

# Stop Sexual Harassment Before It Stops You

## A Guide for AFGE Members and Representatives

The American Federation of Government Employees (AFGE) is a labor organization affiliated with the AFL-CIO which represents approximately 600,000 employees of the United States federal government and the government of the District of Columbia.

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## What is Sexual Harassment?

### EEOC Definition

“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 the 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.”
- 29 C.F.R. Section 1604.11

Sexual harassment on the job is a serious situation. It occurs when someone engages in unwelcome conduct towards you **in a sexual way** or because of your gender, and that behavior affects your job or your job environment. Federal law (Title VII of the Civil Rights Act of 1964) and your Local AFGE union contract make sexual harassment **ILLEGAL**. Therefore, you can take action and do something about it.

Under the law, there are two types of sexual harassment claims: “quid pro quo” and “hostile environment.”

1. “Quid Pro Quo” simply means something given in exchange for something else. Quid pro quo sexual harassment happens when a supervisor or someone with authority over an employee requests or implies an **unwelcome** sexual demand in exchange for a job benefit or in exchange for not firing or taking some other harmful employment action against the employee.
2. Hostile Environment is **unwelcome** sexual conduct or conduct directed at one because of one’s gender that creates an intimidating, hostile or offensive work environment. There may not be any tangible loss of benefit or adverse action involved in this type of harassment. Examples include, but are not limited to, demeaning or sexual pictures, sexual jokes, and lewd sexual comments.

**Anyone can fall prey to sexual harassment - both men and women can be victims. Similarly, the harasser can be male or female, and the harasser and victim can be of the same gender.**

## Important United States Supreme Court Cases



Meritor Savings Bank, FSB v. Vinson, 477 U.S. 57 (1986).

The Supreme Court held that hostile environment sexual harassment is a form of sex discrimination actionable under Title VII if it severe or pervasive enough to alter the conditions of employment and create an abusive working environment.



Harris v. Forklift Systems, Inc., 510 U.S. 17 (1993).

The Supreme Court held that a hostile environment caused by sexual harassment does not have to cause psychological harm to be hostile or abusive, because such an environment can detract from employees' job performance.



Oncale v. Sundower Offshore Services, 523 U.S. 75 (1998).

The Supreme Court held that same-sex sexual harassment is covered under Title VII of the Civil Rights Act because Title VII prohibits discrimination based on gender, which protects both men and women.



Faragher v. City of Boca Raton, 524 U.S. 775 (1998).  
Burlington Industries Inc., v. Ellerth, 524 U.S. 742 (1998).

The Supreme Court joined these two cases together and rendered one ruling. The Court held that “quid pro quo” sexual harassment that does not lead to an undesired job consequence might still be illegal if the harassment created a hostile environment. Further, the Court held that employers are only “vicariously liable” (i.e. automatically liable) if the harassment led to a “tangible loss” (i.e. an undesired job consequence). If the harassment did not lead to tangible loss, employers are not liable if they can prove that (1) the employee did not reasonably take advantage of any preventive or corrective measures offered by the employer, and (2) the employer exercised reasonable care to prevent and promptly correct the behavior.



ApolloMedia Corp. v. Reno, Attorney General, 526 U.S. 1061 (1999).

The Supreme Court, without rendering an opinion, affirmed judgment of a lower court. By doing so, the Court upheld the federal 1996 Communications Decency Act that makes it a crime to send e-mails that are obscene in order to annoy or harass individuals.

## Types of Sexual Harassment

	<b>Hostile Work Environment</b>	<b>Quid Pro Quo</b>
<b>Definition</b>	Unwelcome conduct based on the victim's sex that "unreasonably interferes with work performance" or creates an "intimidating, hostile, or offensive work environment."	“This for that”: Requests for sex or a sexual relationship from a supervisor or someone with authority in exchange for obtaining a job benefit or not taking a harmful employment action, or using submission to or rejection of such a request as a basis for such an employment action.
<b>The Harasser</b>	<b>Supervisors, co-workers,</b> or even <b>non-employees</b> such as vendors, consultants, customers or clients.	Supervisor or person with power to influence/affect an employment or educational situation.
<b>The Victim</b>	Anyone whose work is affected by the harassment, not only the targeted individual.	The direct target of the harassment.
<b>Unwelcome</b>	Victim did not ask for it and regards it as offensive; based on the perspective of the employee, not the harasser.	Victim did not ask for it and regards it as offensive; submission does not necessarily mean it was welcomed.
<b>Frequency</b>	Severe and/or Pervasive.	Once is Enough!
<b>Tangible Loss</b>	There does not need to be a tangible loss for a finding of hostile environment.	<b>REQUIRED</b> (If there is no tangible loss, must analyze whether a hostile environment was created.)

## More About Quid Pro Quo

There are several important points to remember about quid pro quo – sexual favors in exchange for job benefits – sexual harassment. First, quid pro quo sexual harassment can only be committed by a supervisor or somebody in the agency with the power to give or withhold some job benefit from the harassed individual.

Second, quid pro quo sexual harassment may involve more than direct, obvious requests for sexual favors in exchange for job benefits. It may also involve indirect, implicit requests for sexual favors in exchange for job benefits.

Third, quid pro quo sexual harassment is only harassment if the conduct was unwelcome to the harassed individual. Whether the conduct was welcome is determined by the harassed individual's conduct and statements. However, submission to a sexual demand and/or silence is not a sign that the conduct was welcome. In other words, if a harassed individual participates in the sexual act(s) requested of him or her because he or she was concerned for his or her job, that participation does not prove that the harassment was welcome.

Last, as a result of Supreme Court decisions, when one proves quid pro quo sexual harassment, the agency may automatically be held liable if there was a tangible job loss to the harassed individual. This is true even if the agency did not have an opportunity to correct the supervisor's behavior - even if the employer has specifically prohibited the conduct. The agency's liability is grounded in the premise that the supervisor is considered to be the "agent" of the employer or the agency itself.

### **Checklist to determine Quid Pro Quo**

- ✓ Once or more
- ✓ Stated or implied
- ✓ Unwelcome
- ✓ Demand for a sexual favor
- ✓ In exchange for a job benefit or in exchange for not taking a harmful employment action
- ✓ By a supervisor or person in authority
- ✓ Carry through on the threat
- ✓ Tangible job loss

## More About Hostile Environment

While it is easy to decide if a situation is quid pro quo sexual harassment, it is often hard to determine whether unwelcome conduct of a sexual nature has created enough of a hostile or offensive workplace for a judge to consider the situation an illegal hostile work environment sexual harassment.

A hostile environment will be found when there is a **severe and/or pervasive** pattern of unwelcome sexual conduct that creates an intimidating, hostile, or offensive work environment. In general, the conduct must be both serious and frequent. A single isolated incident will not be considered hostile environment sexual harassment unless the action was extremely outrageous.

For conduct to be considered hostile work environment sexual harassment, it must be unwelcome or offensive to someone in the workplace. Sometimes the conduct or language is so crude that it is reasonable to assume that any listener would be offended. For example, if one employee makes sexual advances toward another using sexually derogatory and vulgar language such as, “come on slut” or makes lewd comments about a person’s private body parts, a court might find the behavior to be unwelcome and offensive. However, not all statements are that blatant and it may be harder to determine whether a particular conduct is unwelcome. In these more difficult cases, *the welcomeness depends on the recipient’s response to the words or conduct. Saying “I find that behavior unwelcome” is the best method of establishing that the conduct is unwelcome.* The more direct and forceful the victim is in telling the harasser to stop, the more likely a court will find it to be unwelcome.

The standards for proving “**welcomeness**” based on conduct differ between hostile environment sexual harassment and quid pro quo sexual harassment. In quid pro quo situations, an employee may be able to prove that the conduct was unwelcome - even if he or she participated in the sexual conduct with the harasser. By contrast, initiation and/or participation by an employee in the sexual conduct with the harasser are proof of welcomeness in a hostile work environment situation. Therefore, consensual dating, mutual joking, group banter where everyone participates, and consensual touching do not generally amount to sexual harassment for any of the participants. **Beware:** silent observation is not participation.

**Remember, in order for the agency to be held liable for hostile work environment harassment, the agency must have known, or had the ability to know, about the harassment and failed to do something to stop it.**

## Additional Behaviors That Might Constitute Sexual Harassment

### VERBAL Conduct That Might Constitute Unwelcome Sexual Harassment

➤ Direct demand for sexual favors
➤ Kissing sounds, whistling, smacking, or other noises suggesting sex or cat calling
➤ Personal questions about one's sex life
➤ Demeaning names such as "Cutie", "Sugar", "Sweetie", "Honey", "Darling", "Hey baby", "Doll", "Babe", "Hunk", "Girl", or "Boy" (when referring to an adult), "Dear", "Pussycat", or "Broad", etc.
➤ Referring to a man or woman by his or her private parts
➤ Making sexual innuendoes or sexually obscene comments
➤ Telling sexually explicit jokes or stories, telling sexist jokes or stories, turning work discussions to sexual topics, or using sexual innuendoes during work discussions
➤ Asking about sexual fantasies, preferences, or history
➤ Discussing sexual activities
➤ Sexual teasing
➤ Spreading rumors or lies about a person's sex life
➤ Making lewd or suggestive comments regarding an employee's appearance (body, clothing, anatomy, or looks) or personal life
➤ Making sexual advances or repeated requests for dates even after recipient indicates that they are unwelcome
➤ Publicly berating members of one sex but not the other

**NOTE:** Asking someone out for a date once is not harassment, as long as the person asking is prepared to take "no" for an answer.



