

# PREVENTING SEXUAL HARASSMENT AND OTHER WORKPLACE HARASSMENT

## A FACT SHEET FOR EMPLOYEES

### Inside This Fact Sheet You'll Find:

#### Definitions of Sexual and Other Workplace Harassment

- what harassing behavior is
- when a workplace environment becomes hostile
- how to tell if conduct is unwelcome

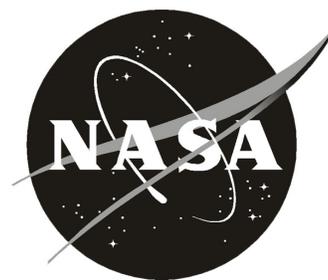
#### Employee Responsibilities for Preventing Sexual and Other Workplace Harassment

- appropriate responses
- participating in an investigation

#### Chronology of Development of Workplace Harassment Law

National Aeronautics and  
Space Administration

Lyndon B. Johnson Space Center



<http://www.nasa.gov/offices/oeod/index.html>

[www.nasa.gov](http://www.nasa.gov)

# THIS FACT SHEET . . .

explains what workplace harassment is under federal law and what it is not, the kinds of behavior that may be interpreted as harassment in the workplace, how a workplace environment can become “hostile,” how to avoid harassment of co-workers, how to deal with harassment if it arises, and what to do if you become involved in a harassment investigation.

This publication was prepared by David Kadue, a partner in the law firm of Seyfarth Shaw. It emphasizes not only explicitly sexual and gender-based harassment but also harassment that is based on protected statuses other than sex. This Fact Sheet provides accurate and authoritative information regarding harassment but is not legal advice. For legal advice or other expert assistance, seek the services of a competent professional.

## Why Do Organizations Have Policies Against Workplace Harassment?

One important factor is the law. Over the last 40 years workplace harassment law has expanded dramatically, affecting both the scope of conduct covered and the recoveries that courts can award. A chronology of legal developments appears elsewhere in this Fact Sheet. The developing law has made clear that employers must prevent and correct workplace harassment, and that an antiharassment policy is key to those efforts.

Yet employers typically go far beyond the law to forbid harassing behavior that the law itself does not necessarily reach, in order to maintain the organization’s good reputation, promote employee morale and productivity, and take a moral stand against demeaning behavior.

## What Is Workplace Harassment?

Workplace harassment rises to an unlawful level whenever unwelcome conduct on the basis of gender or other legally protected status affects a person’s job. Both employers and employees have a responsibility to prevent and stop workplace harassment.

**Sexual harassment.** Sexual harassment 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 the conduct is made either explicitly or implicitly a term or condition of an individual’s employment, or
- submission to or rejection of the conduct by an individual is used as a basis for employment decisions affecting such individual, or
- the conduct has the purpose or effect of unreasonably interfering with an individual’s work performance or creating an

intimidating, hostile, or offensive working environment.

The U.S. Supreme Court has explained that there are two basic types of unlawful sexual harassment. The first type involves harassment that results in a tangible employment action. An example would be a supervisor who fires a subordinate for refusing to be sexually cooperative. The imposition of this crude “put out or get out” bargain is often referred to as *quid pro quo* (“this for that”). This kind of sexual harassment can be committed only by someone who can effectively make formal employment actions (such as firing, demotion, and denial of promotion) that will affect the victim.

A second type of unlawful sexual harassment is referred to as *hostile environment*. Unlike a *quid pro quo*, which only a supervisor can impose, a hostile environment can result from the gender-based unwelcome conduct of supervisors, co-workers, customers, vendors, or anyone else with whom the victim interacts on the job. The behaviors that have contributed to a hostile environment have included:

- threats to impose a sexual *quid pro quo*;
- discussing sexual activities;
- telling off-color jokes;
- unnecessary touching;
- commenting on physical attributes;
- displaying sexually suggestive pictures;
- using demeaning or inappropriate terms;
- using indecent gestures;
- using crude language;
- sabotaging the victim’s work;
- engaging in hostile physical conduct; or
- granting job favors to those who participate in consensual sexual activity.

These behaviors can create liability if they are based on the affected employee’s gender and are severe or pervasive, as explained in the next section. Nonetheless, even if unwelcome conduct falls short of a legal violation, employers have moral and organizational reasons as well

as legal incentives to address and correct that conduct at its earliest stages.

Conduct constituting gender-based harassment is not always sexual in nature. A man’s physical assault on a woman can be sexual harassment if the assault was based on the woman’s gender, even though there was nothing sexual about the assault itself. Or suppose, for example, that men sabotage the work of a female co-worker. Even if the men don’t engage in sexual behavior, such as telling off-color jokes or displaying pornographic photos on the walls, their behavior is unlawful harassment if their behavior is based on the woman’s gender.

**Harassment on bases other than sex.** The *quid pro quo* type of harassment described above happens with respect to sexual harassment, and perhaps religious harassment (if an employer requires an employee to participate in religious activities as a condition of employment). The hostile environment type of harassment described above can happen with respect to any offensive conduct based on other protected statuses, such as race, color, religion, national origin, age, and disability. Federal law protects all of these statuses. State or local law often protects other statuses, such as sexual orientation.

