

# **CROSSING**

**THE**

**LINE**



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# **CROSSING THE LINE**

## **Participant Manual**

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## **INTRODUCTION**

Sexual harassment is a form of sex discrimination and, as such, is prohibited by Title VII of the Civil Rights Act of 1964—the federal law that outlaws discrimination in employment on the basis of race, creed, color, national origin, or sex.

Our policy against sexual harassment prohibits unwelcome sexual advances, requests for sex (with or without related threats or promises of favors or other benefits), or other verbal or physical sexual conduct that could have a harmful effect on your work performance or create a hostile or offensive work environment.

We are committed to providing you with a workplace that is safe, comfortable, and free from harassment. It is our policy to prohibit all forms of harassment at work, including harassment based on age, race, color, religion, sex, sexual orientation, national origin, disability, or veteran status.

All employees are responsible for complying with the non-harassment policy as well as the policy against sexual harassment. Failure to comply with these policies may result in disciplinary action up to and including termination.

## **DEFINITIONS AND EXAMPLES**

This background section contains legal references, examples, and clarifying information on various aspects of sexual harassment.

### **Hostile Working Environment**

This type of harassment involves repeated behavior of a sexual nature that creates a hostile, offensive, or intimidating work environment, i.e., jokes, comments, gestures, or touching.

In these situations, it is not necessary for the victim to prove actual loss of benefits (job, promotion, work assignments), or even that the jokes were directed at him or her. It is enough to demonstrate that the employer created or condoned a discriminatory work environment.

#### ***Legal References***

*A pattern of "sexual insult and innuendo" including "extremely vulgar and offensive sexually related epithets" (Katz v. Doyle, 1983). Circulation of a lewd cartoon combined with verbal abuse (Kyriazi v. Western Electric Co., 1979). Requirement to wear a sexually provocative uniform that encouraged lewd comments from the public (EEOC v. Sage Realty Corp., 1981).*

### **Repeated Conduct**

Actions that are hostile and offensive, however, may not always constitute sexual harassment. Most unwelcome behaviors must be repeated to meet the legal requirements to be considered sexual harassment. Even though the behavior may not constitute sexual harassment in the legal sense, chances are that it is unacceptable behavior in the workplace and considered to be misconduct.

### **Sex in Exchange for Continued Employment or Other Benefits**

This type of harassment involves demanding sexual favors in return for some tangible job benefit. It is known as quid pro quo harassment and is the one people generally think of when asked to define sexual harassment. It should be noted that submission to such conduct is made—either explicitly or implicitly—a term or condition of an individual's employment.

#### ***Examples***

*"Have sex with me, and I'll guarantee you a promotion, raise, better shift, etc."*

- ❑ **Implicit**—Change in attitude, performance evaluation, work assignments, etc., when an employee rejects the request or demand.
- ❑ **Explicit**—A specific request for sexual favors as a condition for continued employment.

## UNEQUAL POWER

It is important to note that quid pro quo sexual harassment occurs between a person with supervisory authority and a subordinate. In such cases, the person in authority is able to demand sexual favors from and provide job benefits for the person with less power. The person with less power has little control over a situation where unwelcome behavior of a sexual nature becomes part of the work environment.

Because males have historically held most positions of power in the workforce, charges of sexual harassment against men are the most common. This pattern has changed slightly. As more females move into positions of power, males are being subjected to sexual harassment in the workplace.

Another type of sexual harassment involves sexual demands by a member of the same sex. Although such cases are rarer than the other types, the courts and enforcement agencies have made it clear that all employees, regardless of their sexual orientation, have a right to a workplace free from sexual harassment.

## LEGAL LIABILITY

Sexual harassment can bring with it several different types of legal and financial liability.

The EEOC guidelines state that an employer "is responsible for its acts and those of its agents and management employees...regardless of whether the specific acts complained about were authorized or even forbidden by the employer and regardless of whether the employer knew or should have known of their occurrence" (29 CFR Section 1604.11(c), 1980).

### **Liability of the Employer for Acts of Managers**

The EEOC guidelines on sexual harassment favor strict liability in quid pro quo cases and several courts have agreed that when a manager makes sexual advances to a subordinate employee, the organization is presumed responsible for its manager's actions.

