Department of Recreation, Park & Tourism Administration
Western Illinois University

RPTA 323: Administration of Leisure Services II

Sexual Harassment

The following is based on training materials for supervisory employees posted on the WIU Office of Equal Employment Opportunity web page (www.wiu.edu/equal_opportunity_and_access/).

Harassment of any kind is bothersome, demeaning, irritating, and annoying behavior. *Sexual harassment* is specifically harassment of a sexual nature. Most sexual harassment is simply disrespectful behavior toward others, whether female or male, supervisors, subordinates or peers. Disrespectful behavior in the workplace affects everyone, even those not directly involved.

Adults are responsible for their own behavior, including changing behavior that is unacceptable in the workplace. Changing unacceptable workplace behavior involves two steps:

1. Knowing that specific behavior is unacceptable and why.
2. Understanding the consequences of engaging in or failing to change that behavior.

The courts allow very little wiggle room when dealing with sexual harassment, which means the consequences of sexually harassing workplace behavior can be quite harsh. This applies to both employees who engage in sexual harassment and to employers who fail to take the steps necessary to prevent it. Employees may face termination and career damage; employers may face significant financial penalties and government surveillance. It is therefore very important that you learn to recognize and avoid behaviors that may be regarded as sexually harassing. It is very important that you learn what to do if you encounter unwelcome conduct of a sexual nature at work.

Court Decisions on Sexual Harassment

The U.S. Supreme Court has consistently supported employee claims against employers who fail to prevent sexually harassing behavior. In June 1998, the Court handed down two landmark decisions that clarified the liability standards for sexual harassment. These two decisions established stricter rules for determining employer liability for sexually harassing behavior by supervisors toward employees under their authority.

Under these two decisions, an employer is legally responsible for sexual harassment by a supervisor:

1. Absolutely when the harassment leads to a *tangible employment action* (e.g., demotion, decreased compensation, significantly different work assignments, or termination).
2. Presumptively even in the absence of a tangible employment action, unless the employer can prove *both* that it has taken reasonable care to prevent and correct promptly any sexually harassing behavior (e.g., by widely disseminating an effective sexual harassment policy and complaint procedure) *and* that the employee "unreasonably failed to take advantage of any preventive or corrective opportunities provided by the employer or to avoid harm otherwise."

These U.S. Supreme Court decisions have several effects. The first and most significant is to make employers responsible for their supervisors' sexually harassing behaviors in the workplace. The second effect is to make employees responsible for reporting sexual harassment in accordance with the employer's policy and complaint procedure, provided that the employer has (a) properly publicized the policy and procedure and (b) consistently and fairly enforced them. The third effect is to make the creation, distribution, and enforcement of a sexual harassment policy the most effective defense available to employers against allegations of workplace sexual harassment.

Another U.S. Supreme Court decision, delivered in June 2004, held that an employer has no legal recourse when a supervisor's unlawful harassment includes an "official act" that causes an employee to quit (constructive discharge). "Official acts" include such things as "a humiliating demotion, extreme cut in pay, or transfer to a position in which the employee would face unbearable working conditions." However, if no

"official act" was involved, an employer may be able to defend itself by demonstrating that it exercised reasonable care to prevent and promptly correct any wrongful behavior and that the employee unreasonably failed to take advantage of complaint procedures or other preventive opportunities provided by the employer.

A fourth U.S. Supreme Court decision, issued in June 2006, dealt with retaliation by an employer against an employee who reports or complains about sexual harassment. In this case, a woman employed by a railroad complained about sexual harassment, after which she was reassigned to a less desirable job. No wage reduction occurred, but the new job involved much harder, dirtier work. The worker filed a complaint with the Equal Employment Opportunity Commission (EEOC), alleging that her reassignment was retaliation by the employer. The worker later filed a second retaliation complaint, alleging that the employer kept her under surveillance following her original retaliation complaint. Shortly after filing the second retaliation complaint, the worker was suspended without pay for 37 days. When this case reached the U.S. Supreme Court, the Court ruled unanimously that the employer had violated the anti-retaliation provisions of Title VII of the Civil Rights Act, which make it illegal to try to deter an employee from filing a complaint. The Court held that reassignment or unpaid suspension were clearly meant to act as deterrents.

As a general rule, courts have consistently held employers responsible for sexual harassment if employers knew, or should reasonably have known, about the sexually harassing behavior but failed to take immediate and appropriate corrective action. Such action might include ending the harassment, preventing future harassment, and taking appropriate disciplinary action against any offending employees.

How Common is Workplace Sexual Harassment?

Sexual harassment is common throughout the workplace, in all occupations and professions, educational backgrounds, age, racial and ethnic groups, and income levels. While the majority of reported cases of sexual harassment involve a male harassing a female, such cases can also involve a female harassing a male or either men or women harassing members of their own sex. In 2009, the EEOC received 12,696 complaints at the Federal level about sexual harassment, approximately 16% of which were filed by males.

Workplace sexual harassment is particularly troublesome because at work some people have authority over others. Authority can lead to coercion. People depend on their jobs, making it much more difficult for them simply to go elsewhere. At work people have to work where they are assigned. But this does not mean they must submit to harassing behavior by supervisors or peers.

The Law on Sexual Harassment

Sexual harassment law in the United States has developed over the past four decades. Sexual harassment is a form of employment discrimination prohibited under Title VII of the Civil Rights Act of 1964, as amended. It falls under the category of discrimination based on sex.

The law describes two different forms of sexual harassment: *quid pro quo* and hostile work environment.

<u>Quid Pro Quo Sexual Harassment</u>

Quid pro quo is Latin for "this for that" or "something for something" and refers to an exchange. In this case, the exchange is between employees, where one is asked to provide sexual favors in exchange for something else, such as favorable treatment in work assignments, pay or promotion.

> Examples of *quid pro quo*: "Have sex with me and you will get promoted" or "Have sex with me or you won't get promoted."

Quid pro quo is usually more severe and occurs less frequently than hostile work environment sexual harassment (see below). *Quid pro quo* occurs when employment decisions and conditions are based upon whether an employee is willing to grant sexual favors. Hiring, promotions, salary increases, shift or work assignments, and performance expectations are some of the working benefits that can be made conditional on sexual favors.

A person does not have to demonstrate that he/she suffered an economic loss (e.g., been denied a promotion or a raise) to prove *quid pro quo* sexual harassment. It's enough to show a threat was made or reasonably implied.