## Additional Behaviors That Might Constitute Sexual Harassment

### PHYSICAL Conduct that Might Constitute Unwelcome Sexual Harassment

➤ Actual or attempted rape or sexual assault
➤ Touching or rubbing oneself sexually in front of another person
➤ Stalking; hanging around a person without a legitimate reason
➤ Blocking, leaning over, intentionally brushing up against, or cornering a person
➤ Invading someone's personal space in a way that indicates a desire for sexual activity
➤ Giving personal gifts that are unsolicited
➤ Assault in retaliation of person refusing sexual advance
➤ Touching that is sexual in nature, such as massaging, touching a person's clothing, hair or body, hugging, kissing, patting, stroking, grabbing, pinching, hand on knee

### VISUAL Conduct that Might Constitute Unwelcome Sexual Harassment

➤ Public displays of pornography
➤ Sexually suggestive graffiti
➤ Sexually suggestive or explicit posters, pin-ups, calendars, cartoons, or magazine clippings
➤ Sending sexually explicit e-mail messages or displaying a sexually suggestive screen saver or computer wallpaper
➤ Viewing pornography via Internet in the work environment
➤ Leering, eyeballing, looking someone up and down, staring at an individual or his or her private body parts

## Hazing that Might Constitute Sexual Harassment

Hazing may occur where a man or woman becomes part of a workforce that is made up mostly or entirely of members of the opposite sex (e.g. when a woman joins an entirely male construction group or police force). Hazing activity that may create a sexually hostile work environment includes:

- ◆ group exclusion and shunning of a worker due to the worker's gender;
- ◆ requests to engage in group rituals to be part of the "club," for example, requesting female police officers to be tattooed on their behinds to join the "club;"
- ◆ sabotaging or creating obstacles to make it more difficult for the individual to perform his/her duties.
- ◆ unwelcome group teasing or pranks played on a worker due to the worker's gender, such as giving a worker a sex toy for a gift.



## Using Technology to Sexually Harass

Increasingly, harassers are taking advantage of technology to assist in their conduct. The most common abuse of current technology is sending sexually harassing messages or images through e-mail. Another common abuse is viewing sexually-laden websites, such as pornography, at the workstation via Internet or other electronic devices.

There are more creative abuses as well. In one case, an employee made a photo manipulation of his co-worker by downloading a nude photograph of a model from the internet and superimposing a photograph of his co-worker's face in the place of the model's face. The Court found this to be sexual harassment.

Many state legislatures are in the process of passing, or have passed, laws criminalizing email harassment to or from computer terminals within the state. Consequently, in addition to violating civil sexual harassment laws, a harasser might also violate a state criminal statute by sending a sexually-harassing email.

## Severe and/or Pervasive

Not all offensive sex-based behavior amounts to hostile environment sexual harassment. Instead, the law requires that the unwelcome sex-based behavior be “**severe and/or pervasive.**”

There is no magical yardstick or thermometer to measure whether a situation is severe or pervasive. A sexually hostile environment will exist where the offensive incidents or activities occur fairly frequently, or are so egregious as to be deemed severe; where the offensive events are rare or isolated, and are minor or mild, the workplace will not be considered sexually hostile. Generally, the more severe incidents are, the fewer of them will be necessary to show a hostile environment. If it is sufficiently severe, a single incident can establish a hostile environment.

Different judges will reach different conclusions on exactly how many or what types of incidents are necessary to establish hostile environment sexual harassment. Some judges emphasize one factor over the other. Other judges believe that the harassment must occur frequently *and* the actions must be egregious. The differences in judges’ interpretations of the standard of “severe and/or pervasive” sometimes lead to startling results.

### **Don’t Cross the Line: Factors to Consider**

- ◆ Is the conduct physical or verbal?
- ◆ Is the conduct occurring frequently?
- ◆ Is the conduct hostile and blatantly offensive?
- ◆ Is the harasser a co-worker or a supervisor?
- ◆ Is the harassment by more than one person?
- ◆ Does the conduct affect others in the workplace?
- ◆ Is the harassment directed at more than one person?
- ◆ Does body language indicate that the conduct is unwelcome?
- ◆ Would a reasonable person in complainant’s position find the conduct intimidating, hostile, or offensive?



## Severe and/or Pervasive, What Do You Think?

### Examples

- 1) A supervisor subjected his employee to undue attention, did not remove graffiti that implied she was having an affair with him, did not squelch rampant rumors that she was having an affair with him, and limited her assignments. Mangano v. Reno, Attorney General, 99 FEOR 3183 (EEOC 1999).  
**Severe and Pervasive.**
- 2) A male co-worker pulled open the blouse of a female co-worker and exposed her breasts. Later that day, he tried to lure her into his office. This was the only act of a sexual nature that he committed toward her - in other words, it was an isolated incident. After investigation, the male co-worker was suspended for three days without pay. Jackson v. Washington Hilton Hotel (DC 1997).  
**Not severe and pervasive.**
- 3) Over the course of three years on business trips, a supervisor gave hotel clerks the impression that he was sharing a room with his female employee, took her to dine at Hooters, and insisted that she work in his hotel room despite her protests. The supervisor also made sexually explicit comments on and off throughout the three years. Penry v. Federal Home Loan Bank of Topeka (10th Cir. 1998).  
**Not severe and pervasive.**
- 4) A female co-worker was often subjected to the use or display of fake penises constructed from rubber sealant by multiple co-workers, co-workers touching her breasts, verbal abuse, and offensive literature. One or more of these behaviors occurred on a weekly basis over the course of 20 years. Wilson v. Chrysler Corp. (7th Cir. 1999).  
**Severe and pervasive.**
- 5) A supervisor questioned an employee's personal life, placed his hands on her and called her "baby," brushed up against her backside, stated, "You are the prettiest thing I've ever seen," and watched or followed the employee on the work room floor every night. Stovall v. Potter, Postmaster General, Appeal No. 01A51531 (EEOC 2005).  
**Not severe and pervasive.**
- 6) A male supervisor told a female employee sexually-themed stories on a daily basis, ignoring her when she asked him to stop, and made sexual comments about her appearance. Bruno v. Monroe County, 383 Fed.App. 845 (11th Cir. 2012).  
**Severe and pervasive**

## **Domestic Violence and Soured Relations**

Sometimes, the distinction between work environment and personal life is blurred when one's significant other, or past significant other, is also a co-worker and begins behaving in a sexual manner or sexually harassing one at work. A significant other may be one's boyfriend, ex-boyfriend, girlfriend, ex-girlfriend, partner, spouse, estranged spouse, or ex-spouse.

When two employees enter into a consensual sexual relationship, it may present problems in the workplace. Domestic violence within a relationship and/or when one individual in the relationship later wants to end the relationship are two situations that may lead to sexual harassment in the workplace. Once the consensual relationship is over, conduct that was previously welcomed becomes unwelcome and can create a hostile environment.

### ***Domestic Violence***

Sometimes, particularly when an abuser is no longer able to contact his or her abused significant other at home, the abuser will begin harassing the individual at the workplace. The same standards regarding sexual harassment apply, regardless of who the harasser is. In other words, if the conduct would be considered sexual harassment if a co-worker behaved in the same manner, then it is sexual harassment even though the abuser once had a consensual sexual relationship with the abused. Individuals in abusive relationships should remember that, in addition to external devices such as restraining orders and/or pressing criminal charges, employees may ask the employer to prevent sexual harassment by the abuser from occurring at the workplace. For more information on domestic violence, see WFP's new publication, *An AFGE Handbook on ... Domestic Violence*.

### ***Soured Relationships***

The employee seeking to end a relationship needs to communicate very clearly the desire to end that relationship and the unwelcomeness of any further sexual advances or conduct, *particularly further advances or conduct occurring at the workplace*. Once this is stated, it should be clear that any further sexual conduct would be considered unwelcome. In addition, if either person has supervisory authority over the other, that person may not threaten or engage in any job retaliation in response to the failed relationship.

## Mixed Signals and Blaming the Victim

- *Statistics show that most women will not confront their harassers*

The question of whether the employee welcomed the conduct becomes more difficult when the employee does not communicate her feelings clearly to the harasser. For example, a supervisor in whom an employee has no interest may ask her on a date. If she says that she is busy that night, rather than that she does not wish to date him, he may continue to ask. The employee may have been unwilling to communicate her real feelings for several reasons: fear of offending her supervisor, desire not to embarrass him, or general politeness. No matter the reason for her indefinite response, it is likely unclear to the supervisor that the request for dates is unwelcome. Later, it may also be unclear to a judge, jury, or arbitrator whether the conduct was unwelcome.