However, while there is strict employer liability for quid pro quo harassment, in "hostile environment" harassment cases liability arises if the employer knew or should have known of the harassment and failed to take appropriate corrective action (*Henson v. City of Dundee*, 1982).

The best way to prevent liability is for managers to know what constitutes sexual harassment and to avoid conduct that can be considered sexual harassment. If they become aware of a situation, they should take immediate action and follow through.

## **Employer Liability for Acts of Non-Employees**

The organization may also be responsible for the acts of non-employees where the manager knew or should have known of the harassing conduct but failed to take immediate and appropriate corrective action.

### **Note**

Management has a very strict responsibility to protect employees from harassment by customers, guests, and clients.

## **Employer Liability to Non-Participants**

When employment opportunities or benefits are granted because of an employee's submission to the manager's sexual advances or requests for sexual favors, the organization may be liable to other persons who were qualified for but were denied that opportunity or benefit.

### **Legal References**

*A woman who did not get a promotion given to a co-worker who was having an affair with the supervisor filed a successful claim of sexual harassment (Toscano v. Nimmo, 1983). The courts have also ruled that there is no need to prove the affair. Evidence of a sexual relationship through kisses, embraces, and amorous behavior may be sufficient to prove a sexual harassment claim (King v. Palmer, 1985).*

## **Individual Liability**

The courts have also ruled that individual managers may have to pay damages to the person they harassed. The courts have prohibited employers from paying the damages that are assessed against the individual harasser (*Kyriazi v. Western Electric Co., 1979*).

Under such rulings, in addition to possible loss of job, a manager may have to pay damages out of his or her pocket if found guilty of sexual harassment. The organization may defend or may hire counsel for the manager.

## **Liability for Acts of Non-Management Employees**

The organization may avoid liability for acts of co-workers where the manager knew of the conduct and the organization can demonstrate that it took immediate and appropriate corrective action.

### ***Legal References***

*In Barrett v. Omaha National Bank (1984), a female bank associate, Deanna Barrett, attended an out-of-town seminar with two male co-workers. She alleged that she was repeatedly sexually harassed by one of the co-workers during this trip. She issued a complaint to her superiors and corrective action was taken within four days of the initial complaint. The court found that the bank acted within a reasonable period of time and was responsive to the complaint.*

It is useful to compare the Barrett case with *Zabkowicz v. West Bend Co. (1985)*. In this case, Zabkowicz, a warehouse worker alleged she was subjected to sexual harassment by several co-workers over a long period of time and issued many complaints to her supervisors. The court found that Zabkowicz was sexually harassed over a three-year period. During this time, although she complained to her supervisors, they never conducted an investigation or disciplined a single harasser. It was determined that the company never took appropriate corrective action over the three-year period even though occasional meetings were held with the employees to discuss the incidents. These meetings were determined ineffective in halting the harassment. The court felt other steps should have been taken to resolve the situation. In the Barrett case, the court felt the actions in response to the complaint were timely and responsive; in the second case, the steps taken were not. In the first case, the company was not held liable; in the second case, it was.

### **State Claims**

Title VII claims of sexual harassment are limited to compensatory damages of back pay, reinstatement, and attorneys' fees. In a state court, however, an employee who wins a sexual harassment case can potentially recover not only compensatory damages but punitive damages for claims such as intentional infliction of emotional or mental distress, assault, battery, and invasion of privacy.

### ***Legal References***

*An employee wins damages for intentional infliction of emotional distress, assault, battery and invasion of privacy (Rogers v. Loews L'Enfant Plaza Hotel, 1981).*

*Breach of contract and intentional inflection of emotional distress are at issue in Lucas v. Brown & Root Co. Inc., 1984.*

## NOTES

## **SEXUAL HARASSMENT INVESTIGATIONS**

The following are guidelines for conducting interviews in connection with sexual harassment allegations.

### **Preparing for the Interviews**

Interviews should be conducted away from the employee's/witness's work area in a private office or conference room to ensure privacy and no interruptions.

Introduce yourself and the witness/note taker. Explain your purpose (without mentioning any names state that an allegation of sexual harassment has been made and you are conducting an investigation) and what is going to take place, giving the employee/witness the option to participate in the interview or not. Review the company's policy on sexual harassment and the law to ensure that the employee/witness has a clear understanding of what sexual harassment means.