According to federal guidelines regarding sexual harassment, *a single sexual advance may constitute harassment if it is linked to the granting or denial of employment benefits.* The harassment does not have to occur more than once to prove quid pro quo sexual harassment.

Hostile Work Environment Sexual Harassment

A hostile work environment is one in which unwelcome conduct of a sexual nature creates an uncomfortable work environment for some employees. Examples of this conduct may include sexually explicit talk or emails, sexually provocative images, comments on physical attributes or inappropriate touching.

The following example could be construed as hostile work environment sexual harassment.

> Mandy has a habit of leaning in close to Rachel and brushing her hand against her thighs when they are working at a shared workstation. Rachel has brushed her away and asked her to stop several times, but Mandy continues to annoy her.

Mandy and Rachel are co-workers, and Mandy is not asking Rachel to exchange sexual favors for favorable working conditions, so her behavior is not *quid pro quo* sexual harassment. It could, however, be considered hostile work environment sexual harassment.

Here are lists of several types of risky types of behavior that could be considered as creating a hostile environment and therefore as sexual harassment, depending on the circumstances.

Risky verbal behaviors

- derogatory comments of a sexual nature or based on gender
- comments about clothing, personal behavior, or a person's body
- sexual or gender-based jokes or teasing
- requests for sexual favors
- repeated requests for dates
- terms of endearment, such as "honey," "dear," "sweetheart," "babe"
- references to an adult as "girl" or "boy," "doll" or "hunk"
- sexual innuendoes or stories
- grunts, wolf whistles, catcalls, hoots, sucking noises, lip-smacks and animal noises
- tales of one's partner's sexual inadequacies or prowess
- tales of sexual exploitation
- graphic descriptions of pornography
- obscene phone calls or emails
- transmission of emails, text messages, tweets, blogs or social networking of a sexually graphic, threatening or vulgar nature when related to or accessible by associates
- lies or rumors about a person's personal or sex life
- puns such as turning work discussions to sexual topics

Risky non-verbal behaviors

- staring
- looking up and down ("elevator eyes")
- making derogatory gestures of a sexual nature

- giving sexually suggestive looks
- making facial expressions of a sexual nature; winking, licking lips

Risky physical behaviors

- leaning over, invading a person's space
- inappropriately touching a person or person's clothing
- "accidentally" brushing sexual parts of the body
- indecent exposure, mooning or flashing
- blocking someone's path with the purpose of making a sexual advance
- uninvited neck massaging
- deliberately touching sexually, or brushing up against, or pinching
- pressing or rubbing up against a person
- stalking
- grabbing
- kissing, hugging, patting, stroking
- actual or attempted sexual assault

Risky visual behaviors

- posters, cartoons, drawings, calendars, pinups and pictures of a sexual nature
- electronic bulletin boards/computer graphics of a sexual nature
- inappropriate, sexually expressive or revealing clothing
- knick-knacks and other objects of a sexual nature

EEOC Definition of Sexual Harassment

The EEOC defines sexual harassment in the workplace as:

> Unwelcome sexual advances, requests for sexual favors, and other verbal or physical conduct of a sexual nature constitute sexual harassment when: (1) submission to such conduct is made either explicitly or implicitly a term or condition of an individual's employment, (2) submission to or rejection of such conduct by an individual is used as a basis for employment decisions affecting such individual, or (3) such conduct has the purpose or effect of unreasonably interfering with an individual's work performance or creating an intimidating hostile or offensive working environment.

Most federal courts, including the United States Supreme Court, use the EEOC's definition as a test for determining if sexual harassment has occurred. Any behavior that meets this test is *prima facie* ("on the face of it" or "at first glance") sexual harassment.

Although the EEOC's definition seems straightforward and easy to understand, in the workplace we often encounter people with widely different backgrounds and values. Each of us perceives and interprets the world based on our experiences and values, so we may interpret words and behavior very differently from others. Different social, cultural and gender standards can lead to very different understandings. Thus what is harmless joking to one person may be grossly offensive to another.

It is very important to know that men and women, people from different cultures, even people of different ages, often have quite different perspectives on harassment and at times may be unable to know the perceptions or intents of another person. The reasons for these differences are many and complex, but it is important for everyone to know that substantial differences may exist, and that assumptions you believe you make in good faith about another's behavior may be invalid. Knowing this, it is advisable for you to exercise restraint, and perhaps consult others, before acting on assumptions.

Women and Men: Different Perspectives

Men and women often perceive behavior differently.

- Men are often raised in an environment that encourages them to be sexually explicit or aggressive. They may often feel that the sexual harassment issue is blown out of proportion. They tend to believe that most incidents just reflect normal sexual attraction.
- Many women have been encouraged by movies, television and peers to use their looks and talents to please and attract men. At first some women may be flattered by sexual attention, then perhaps reluctant to anger the harasser by rejecting him. Women frequently try to ignore the behavior, which men may interpret as indirect encouragement.

Unwelcomeness: What Does It Mean?

Sexual harassment occurs in many forms, some mild and others severe. It may range from a harmful joke to physical assault. Whether a particular behavior constitutes sexual harassment depends largely on whether the behavior is *unwelcome* to the target.

Unwelcome behavior is just that: behavior that is not welcome, not solicited and not wanted by the offended person. While *you* may perceive your behavior to be friendly and harmless, a *co-worker* may find the behavior offensive, so it is important to think before you act in a way that could be reasonably perceived as sexually offensive.

Most adults who pause to think about it can distinguish between what might be perceived as welcome and unwelcome behavior, especially if they think carefully about how others might react. Here are some questions to see if you can tell the difference. Would the behavior be *welcome, unwelcome,* or does it *depend*? Answers with comments follow on the next page.

1. *When meeting a person for the first time, holding the handshake a little longer than normal.*

   Welcome: When you meet someone for the first time, you want to make a good impression. Holding your handshake a little longer than usual could make your new acquaintance uncomfortable and your behavior unwelcome.

   Unwelcome: Yes, holding your handshake a little longer than usual is probably unwelcome behavior. First impressions are made within a few seconds of meeting a new person. Best to keep your handshake firm and friendly, but don't linger.

   Depend: You might find yourself very attracted to the person you're meeting for the first time. Perhaps you get the feeling that your new acquaintance finds you attractive also, but testing out your feelings by holding your handshake a little bit longer than usual is risking that your behavior will be offensive and unwelcome.