- *Harassed individuals may feel they have too much to lose if they confront or complain*

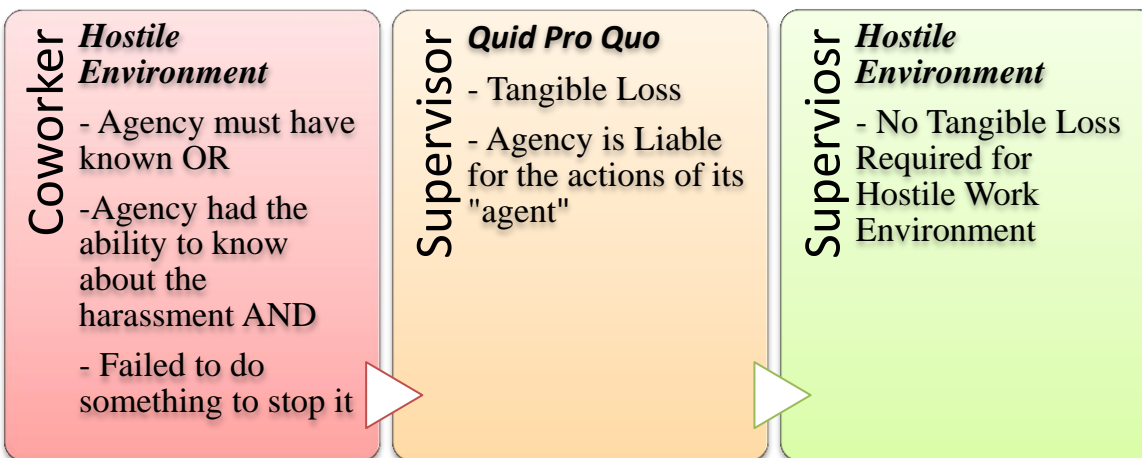
It is also very important for the employee not to participate in any way with sexual conduct that he/she does not welcome. If he/she does, it may later be found that he/she welcomed the conduct - even if he/she really only took part in it because of peer or other pressure. Therefore, one should not (1) reciprocate sexual touching if it is unwelcome, (2) engage in sexual banter, use vulgar language, or make sexual jokes, or (3) pinch, pat or otherwise initiate sexual contact with others if one would find it distasteful if directed toward him or her.

Unfortunately, society, judges, juries, and arbitrators have sometimes blamed the victim for encouraging harassment when the victim did not intend to do so. Judges, juries, and arbitrators have decided against victims on the basis of conduct they see as encouraging the harasser, such as (1) using sexual mannerisms around the harasser, (2) wearing revealing or tight clothing, and (3) inviting the harasser out or otherwise initiating social contact with the harasser after the harassing events occurred.

- *Fear of retribution, job loss, humiliation, and being doubted are among the reasons that individuals do not complain.*

If you are having trouble convincing others that you were sexually harassed because you maintained contact with the harasser, remind them that both women and men in the workplace are encouraged “not to burn bridges.” Many victims of sexual harassment maintain cordial relationships with their harassers for years afterward because they need a job reference or for some other similar reason.

**Remember:** The agency might only be liable when the conduct that is unwelcome is completed by:



## Sexual Favoritism

Under the law, there is a third type of illegal sexual harassment that is a combination of the other two. This type of sexual harassment is called **sexual favoritism** and it may occur when a supervisor rewards employees who participate in sexual activities but does not reward an employee who has not participated in sexual activity. This is true even if the employee who has not participated has not been asked to participate.

The EEOC Guidelines define “Sexual Favoritism”:

Where employment opportunities or benefits are granted because of an individual’s submission to the employer’s sexual advances or requests for sexual favors, the employer may be held liable for unlawful sex discrimination against other persons who were qualified for but were denied that employment opportunity or benefit. (EEOC Guidance, No. 915.048 (January 12, 1990)).

Sexual Favoritism requires a brothel-like environment.

Sexual Favoritism may not be found to exist if the allegation is merely that a supervisor promoted his or her spouse or boyfriend/girlfriend, however unfair that may be.

As a result, the employee who does not participate in or approve of the behavior is penalized. It is similar to quid pro quo harassment because an employee may not receive job benefits and promotions that others who submit to sexual demands receive. It is like hostile environment sexual harassment in that the sexual atmosphere in the office makes the work environment difficult.

Not all courts recognize sexual favoritism as unlawful sexual harassment. Since it has only been considered unlawful sexual harassment by some courts since 1988, the law is not yet clear on what constitutes sexual favoritism sexual harassment and what does not. The EEOC, however, has said that a single or isolated instance of favoritism based on a consensual sexual relationship is not unlawful to other employees, even though it may seem unfair, because it disadvantages both men and women for reasons other than their gender. The favoritism must be widespread and extensive to be unlawful sexual favoritism sexual harassment.

- A. Isolated Instances of Favoritism Towards a “Paramour”: Not Prohibited
- B. Favoritism Based Upon Coerced Sexual Conduct: May Constitute Quid Pro Quo Harassment
- C. Widespread Favoritism: May Constitutes Hostile Environment Harassment



## Sexual Favoritism cont'd

If favoritism based on employees giving sexual favors is widespread in a workplace, both male and female colleagues who do not welcome the conduct can establish illegal sexual harassment. This is so even if they are not the targets of the sexual requests and even if those who received the favorable job treatment willingly gave the sexual favors.

Ms. Broderick, a federal lawyer, complained to her supervisor that the workplace was "run like a brothel." In her workplace, senior employees were having affairs with junior employees and rewarding them with cash bonuses and promotions, although Ms. Broderick was not involved in any affairs personally. After Ms. Broderick complained, she received poor reviews and her supervisor threatened to fire her. She sued and won the first case of sexual favoritism sexual harassment.

Broderick v. Ruder, 685 F. Supp. 1269 (D.D.C. 1988).

## Examples

- 1) Charging Party (CP) alleges that she lost a promotion for which she was qualified because the co-worker who obtained the promotion was engaged in a sexual relationship with their supervisor. EEOC's investigation discloses that the relationship at issue was consensual and that the supervisor had never subjected CP's co-worker or any other employees to unwelcome sexual advances. The Commission would find no violation of Title VII in these circumstances, because men and women were equally disadvantaged by the supervisor's conduct for reasons other than their genders.

**Even if CP is genuinely offended by the supervisor's conduct, she has no Title VII claim.**

- 2) Same as above, except the relationship at issue was NOT consensual. Instead, CP's supervisor regularly harassed the co-worker in front of other employees, demanded sexual favors as a condition for her promotion, and then audibly boasted about his "conquest."

**In these circumstances, CP may be able to establish a violation of Title VII by showing that in order to have obtained the promotion, it would have been necessary to grant sexual favors. In addition she and other qualified men and women who were denied the promotion would have standing to challenge the favoritism on the basis that they were injured as a result of the discrimination leveled against their co-worker.**

## What Should I Do? It Is Happening To Me!

### Recognize the Harassment

Trust your instincts to tell you when there is a problem.

If something offends you, makes you uncomfortable, or frightens you, do not ignore it.

If it feels serious, it probably is serious.

Recognize that you - no matter what people say - are not at fault for a harasser's behavior.

Sexual harassment has more to do with power than anything else.

It is common for harassed individuals to wonder if they did anything to provoke the harassment and to hold themselves responsible - do not blame yourself.

If you still have doubts, talk with your friends, colleagues, union steward, and/or the Women's/Fair Practices Coordinator in your AFGE Local.

## What Should I Do? It Is Happening To Me!

### Report the Harassment

**S**aying to the harasser and/or management official that you do not approve of the behavior is the best method of indicating that you find the conduct unwelcome. This will help you to stop future harassment.

**A**ccording to studies, the majority of individuals who find themselves accused of sexual harassment were not aware that his or her behavior was offensive. These studies suggest that, had the individual been told, they would have stopped the offensive behavior. Therefore, saying “no” or reporting the behavior may stop the conduct early on.

**Y**ou are not alone if you do not feel comfortable telling the harasser to stop. In fact, studies have found that most women do not feel comfortable confronting a male harasser by saying “no” while the harassment is ongoing. If you cannot verbally tell the harasser to stop at the time of the harassment, make your wishes known through body language such as looking angry or turning or walking away. Also, by making your feelings known to a supervisor, it puts him or her in the position to confront the harasser and tell the harasser to stop. The key is to somehow have it communicated to the harasser that his or her behavior is unwelcome and offensive to you.

**N**oting your feelings in writing and presenting a copy of your letter to the harasser or supervisor **IN PERSON** and in front of a **WITNESS** is another manner in which you can say “no.” Make a copy of the letter for yourself and store it in a safe place away from work. Putting your feelings in writing will prevent the harasser and/or management from being able to claim that they did not know the conduct was unwelcome in the event that you later file a charge or grievance.

**O**rganize your thoughts. Make sure in your discussion or letter that you (1) state the specific behavior that bothers you, (2) explain how it makes you feel, and (3) explain specifically what you would like to have happen next (e.g., “I would like for the telling of dirty jokes to stop,” “I would like that pin-up calendar removed from the wall,” “I would like for the harasser to stop hugging me”).

## What Should I Do? It Is Happening To Me!

### Document the Harassment

Gather evidence of the harassment, even if you are initially unsure that you wish to pursue the situation.

- ⇒ Keep a record of the incidents including date, time, place, and names of everyone who may have overheard or witnessed the event. Write down, word for word, what was said by all involved. Detail any gestures or acts (if any) that the harasser did and your responses.
- ⇒ Ask witnesses to write down exactly what they heard or observed soon after the incident. Ask them to be detailed and have them sign the statement.
- ⇒ If you decide to tape record the harasser, remember to check to make sure it is legal to do so in your state without the harasser's knowledge.
- ⇒ Look for other victims of the same harasser. Since harassers are frequently repeat offenders, ask others you can trust if they have experienced the same thing. You may find that people who have left former positions did so because of sexual harassment.
- ⇒ Gather evidence of your good job performance. Often, a harasser tries to attack the victim's work performance in order to justify his or her behavior. Keep copies of your job evaluations and any other evidence regarding the quality of your work. This evidence may be pivotal if the harasser claims you are lying about the harassment in order to cover up your poor work performance.
- ⇒ Keep copies of any receipts or statements regarding costs that you may incur in order to seek therapy or medical intervention (doctor's notes, doctor's bills, parking receipts, other transportation costs) because of the sexual harassment.