If the employee/witness agrees to participate, document the interview reducing the statement to writing and ask him/her to sign it. Only include in the written document the facts, statements, or actions the employee/witness personally heard or observed. Do not include the employee's/witness's opinions or judgments in the signed statement. These should be included in separate notes. The interviewer and the note taker should also sign the statements as witnesses.

The employee/witness should be assured that the company will attempt to protect his/her identity but that it will have to reveal the allegations or use his/her information to the extent necessary to conduct a fair and thorough investigation of the matter. It is important to note that once charges of sexual harassment have been made known to a management employee, the employer is under legal obligation to investigate the charges and take appropriate action. The employee/witness should also be told that the employer will protect the reporter against retaliation, and that if anything of that nature should occur, the interviewer should be notified immediately. The employee/witness should also be advised that no conclusions have been reached as to the merits of the case and that feedback as to what, if any, corrective action is taken will be given only as appropriate. Finally, the interviewer should thank the employee/witness for coming forward.

### **Interviewing the Complainant**

Once a complaint of sexual harassment has been lodged, it is in the employer's best interest to promptly set up an interview with the complaining employee. It is important that the interview be conducted in a manner conducive where the employee feels free to express his/her concerns and is able to make a full disclosure of the problem(s). Consequently, it is important that the person conducting the interview be someone who is not associated with any of the events involved in the complaint. At the interview, the employee's statement should be taken, signed by the employee, and witnessed by the interviewer and/or the note taker. The statement should contain a complete chronology of the events and facts that led to the complaint.

**The following are some suggested questions to ask the complainant:**

- What is the sexual nature of the offensive conduct?
- Where did the offensive conduct take place, on or off company premises?
- When did the offensive conduct start, and has it been repeated? If so, when or how often?
- What are the names of the individuals who engaged in the offensive conduct? Are they supervisory or non-supervisory employees? Specify the times and places that each individual engaged in such conduct.
- Did the complainant tell the accused that his/her conduct was offensive? If not, why not?
- Did anyone else witness the offensive conduct?
- If the employee told someone of the offensive behavior, who did they tell and what action, if any, was taken to resolve the problem?
- Has the employee made known to those engaging in the offensive conduct that it was unwanted and that he or she wanted it to cease? If so, whom did he or she tell and when?
- What effect has the conduct had on the employee?
- Has the employee had any other problems with the individuals he/she accuses of engaging in the offensive conduct?
- Does the employee have any evidence such as notes, letters, tapes, or photographs that may support his/her allegations?
- If yes, will the employee provide the evidence to the investigator?
- Is the employee aware of the company's policy on non-harassment?
- Does the employee have any other background information or data that could be helpful in investigating his/her claims?

## **Interviewing the Alleged Harasser**

Interview the alleged harasser before interviewing any witnesses. At the outset of the interview, the company's policy on sexual harassment should be reviewed, including the fact that the complaining employee as well as the witnesses who came forward are protected against retaliation. Tell him/her that he/she has been referenced in regards to sexual allegations; however, at this juncture do not reveal, if possible, the name of the complaining employee. Review the charges with him/her and ask for his/her version of the facts.

If, at this juncture, the alleged harasser denies the charges or has a different version, review each allegation again in greater detail, revealing the identity of the complaining employee at this time if necessary, and prepare a statement that contains a point-by-point answer to each allegation. Some additional points to clarify with the accused are: a) did the complainant ever tell the accused that his/her behavior was unwelcome and b) did the accused do or say anything that might have been misconstrued as sexual harassment. At the conclusion of the interview ask the accused if there is any other information he/she thinks might be useful to the investigation. Review the statement with the accused before he/she signs it.

At this point, based on the accused's information, it will be necessary to determine whether to interview other witnesses to help resolve any credibility questions.

## **Interviewing Witnesses**

The witness should be advised that a co-worker has complained about being sexually harassed at work. Give an example of sexual harassment to ensure the witness understands the type of conduct being discussed. Again, identify the complaining employee only if it is necessary; however, during the course of the interview, the identity of the accused harasser should come from the witness, not from the interviewer.