In a hostile environment the same principles that apply to harassment based on gender apply to harassment based on other protected statuses. In each case, the questions will be whether there was unwelcome conduct, whether the conduct was based on a protected status, whether the conduct was severe or pervasive enough to affect employment, and whether the employer will be liable. These issues are addressed in the remainder of this Fact Sheet.

## When Does a Work Environment Become Hostile?

To create a hostile environment, unwelcome conduct based on a protected status

must meet two requirements: (1) it must be subjectively abusive to the person(s) affected, and (2) it must be objectively severe or pervasive enough to create a work environment that a reasonable person would find abusive.

To determine whether behavior is severe or pervasive enough to create a hostile environment, a judge considers:

- the frequency of the unwelcome discriminatory conduct;
- the severity of the conduct;
- whether the conduct was physically threatening or humiliating, or a mere offensive utterance;
- whether the conduct unreasonably interfered with work performance;
- the effect on the employee's psychological well-being; and
- whether the harasser was a superior in the organization.

Each factor is relevant—no single factor is required to establish that there is a hostile environment. Trivial, isolated incidents do not create a hostile work environment.

Courts have declined to find liability where women were asked for a couple of dates by co-workers, subjected to three offensive incidents over 18 months, or subjected to only occasional teasing or isolated crude jokes and sexual remarks.

Courts have upheld findings of unlawful harassment, however, where women were touched in a sexually offensive manner while in a confined work space, subjected to a long pattern of ridicule and abuse on the basis of their gender, or forced to endure repeated unwelcome sexual advances.

These examples simply illustrate how severe or pervasive discriminatory conduct must be to be legally actionable (and how blurred the line between lawful and unlawful conduct sometimes is). Given this uncertainty, prudent employers address incidents of unwelcome gender-based conduct long before they approach the level that would create a hostile environment.

## Is It Really Harassment?

Hostile environment cases are often difficult to recognize. The particular facts of each situation determine whether offensive conduct has “crossed the line” from simply boorish or childish behavior to unlawful harassment. One factor to consider is the reasonable sensibilities of the person affected. Courts have recognized that people of different races,

cultures, or genders have varying sensitivities to certain conduct. For example, sexual conduct that does not offend most reasonable men might offend most reasonable women. In one study, two-thirds of the men surveyed said they would be flattered by a sexual approach in the workplace, while only 15 percent would be insulted. The figures were reversed for the women responding. Varying levels of sensitivity have led some courts to adopt a standard for judging cases of sexual harassment that considers the reaction of a reasonable person belonging to the protected group in question.

Because the boundaries are so poorly marked, the best course of action is to avoid all conduct in the workplace that is potentially offensive on the basis of a person's protected status. Be aware that your conduct might be offensive to a co-worker and govern your behavior accordingly. If you're not absolutely sure that behavior is harassment, ask yourself:

- Is this verbal or physical behavior of a sexual nature?
- Is the conduct offensive to the persons who witness it?
- Is the behavior being initiated by the party who has power over the other?
- Might an employee feel compelled to tolerate that type of conduct in order to remain employed?
- Might the conduct make an employee's job environment unpleasant?

If the answer to these questions is “yes,” put a stop to the conduct.

## How Can You Tell if Conduct Is Unwelcome?

Only *unwelcome* conduct can be harassment. Joking, comments, and touching, for example, are not harassment if they are welcomed by the persons involved.

Conduct is *unwelcome* if the recipient did not initiate it and regards it as offensive. Some sexual advances are so crude and blatant that the advance itself shows its unwelcomeness. Similarly, use of a racist epithet or display of a noose (to suggest lynching) is so obviously offensive that no additional proof of unwelcomeness is needed. Often, however, the welcome-ness 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 conduct is unwelcome and makes the employee uncomfortable. It is

very difficult for a harasser to explain away offensive conduct by saying, “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.

**Ambiguous rejection.** Matters are more complicated when an offended employee fails to communicate clearly. All of us, for reasons of politeness, fear, embarrassment, or indecision, sometimes fail to make our true feelings known.

**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 these relationships without fear of retaliation on the job, so that conduct that once was welcome is now unwelcome. 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 of sexual harassment 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; and
- participated with others in vulgar language and horseplay in the workplace.

For these reasons, if you find conduct offensive, you should make your displeasure clearly and promptly known. Remember that some offenders may be unaware of how their actions are being perceived. Others may be insensitive to the reactions of fellow workers. Tell the harasser that the behavior is not acceptable and is unwelcomed by you. At the very least, refuse to participate in the behavior.

Even if you do not find the conduct personally offensive, remember that some of your co-workers might, and avoid behavior that is in any way demeaning on the basis of a protected status such as gender, race, or religion. In determining if your own conduct might be unwelcome, ask yourself these questions:

- Would my behavior change if someone from my family was in the room?
- Would I want someone from my family to be treated this way?