   Keep in mind that cultural differences may play a role in any such situation. When dealing with persons from other countries or cultures, remember that gestures such as handshakes, touching, hugs and even kissing may not have the same sexual connotation or intent as they may have in the dominant U.S. culture.

2. *Standing behind a co-worker seated at a computer and putting your hand on his/her shoulder.*

   Welcome: Many people touch others in the normal course of life and work, but unwanted touching can be offensive and uncomfortable to others. The best policy is always to avoid touching someone else unless you are absolutely sure it is welcome.

   Unwelcome: Some people like to touch and be touched more than others. It is advisable to avoid touching of this kind if you aren't absolutely sure it is welcome.

   Depend: Whether touching someone on the shoulder is welcome or not may depend on the person, the circumstances and context of the behavior. While touching of this sort may be typical behavior in your workplace, it is generally unadvisable, since you're risking that your behavior will be unwelcome.

3. *Staring at someone's body rather than looking him/her in the eye while talking.*

   Welcome: No. In the dominant American culture, maintaining eye contact helps build rapport and good communication. When avoiding eye contact is a cultural or personal preference, it may be better to look at the speaker's lips or shoulder than appear to be staring at his/her body.

   Unwelcome: Many people like eye contact when communicating with others. In the dominant American culture, if the person you are talking with does not make eye contact, it may give the impression that the person is trying to hide something.

   Most people feel threatened when their bodies are scrutinized and would find this type of attention intimidating and unwelcome. When avoiding eye contact is a cultural or personal preference, it may be better to look at the speaker's lips or shoulder than appear to be staring at his/her body.

   Depend: Perhaps people who take pride in body building and their physique might welcome someone looking at his/her body rather than their eyes; however, most of us find that behavior threatening, unwelcome and inappropriate in the workplace. When avoiding eye contact is a cultural or personal preference, it may be better to look at the speaker's lips or shoulder than appear to be staring at his/her body.

4. *Looking someone up and down when meeting.*

   Welcome: Checking out people by looking them up and down is rarely welcome behavior. People generally feel threatened and demeaned when they are looked at as sex objects.

   Unwelcome: Most people would find this behavior unwelcome.

   Depend: Some people may feel that their sexual attractiveness adds to their self-worth. However, only a very small minority feels comfortable with sexual attention at work, and this type of behavior is never appropriate in the workplace. Checking out people by looking them up and down can be very threatening and uncomfortable to most people.

5. *Making remarks about someone's body, either in person or by email, IM or text messaging.*

   Welcome: Many people are very sensitive about their bodies. While some comments, such as asking about an injured leg or a hurt shoulder, or even genuine praise for a successful weight-loss program, are usually interpreted kindly, comments with sexual overtones are not appropriate and are generally unwelcome.

   Unwelcome: Probably. Most people are uncomfortable when other people comment on their body. Possible exceptions are discussions of health or wellness, such as may regard a recent injury, illness or weight-loss program. Otherwise keep comments which may be viewed as personal or sexual in nature to yourself.

   Depend: Some people may love to have others comment on their bodies, especially if they pride themselves on shaping or building their body. For the most part, however, people find comments on their body unwelcome, especially if they are sexual rather than complimentary in nature.

How can you know in advance if a behavior is unwelcome? Here are some general guidelines to avoid committing unwelcome behavior:

- Respect the people around you.
- Think before acting.
- Imagine how other people might be feeling,
- Be sensitive to diverse perspectives,
- Exercise common courtesy, and
- Think twice before making a joke (any joke).

Some questions to ask yourself are:

- How would I feel if I were in the position of the recipient?

- Would my spouse, parent, child, sibling or friend like to be treated this way?
- Would I like my behavior published in the organization newsletter?
- Could my behavior offend or hurt other members of the work group?
- Could someone misinterpret my behavior as intentionally harmful or harassing?

If you are unsure if something might be welcome, don't do it. There is no risk in not doing something.

Intent vs. Impact / Effect

It is important to understand that intent is *not* relevant in determining whether or not a behavior is sexual harassment. All that matters is the impact of the behavior on the work environment, or the offended individual. Regardless of the intent, the behavior will be judged on its impact or effect.

This fact is critically important. The statement "I didn't mean anything by it" is not a valid defense of harassing behavior.

> Joey loves to tell funny stories and keep the spirit of good cheer alive in the workplace. One morning, he spies Jessica looking a little tired and depressed. To cheer her up, he tells her a silly story with sexual innuendo.
>
> Jessica looks offended and moves away hurriedly.
>
> Joey didn't mean any harm, but what one person may intend as genuine friendship (even if in a clumsy way) may be perceived quite differently by another.

Does this mean that an unintentional slight of someone can contribute to hostile environment sexual harassment?

Yes, it means exactly that. It is the impact or effect of the behavior, not the intent, that matters with regard to sexual harassment.

A Matter of Respect

Sexually harassing behavior shows great disrespect. Nobody is likely to harass someone he or she respects, either accidentally or deliberately.

Despite some claims of over-sensitivity, most adults understand the meaning of harassment, just as they know the meaning of teasing. An attitude of consideration and respect toward all those with whom we come in contact will go a long way toward creating an atmosphere that excludes sexual harassment.

More Risky Behaviors

<u>Humor</u>

Most of us love a good laugh. Humor can relieve tension and energize, but teasing and sarcasm are high-risk ways of communicating.

Does this mean that all fun is out of order in the workplace? Absolutely not, but if the fun is at the expense of another person or persons, it is risky.

"It was just a joke" is not an excuse for sexual harassment.

People often have such different perspectives on behaviors that it is easy to offend someone through ill-considered attempts at humor, teasing or sarcasm. Remember that only the impact or effect, and not the intent, matters in determining if a reasonable person would consider the behavior sexual harassment.

Before taking any risks, make certain that your behavior — whether in person, by phone or via email — is welcome. A careless mistake may become very costly to the respect others have for you and to your financial and job security.

Touching

Many people touch others in the normal course of life and work, but unwanted touching can be offensive and uncomfortable to others. This is especially important to know for people who are accustomed to touching others.

The best policy is always to avoid touching someone else unless you are sure it is welcome.

The "Reasonable Person" Standard

If an unwelcome behavior of a sexual nature causes someone to take offense, it will be judged based on whether a "reasonable person" would find it offensive.