### **Some points to clarify with the witnesses:**

- Have they seen or heard, or in any way been a witness to any sexually harassing conduct occurring at work? Toward any other employees or themselves? Describe what was seen or heard in detail giving dates, times, names of those engaging in the harassment, places, and any other possible witnesses.
- Do they have any other background information or data that could be helpful in the investigation?

At the conclusion of the interview, prepare a statement for signature. All statements taken from witnesses should contain an acknowledgment that the statement is given freely and without threat of reprisal or promise of benefit.

## **Conclusion**

After the investigation is completed, the evidence analyzed, and conclusions reached as to the merits of the complaint, you must determine what action, if any, is appropriate as a response. Refer to the company's policy against sexual harassment and then consider the following factors:

- ❑ The nature of the offense. Any penalty should be in keeping with the seriousness of the offense and consistent with the company's discipline policy.
- ❑ Before any penalty is imposed, the findings should be reviewed with the accused and they should be given a final opportunity to be heard on the matter.
- ❑ Review the accused's personnel record, specifically for prior complaints of a similar nature. Prior, similar complaints would justify more severe action.
- ❑ Action taken in previous cases with other employees. Consistency is the key.

Based on such factors, the appropriate action could consist of a verbal warning, a written warning placed in the employee's file, or termination. Whatever the action, it should be explained fully to the recipient and, if the recipient remains on the payroll, accompanied by a documented warning that in the future such misconduct will not be tolerated and will be met with the appropriate disciplinary action. The purpose is to end the harassment and correct any adverse, job-related effect it may have had on the complainant.

Follow up with the complaining employee, giving feedback on the investigation and/or action taken, if appropriate. Encourage the complaining employee to document any continuing harassment or retaliation and to notify the interviewer immediately.

Fully document the entire investigation and interview process including any background information or data gathered in addition to that contained in the various statements made by the complaining employee, alleged harasser, and witnesses. Maintain the investigation file separate from the disciplinary documentation entered into the accused's personnel file. This will be particularly important if you conclude that the complaining employee's allegations cannot be corroborated despite his/her insistence that the alleged harassment took place. Give feedback as to the facts of the case, conclusions, and recommendations for corrective action to appropriate management.

## PREVENTING SEXUAL HARASSMENT "DO'S AND DON'TS"

### For Management

- ❑ Ensure that your working environment is both professional and businesslike.
- ❑ Help sensitize employees to the problems surrounding sexual harassment in the workplace, including disruption of work, embarrassment suffered by co-workers, etc.
- ❑ Ensure that your employees are kept aware of their rights regarding filing equal opportunity complaints and that they are told that sexual harassment will not be tolerated in the workplace.
- ❑ Ensure that all employees are aware of and have access to copies of the company's policy against sexual harassment.
- ❑ Do not confuse and do not allow your employees to confuse routine comments and compliments between members of the opposite sex with sexual harassment.
- ❑ If an employee comes to you with a sexual harassment complaint, evaluate the complaint objectively, investigate, and take immediate corrective action, if appropriate.
- ❑ You are responsible for what you know, as well as what you should know, about the occurrence of sexual harassment in your workplace. Keep alert for the signs of the impact of sexual harassment, such as poor morale, requests for transfer, and sudden undue tension in the workplace. Initiate investigations and take prompt corrective action, if appropriate. Remember, you will be held accountable for failure to take appropriate action.

## **NOTES**

## COURT DECISIONS

### Employment Terms and Conditions

While the corrective action that an employer must take in response to unlawful harassment does not require termination of the harassing employee, it must be calculated to end the harassment. Merely requiring the harasser to apologize to the victim is not enough (*Davis v. Tri-State Mack Distributors Inc.* (1992, CA8) 1992 US App LEXIS 32109).

### Co-worker "Hostile Work Environment" Harassment

The requirement that an employer have notice of alleged hostile environment sexual harassment by an employee was satisfied by a victim's complaint to her immediate supervisor (*EEOC v. Hacienda Hotel* (1989, CA9) 811 F2d 1504, 50 BNA FEP Cas 877, 51 CCH EPD ¶ 39250; *Davis v. Tri-State Mack Distributors Inc.* (1992, CA8) 1992 US App LEXIS 32109).