## What Should I Do? It Is Happening To Me!

### Go to your AFGE Union

Talk to your steward and/or Women's/Fair Practices Coordinator and give him or her all of the details, even those that are embarrassing and unpleasant. Make sure you tell the union what you would like to have happen. The union officers should have a talk with your supervisor or, if the supervisor is the harasser, go to the supervisor's supervisor or labor relations staff. Often, the union official can get an immediate conference with the highest-level management official available (such as the Chief of Personnel, the Commanding Officer, or the Facility Director) when sexual harassment concerns are raised. The union official might also want to contact the Agency's Office of Inspector General, if the Agency fails to take any action.

If management refuses to immediately take care of the problem, the union can file a grievance against management, or help you file an EEO complaint against the agency for failing to provide a work environment free of sexual harassment.

If the harasser is a union member, there are several ways for the union to deal with the problem. After investigating the situation, the official may speak to the member directly and ask the member to stop, or, if the member refuses to stop, involve management. Additionally, the union can take internal union action. The AFGE Constitution provides that union members shall not engage in conduct unbecoming a union member. A member who sexually harasses another member is not upholding this clause of the Constitution.



### Complain to the Agency's EEO Counselor

Although the EEO Counselor is not there to represent you, the counselor may be able to help you to get the harasser to stop or to get management to do something about the harassment. Additionally, if you ever decide to file an EEO complaint or bring a civil suit, the law requires you to have made first contact with the EEO Counselor within 45 days of the last time you were sexually harassed.

## CHECKLIST:

- ✓ **Recognize the Problem**
- ✓ **Say No**
- ✓ **Gather Evidence**
  - **Evidence of the Harassment**
  - **Evidence of Your Work Performance**
- ✓ **Go to AFGE**
  - **Union Steward**
  - **Local Women's Coordinator**
  - **Organize!**
- ✓ **Go to the Agency's EEO Counselor**
  - **Within 45 days of the harassment**
  - **Your union representative can come with you!**



Don't forget, in order for the agency to be ultimately liable in situations of a hostile work environment, they must KNOW about the harassment. Complaining to the EEO Counselor means that the agency knows! Complaining to another supervisor means the agency knows and should take immediate action to stop or at least investigate the situation.

Sexual relationships at the workplace can lead to discipline even if the conduct is consensual. Agencies expect employees to perform work, not social activities, at the workplace. Thus, workplace sexual activities may lead to discipline even if there is no unlawful sexual harassment. In addition, even if the sexual activity is consensual, others in the workplace may be offended.

**All Agencies are required to have a Sexual Harassment policy!**

## Agency Liability

	<b>Quid Pro Quo</b>	<b>Hostile Work Environment</b>
<b>Harassment by Supervisor</b>	Strict Liability	<p>Agency is vicariously liable unless it can demonstrate that:</p> <p>(1) no tangible work loss occurred;</p> <p>(2) the Agency exercised reasonable care to prevent and promptly correct the behavior; and</p> <p>(3) the employee unreasonably failed to take advantage of any preventative or corrective opportunities offered by the employer.</p> <p><u>See Burlington Industries, Inc. v. Ellerth</u>, 118 S. Ct. 2257 (1998) and <u>Faragher v. City of Boca Raton</u>, 118 S. Ct. 2275 (1998).</p>
<b>Harassment by Co-Worker</b>	n/a	Employer liable if it knew or should have known of the harassment and failed to take immediate and appropriate corrective action.
<b>Harassment by Non-Employee</b>	n/a	Employer liable if it knew or should have known of the harassment and failed to take immediate and appropriate corrective action within its control.

## **Agency Liability & Agency Anti-Harassment Policy**

Once quid pro quo harassment is proven, the agency is automatically responsible. In order for the agency to be held liable for a hostile environment claim (or for sexual favoritism), the agency must have known, or had the ability to know, about the harassment and must have failed to do something about it the action they did take failed to stop the harassment.

There are three basic situations in which a court will determine that the agency knew about the sexual harassment: (1) when the harasser is the supervisor or a management level employee, (2) when someone tells a supervisory employee, management or the EEO counselor, (3) when it is such common knowledge that practically everyone knows. Once the agency is aware of the harassment, it must take action necessary to correct the problem. At minimum, if the investigation reveals that harassment has taken place, the agency needs to investigate the situation and discipline the harasser.

### **ANTI-HARASSMENT POLICY**

EEOC established minimum standards and guidelines for agencies to use in developing anti-harassment policies. If the Agency fails to have an anti-harassment policy or its policy does not meet the minimum standards, the Agency may not raise an affirmative defense. *EEOC Enforcement Guidance: Vicarious Employer Liability for Unlawful Harassment by Supervisors, Notice 915.002, June 18, 1999.*

An anti-harassment policy and complaint procedure should contain, at a minimum, the following elements:

- A clear explanation of what constitutes prohibited conduct;
- Assurance that employees who bring complaints of harassment or provide information related to such claims will be protected against retaliation;
- A clearly described complaint process that provides accessible avenues for complainants;
- Assurance that employer will protect the confidentiality of the individuals bringing harassment claims to the extent possible;
- A complaint process that provides a prompt, thorough, and impartial investigation; and
- Assurance that the employer will take immediate and appropriate corrective action when it determines that harassment has occurred.

*EEOC's Enforcement Guidance on Vicarious Employer Liability for Unlawful Harassment by Supervisors, [www.eeoc.gov](http://www.eeoc.gov).*

In a recent sexual harassment case, the administrative judge (AJ) granted AFGE's motion for summary judgment against the agency. AFGE was successful in proving the Agency did not



have a valid sexual harassment policy in place. The AJ then ordered a hearing only to determine the extent of the employee's damages. However, the parties submitted a joint stipulation of damages to the judge agreeing to resolve the damages claim and a revision to the Agency's anti-harassment policy.

In addition, anti-harassment policies and procedures should be widely communicated and require training on the policies and procedures. The Enforcement Guidance and the NO FEAR Act require agencies to ensure that their supervisors and managers receive periodic training so that they understand their responsibilities under the agencies' anti-harassment policy and complaint procedure. Such training should explain: the types of conduct that violate the agency's anti-harassment policy; the seriousness of the policy; the responsibilities of supervisors and managers when they learn of alleged harassment; and the prohibition against retaliation. Agencies have discretion to establish the format and wording of their anti-harassment policies to meet the structure and operational needs of the particular agency, however they must widely communicate such policies.

*See also Model EEO Programs Must Have An Effective Anti-Harassment Program, [http://www.eeoc.gov/federal/model\\_eeo\\_programs](http://www.eeoc.gov/federal/model_eeo_programs).*

*Model EEO Programs Must Have An Effective Anti-Harassment Program; EEOC's Enforcement Guidance: Vicarious Employer Liability for Unlawful Harassment by Supervisors, Notice 915.002, June 18, 1999 at footnote 57.*

### ***Difference between filing an EEO complaint and just complaining through the internal Agency process***

*The EEO process and anti-harassment programs do not exist for the same purposes. The EEO process is designed to make individuals whole for discrimination that already has occurred through damage awards and equitable relief paid by the agency and to prevent the recurrence of the unlawful discriminatory conduct. Albemarle Paper Co v. Moody, 422 U.S. 405 (1975); Clarke v. Department of Justice, EEOC Appeal No. 01922561 (1992). The EEO process cannot require an agency to discipline its employees. Cagle v. U.S. Postal Service, EEOC Appeal No. 01903198 (1990).*

*The Agency's internal anti-harassment program is designed to take immediate and appropriate corrective action, including the use of disciplinary actions, to eliminate harassing conduct regardless of whether the conduct violated the law. One of the primary goals of the anti-harassment program is to prevent harassing conduct before it can become "severe or pervasive."*