This standard of a reasonable person has arisen from court attempts to interpret what behaviors should reasonably be considered sexual harassment. Since not everyone interprets behaviors in the same way, the courts find that, in order to be illegal, the conduct must be severe or pervasive and offensive to a reasonable person in similar circumstances.

Under this standard, one-time unwelcome behavior will seldom qualify as sexual harassment unless it is sufficiently severe as judged by a reasonable person.

What Counts as Repeated or Severe?

Are any of the following situations sexual harassment? Remember that since there are no clear-cut rules defining a "hostile and threatening work environment," courts generally look at the severity or pervasiveness of the behavior, as judged by a "reasonable person."

In the situations that follow, decide how severe the behavior is, how pervasive it is, and then decide whether you think the situation reflects sexual harassment in a hostile working environment.

There are no hard and fast rules to govern your decisions. Interpret each situation according to how you think a reasonable person would react.

1. For the past two years, Denise, an inventory clerk, has been subjected daily to fondling, hugging and kissing from her supervisor against her will.

   Ask yourself:

   - Is this behavior severe, mild, or somewhere in between?
   - Is this behavior frequent, a rare occurrence, or somewhere in between?

   Then ask yourself: Would a reasonable person judge this behavior as sexual harassment? Yes, no, perhaps?

2. Terrance likes to talk about himself, including his sexual exploits, during a team meeting. Joanne takes him aside, tells him she finds his stories offensive, and asks him to stop. Terrance doesn't stop telling personal stories after Joanne's request, but he leaves out sexual references.

   Ask yourself:

   - Is this behavior severe, mild, or somewhere in between?
   - Is this behavior frequent, a rare occurrence, or somewhere in between?

   Then ask yourself: Would a reasonable person judge this behavior as sexual harassment? Yes, no, perhaps?

3. Marie works in an auto shop where images of nude models are plastered on every wall. Her co-workers, mostly men, swear and use foul language as a matter of course. Some of the men frequently hoot and make catcalls at Marie when she walks down the hallways. Marie complains to her supervisor, but the supervisor takes no action.

   Ask yourself:

   - Is this behavior severe, mild, or somewhere in between?

- Is this behavior frequent, a rare occurrence, or somewhere in between?

Then ask yourself: Would a reasonable person judge this behavior as sexual harassment? Yes, no, perhaps?

4. William, the sales manager, gets drunk and exposes himself to Maureen and Kathleen at the company picnic. The next day William apologizes to the women. He says he is totally embarrassed that he got so drunk and that his behavior got so out of hand. From that point on, William tends to avoid the two women, but he treats them courteously and respectfully.

   Ask yourself:

   - Is this behavior severe, mild, or somewhere in between?
   - Is this behavior frequent, a rare occurrence, or somewhere in between?

   Then ask yourself: Would a reasonable person judge this behavior as sexual harassment? Yes, no, perhaps?

Sex or Power?

Most workplace sexual harassment is based on power and not on romance, although failed romances can lead to sexual harassment.

At work some people have authority over others. In these formal power relationships, subordinate employees do not always feel free to speak up to persons of higher authority who have control over their working conditions.

But sexual harassment is illegal, and neither workplace authority nor any power position ever conveys the right to break the law.

In addition to formal power relationships, informal types of power, such as domination through physical size, loud voice, overbearing personality, superior or controlling attitude, or the harasser's position amongst peers can be intimidating and threatening to some employees, discouraging them from speaking up about unwelcome behavior.

Office Romance

While office romances are not illegal, they can create three serious problems.

1. Romantic behavior may raise concerns about undue favoritism, may be distracting to other employees, and may imperil the integrity of the work environment. Because productivity may suffer under these circumstances, some employers have policies prohibiting such relationships.
2. If those involved in a romantic relationship engage in behaviors in the workplace that create a hostile work environment for other third party employees, those behaviors can expose the employer to liability for sexual harassment.
3. If the romance goes sour, especially between supervisor and subordinate, the risk of liability for sexual harassment is greatly enhanced.

Types of Harassment

Sexual harassment does not occur just between a male boss and a female subordinate. Sexual harassment may also occur:

- Between peers.
- By a subordinate toward a supervisor.
- By women against men.
- Between members of the same sex — men can harass men; women can harass women.
- By a third party, such as a vendor or contractor's employees.

Peer to Peer Harassment

Workplace sexual harassment usually involves persons of unequal authority, but it can occur between employees of equal rank, or peers.

Peer to peer harassment is normally not difficult to stop. The offended party should directly and clearly ask the offender to stop the behavior, if she or he feels comfortable doing so. If the request to the offender does not stop the behavior, the next step is to ask a supervisor to intervene.

Once asked, the supervisor is *obligated* as the agent of the employer to take appropriate action.

Subordinate Harassment of a Supervisor

It is possible for a subordinate to harass a supervisor, although this is not very common. It may occur when the offender is particularly intimidating or if the victim is unable to exert the authority of his or her position.

This type of harassment must be taken just as seriously as any other. If the behavior continues after requesting the offender to stop, the target of the harassment must seek help from a higher level of management.

Same Sex Harassment

Unwelcome behavior does not have to involve persons of the opposite sex to qualify as sexual harassment. In a unanimous ruling in March 1998, the U.S. Supreme Court ruled that same sex sexual harassment is illegal, and sent the case before it (*Oncale v. Sundowner Offshore Services,* No. 96-568) back to the lower courts.

Just as with sexual harassment between persons of the opposite sex, under federal law harassing behavior toward someone of the same sex can be sexual harassment if the behavior is unwelcome, sexual in nature and based on the person's gender.

Third Party Harassment

Persons offended by a hostile work environment need not be direct participants or targets of the hostile behavior. They can be third parties.

The most critical factor in determining if behavior is sexual harassment is whether it is unwelcome. The workplace is not an entirely free and voluntary environment, and people have to work at designated locations in proximity to each other. In these circumstances, behavior that is comfortable between direct participants may be unwelcome to others close by (third parties) who cannot avoid observing it.

Examples of third party harassment include direct (or telephone) conversations about sex in the hearing range of others to whom it is unwelcome. Employees should refrain from this behavior in the workplace.

Another type of third party harassment is harassment of an employee by a third party (non-employee). This may include harassment toward an employee by a:

- visitor,
- vendor,
- delivery or repair person,
- customer or client, or
- employee of another business or agency on site, or at an off site location, interacting with our employees for any number of job-related reasons.