# Employee Responsibility for Preventing Workplace Harassment

## The Antiharassment Policy

You and your employer share a stake in maintaining a harassment-free work environment. It is important to learn about your written policy. A typical policy will contain these basic elements:

- a prohibition of described harassing conduct, often with examples that in themselves do not necessarily rise to the level of unlawful conduct;
- a statement of who is protected by the policy and who must abide by it;
- a warning that all employees, regardless of rank, must comply with the policy;
- a procedure that authorizes complaints of harassment through alternative channels of communication, to ensure that complaints can be investigated impartially as well as promptly;
- assurances that complaints will be investigated discreetly, preserving confidentiality to the extent that the needs of the investigation will permit;
- a provision that individuals found to have engaged in inappropriate conduct will be subject to discipline, up to and including dismissal; and
- a prohibition against retaliation by anyone against any employee who reports harassment or who cooperates with the investigation of that report.

All of these provisions serve the purpose of encouraging people to come forward—without fearing retaliation or sensing futility—to report information that will permit the organization to address perceptions of inappropriate conduct.

## Avoiding Offense: Seven Risk Areas

Situations that evolve into harassment lawsuits have tended to arise in common recurring factual scenarios. Here are seven scenarios to avoid:

**1. Vulgar language**—Many cases involve the use of vulgar language, such as “nigger” or “bitch.” While the mere utterance of an offensive epithet does not violate the law, any such epithet does contribute toward a hostile work environment and thus runs afoul of virtually any antiharassment policy.

**2. Work-related off-premises conduct**—Many cases have involved dysfunctional office holiday parties or other off-premises gatherings at which alcohol was served. Some employees, loosening their inhibitions in these situations, have assumed that workplace rules no longer apply in what

might seem to be a purely social setting. In fact, these settings often are best described as extensions of the workplace.

**3. Touching**—While physical touching can be consoling or otherwise effective in certain situations, “hands on” management often has gone too far. A single incident of sexual touching can create liability. Ask yourself, is touching one’s fellow employees (beyond a handshake) really necessary?

**4. Dating subordinates**—Not every workplace romance has a happy ending. A supervisor dating a subordinate is particularly risky. Sometimes the romantic overtures themselves are offensive, sometimes the overtures are seemingly accepted and only later are claimed to have been unwelcome from the outset, sometimes a relationship ends with bad feelings between the parties, and sometimes the relationship creates perceptions of favoritism that lead to the hostility of co-workers.

**5. Visual displays**—Posters, graffiti, and other displays can be offensive on the basis of a protected status even when they are not directed at a particular individual, and even when they existed in the workplace before the individual’s arrival. Examples of displays leading to litigation have included sexually suggestive computer screen savers, restroom graffiti, cartoons, obscenely shaped objects, and nooses.

**6. Talking dirty and telling jokes**—Discussing sexual details, whether they be autobiographical or based on literature or the news, is not necessarily a matter of gender discrimination. And jokes can relieve workplace tension and build comradery. Nonetheless, sexual gossip and joking often are offensive, and reactions can divide along gender or racial lines. Sexual and ethnic humor often imply offensive stereotypes.

**7. Email**—In many recent cases the most powerful evidence of harassing behavior has come in the form of email communications, which often are created in the erroneous assumption that the communication would remain private or that they would disappear once deleted. Emails in fact can be accessible for long periods of time to the organization that owns the equipment on which they are sent or received.

## Nine Excuses

Just as certain scenarios often lead to charges of harassment, there are certain standard (and often unpersuasive) responses to those charges. Here are some examples, and the fate that these responses often meet.

**1. “She (or he) is hypersensitive; how could anyone be offended?”** For the purposes of assessing harassment, conduct

is viewed from the perspective of the offended party. If the party’s reaction was that of a reasonable person of the party’s own sexual and ethnic background, then liability could follow even if the offender’s own closest associates would not find the conduct seriously wrong or even offensive.

**2. “I treat everybody this way.”** This excuse, while a good technical defense, creates the difficulty of portraying yourself as offensive to everyone. In any event, the lack of respect exhibited by an “equal opportunity offender” is going to run afoul of the typical antiharassment policy.

**3. “No one ever complained before, so how can the conduct be offensive?”** Some people do suffer in silence. They may have reasons to refrain from complaining, particularly when the offender is in a position of power. Unless the other party is initiating similar conduct, or otherwise affirmatively welcomes the conduct, there is no good reason to assume potentially offensive conduct is welcome.

**4. “Boys will be boys.”** Variants of this excuse include, “We work in a rough environment,” and “We were just treating her like one of the boys.” Although social context can affect the analysis of what is actionable, conduct that is acceptable in coarse environments often is not acceptable at work, and a court applying the law or an official applying an antiharassment policy will demand some sensitivity to individual differences. Conduct is not necessarily appropriate just because most employees view it as traditional or natural.

**5. “I didn’t mean any harm.”** Having a good heart is not a defense to a charge of harassment. It is only a factor in assessing the degree of discipline. The analysis focuses on the impact felt by the party being offended, not the impact intended by the offender.

**6. “No harm, no foul.”** Variants of this excuse include, “All I did was hurt her feelings, and it’s not like I drove her crazy or anything.” The law and the organization’s policy protect the psychological benefits of employment. Respect for co-workers and maintaining good morale are vitally important even if they involve only “feelings.”