## Enforcement Guidance on Vicarious Employer Liability

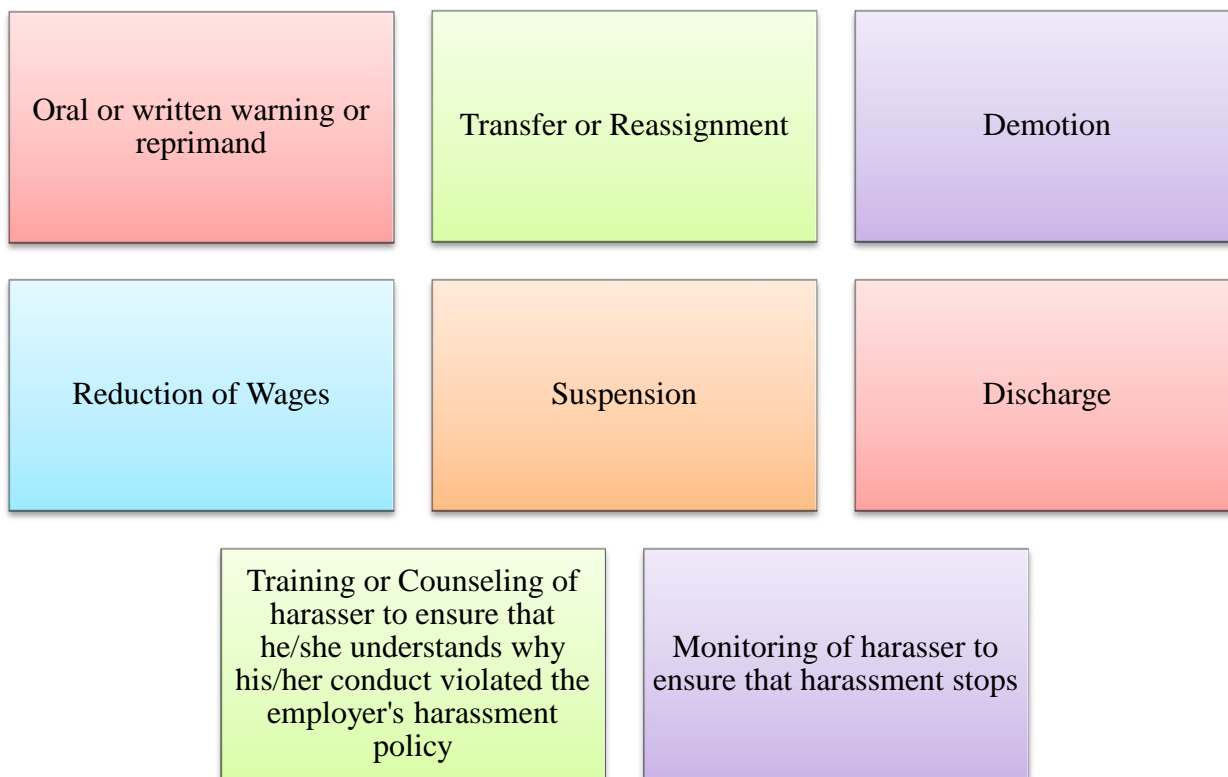
In Burlington Industries, Inc. v. Ellerth, 118 S.Ct. 2257 (1998), and Faragher v. City of Boca Raton, 118 S. Ct. 2275 (1998), the Supreme Court made clear that employers are subject to vicarious liability for unlawful harassment by supervisors. The standard of liability is premised on two principles:

1. An employer is responsible for the acts of its supervisors
2. Employers should be encouraged to prevent harassment and employees should be encouraged to avoid or limit the harm from harassment

An employer may be able to avoid liability or limit damages by establishing an **affirmative defense** that includes two necessary elements:

- The employer exercised reasonable care to prevent and correct promptly any harassing behavior,
- The employee unreasonably failed to take advantage of any preventive or corrective opportunities provided by the employer or to avoid harm otherwise.

### **Examples of Measures to Stop the Harasser and Ensure that the Harassment Not Recur**



## Compensatory Damages



As a result of the November 21, 1991 signing of the 1991 Civil Rights Act, federal employees are now entitled to compensatory damages. Compensatory damages are awards of money for actual losses suffered for intentional discrimination. Compensatory damages include lost employment benefits, medical costs, “out of pocket” expenses, pain and suffering, and emotional distress that resulted from the discrimination.

Soon after the 1991 Act went into effect, the Equal Employment Opportunity Commission (EEOC), the Merit Systems Protection Board (MSPB) and Arbitrators began awarding compensatory damages. On June 14, 1999, the Supreme Court held in West v. Gibson, 527 U.S. 212 (1999) that the EEOC is entitled to award compensatory damages.

Compensatory damages are capped at \$300,000 for federal EEO cases. In other words, an employee can only receive up to \$300,000 in compensatory damages—even if more was lost. Remember that this cap is a ceiling: an employee is not automatically entitled to \$300,000.

**Make your claim for compensatory damages with the agency as early as possible and be creative, but reasonable!**





## Statistics of Interest

- ✦ A study of over 10,000 women working for the federal government found the women had experienced: Sexual remarks (33%); Leers and suggestive looks (28%); Touching (25%); Pressure for dates (15%); Pressure for sexual favors (9%); and Sexual assault or rape at work (1%). ("Sexual Harassment: It's About Power, Not Sex," New York Times, Oct. 22, 1991).
- ✦ In a survey of 456 (private-sector) companies, forty-three percent (43%) of the claims of sexual harassment were against a direct supervisor or other superior, fifty percent (50%) of the claims were against a co-worker, and the remaining seven percent (7%) were against a customer or vendor. Grimsley, "Co-Workers Cited in most Sexual Harassment Cases," Washington Post, pg. D1 (June 14, 1996).
- ✦ In a survey of 313 (private-sector) companies that in total had 1,335 claims of sexual harassment, the alleged harasser was reprimanded in thirty five percent (35%) of the claims, there was mediation &/or counseling for parties in thirty-five percent (35%) of the claims, the alleged harasser was terminated in sixteen percent (16%) of the claims, the allegation was dismissed in fifteen percent (15%) of the claims, the complainant was transferred in four percent (4%) of the claims, and the alleged harasser was transferred in three percent (3%) of the claims. Grimsley, "Co-Workers Cited in most Sexual Harassment Cases," Washington Post, pg. D1 (June 14, 1996).
- ✦ Almost seventy percent (70%) of respondents in an NBC News poll say calling a co-worker 'babe' or 'honey' is offensive. "Washington Wire," *Wall Street Journal*, pg. A1 (April 24, 1998).
- ✦ Seventy-seven percent (77%) of respondents in an NBC News poll say telling dirty jokes in the office is offensive. "Washington Wire," *Wall Street Journal*, pg. A1 (April 24, 1998).
- ✦ Fifty-nine percent (59%) of respondents in an NBC News poll believe that asking a co-worker for a date is permissible, but eighty-nine percent (89%) say it is not permissible to ask repeatedly after being refused. "Washington Wire," *Wall Street Journal*, pg. A1 (April 24, 1998).
- ✦ Fifty percent (50%) of respondents in an NBC News poll disapprove of asking a co-worker of the opposite sex about his or her private life. "Washington Wire," *Wall Street Journal*, pg. A1 (April 24, 1998).
- ✦ Only thirty-three percent (33%) of respondents in an NBC News poll find hugging a co-worker of the opposite sex offensive. "Washington Wire," *Wall Street Journal*, pg. A1 (April 24, 1998).
- ✦ More than half of employees with access to the Internet at work have received adult-oriented, racist, sexist or improper e-mail at work. "Money," USA TODAY pg. IB (April 5, 1999). It is estimated that 95 percent of sexual harassment incidents may go unreported. (Equal Rights Advocates, 2000, "Facts About Sexual Harassment in the Workplace.")

- ✦ A survey of the armed forces found that 50% of women and 17% of men experienced sexist behavior, 45% of women and 23% of men experienced crude or offensive behavior, 27% of women and 5% of men experienced unwanted sexual attention, 8% of women and 1% of men experienced sexual coercion, and 3% of women and 1% of men experienced sexual assault. 30% of women and 38% of men reported this behavior. Department of Defense, Armed Forces 2002 Sexual Harassment Survey (2002), <http://www.defense.gov/news/Feb2004/d20040227shs1.pdf>.
- ✦ The Department of Labor estimates that private businesses lose around \$1 billion annually due to sexual harassment. Mary L Boland, *Sexual Harassment in the Workplace* (2005).
  - Sexual harassment costs a typical Fortune 500 company \$6.7 million per year in absenteeism, low productivity, and employee turnover. Ronni Sandoff, *Sexual Harassment in the Fortune 500*, Working Woman (Dec. 1988).
- ✦ Fifteen percent of men and 8% of women have emailed sexual images to co-workers. *Technology Makes Porn Easier to Access at Work*, USA Today (Oct. 18, 2007).
- ✦ The proportion of women who reported experiencing sexual harassment increased to 63% in male-dominated fields such as science, engineering, and technology. Barbara Rose, *Workplace Full of Gender Time Warps, Parallel Universes*, Pittsburgh Post-Gazette (June 8, 2008).
- ✦ Statistics from EEOC show that from 1997 to 2011 the percentage of sexual harassment charges filed by men rose from 11.60% in 1997 to 16.3% in 2011.
- ✦ A survey of 1,018 adults in the U.S. found that one in four women and one in ten men has experienced workplace sexual harassment. 41% of harassed women reported it to their employers. Among those who did not, 4 in 10 were either concerned about the consequences or thought it would not help. Only 56% of women think that if they report sexual harassment, it will be handled fairly. *One in Four U.S. Women Reports Workplace Harassment*, ABC News (Nov. 16, 2011), <http://abcnews.go.com/blogs/politics/2011/11/one-in-four-u-s-women-reports-workplace-harassment/>.

## Effects of Sexual Harassment

Sexual harassment may have a terrible impact on the victim psychologically, physically and economically. It can also affect the victim's family, sometimes very seriously. Finally, even seemingly insignificant harassment can hurt the union and the employer in many short-term and long-term ways.

### Psychological Effects on the Victim

Sexual harassment victims can suffer a wide range of emotional reactions. While some victims may suffer severe depression, many suffer from self-blame, self-doubt, humiliation, loss of interest in work, frustration and powerlessness, anger and loss of trust.

- Self-blame, self-doubt, and humiliation

Common emotional reactions to sexual harassment are self-blame, self-doubt, and humiliation. Victims often react to sexual harassment by blaming themselves for the actions of the harasser. They wonder what they are doing wrong: whether they are dressing the wrong way, talking the wrong way, or acting the wrong way. Some victims try to make themselves unattractive hoping that this will stop the harassment. For example, they might try to gain weight or wear unattractive clothing. Victims also blame themselves for not telling the harasser to stop. Victims are afraid that people will believe that they "let it happen."