The employer has the responsibility to prevent the harassment of employees by any of these third parties and to react immediately, if harassment occurs, to assure that it stops and does not recur.

False Accusations

Both men and women sometimes attempt to file false claims of discrimination or harassment. Their reasons are many: psychological problems, the desire to get back at a manager or co-worker or gain status among

peers, the attempt to earn money in a lawsuit, or perhaps an attempt to protect their jobs if they are performing poorly.

False claims — those not made in good faith — can lead to serious discipline and financial liability for the accuser.

Once sexual harassment has been reported, the employer is obligated to investigate all claims, including accusations that later turn out to be false.

Retaliation

Retaliation against an employee after he or she has complained about harassment or participated in an investigation of harassment (or threatening to retaliate if he or she complains or participates in an investigation) is unlawful and can lead to serious consequences, including liability.

Once the allegation of potential sexual harassment is raised, all persons who have knowledge of the issue are on notice, and the employer is responsible for ensuring that a proper investigation is undertaken.

The U.S. Supreme Court ruling in *Burlington Northern & Santa Fe Railway Co. v. White (2006)* established a definition of retaliation that includes any employer action that could discourage a reasonable employee from making or supporting a charge of harassment or discrimination.

The Court stated that the standard is objective, based on the perspective of a "reasonable worker" but, by necessity, is flexible because the significance of any given act of retaliation is context-specific and may depend upon an employee's professional and personal situation. The Court gave two examples to clarify that the difference between a "trivial harm" and a "materially adverse" action is context-specific:

- A schedule change might be immaterial to most workers but materially adverse to a young mother with school-age children; and
- A supervisor's refusal to invite an employee to lunch is usually trivial, except if the lunch is a weekly training session that contributes significantly to the employee's professional advancement.

In the past, an employer's action against an employee who had engaged in protected activities (that is, complained of discrimination or harassment or took part in an investigation of such a claim) was not considered retaliation unless it resulted in the employee being terminated, demoted or otherwise monetarily impacted by an employment action. However, in June 2006, the U.S. Supreme Court stated that any action against an employee that has the effect of discouraging employees from filing complaints of discrimination constitutes retaliation.

A charge of retaliation, unlike charges of harassment or discrimination, does not necessarily require an adverse effect only on an employee's employment situation. Other circumstances, outside of the workplace, may be taken into consideration in determining if an employer's action against an employee who filed a discrimination claim constituted retaliation. The following scenario would illustrate such a situation.

> Two employees, one of whom filed a claim of discrimination and another who testified on the first's behalf in the investigation, are reassigned to work at another site several blocks away from their current work location. All the job duties, pay, benefits and working conditions are the same at both sites. One of the employees drives to work and going the extra distance may be slightly less convenient, but not materially adverse, therefore the reassignment would probably not be considered an act of retaliation. The other employee, however, has a medical condition which prevents her from obtaining a driver's license so she takes a bus to work. The alternate location is not on a bus route and therefore requires the employee to walk an additional three quarters of a mile to get to and from work from the nearest bus stop. Under the explanation provided by the Court, this could very well be considered an act of retaliation.

Approximately a third of all cases brought against employers claim retaliation. An individual does not need to prove the original claim of discrimination in order to win the retaliation suit. In fact, there is a much broader definition, meaning it may be much easier to prove retaliation than harassment or discrimination.

This is *very important* for supervisors to understand thoroughly. The fact that it may be *easier* to prove retaliation than discrimination means supervisors must be doubly careful to not treat employees who have made any complaint of harassment or discrimination, or who have been part of an investigation or had any involvement with any such complaint, differently than they treat any other employee. Considered carefully, this makes common sense; it may be instinctive to treat some employees differently than others but doing so is against the law. This emphasizes the importance of keeping personal emotions under control and leaving them at the door when entering the workplace.

What Counts as Retaliation?

Would a reasonable person believe the following to be petty slights or retaliation if after an employee complains about a supervisor's harassing behavior, the supervisor:

1. Refuses to acknowledge the employee when they pass in the hall?

   Petty slight: Good answer. Almost certainly petty slight. Using the U.S. Supreme Court standard of "trivial harm" and "materially adverse," this action fails both tests. Even if the supervisor had routinely acknowledged the employee in similar circumstances, this action has no consequences beyond a personal slight to the employee. It is quite certain this would not be considered retaliation in its legal sense, even if it may be taken that way in a personal sense.

   Retaliation: Likely incorrect. Almost certainly this is a petty slight. Using the U.S. Supreme Court standard of "trivial harm" and "materially adverse," this action fails both tests. Even if the supervisor had routinely acknowledged the employee in similar circumstances, this action has no consequences beyond a personal slight to the employee. It is quite certain this would not be considered retaliation in its legal sense, even if it may be taken that way in a personal sense.

   It depends: It's possible, but not likely. Almost certainly this would not be considered retaliation. Using the U.S. Supreme Court standard of "trivial harm" and "materially adverse," this action fails both tests. Even if the supervisor had routinely acknowledged the employee in similar circumstances previously, this has no "materially adverse" consequences to the employee. It is extremely unlikely this would be considered retaliation in its legal sense, even if it may be taken that way in a personal sense.

2. Denies the employee's first, second and third choice of vacation week with little or no explanation.

   Petty slight: Perhaps, but not if this was treated differently than normal practice.

   Yes, if that was the supervisor's and the employer's normal practice to arbitrarily deny employee choices.

   Again we must consider the U.S. Supreme Court standards of "trivial harm" and "materially adverse." Unless employees were normally granted their preferences, and the employee had made plans based on that practice, this has no "materially adverse" consequences to the employee. However, if it was routine to grant higher choices, and particularly if this employee was the only one to be denied all three first choices and there were no valid reasons given or available for the denial, this could be an instance of retaliation if it could be shown this employee was treated differently than others.

   Unless this employee could show this denial differed materially with prior practices of the employer and how others were treated compared to this employee, it is unlikely this could be considered retaliation. However, this is an example of how arbitrary different treatment could become retaliation, especially if it occurred after the employee had filed a complaint of discrimination or harassment.