**7. “I just read the policy again and I still don’t understand where you draw the line.”** Harassment, like pornography, is not subject to a precise definition, but it is important to know it when you see it. Bottom line: don’t go near the line.

**8. “I was only mentoring, trying to help with a personal crisis.”** Perceptions of power in the workplace can convert the most voluntary of relationships into an implied condition of employment. Even the best intentions can be misunderstood.

**9. “You cannot take that charge seriously; he (or she) is trying to hold us up.”** Maybe yes, maybe no. Understand that all complaints of harassment must be investigated, even if that is annoying to the person accused. Employers must investigate and take appropriate action, no matter where the complainant and the accused stand in the organizational hierarchy. Retaliation is wrong even if the allegation of harassment was mistaken.

## Respond Appropriately When You Encounter Workplace Harassment

If you experience harassment or witness it, you should make a report to the appropriate official. You do not have to report the incident to your supervisor first, especially if that is the person doing the harassing.

Remember that harassment is an organizational problem, and the employer wants to know about it so it can take prompt and appropriate action to ensure that no further incidents occur, with the present victim or other employees, in the future. Report incidents immediately, especially if they are recurring.

Employees who promptly report harassing conduct can help their organization as well as themselves. One comprehensive survey by the American Management Association reported that roughly two-thirds of internal reports result in some kind of discipline being imposed on the alleged harasser.

## Participating in an Investigation

All employees have a responsibility to cooperate fully with the investigation of a harassment complaint. Investigations will vary from case to case, depending on a variety of circumstances. While not every investigation will follow the same format, in every case you need to keep certain things in mind.

**Keep it confidential.** First, whether you are the accused or the complainant, or merely a potential witness, bear in mind that confidentiality is crucial. People have their reputations on the line, and you may not know all the facts. In the typical situation, the employer will keep the information it gathers as confidential as possible, and both the accused and the complainant will have a chance to present their cases.

**Don't be afraid to cooperate.** There can be no retaliation against anyone for complaining about harassment, for helping someone else complain, or for providing information regarding a complaint. The law protects employees who participate in any way in administrative complaints, and employer policies protect employees who honestly participate in in-house investigations. If you are afraid to cooperate, you should be very frank about your concerns when talking to the employer's investigator.

### Answer the questions completely.

**As the complainant**—The investigator will need to know *all* the details, unpleasant though they will be to recount. Be prepared to give the following information:

- the names of everyone who saw or heard the offensive conduct;
- the names of everyone who may have had a similar experience with the alleged harasser;
- a chronology—when and where each incident occurred;
- the reasons why you did not report the incidents earlier (if you have delayed at all); and
- your thoughts on what the employer should do to correct the problem and maintain a harassment-free environment.

The investigator may need to talk with you several times while other information is gathered.

**As the accused**—You must cooperate in the investigation, regardless of whether the allegations are true or false. You will be expected to answer questions completely and honestly.

You may be asked not to communicate with certain individuals during the investigation. You are not to retaliate against the person who made the complaint or against anyone who participates in the investigation. You must treat them in the same even-handed manner you would if no complaint had ever been raised.

Failure to abide by these rules may result in discipline against you, even if the investigation shows that no harassment occurred. Indeed, retaliation against the complainant may violate the law even if the underlying complaint cannot be substantiated.

You should expect to be asked to confirm or deny each specific allegation against you. It is possible that the allegations are exaggerations or lies, but it is important to remain calm and keep your responses factual. You may be asked to provide any facts that might explain why the complainant would exaggerate or fabricate charges. The investigator might need to talk to you several times while other information is gathered.

**As a potential witness**—You may be asked to provide details concerning alleged harassment between other employees. You have a duty to respond truthfully to the questions concerning these allegations.

The natural tendency after an interview by an investigator is to share with co-workers the more interesting details. Remember that the employer's policy is to keep the interviews as confidential as possible. Gossip about allegations can unfairly damage the reputation of co-workers.

**Keep the lines of communication open.** The object of the employer's investigation is to find out what happened. The investigator may conclude that harassment occurred, that it did not occur, or that it is impossible to tell what really happened.

As the complainant or as the accused, you have the right to know in general terms what the organization's conclusion is, and you

should ask if you are not told. Do not assume that the matter is settled until you have been told so directly.

If you are the complaining party, it is important to promptly report any new incidents of harassment that occur after your first talk with the investigator, and to tell the investigator about anything you may have forgotten or overlooked. Do not be discouraged by the fact that the employer takes time to act, and bear in mind that the more information you provide, the better chance there is for decisive action by the employer.

If you are the accused, do not be discouraged if the employer's investigation fails to completely clear your name. It is not uncommon to conclude that there is no way to tell what really happened. Remember, harassment complaints often involve one-on-one situations where it is difficult to determine the truth. Moreover, two people can have totally different perceptions of the same incident. The best you can do in such a situation is to avoid future situations where your words or conduct could be used as evidence of harassment.

**Expect adequate remedial action.** If the employer finds that inappropriate conduct occurred, expect remedial action. A variety of disciplinary measures may be used, including:

- an oral or written warning;
- deferral of a raise or promotion;
- demotion;
- suspension; or
- discharge.