All of this self-blame can lead to self-doubt, another common reaction to sexual harassment. Victims of sexual harassment may feel that they are inferior and unworthy, which can then lead to even worse psychological reactions. Victims of sexual harassment also suffer from humiliation. They feel embarrassed that they are being demeaned as sexual objects, instead of a person there to do a job.

- Loss of interest in work

Many victims of sexual harassment come to feel a serious lack of interest in their job. They are unable to enjoy their work and dread going there each day.

- Frustration and powerlessness

Victims also feel frustrated and powerless. They are afraid that, if they fight the harassment, they may lose their jobs (which they cannot afford to do). If they do not fight the harassment, however, they find themselves losing self-respect and self-esteem. Because they do not know what to do, they feel powerless to do anything.

- Anger

Victims frequently feel extreme anger and rage toward their harasser. Unfortunately, this anger often remains pent-up for many years because many victims feel they cannot tell anyone about it. Many feel they cannot confront the harasser, for fear of job loss or the perception that they are too sensitive. Many feel they cannot tell a spouse or partner because of how that person might react. Finally, many feel they cannot tell friends because it is too personal, embarrassing and humiliating.

- Loss of trust

Victims sometimes develop a lack of trust in the gender of their harasser. They are frightened of other men or women in the workplace or on the street. In severe cases, they sometimes lose trust in their spouses or partners. Because of this loss of trust, sexual harassment victims may later find it difficult to work outside of the home.

- Depression

The most severe psychological reaction that victims tend to suffer from is clinical depression. Clinical depression is characterized by extreme sadness or loss of interest in usual activities and pastimes, and at least four of the following symptoms nearly every day for at least two weeks:

- \* poor appetite or weight loss;
- \* increased or decreased sleep;
- \* loss of interest or pleasure or decreased sex drive;
- \* loss of energy or fatigue;
- \* feelings of worthlessness or guilt;
- \* decreased concentration;
- \* thoughts of death.



## Effects of Sexual Harassment

### Physical Effects on the Victim

Victims have also suffered from a variety of physical ailments as a result of their harassment. Some of them include:

- \* headaches;
- \* backaches;
- \* nausea, throwing up or other stomach ailments;
- \* fatigue or sleeping disorders;
- \* eating disorders;
- \* hair falling out in clumps;
- \* weight gain or weight loss
- \* lowered immune system due to stress attacks.

The physical effects may be so severe that victims end up in the hospital.



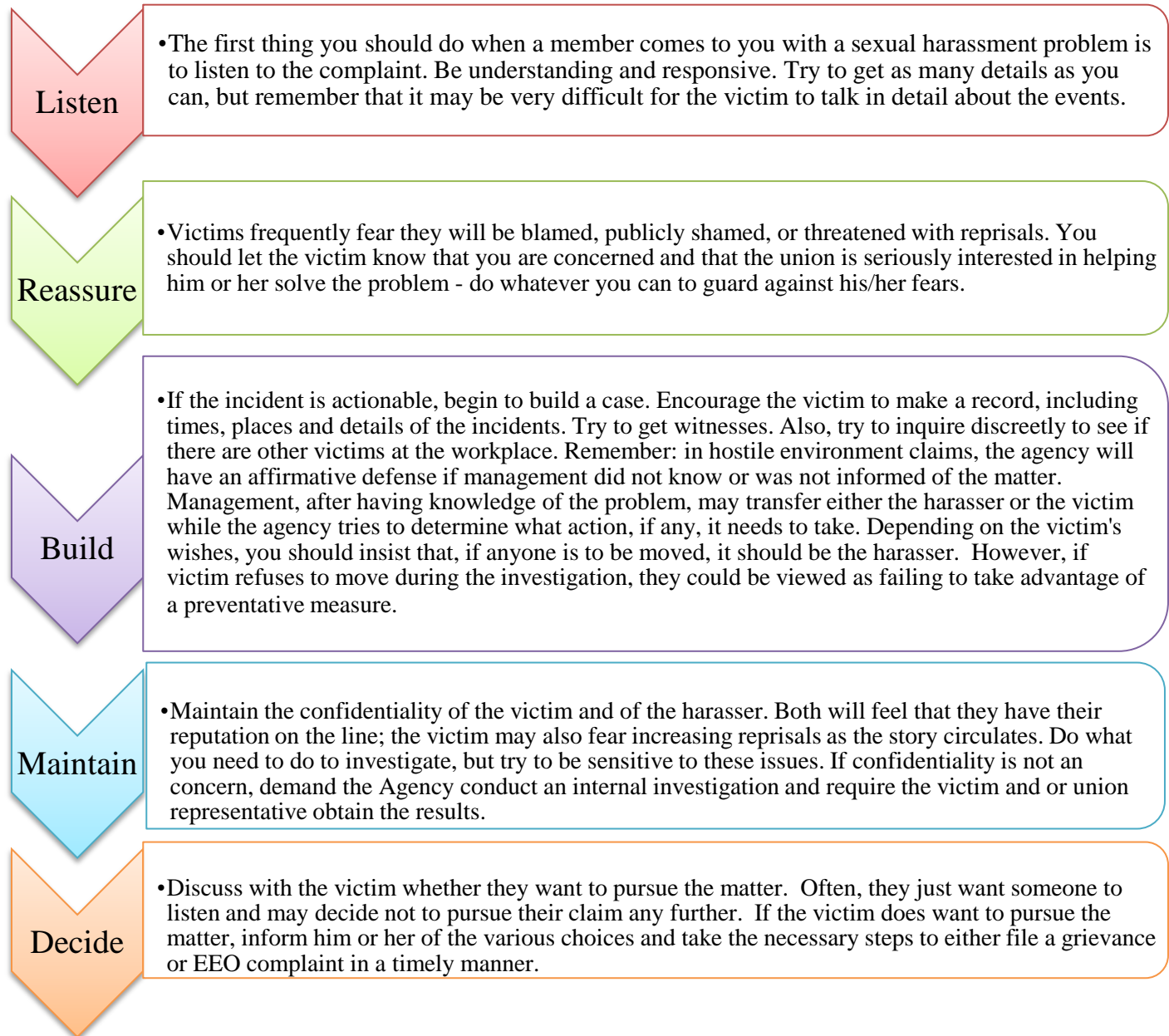
### Economic Effects on the Victim

In addition to the psychological and physical effects, victims of sexual harassment also may suffer negative economic effects. The negative economic effects can come about for several reasons. First, the victim may lose his or her job for refusing to submit to sexual advances, and have to settle for a lower paying position. Second, the victim may quit the job in order to end the harassment, causing job interruption and possibly the need to accept a lower paying position. Job interruptions like these can result in long-term effects: forfeiting time accrued toward a pension or seniority, loss of health benefits, and concern by employers that the individual is not reliable. Third, in order to avoid the harassment, one may avoid job duties or opportunities they would otherwise accept - this may have a negative effect on one's career advancement. Finally, the victim may wind up with high medical, counseling, or attorney bills because of the harassment.



## The Steward's Role

### A Member Comes to You



## The Steward's Role cont'd

### Educate Yourself

Part of your role as union steward is to educate yourself. Finding a solution to sexual harassment in the workplace begins with understanding the problem. You can take advantage of a variety of formal and informal educational methods, such as:

Attending any training offered or conducted by the Agency to ensure that they are dissemination accurate information;

Attending training on the grievance process, EEO complaint process, and MSPB appeal process;

Distributing AFGE's mini-brochures & any other materials on the subject; and

Ensuring that the Agency's policy on Sexual Harassment and AFGE Sexual Harassment posters/flyers are placed in prominent areas.

## **The Union Can...**

Local unions can take many steps to fight sexual harassment. Their main goals should be to educate union members, make them sensitive to the problem, and create a climate that discourages sexual harassment and encourages victims to turn to the union for assistance when it occurs.

### **Educate the Members**

Local unions can help educate union members by:

- \* Distributing education material to inform members about sexual harassment, including this booklet, AFGE's mini-brochures "Sexual Harassment in the Federal Government" and "Sexual Harassment in the D.C. Government," the AFGE Sexual Harassment poster and any other appropriate materials;
- \* Including articles on sexual harassment in your local's or council's newsletter;
- \* Encouraging discussion of the topic at local, council and executive meetings;
- \* Sponsoring trainings and seminars on sexual harassment;
- \* Including the topic of sexual harassment at conferences (not just women's conferences); and
- \* Including training on handling sexual harassment grievances as part of your steward-training program.

### **Show the Membership that It Matters**

The union should think about ways to impress upon the membership the seriousness of sexual harassment and the local union's commitment to ending it. Consider:

- \* Establishing an anti-sexual harassment policy through local or council resolutions;
- \* Determining the extent of the problem in the workplace by surveying the membership (anonymously); and
- \* Supporting efforts to expand protection for victims of sexual harassment (such as laws that require employers to educate and train workers, laws that broaden penalties for employers who allow harassment, and laws that make it easier for victims of sexual harassment to collect unemployment compensation if they leave a job).

## **The Union Can...**

### **Negotiate Protection**

Local union leadership should study the present union contract language on discrimination to determine whether it is adequate to deal with sexual harassment. If not, additional protections should be negotiated. Some important protections the union should seek to include are:

- \* A statement in the antidiscrimination clause that sexual harassment is a form of sex discrimination. This will tell the union members and agency officials that the issue is important, and ensure that sexual harassment will be covered by the grievance procedure;
- \* A requirement that arbitrators in sexual harassment cases have prior experience or training in the area; and
- \* Making sexual harassment grievances among those eligible for an "expedited procedure," allowing the grievant to skip the initial steps of the grievance process.