   Retaliation: Perhaps, but not likely to be retaliatory if it is the supervisor's and the employer's normal practice to arbitrarily deny employee choices. Again we must consider the U.S. Supreme Court standards of "trivial harm" and "materially adverse." Unless employees were normally granted their preferences, this probably has no material consequences to the employee even if it is inconvenient. But if it has been routine to grant higher choices, and particularly if this employee had recently

voiced a complaint of harassment or discrimination and was the only one to be denied all three first choices with no valid reasons given for the denial, this could be an instance of retaliation. Whether or not this would be considered discrimination or retaliation would depend on all the facts of the current situation, as well as prior practices of the employer.

It depends: Probably correct — this is the best answer. This is an example of an issue that would very likely depend on many other factors. It might be shown to be retaliation if this employee had recently filed a complaint or acted as a witness in an investigation and was the only one denied first choices. Also, it would be important to know if it had been common practice to approve first choices unless there were good reasons for not doing so and this was the first case of such a denial. However, considering the U.S. Supreme Court's "materially adverse" standard, unless there were material personal consequences caused by the denial, such as missing a pre-paid trip or an important personal event, the action may not amount to retaliation.

If treatment like this could be shown to be different than treatment accorded other employees and became a pattern of different treatment, this is the kind of issue that could escalate into actionable retaliation. The law mandates employers treat all employees equally and any variance in that affecting an employee who has voiced a complaint or participated in an investigation risks a charge of retaliation.

3. Assigns the employee to a less desirable spot in the corporate parking garage.

   Petty slight: Almost certainly — good answer. Under the U.S. Supreme Court standards of "trivial harm" and "materially adverse," this almost certainly would not arise to legal retaliation unless the employee has a mobility impairment which is severely aggravated or inconvenienced by a more distant parking space. It is much more likely to send a message to all employees that the employer plays favorites. Parking spaces may be meaningful to individual employees for status reasons, but it is hard to imagine circumstances in the case of an individual without a disability or impairment that would cause a change in parking space to rise to material retaliation.

   Retaliation: Unlikely. Under the U.S. Supreme Court standards of "trivial harm" and "materially adverse," this almost certainly would not arise to legal retaliation unless the employee has a mobility impairment which is severely aggravated or inconvenienced by a more distant parking space. It is much more likely to send a message to all employees that the employer plays favorites. Parking spaces may be meaningful to individual employees for status reasons, but it is hard to imagine circumstances in the case of an individual without a disability or impairment that would cause a change in parking space to rise to material retaliation.

   It depends: Not likely. The new space would have to be very inconvenient before this could rise to legal retaliation. Under the U.S. Supreme Court standards of "trivial harm" and "materially adverse,". Parking spaces may be meaningful to individual employees for status reasons, but it is hard to imagine circumstances, other than in a case involving an individual with a disability or other mobility impairment, that would cause a change in parking space to rise to material retaliation.

   However, even though the offended employee may not be able to demonstrate that the change in parking space caused material harm, if the action occurs soon after that employee has filed a complaint of harassment or discrimination, it is the type of action which may discourage the employee or others from voicing concerns in the future. Under those circumstances, this action may be found to be an act of retaliation.

4. Reassigns the employee from the preferred weekday, daylight shift she has held for five years to an evening shift, which includes weekends.

   Petty slight: Almost certainly not, unless the change was welcomed.This change is clearly not petty and is consequential to the employee. However, the question does not indicate whether the employee was happy with the reassignment. For example, if she earned a night shift pay premium that she wanted to help pay her child's college education and liked the idea of working at night, it would not be retaliation.

However, assuming the change was not voluntary, its consequences are clearly not trivial and could be "materially adverse." Therefore, unless it was made for good business reasons evident to all observers, this change could rise to retaliation.

Retaliation: Quite likely, unless the change was welcomed. This change is clearly not petty and may meet the U.S. Supreme Court standards of "trivial harm" and "materially adverse." Therefore, unless it was made for good business reasons evident to all observers and was acceptable to the employee, this change could rise to retaliation.

Again, however, the question does not indicate whether the employee was happy with the reassignment. For example, if she earned a night shift pay premium and wanted that to pay her child's college education, liked the idea of working at night and was pleased with the change, it would not be retaliation.

It depends: Certainly possible if change was welcome, but not likely. This change is clearly not petty and is consequential to the employee. Assuming the change was not voluntary, its consequences are clearly significant. Therefore, unless it was made for good business reasons evident to all observers, this change could rise to retaliation; especially if it closely follows an incidence of the employee filing a complaint of unlawful treatment.

And again, the question does not indicate whether the employee was happy with the reassignment. For example, if she earned a night shift pay premium that she wanted to help pay her child's college education and liked the idea of working at night, and was pleased with the change, it would not be retaliation.

5. The supervisor does not sign the birthday card for the employee when it is circulated and leaves the cafeteria before the cake is served.

   Petty slight: Almost certainly — best answer choice. Under the U.S. Supreme Court standards of "trivial harm" and "materially adverse," this almost certainly would be considered a petty slight. There are no materially adverse consequences to the employee, and the supervisor has as much right to leave an event of this nature for personal reasons as others have to remain and enjoy the cake.

   Retaliation: Very unlikely. Under the U.S. Supreme Court standards of "trivial harm" and "materially adverse," this almost certainly would not be considered retaliation. There are no materially adverse consequences to the employee, and the supervisor has as much right to leave an event of this nature for personal reasons as others have to remain and enjoy the cake.

   It depends: As always, "it depends" is possible, but very unlikely here. Under the U.S. Supreme Court standards of "trivial harm" and "materially adverse," this almost certainly would be considered a petty slight and not retaliation. There are no materially adverse consequences to the employee, and the supervisor has as much right to leave an event of this nature for personal reasons as others have to remain and enjoy the cake.

Confidentiality

If you report an incident of sexual harassment, or ask for help on a question of sexual harassment, you are entitled to confidentiality within certain limits.

If you request confidentiality, you will be advised that your employer needs to conduct an investigation. Those involved will need to be interviewed. Confidentiality will be protected where possible. Some people may "need to know." In such cases, these people will be asked to keep matters confidential where possible. If the issue later becomes a lawsuit, any request for confidentiality may not be able to be honored at that future time if personnel files are demanded, or if employees are interviewed by attorneys. Otherwise, access to your files on the issue can and should be limited to a "need to know" basis.

Responsibilities

The two landmark U.S. Supreme Court decisions in June 1998 clarified the responsibilities of both employers and employees in preventing sexual harassment.

The Court ruled that *employers* are responsible for the behavior of their employees, but that *employees* must report any complaints they have, and that employers with well-publicized sexual harassment policies and complaint procedures can cite this in defending themselves.