The action taken in any particular case is within the organization's discretion. The precise nature of the discipline is often kept confidential to ensure that the privacy of individuals is protected. One aim of the action is to deter any future harassment. If you, as the complaining party, feel that the harasser is retaliating against you for complaining or is continuing to harass you, you should immediately report the conduct so that the employer can take whatever further action is appropriate.

If the employer lacks evidence to reach a conclusion about harassment, it still might take other actions, such as separating the parties, holding training sessions on preventing harassment, or having employees certify that they have read again and fully understand the antiharassment policy.

**Note:** Many organizations forbid conduct that falls short of unlawful harassment, and also impose discipline for conduct that comes to their attention as the result of a harassment complaint, even if the conduct does not violate the law or the organization's antiharassment policy. For example, a manager who makes sexual advances to subordinates might be disciplined for exercising poor judgment, even if the advances were welcome; and an employee who engages in a single incident of offensive conduct might be disciplined for inappropriate conduct, even if the incident was not severe enough to create a hostile environment. The fact that an employer imposes discipline in response to a complaint of harassment is not an admission, therefore, that any unlawful harassment has occurred.

# DEVELOPMENT OF THE LAW OF WORKPLACE HARASSMENT

## 1964...

The Civil Rights Act of 1964 becomes law. Title VII prohibits employment discrimination on the basis of race, color, religion, national origin, and sex, but does not mention harassment.

## 1967...

The Age Discrimination in Employment Act becomes law. It forbids employers to discriminate against individuals, over age 40, on the basis of their age, without mentioning harassment.

## 1968...

The Equal Employment Opportunity Commission (EEOC), the agency that enforces federal antidiscrimination laws, finds that an employer engaged in national origin discrimination by permitting employees to harass a Polish-born co-worker with demeaning conduct and making him the butt of "Polish" jokes. *Case No. 68-12-431*, 2 FEP Cases 295

## 1980...

The EEOC interprets Title VII sexual harassment as a form of sex discrimination. 29 C.F.R. §1604.11

## 1981...

A U.S. appeals court endorses the EEOC's position that Title VII forbids sexual insults and propositions that create a "sexually hostile environment," even if the employee lost no tangible job benefits as a result. *Bundy v. Jackson*, 641 F.2d 934, 24 FEP Cases 1155 (D.C. Cir.)

Another U.S. appeals court recognizes that African-American employees subjected to a "steady barrage of opprobrious racial comment" by co-workers and supervisors can sue for racial discrimination under Title VII, if the comments were more than sporadic. *Johnson v. Bunny Bread Co.*, 25 FEP Cases 1326 (8th Cir.)

## 1986...

Addressing sexual harassment for the first time, the U.S. Supreme Court rules that a woman who allegedly had sex with her boss because she feared losing her job if she did not, could sue for sexual harassment. The question is not whether her conduct was voluntary, but whether the boss's conduct was unwelcome, the Court explains. An employer is liable for sexual harassment committed by supervisors if it knew or should have

known about the conduct and did nothing to correct it, the Court adds. *Meritor Savings Bank v. Vinson*, 477 U.S. 57, 40 FEP Cases 1822

## 1989...

Addressing age harassment, a U.S. appeals court assumes that the principles forbidding sexual harassment also apply to claims of harassment based on age over 40. *Young v. Will County Dep't of Public Aid*, 50 FEP Cases 1089, 1093 (7th Cir.)

## 1990...

The EEOC issues a policy statement saying that sexual favoritism can be sexual harassment. Isolated incidents of consensual favoritism do not violate Title VII, but sexual favoritism does violate the law if advances are unwelcome or favoritism is so widespread as to be an unspoken condition of employment, the EEOC says.

The Americans with Disability Act (ADA) becomes law. It forbids employers to discriminate against individuals on the basis of a disability, without mentioning harassment.

## 1991...

A sexually hostile environment is found where new female employees encountered crude language, sexual graffiti, and pornography. Title VII is "a sword to battle such conditions," not a shield to protect preexisting abusive environments, the court declares. *Robinson v. Jacksonville Shipyards*, 760 F. Supp. 1486, 57 FEP Cases 971 (M.D. Fla.)

Because male and female sensibilities differ, a court adopts a "reasonable woman" standard for sexual harassment cases. The conduct in question—a man's unsolicited love letters and unwanted attention—might seem inoffensive to the average man, but might so offend the average woman as to create a hostile working environment, the court rules. *Ellison v. Brady*, 924 F.2d 872, 54 FEP Cases 1346 (9th Cir.)

The Senate Judiciary Committee considers the nomination of Clarence Thomas to Associate Justice of the United States Supreme Court. One issue is whether, while chairman of the EEOC, Thomas sexually harassed female assistant Anita Hill. The hearings spark debate over sexual harassment and what to do about it.

The Civil Rights Act of 1991 becomes

law, providing for jury trials and for increased damages under Title VII.