### **Designate a Union Contact for Complaints**

Because victims are often reluctant to bring their complaints to a steward who may not be sympathetic, the local union should think about designating particular persons (one male and one female because a female victim may not feel comfortable talking to a male steward or vice versa) as the union contact for sexual harassment complaints. Once done, the union should ensure that the people chosen get additional training on how to deal with sexual harassment problems. Union leadership should also ensure that the membership knows who the contact persons are for sexual harassment problems.

The union should exercise great care in choosing the contact people; this will make it easier for victims to make contact. In addition, the union should choose individuals who are well-respected, approachable, and understanding. A good choice for most AFGE Locals will be the Local Women's Coordinator and/or the Local Fair Practice Coordinator.

## Questions and Answers

After reading this booklet, you should have a good understanding of sexual harassment and how to combat it. You may still have some questions, however. Below are some of the most common questions. If you need more specific information, contact your elected District Women's Coordinator; District Fair Practice or the AFGE Women's/Fair Practices Departments.

**Q: Can my supervisor be held legally liable for harassment, or is it just the agency?**

A: Federal employees can only sue the head of the agency for most forms of sexual harassment. Federal anti-discrimination laws only apply to "employers," which is limited to the agency itself, meaning a complaint about a hostile work environment or quid pro quo sexual harassment must be against the agency. However, if a supervisor's behavior is extreme, such as sexual assault, he or she may be liable under a civil claim (for example, assault or emotional distress) or a criminal claim (for example, assault or lewd conduct).

**Q: Shouldn't women who join mostly male workforces have to put up with rough language, dirty jokes and some hazing? After all, the men are treating the women the same as they treat each other.**

A: There is an ongoing myth that men in mostly male work environments treat the women who join just as they treat each other. This is not necessarily true. Instead, some men in these environments increase their use of foul language and sexual conduct to make it more difficult for women to succeed. In some lawsuits, courts have held that increased sexual conduct that results from a woman joining a mostly male workforce is illegal sexual harassment.

**Q: Don't people in the workplace find it complimentary when others whistle at them, give them gifts, or make sexual comments to them?**

A: Very frequently -- NO! Mostly people feel humiliated and degraded by this behavior. Victims understand sexual harassment for what it is -- a power play using sexual conduct as a weapon. It is a weapon to make the victim feel like a sex object, rather than a valuable employee.

**Q: Is sexual harassment of men, either by a woman or a man, illegal?**

A: Yes. Sexual harassment is illegal regardless of the sex of the harasser or the victim. Unwelcome sexual conduct against workers of either sex may be the basis for a case of illegal sexual harassment.

**Q: Isn't it true that many women lie about being sexually harassed to cover up for job problems or get back at men who have hurt them in some way? Do some women fantasize the whole situation?**

A: Rarely. A Working Woman magazine survey of Fortune 500 managers (December 1988) showed that false reports are rare. People in the workplace have very little incentive to lie about being sexually harassed. Unfortunately, victims are often blamed for the problem and can suffer career detriment from coming forward. Consequently, sexual harassment often goes unreported.

**Q: When my supervisor persistently yells swear words at me that are not sexually oriented, is he guilty of sexual harassment because he is a man and I am a woman?**

A: A supervisor yelling at employees in a nonsexual way is not sexual harassment simply because the supervisor is a man and one of the employees is a woman. If however, the supervisor persistently uses sexually abusive language or persistently yells at an employee because of her sex, he is likely sexually harassing that employee. If your supervisor is yelling at you, but it is not sexual harassment, you likely still have rights you can pursue. Your union contract may mandate that supervisors treat employees with fairness and respect, or has other similar language. If it does, you can pursue your rights under the contract.

**Q: How can employers correct harassment?**

A: If harassment is found to have occurred, an employer should take immediate action to stop it and ensure that it does not happen again. The employer should issue discipline proportionate to the seriousness of the conduct. The employer should also correct the effects of the harassment on the victim (e.g. restoring leave that the victim used because of the harassment).

**Q: Can my employer be held responsible for harassment by people outside the government -- such as customers, contractors, or vendors?**

A: Possibly. Your employer has the obligation to provide a workplace free from unlawful sexual harassment. This may be more difficult when the harasser is a not another employee, but the employer must try to eliminate the behavior in any event.

**Q: Won't cracking down on sexual harassment make the workplace too boring and serious?**

A: On the contrary, cracking down on sexual harassment will make the workplace more enjoyable for everybody. Policies against sexual harassment are directed at repeated, unwelcome sexual harassment. They are not directed at friendly and mutually enjoyable interaction that doesn't offend those involved or others. Sexual harassment policies and laws aim to stop offensive interactions that usually involve assertions of power, not mutually enjoyable, affectionate, or romantic feelings.

## Development of the Law



- 1964** The Civil Rights Act of 1964 becomes law. Title VII of the Civil Rights Act of 1964 prohibits employment discrimination based on race, color, religion, national origin, and sex. There is no mention of sexual harassment in the law or its legislative history.
- 1975** Former female employees charge that their male supervisor forced them to quit with his offensive sexual advances. This is not sex discrimination, a court finds, only a “personal urge” of the supervisor. Corne v. Bausch & Lomb, Inc., 390 F. Supp. 161 (D. Ariz 1975) vacated, 562 F.2d 55 (9th Cir. 1977).
- 1976** The humiliation and termination of a female employee by her male supervisor because she rejected his sexual advances, if proven, would be sex discrimination, a court rules, because it was an artificial barrier to employment that was placed before one gender and not the other. Williams v. Saxbe, 413 F. Supp. 654 (D.D.C. 1976) vacated sub nom. Williams v. Bell, 587 F.2d 1240 (D.C. Cir. 1978).
- 1977** This case was an appeal from a trial court decision finding that a male supervisor did not discriminate on the basis of sex against a female employee when he solicited from her sexual favors because he found her “attractive” and then retaliated when she rejected his advances and he felt “rejected.” The appeals court rules that if a female employee is retaliated against because she rejects the sexual advances of her boss, the retaliation is sex discrimination in violation of Title VII. Barnes v. Costle, 561 F.2d 983 (D.C. Cir. 1977).
- 1980** The Equal Employment Opportunity Commission (EEOC), the agency that enforces Title VII, issues guidelines interpreting the law to forbid sexual harassment as a form of sex discrimination. 29 C.F.R. § 1604.11.
- 1981** For the first time a federal appeals court endorses the EEOC’s position that Title VII liability can exist for sexual insults and propositions that create a “sexually hostile environment,” even if the employee did not lose any tangible job benefits as a result. Bundy v. Jackson, 641 F.2d 934 (D.C. Cir. 1981).

In another case, a federal district court decides that firing a male employee because he rejected the sexual advances of his male supervisor violates Title VII. The discrimination was based on the employee’s gender, because a similarly situated woman would not have

had sexual demands made of her, the court decides. Wright v. Methodist Youth Services, Inc., 511 F. Supp. 307 (N.D. Ill. 1981).

- 1983** An employer with a policy forbidding sexual harassment is held liable for the sexist name-calling of a female air traffic controller because it failed to take corrective action when the employee complained. Katz v. Dole, 709 F.2d 251 (4th Cir. 1983).
- 1985** Physical violence can amount to sexual harassment, an appeals court says, even if the conduct is not overtly sexual. All that is necessary, the court rules, is that the unwelcome conduct be on the basis of the victim's gender. McKinney v. Dole, 765 F.2d 1129 (D.C. Cir. 1985) abrogated by Stevens v. Dep't of Treasury, 500 U.S. 1 (1991).
- 1986** Addressing the sexual harassment issue for the first time, the Supreme Court ruled that a woman who had sex with her boss a number of times because she was afraid of losing her job if she refused could sue for sexual harassment. The question is not whether the employee's conduct was voluntary, but whether the boss's conduct was unwelcome, the Court explains. An employer can be held liable for sexual harassment committed by its supervisors if it knew or should have known about the conduct and did nothing to correct it, the Court adds. Meritor Sav. Bank, FSB v. Vinson, 477 U.S. 57 (1986).
- 1988** Male construction workers haze three female colleagues. Even though some of the conduct was not specifically sexual in nature, it occurred because of the female employees' gender. The law prohibits such gender-based harassment, a court of appeals finds. Hall v. Gus Const. Co. Inc., 842 F.2d 1010 (8th Cir. 1988).
- 1989** A female candidate for partnership was denied admission as a partner in an accounting firm. The Supreme Court held, inter alia, that gender discrimination occurs any time an employer treats an employee differently for failing to conform to any gender-based expectations or norms. Price Waterhouse v. Hopkins, 490 U.S. 228 (1989).
- 1990** The EEOC issues a policy statement saying that sexual favoritism is a form of sexual harassment; it takes the position that isolated incidents of consensual favoritism do not violate Title VII and that sexual favoritism does violate the law when the advances are unwelcome or the favoritism is so widespread that it has become an unspoken condition of employment.
- 1991** A court finds a sexually hostile environment violating Title VII where women are a small minority of the work force and crude language, sexual graffiti, and pornography pervade the workplace. Title VII is "a sword to battle such conditions," not a shield to protect pre-existing abusive environments, the court declares. Robinson v. Jacksonville Shipyards, Inc., 760 F. Supp. 1486 (M.D. Fla. 1991).