Employee Responsibilities

Employees who object to behavior of others should:

1. Ask the offender to stop if they are comfortable doing so; and/or
2. Report their concerns to a supervisor or other member of management to ensure the problem is properly handled.

Employees who deal directly with customers, the public or with personnel from other organizations, must always ensure that their own behavior is acceptable. They are also strongly encouraged to report incidents of unwelcome behavior by others.

You do not have to tolerate unwelcome behavior by the public, but like everyone else, you must act responsibly when dealing with unwelcome conduct.

Supervisors' Responsibilities

Supervisors exercise authority on behalf of their employer, which gives them important additional responsibilities regarding sexual harassment.

1. Supervisors must exercise their authority to ensure that their workplace is free of sexual harassment. They must take every complaint seriously and respond promptly to employees requesting help.
2. Supervisors who themselves engage in unwelcome behavior toward others, including subordinates, take a very large personal risk. Under rare circumstances, a court may find these supervisors personally liable, in addition to your employer's liability.

It is essential that all supervisors are aware of their responsibilities. Anyone who ignores this responsibility and is found guilty of sexual harassment may be held personally liable for financial costs that have reached into the millions of dollars and may incur discipline up to and including termination of employment.

Supervisors' Actions as Agents of the Employer

Supervisors exercise authority on behalf of their employers, and therefore their employer may be liable for any illegal behavior by its supervisors.

The United States Supreme Court has affirmed that employers are responsible for the behavior of their supervisory employees, and particularly that supervisors who abuse their authority are considered to be acting on behalf of the employer. The Court said clearly that employers are liable for sexual harassment by their supervisors, but gave employers the opportunity to defend themselves in some instances, if they can prove they have well-publicized, consistently-enforced sexual harassment policies and complaint procedures, and the victim had unreasonably failed to follow them or take other steps to avoid harm.

Management must provide reasonable supervision and must respond promptly when employees complain of unwelcome behavior.

What to do: Scenario One

Assume you are the supervisor of a large workforce. In the department there is one employee, Don, who seems to be liked by everyone, including you. Don is always in a good mood, very personable and extremely witty. However, you notice that this wit often includes sexual jokes, comments or innuendo. No one has ever complained about Don's jokes or even hinted that they were offensive.

Now, however, an employee has filed a complaint against Don. Moreover, the complainant has bypassed you and filed the complaint with your boss, explaining that the reason she didn't go to you first is that she knows you are well aware of Don's behavior but won't do anything to stop it because Don is your friend. Your boss contacts Human Resources, which begins an investigation into the complaint. When your boss and the investigator from HR summon you to the boss's office and ask for your comments, how do you respond?

1. Defend Don's behavior and your own inaction, and ridicule the complainant for not going straight to Don.

   Comments: You don't get it, do you? Remember: It is the impact of the behavior on the recipient, not the intent of the "harasser" that matters. Also you are not in a similar situation; that is, a female co-worker who must work daily in close proximity to a man who frequently brings sex into his conversations, apparently with the knowledge and acceptance of management. You don't know what she is feeling, but apparently she is offended and uncomfortable in the work environment. Finally, please remember that the complainant is not required to complain to the "harasser" nor to her immediate supervisor, if she feels uncomfortable or threatened by doing so.

   Possible outcome: As a result of your poor judgment, and inability to properly deal with the present situation, you are disciplined.

2. Explain that you are aware of Don's behavior but he doesn't mean any harm, you just thought that, if someone was offended, they'd tell him and it would be over. After all, he doesn't mean any harm and only likes to make people laugh. You assumed that because Don is such a nice guy, he would certainly respond appropriately if a co-worker asked him not to tell sexual jokes around him or her. You therefore didn't believe there was any reason for you to attempt to limit the content of Don's wit.

   Comments: Remember the following:

   - It is the impact, not the intent of sexual behavior that has to be considered. The argument that "He doesn't mean any harm" is not acceptable.
   - A complainant is not required to confront the "harasser" if she is not comfortable doing so. In this case, she had reason to believe Don's behavior was acceptable and even welcome in the department, so she was afraid her complaint would not be taken seriously.
   - As a supervisor, you are *required* to prevent and/or correct offensive behavior in your department *whenever* you become aware it is occurring, whether a complaint has been filed or not.

   Possible outcome: You are disciplined for your lack of response.

3. Admit you made a mistake in judgment and will cooperate fully with the investigation and possible discipline and will follow the situation to assure there is no retaliation against the complainant.

   Comments: You admit that, in retrospect, you made a poor decision in not speaking to Don about his behavior as soon as you became aware of it. You offer your full cooperation and the resources of your department to assist the investigator and preserve the complainant's confidentiality as much as possible. You understand that the result of the investigation may be that Don, and perhaps you as well, will be disciplined. You offer to keep a close eye on the situation following the completion of the investigation to ensure that the behavior does cease and that the complainant does not face retaliation from anyone in the department. This possibility needs to be considered because of Don's popularity within the department.

   Possible outcome: Congratulations, you got it right!

<u>What to Do: Scenario Two</u>

Now suppose that the employee comes to you with her complaint. You agree to say something to Don about his behavior, so the next day when you encounter Don in the parking lot after work, you mention to Don that he may someday run into someone who doesn't appreciate his humor so maybe he should

"clean it up" before before some is offended and creates problems for the both of you. Don responds by laughing the possibility off, saying it's all in fun, he means no harm, and people need to laugh so the day goes faster.

How would you respond to Don's comment?

1. Decide that Don is probably right and just drop the matter because he really doesn't mean to offend anyone.

   Comments: See Scenario One.

   Possible outcome: You face disciplinary action for failing to meet your supervisory responsibilities.

2. Ask Don to come see you tomorrow in your office where you will explain to him the seriousness of his behavior. When you meet with Don, you tell him that his behavior is inappropriate at work. Though some people may enjoy Don's humor, you remind him that in the workplace he can't assume that everyone will be as accepting. You tell Don he must realize that some people who overhear his sexual comments and jokes may be uncomfortable with that type of humor. Finally, you tell Don that you are documenting your discussion and advise him that he will be subject to disciplinary action if the behavior continues.

   Comments: Congratulations, you did the right thing!

3. Decide to wait until Don's next performance appraisal when you'll take points away from him for laughing at your warning.