## 1993...

### Standard for hostile environment

In its second case on workplace harassment, the Supreme Court rules that a discriminatorily abusive work environment is unlawful even if it does not affect psychological well-being. It is enough if (1) the employee subjectively perceives a hostile work environment, and (2) the conduct was so objectively severe or pervasive that a reasonable person would find a hostile work environment. *Harris v. Forklift Sys.*, 510 U.S. 17, 63 FEP Cases 225

## 1998...

### Same-sex harassment

In its third case on workplace harassment, the Supreme Court holds that Title VII applies to "same-sex" harassment. An oil platform worker alleged that male co-workers subjected him to sexual assaults. The Court holds that even though Title VII does not specifically protect men from gender-based harassment by other men, the general principles of sex discrimination do apply to that conduct. This does not mean that Title VII creates a "general civility code for the American workplace," for "social context" and "common sense" will still control whether particular conduct can create a hostile environment for a reasonable person. *Oncale v. Sundowner Offshore Servs., Inc.*, 523 U.S. 75, 76 FEP Cases 221

### Employer's duty to prevent harm; employee's duty to avoid harm

In two more cases addressing workplace harassment, the Supreme Court holds that an employer is liable for an actionable hostile environment created by a supervisor who has immediate (or successively higher) authority over the victimized employee if the harassment results in a tangible employment action, such as a dismissal or a denial of promotion. The employer is also liable for a hostile environment created by a supervisor even where no tangible employment action has occurred, unless (1) the employer has taken reasonable care to prevent and correct sexual harassment, and (2) the employee unreasonably has failed to avoid harm. Proof that an employee failed to use the employer's complaint procedure usually will be enough to show unreasonable failure to avoid harm. *Burlington Indus. v. Ellerth*, 524 U.S. 742, 77 FEP Cases 1; *Faragher v. City of Boca Raton*, 524 U.S. 775, 77 FEP Cases 14

## 1999...

### Importance of employer's antiharassment policy

Addressing employment discrimination, the Supreme Court holds that an employer can avoid punitive damages for discrimination if it has implemented, in good faith, an anti-discrimination policy. This decision gives further incentive to employers to make and enforce antiharassment policies. *Kolstad v. American Dental Ass'n*, 527 U.S. 526

## 2000...

### Employee must use avenues available

A male employee lost his case because his "off the record" discussion did not imply harassment and he endured 15 unwelcome sexual propositions before reporting. *Casiano v. AT&T Corp.*, 213 F.3d 278, 286-87 (5th Cir.)

## 2001...

### Disability harassment

Ruling for a medical assistant harassed because of HIV-positive status, a U.S. appeals court becomes the first to rule that an employee can sue for disability-based harassment under the ADA. *Flowers v. Southern Regional Physician Servs., Inc.*, 247 F.3d 229, 232-33 (5th Cir.)

### An invitation to some sexual conduct does not excuse other unwelcome conduct

An assistant manager prevailed where her supervisor touched her breasts; her speaking in "sexually suggestive terms" did not show she welcomed having her breasts touched. *Beard v. Flying J, Inc.*, 266 F.3d 792 (8th Cir.)

### The First Amendment does not protect harassment

Female firefighters won a sexual harassment case when the court rejected the defense that male firefighters had a First Amendment right to view pornography in public areas of the fire station. *O'Rourke v. City of Providence*, 235 F.3d 713, 735 (1st Cir.)

## 2003...

### Offensive sexual banter can create hostile environment

A controversial U.S. appeals court opinion upholds a jury verdict for a female shop employee subjected to sexually explicit daily bantering by male co-workers, which showed general hostility to the presence of a woman in the workplace. *Ocheltree v. Scollon Productions, Inc.*, 335 F.3d 325 (4th Cir.) (en banc)

## 2004...

### Constructive discharge

The Supreme Court holds that an employee may quit and sue as if she had been fired if she quit in reasonable response to aggravated sexual harassment. The Court also holds, however, that the employer sometimes can avoid liability for a constructive discharge by establishing reasonable care to prevent and correct harassment and unreasonable failure by the employee to avoid harm. This defense is available when the constructive discharge results from co-worker harassment or unofficial supervisory harassment, but is not available when the constructive discharge results from an official company act, such as a humiliating demotion or job transfer. *Pennsylvania State Police v. Suders*, 542 U.S. 129

## 2005...

### Sexual favoritism can create a hostile environment

The California Supreme Court permits two women to sue on the basis that their boss, by favoring his female lovers, sent a message that women are "sexual playthings" and thereby created a workplace atmosphere "demeaning to women," even though neither woman experienced an unwelcome sexual advance or hostile conduct based on her gender. *Miller v. Department of Corrections*, 36 Cal. 4th 446

### Differential impact on women can be harassment

A U.S. appeals court permits women to sue on the basis that their angry male supervisor subjected them to hostile acts that, while facially gender-neutral, caused women more than men to have severe reactions, such as crying, feeling panicked, feeling physically threatened, quitting, and calling police. *EEOC v. National Educ. Ass'n*, 422 F.3d 840 (9th Cir.)

### Nickname harassment

A U.S. appeals court, in a case of national origin discrimination, rules that an employer's calling an employee by an Anglicized nickname instead of his Arabic given name, as the employee had insisted upon, supported a finding of a hostile environment, regardless of the defendant's innocent intent. *El-Hakem v. BJJ Inc.*, 415 F.3d 1068 (9th Cir.)

