly correct sexually harassing behavior AND employee unreasonably failed to take advantage of preventive/corrective opportunities provided by employer or to avoid harm.

# Preventing Harassment



- Develop a harassment policy
- Communicate the Policy
  - Post the policy
  - Distribute the policy to each employee
  - Periodic reminders about the policy
  - Repeat the policy in meetings
- Train all employees on how to utilize the system
- Promptly & thoroughly investigate upon receipt of a complaint – don't stick your head in the sand!
  - Investigate consistently.



# Handling Complaints



- Upon receiving a complaint, the District must conduct a prompt & thorough investigation
- Conduct investigatory interviews with:
  - The complaining employee,
  - All possible witnesses, and
  - The alleged harasser
- Get signed statements from each party and witnesses
- Treat the investigation as highly confidential, but do not make absolute assurances of confidentiality
  - CANNOT DISCIPLINE IF A WITNESS DOES NOT KEEP CONFIDENTIAL

# Investigative Process



- Inform complaining employee, witnesses, and alleged harasser of anti-retaliation policy.
  - Encourage any involved employees to report any perceived retaliation.
- Take prompt corrective action:
  - To end harassment, and/or
  - To avoid the perception of harassment or retaliation.
  - Avoid any measures that penalize the complainant.

# Retaliation



- Retaliation occurs when an employer takes an adverse employment action against the accuser because he or she complained of the sexual harassment.
- 39,110 claims of retaliation filed with the EEOC in FY2019. (53.8% of all charges filed.)

# Retaliation



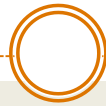
- Examples –
  - An upper-level administrator provides the most unpopular job assignments to an employee after the employee complains about her co-worker harassing her
  - An employee complains about her coworker's behavior, including massaging her shoulders, brushing against her repeatedly, and making uncomfortable sexual comments. The administrator tells her to let it go. When it happens again and she complains, the administrator starts writing her up. She has never been written up before.

# Retaliation



- Retaliation is illegal even if the underlying claim of harassment is not proven.
- Many employers find themselves liable for retaliation, even if they would not have been liable for the alleged sexual harassment.

# Is it Sexual Harassment?



- Samantha is the only female coach at Best District. Samantha's co-workers consistently fail to invite her to lunches where athletics business is discussed, fail to notify her of coach meetings, have made comments that the coaching world is not for women, and tell parents the athletics department was better off before Samantha was hired. Male coaches are not treated this way.
  - Is this sexual harassment? If so, what should the District do?

# Is it Sexual Harassment?



- Yes. This is an example of gender-based animosity
- Samantha's co-workers treat her differently and negatively because of her gender.

# Is it Sexual Harassment?



- Amy and Cheyenne are both paraprofessionals at Better District. Garrett is a vendor who comes into the District, and specifically, the building where Amy and Cheyenne work, several times a week. Over the past year, Garrett frequently whistles at Amy and Cheyenne and made comments about them “coming home with him.” On two different occasions Garrett actually groped Amy. Amy and Cheyenne have complained to Glenn, the principal, but Glenn either ignores them or says that Garrett “does a lot for the District.”
  - Is this sexual harassment? What should Glenn do?



# Is it Sexual Harassment?



- Yes. This is an example of a hostile work environment.
- It doesn't matter that Garrett is a vendor. It is still sexual harassment and Better District needs to take reasonable steps to stop Garrett from making these comments and touching any of the employees.
  - The District could still find itself liable even though Garrett is a vendor and not an employee

# Is it Sexual Harassment?



- Monica and Chandler are Assistant Superintendents at Best School District in Small Town, AR. The employees at BSD are a wild bunch and constantly make lewd comments and sexually-based jokes about both men and women. Several employees in the admin office, including females, participate and no one seems to be offended. Rachel and Phoebe, the bookkeeper and admin assistant, both female, often hear these comments and have complained to Monica that it makes them very uncomfortable.
  - Is this sexual harassment? If so, what should Monica do?

# Is it Sexual Harassment?



- Maybe. It's certainly a hostile work environment in the making.
- Monica and Chandler need to take steps to end the harassing behavior. Even though some employees do not seem to mind, it could still be considered a hostile work environment as to those who do (Rachel and Phoebe and their co-workers).

# Is it Sexual Harassment?



- Ted works at the elementary campus. He thinks that his new co-worker, Becca, is attractive. Every two to three weeks Ted asks Becca if she wants to get drinks after work. Becca politely declines and typically Ted says something like “Oh, come one, you’ll have fun!” This continues for several months and Becca gets increasingly annoyed. Unbeknownst to her, every week Ted and quite a few other co-workers, both male and female, meet for drinks as a group.
  - Is this sexual harassment? If so, what should the District do?

# Is it Sexual Harassment?



- Probably not. Ted, although he may be clueless about Becca not wanting to join him, is inviting both men and women.
- He does think she is attractive, but that by itself is not sexual harassment. He is not asking Becca to get a drink because of her gender. He's asking her because he asks everyone at work.

# Is it Sexual Harassment?



Until recently, Jeff, a teacher, and Terri, his female principal, were dating. However, Jeff is married to someone else. Jeff's wife found out about the affair and he ended it immediately. Terri was furious when Jeff broke it off, and now she won't stop bothering him. Jeff has complained to an Asst. Supt., but Terri claims that because she and Jeff were in a consensual relationship, her behavior does not rise to the level of sexual harassment.

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Does this present a legal risk, and if so, why?



# Is it Sexual Harassment?



Yes.

- The fact that the affair started out as consensual is irrelevant. Now that it isn't, Terri's behavior is inappropriate.
- Work relationships where one person is a supervisor to the other are particularly problematic. Terri, as the supervisor, has the authority to negatively impact Jeff's employment.
- Could also face hostile work environment claims because Terri won't stop bothering Jeff.



# Is it Sexual Harassment?



- Sheldon is the Principal of Best High School. Sheldon hired his long time friend Raj as an Assistant Principal. Raj and Leonard, a paraprofessional at BHS, sometimes work together. Raj thinks that he and Leonard have chemistry and asks if he wants to “Get drinks and come over” later and then winks at Leonard. Leonard politely turns him down, and Raj apologizes for making him uncomfortable. Several months later Leonard goes into Sheldon’s office and says that Raj solicited him and sexually harassed him one night. Sheldon, sticking up for his best friend, says “I can’t believe you would accuse Raj of such a thing! This is because Raj is gay isn’t it? I can’t have that kind of attitude in my bank so you need to find another job!”
  - Is this sexual harassment? What has Sheldon done wrong?



# Is it Sexual Harassment?



- No, but it is retaliation.
- Raj propositioning Leonard one time and then apologizing when Leonard says no may be awkward, but it is not severe or pervasive.
- Sheldon firing Leonard because he complained about potential sexual harassment is absolutely retaliation.
  - Sheldon will likely find himself liable for retaliation even though he would not have been liable for a sexual harassment claim.

# Questions?



**FOR MORE  
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