   Comments: How does waiting address the complaint? And is it fair to Don to dock him points without warning him that you intend to do so and giving him opportunity to change his behavior?

   Possible outcome: If you wait, see Scenario One and prepare to be disciplined. If you dock Don points on his assessment, see item 4 immediately below.

4. You call Don into your office the next day and give him a written warning for telling jokes at work and instruct him to avoid humor in the workplace.

   Comments: Written disciplinary action for telling jokes or using humor in the workplace is taking things a little too far, don't you think? Have you really addressed what is inappropriate in Don's behavior and caused the complaint? Does your organization have a written policy forbidding humor? Probably not.

   Possible outcome: Don sues you and your employer for discrimination, claiming you have applied disparate discipline by treating him differently because of his protected class or classes. Did you discipline that guy of a different national origin for telling "knock-knock" jokes? That woman in the next office for all the stories about her grandchildren's antics? That younger fellow of a different race who makes all those puns throughout the day?

   You've made a mistake, but it illustrates that when considering what behavior contributes to environmental harassment, you should not over react. Not all humor, not even all offensive humor, automatically qualifies as sexual harassment.

<u>Supervisors' Responsibilities Before a Complaint is Filed</u>

- Discourage any behavior which may be discriminatory or harassing — such as offensive remarks or demeaning verbal, written or visual jokes directed toward individuals or groups. You, personally, can set an example by being a model of the type of behavior standards you expect from your employees. Within your area of responsibility, try to create an atmosphere in which people feel comfortable addressing issues and participating in problem solving.
- The law requires those in positions of authority to take action if they know or *should have known* of discriminatory behaviors. This means you should not wait for a complaint to be filed before taking action. If you become aware of a harassing or discriminating situation, take action immediately to stop the inappropriate behavior.

- Ensure that all employees complete required training and receive a copy of the sexual harassment and non-discrimination policies. Be sure that everyone is familiar with and understands your employer's complaint procedures and that they are aware of their rights and responsibilities. This includes informing employees that they have a right to a harassment-free environment and an obligation to report any incidences of sexual harassment that they may experience or witness, without fear of reprisals for doing so.

Supervisors' Responsibilities in Dealing with Complaints

- Immediately report it according to the reporting structure outlined in the policy and complaint procedure.
- Be supportive of complainants; but if an employee approaches you to "discuss" a harassing situation, stating they just want to talk about it, not file a complaint just yet--be careful. You should never promise to keep a situation involving harassment just between the two of you. Every situation needs to be investigated and resolved as quickly as possible.
- Conduct fair and thorough investigations or fully cooperate with designated investigators by committing whatever assistance or resources are necessary to probe allegations of hostile, abusive or offensive treatment.
- Be diligent and timely in enacting any corrective action, whether it is to resolve a situational issue, discipline an offending employee or correct any harm done to the complainant.
- Following a complaint or investigation, continue to monitor the situation to assure that the problematic behavior has ceased. Periodically meet with the complainant after the issue has been resolved and confirm that no retaliation has occurred.
- Protect the privacy of all parties by maintaining confidentiality as much as possible.

What if *You* Are Accused of Sexual Harassment?

If an employee directly accuses you of sexual harassment, you should listen carefully to understand what that person is feeling and why he or she feels your behavior was inappropriate or offensive. Regardless of whether or not you agree or understand the other person's point of view, you should respect his or her feeling, meaning cease the behavior in question and apologize for making that individual feel uncomfortable.

You should appreciate that the employee has approached you directly and provided an opportunity to solve the problem informally. Tell him or her that you will avoid similar conduct in the future and then keep your word.

If you feel your behavior was acceptable or that you are being falsely accused, immediately discuss the situation with your manager or the appropriate department.

If a formal complaint is filed against you, you should become as informed as possible regarding the allegations. Understand that a thorough investigation must take place, though it may be an unpleasant experience. Cooperate fully with the investigator, being honest when questioned about the alleged conduct. You may also choose to seek professional, outside advice.

Beware of attempting to contact the complainant, either to try to apologize or to obtain an explanation of the complaint. Such behavior, in some circumstances, may actually be considered retaliatory.

Under no circumstances should you act in any way that might be construed as retaliation against the person making the complaint. Also, in order to protect the integrity of the investigation, do not discuss the matter with others who may be party to the investigation.

Sexual harassment is highly disruptive and unpleasant for all parties involved, and it is also very costly in many ways. Everyone in the workgroup feels its negative effects, and the immediate parties involved may suffer severe losses affecting finances, physical health, emotional well-being, job time and productivity, and career advancement.

Other Discriminatory Harassment

All forms of discriminatory harassment are unlawful under applicable local, state, and federal law. Other types of federally prohibited discrimination include harassment based on race, color, religion, gender, age, national origin, disability, and genetic information. State and local laws often include additional protections.

The same general principles (such as unwelcomeness, severity or pervasiveness, hostile environment) that you have learned constitute sexual harassment also apply to other forms of harassment.

Examples of such harassment include:

- Using epithets, slurs, or stereotypes.
- Threatening, intimidating, or engaging in hostile acts that relate to a protected characteristic.
- Offensive jokes or pranks targeted at members of a protected group.
- Placing on walls, bulletin boards or elsewhere on the employer's premises, or circulating in the workplace by oral, written, electronic or graphic means any material that belittles, mocks or shows hostility toward a person or group because of protected characteristics.

The standard for other discriminatory harassment is essentially the same as that for sexual harassment — the harassment must be offensive to a reasonable person in the position of the person being harassed, considering all of the circumstances including that person's protected characteristic (such as that person's race, color, religion, age, sex, national origin, or disability).

Note that there is often confusion regarding harassment based on sex such as pervasive "male bashing" or offensive but non-sexual comments regarding women. This type of harassment is equally prohibited by the Civil Rights Act of 1964. However, this is handled differently than sexual harassment, which is harassment that is "sexual in nature" as defined by the EEOC.

What if You Experience Sexual Harassment?

Sexual harassment is illegal and unacceptable in any working environment. Your employer has policies and support structures to enable every employee to work in an environment free of harassment. A sample policy will be displayed on the next page. Print it out and refer to it for help in dealing with harassment, concerns or complaints. Here are some additional guidelines should you encounter harassment at work:

1. Consider firmly, clearly and directly telling the harasser to stop.
2. If the behavior continues, document the conversation or offending behavior.
3. Follow your employer's complaint procedures.