Using the Chevron Oil Co. guidelines (¶ 53,000 et seq.) to apply retroactively the standards used in Ellison (below), the Ninth Circuit has held that discipline in the form of verbal warnings and counseling were an inadequate response to continuing sexual harassment, since these measures were not reasonably calculated to end the harassment. When harassing conduct is not extremely serious, a counseling session may be sufficient if the employer expresses strong disapproval, demands that the unwelcome conduct cease, and threatens more severe disciplinary action if the conduct does not cease. However, counseling is appropriate only as a first step, and if the harassment continues, further counseling alone is insufficient. Thus, an employer that merely continued counseling and informal measures when it was apparent that these efforts were ineffective to stop harassment was liable for the harassment (*Intlekofer v. Turnage* (1992, CA9) 1992 US App LEXIS 19400).

### Corrective Action Must Be Effective

An employer's corrective action attempt that makes a victim of sexual harassment worse off is automatically ineffective. For example, a transfer that reduces the victim's remuneration, increases his or her inconvenience or discomfort of work, or impairs prospects for promotion, would make the victim worse off. However, where an employee was on temporary assignment to the unit in which she encountered the harassment, returning her to her regular employment rather than transferring the offending supervisor did not make her worse off (*Guess v. Bethlehem Steel Corp.* (1990, CA7) 1990 US App LEXIS 16624).

The Ninth Circuit also finds that punishing a victim of harassment, by making him or her work in a less desirable location, does not constitute the corrective action required by an employer. Furthermore, the court concluded that Title VII requires employers to do more than merely request harassers to refrain from violating the statute. In evaluating the adequacy of the required corrective action by the em-

ployer, the court may also take into account whether it will persuade potential harassers to refrain from unlawful conduct (*Ellison v. Brady* (1991, CA9) 924 F2d 972, 54 BNA FEP Cas 1346, 55 CCH EPD ¶ 40520).

While the corrective action that an employer must take in response to unlawful harassment does not include termination of the harassing employee, it must be calculated to end the harassment. Merely requiring the harasser to apologize to the victim is not enough (*Davis v. Tri-State Mack Distributors, Inc.* (1992, CA8) 1992 US App LEXIS 32109).

### **Freedom from Harassment in the Workplace**

As under Title VII (¶ 20,000 et seq.), sexual harassment in the workplace is actionable under the FEP law if it is directly linked to the grant or denial of an economic quid pro quo, or if the conduct has the purpose or effect of unreasonably interfering with an employee's work performance or creating an intimidating, hostile, or offensive working environment. The issue of whether sexual harassment is severe or pervasive is essentially a question of fact for the jury to resolve, and the jury's finding is not to be disturbed on appeal unless it is clearly erroneous (¶ 90,863). For example, evidence that the employer routinely subjected the sole female employee present at sales meetings to obscene language and sexual innuendo, demeaned other female employees in conversations with the complaining employee, and allowed a sexually demeaning attitude toward women to pervade the whole sales operation in the form of gender-based discrimination in assignments and hostile conversations about women was enough to enable the jury to believe reasonably that the offensive conduct was sufficiently severe or pervasive to alter the conditions of employment and create an abusive working environment.

The Ninth Circuit has determined that Arizona law would not require an employer defending a common law contract claim alleging a wrongful discharge in violation of an agreement to discharge only for cause, to prove that the employee actually engaged in sexual harassment prior to terminating him. An employer that conducted an adequate investigation of the harassment complaint and terminated the employee based on a good faith belief in his unlawful conduct was entitled to summary judgment on the common law issue, given the state's strong public policy against such harassment (*Ashway v. Ferreligas Inc.* (1991, CA9) 1991 US App LEXIS 10769 (unpublished)).

A cause of action for intentional infliction of emotional distress is preempted by the Federal Tort Claims Act if the cause of action is against a federal employee acting within the scope of his employment. A member of the U.S. Army who was assigned to a college campus ROTC program was acting within the scope of his employment when he allegedly fired an employee in retaliation for her complaints of sexual harassment by another Army officer. Since the employee had not followed jurisdictional administrative procedures under the FTCA, her suit was dismissed as to that claim (*McHugh v. University of Vermont* (1991, DC Vt) 758 F Supp 945, 56 BNA FEP Cas 954, 56 CCH EPD ¶ 40823, *affd* (CA2) 59 BNA FEP Cas 43).