## 2006...

### Retaliation ban broadened

The Supreme Court expands liability for retaliation by holding that employers must not take any action against an employee who reports discriminatory treatment if the action might dissuade a "reasonable worker" from making or supporting a discrimination charge; the action need not be a formal change in employment status. *Burlington N. & Santa Fe Ry. v. White*, 548 U.S. 53

### Employers must prevent third-party harassment

A U.S. appeals court upholds a jury verdict for a female prison guard whose employer failed to police the sexual behavior of male prison inmates in her presence. *Freitag v. Ayers*, 463 F.3d 838 (9th Cir.)

### Mental disability harassment

A U.S. appeals court upholds a jury verdict for a depressed postal worker whose boss called him "crazy," ridiculed his seeing a psychiatrist and using medication, and labeled him a risk to the workplace. *Quiles-Quiles v. Henderson*, 439 F.3d 1 (1st Cir.)

### Veteran status harassment

A U.S. appeals court upholds a jury verdict for a police officer allegedly harassed for taking a long military leave. *Wallace v. City of San Diego*, 460 F.3d 1181 (9th Cir.)

## 2007...

### Isolated conduct not legally actionable

Four incidents, over 22 months, in which co-workers commented about employee's underwear, commented on a customer's private parts, and touched the employee's buttocks were not severe or pervasive enough to constitute a hostile environment. *Dar Dar v. Associated Outdoor Club, Inc.*, 2007 U.S. App. LEXIS 21795 (11th Cir.)

### No constructive discharge where employer reasonably responds

A constructive discharge claim failed because a reasonable person in the employee's position would not have found working conditions so intolerable that she was compelled to resign; the employer investigated and proposed solutions—a new schedule or relocation. *Brenneman v. Famous Dave's of Am., Inc.*, 507 F.3d 1139 (8th Cir.)

### National origin harassment

A claim of national origin harassment could proceed where co-workers' mocking comments, while

not mentioning employee's native India, told him this was America and he could go back where he came from. *EEOC v. WC&M Enters.*, 496 F.3d 393 (5th Cir.)

### Failure to discipline can create liability

A U.S. appeals court revived a hostile environment claim against a car dealership whose owner made derogatory comments about women and failed to discipline a male employee who called a female sales manager a "bitch." *EEOC v. PVNF, LLC*, 487 F.3d 790 (10th Cir.)

### Inadequate response may cause liability

A hostile environment claim could proceed because the employee had to speak to five different supervisors to elicit a management response after she first began complaining of sexual harassment. *Andreoli v. Gates*, 482 F.3d 641 (3d Cir.)

### Employer defense upheld

A hostile environment claim failed because the employer had a valid policy prohibiting harassment, its investigation was reasonable, and it imposed an adequate remedy—warning the alleged harasser, requiring counseling, and monitoring interactions—while the offended employee refused to give the remedy a chance. *Baldwin v. Blue Cross/Blue Shield of Ala.*, 480 F.3d 1287 (11th Cir.)

## 2008...

### Delay in reporting dooms claim

A claim of sexual harassment failed because the employee's 2-year delay in reporting her male supervisor was not excused by her desire to gather evidence or by her fear of retaliation. *Adams v. O'Reilly Auto., Inc.*, 538 F.3d 926 (8th Cir.)

### Dubious self-help tactics backfire

A female jailor fired after reporting sexual harassment lost her retaliation claim because, in pursuing her harassment claim, she illegally tape-recorded two superiors, providing a legitimate reason to fire her. Title VII does not license aggrieved employees to use dubious self-help tactics of workplace espionage. *Argyropoulos v. City of Alton*, 539 F.3d 724 (7th Cir.)

### Claim lost where plaintiff failed to report to persons named in policy

A supervisor lost her harassment claim even though another supervisor knew about the harassment and company policy required all supervisors to report sexual

harassment. The employer was not liable for harassment it did not know about and the plaintiff should have reported it to higher-level supervision. *Chaloult v. Interstate Brands Corp.*, 540 F.3d 64 (1st Cir.)

## 2009...

### Investigation witnesses are protected

The Supreme Court holds that the antiretaliation provision of Title VII protects an employee witness who alleged harassment in answering questions during her employer's internal investigation, even though she was not initiating a complaint herself. The Court reasons that the law's protection for opposing discrimination extends to someone responding to questions as well to someone who provokes the discussion. *Crawford v. Metropolitan Gov't of Nashville & Davidson County, Tenn.*, 2009 U.S. LEXIS 870

### Harassment based on association

White employees could sue for harassment they suffered because they had associated with and advocated for African-American co-workers. *Barrett v. Whirlpool Corp.*, 56 F.3d 502 (6th Cir.)

### Conduct not meant to offend can still harass

A woman could pursue a sexual harassment claim against a company permitting men to use gender-specific epithets, discuss sexual activities, and view pornography, where effect was felt more by women than men. *Gallagher v. C.H. Robinson Worldwide, Inc.*, 567 F.3d 263 (6th Cir.)

### Recognition of sex-stereotyping harassment

Though Title VII does not protect sexual orientation, both gay and straight employees can claim harassment based on sex-stereotyping, as where an effeminate male employee was ridiculed for his high voice, dressy clothes, filed fingernails, and clean car. *Prowel v. Wise Bus. Forms*, 579 F.3d 285 (3d Cir.)

### Suit by alleged harasser rejected

A manager fired for sexual harassment lost his case for sex discrimination despite protesting his innocence; the key issue was not whether he actually harassed but whether the employer in good faith believed he had. *McCullough v. University of Ark.*, 559 F.3d 855 (8th Cir.)

# Understanding Workplace Harassment

After having read this Fact Sheet, you should have a pretty good understanding of what workplace harassment is, how to prevent it, and what to do if you see it. For review and general guidance, here are some of the most commonly asked questions about harassment. For more specific information, contact the human resources office.

## **Q. Doesn't sexual harassment have to involve sexual advances or other conduct sexual in nature?**

**A.** No. It is just as unlawful to harass people with gender-based conduct of a nonsexual nature. Consider, for example, a supervisor who gives demeaning and inappropriate assignments (such as serving coffee, picking up dry cleaning, emptying a wastebasket) to a woman subordinate, but not to a man, because of the woman's gender. That conduct, if sufficiently severe or pervasive, could amount to harassment on the basis of sex even though the assignments are not sexual in nature. The key question here is not whether the unwelcome conduct was sexual in nature but whether it was based on the victim's gender.

## **Q. Isn't sexual harassment limited to situations where supervisors make sexual demands on subordinates?**

**A.** No. Sexual power plays by supervisors constitute the most easily understood form of sexual harassment. But harassment also occurs when supervisors, co-workers, or even nonemployees create a hostile environment through unwelcome sexual advances or demeaning gender-based conduct.

Regarding harassment by nonemployees (clients, customers, vendors, consultants, independent contractors, and the like), the employer's ability to police unwelcome conduct may be more limited than with employees. For example, it is easier to investigate and discipline an employee than a customer. The employer still, however, must take reasonable steps to address the situation once the matter comes to its attention.

## **Q. Can harassment occur without physical touching or a threat to the employee's job?**

**A.** Yes. Harassment may be purely verbal or visual (pornographic photos or graffiti on workplace walls, for example), and it does not have to involve any job loss. Any conduct based on a protected

status that creates a work environment that a reasonable person would consider hostile may amount to harassment.

## **Q. Can voluntary sexual conduct create harassment for others?**

**A.** Sometimes. A few courts have held that sexual horseplay or sexual affairs, even though welcome to all the participants, can create an environment hostile to third parties on the basis of their gender. Here as elsewhere, a good rule of thumb is, "when in doubt, cut it out."

## **Q. Isn't there a right to free speech?**

**A.** The First Amendment protects some forms of expression, even in the workplace, but the verbal threats and name calling often involved in harassment are not protected as free speech. For example, the First Amendment would not protect, as free speech, a supervisor's threat to a subordinate that she will lose her job if she does not sleep with her boss. Nor will the First Amendment protect verbal conduct that offends and intimidates other employees to the point that their work is affected, creating a hostile environment.

## **Q. Is sexual harassment of men, either by women or by other men, unlawful?**

**A.** Yes. Although sexual harassment generally is perpetrated by men against women, any form of unwelcome sexual advance against employees of either gender may be the basis for a case of unlawful sexual harassment.

## **Q. Can individuals be legally liable for harassment, or just employers?**

**A.** Courts generally hold that individual employees cannot be liable under Title VII. Some state statutes, however, do impose personal liability on individuals for perpetrating harassment, and harassers are personally liable under common law theories of liability in tort. While employers often provide a legal defense for employees in a lawsuit, an employer may be entitled to recover damages and legal

expenses from an employee whose unauthorized conduct created the problem.

## **Q. What about harassment of employees by clients or customers or vendors?**

**A.** Employers have a duty to take reasonable steps to protect employees from discriminatory harassment inflicted by third parties, such as customers. Employers do not have the same power to influence customers that employers have to influence employees, but must take whatever reasonable steps they can to prevent and correct harassment inflicted on employees by third parties.

## **Q. I'm so mad at the person who harassed me and at my employer that I just want to sue. Should I even bother to complain under my employer's antiharassment policy?**

**A.** Yes. You owe it to your employer and to your co-workers to report through the organization's channels to give the employer a chance to solve the problem promptly, before others are affected.

A prompt complaint is also something that you owe yourself, even if your sole concern is to sue your employer. If you fail to use internal procedures, the defense team will be sure to use that fact to argue that (1) the conduct complained of never occurred, (2) the conduct was not really unwelcome, (3) the conduct was not severe or pervasive enough to create a hostile work environment, or (4) the employer cannot be held responsible for preventing or correcting harassment that it did not know about.

Furthermore, under the 1998 decisions by the U.S. Supreme Court in *Elderth* and *Faragher*, if the employer has an effective antiharassment policy that the employee unreasonably fails to use, the employer may win a hostile environment lawsuit on that ground alone.

Failing to complain can be particularly harmful to your legal interests if you claim that harassment forced you to quit. It is hard to blame your employer for forcing you off the job if it could have corrected the conduct but was never given the opportunity to do so.