In another case, a court finds that male and female sensibilities differ, and the appropriate standard to use in sexual harassment cases is that of a "reasonable woman" rather than a "reasonable person." The court concludes that the conduct in question - unsolicited love letters and unwanted attention - might appear inoffensive to the average man, but might



be so offensive to the average woman that it creates a hostile working environment, the court rules. Ellison v. Brady, 924 F.2d 872 (9th Cir. 1991).

The Senate Judiciary Committee conducts hearings on the nomination of Judge Clarence Thomas to Associate Justice of the United States Supreme Court. At issue is whether, while he was chairman of the EEOC, Thomas sexually harassed female assistant Anita Hill, now a law professor. The alleged conduct occurred in private, Hill did not officially report it, and she continued to freely associate with Thomas even after she changed jobs. Although some senators believed Hill's charges, the Senate nevertheless voted to give Thomas a seat on the Court. The hearings brought the issue of workplace sexual harassment out in the open, however, and began an ongoing debate between men and women over just what harassment is and what should be done about it.

The Civil Rights Act of 1991 becomes law. Among its provisions is Section 1981a, a provision for jury trials and compensatory damages when intentional discrimination, including sexual harassment occurs. At the request of AFGE, the Senate amended Section 1981a to include language specific language to extend this right to federal employees.

- 1992** Sexual harassment returns to front-page status with new publicity about the Navy's Tailhook scandal. After an initial delay, the Navy investigated allegations that women attending a convention of naval personnel at a Las Vegas hotel were forced to run through a gauntlet of male personnel and subject themselves to unwelcome touching. The investigation of these and similar allegations led to the discipline of several high-ranking naval officers for permitting the situation to occur.

Addressing the issue of sexual harassment in public schools, the Supreme Court rules that a high school student can collect money damages if she can prove her claim that her high school took no action to halt sexual harassment against her by one of her male teachers. Franklin v. Gwinnett County Pub. Sch., 503 U.S. 60 (1992).

A study by Working Woman magazine reports that over 62 percent of readers polled had experienced sexual harassment, but only 26 percent reported the harassment to their organizations.

- 1993** In its second decision on sexual harassment in employment, the Supreme Court rules that an employee claiming a sexually hostile environment need not prove any tangible psychological injury or serious effect on "psychological wellbeing." The lower courts held that a hostile environment exists only if it affects a person's psychological wellbeing and therefore interferes with work performance. The Supreme Court reversed, holding that, even though a discriminatorily abusive work environment may not seriously affect an employee's psychological well-being, it still may affect job performance or advancement and so proof of psychological harm is not necessary for a successful suit. It is enough if (1) the employee subjectively perceives a hostile work environment as a result of gender-based conduct and (2) the conduct was severe or pervasive enough to

create an objectively hostile work environment - one that a reasonable person would find hostile. Harris v. Forklift Sys., Inc., 510 U.S. 17 (1993).

A mining company in northern Minnesota is found liable in the first successful sexual harassment lawsuit by a group. Over 100 individuals are in the class of women who experienced sexual harassment. Jensen v. Eveleth Taconite Co., 130 F.3d 1287 (8th Cir. 1997).

The EEOC issues proposed guidelines on workplace harassment. The guidelines would apply to harassment on the basis of gender that is not sexual in nature, as well as harassment on the basis of race, color, religion, national origin, age, or disability. The 1980 EEOC guidelines covered harassment consisting of conduct that is sexual in nature. The proposed guidelines issued in 1993 make it clear that Title VII also forbids harassment that is not sexual in nature but is based on gender.

- 1994** The issue of sexual harassment once again becomes front-page news when a federal lawsuit is filed against President Clinton alleging that he sexually harassed a woman in 1991 when he was the governor, and she was an employee, of the State of Arkansas. The allegation is that Governor Clinton misused his authority in an effort to obtain sexual favors from a state employee.

In its third case involving sexual harassment in employment, the Supreme Court holds that provisions of the Civil Rights Act of 1991 that liberalize remedies regarding jury trials and damages do not apply to cases that arose before the 1991 Act took effect. Landgraf v. USI Film Products, 511 U.S. 244 (1994).

- 1995** California Court held that an employer's obligation to take remedial/corrective action after it learns of sexual harassment does not end because of the voluntary termination of the conduct by the harasser. Fuller v. City of Oakland, 47 F.3d 1522 (9th Cir. 1995).
- 1996** A federal court upholds the dismissal of a manager fired for disregarding his boss's order not to discuss an ongoing sexual harassment investigation with other employees. The court rejects the manager's argument that he had been engaged in activity protected by law when he discussed the investigation with another employee. Morris v. Boston Edison Co., 942 F.Supp. 65 (D.Mass.1996).
- 1996** A federal court upholds the dismissal of a female employee who made unfounded harassment charges against a male manager after their romantic relationship had ended. Cerwinski v. Ins. Services Offices, 1996 WL 562988 (S.D.N.Y. Oct. 3, 1996).
- 1997** US Supreme Court decides that a civil law suit alleging sexual harassment can go forward during the presidency of the President of the United States and should not be delayed until his term in office ends. Jones v. Clinton, 520 U.S. 681 (1997).

A U.S. appeals court rules that a sexual harassment investigation need not be perfect and that the employer need not take the action the complainant suggests, so long as the action

- is reasonably calculated to prevent harassment. Knabe v. Boury Corp., 114 F.3d 407 (3d Cir.1997).
- 1998** Supreme Court holds that sexual discrimination consisting of same sex sexual harassment is actionable under Title VII. Oncale v. Sundower Offshore Services, Inc., 523 U.S. 75 (1998).
- 1998** Supreme Court holds that employers are vicariously liable for supervisory acts that cause a hostile work environment but does not result in tangible work detriment for employees, unless, (1) the employer has exercised reasonable care to correct the problem and (2) the employee has failed to reasonably avoid harm. In the instant case, the employer is vicariously liable for the supervisor's act that cause the hostile work environment for it failed to exercise reasonable care when it failed to disseminate sexual harassment policy, failed to track conduct of supervisors, and failed to give employees assurances that harassing supervisors could be bypassed when registering complaints. Faragher v. Boca Raton, 524 U.S. 775 (1998).
- 1998** Supreme Court holds that sexual harassment (in the form of an unfulfilled *quid-pro-quo*-like threat) by a supervisor against a worker is actionable when the harassment was severe and pervasive but did not lead to adverse job consequences under the rubric of hostile work environment. Ellerth v. Burlington Industries, 524 U.S. 742 (1998).
- 1998** A federal district court, applying the new Ellerth/Faragher rule, dismisses a hostile environment claim by an employee because she failed to report the harassment promptly. Montero v. AGCO Corp., 19 F.Supp. 2d 1143 (E.D. Cal.)1998.
- 1999** Supreme Court, in a 5-4 vote, holds that EEOC has authority to award compensatory damages to federal employees. Adopting the argument presented in AFGE's *amicus* brief, the Court overturns two court of appeals cases that found that compensatory damages were only available in federal court. West v. Gibson, 527 U.S. 212 (1999).
- 2000** The EEOC determines that co-workers can create a hostile environment for an employee by consistently reminding him or her of a previous instance of harassment. The complainant alleged she was harassed by a co-worker, who confined her in a cubicle, grabbed her buttocks, made suggestive noises, tried to inappropriately touch her, and suggested he expose himself to her. She complained to the appropriate officials, who investigated, suspended the co-worker, and required him to issue a formal apology to the employee. However, the other employees in her department frequently reminded her of the incident by questioning her and criticizing her for her response. On several occasions, she requested a transfer but was denied. The EEOC determined that the behavior of the employee's other co-workers and the agency's failure to address it was enough to create a hostile environment for which the agency was liable. Pruden v. Caldera, EEOC DOC 01970573, 2000 WL 1460019 (EEOC 2000).
- 2002** The EEOC finds that a complainant established her claim of sexual harassment and that the supervisors did not exercise reasonable care to prevent or correct the inappropriate

behavior where pictures of scantily clad women and sex-based pranks continued to re-occur during a two and a half year period. Waskiewicz v. General Services Administration, EEOC DOC 05940824 (EEOC 2002).

- 2003** Federal appellate court finds that a general “glass ceiling” atmosphere could not establish a hostile environment sexual harassment claim because the plaintiffs could not point to specific instances or acts that significantly changed their employment status for the worse (firing, reassignment, specific failures to promote, etc.). Croy v. Cobe Laboratories, Inc., 345 F.3d 1199 (10th Cir.).
- 2004** In Pennsylvania State Police v. Suders, the plaintiff, an operator for the state police, was subjected to vulgar comments, jokes about bestiality and oral sex and obscene gestures. She was also “arrested” and “interrogated” by her supervisors, who were police officers. She eventually resigned and argued that she had been constructively discharged by the severity of their behavior. Constructive discharge occurs when working conditions are so intolerable that a reasonable person would have felt compelled to quit – even if they were not officially terminated. In Suders, the Supreme Court holds that, if a plaintiff proves constructive discharge, an employer cannot utilize the Ellerth/Faragher rule as a defense. In terms of sexual harassment, the Court suggests that constructive discharge can result from a hostile environment “ratcheted up to the breaking point.” These conditions can be created by co-worker conduct, unofficial supervisory conduct, or official company acts. Pennsylvania State Police v. Suders, 542 U.S. 129 (2004).
- 2006** The Supreme Court holds that retaliation is not limited to adverse employment actions or those that occur in the workplace. A provision limited to employment-related actions would not serve the purpose of the anti-retaliation provision because it would not deter many forms of effective retaliation. However, retaliation must be something that might dissuade a reasonable employee from making or supporting a charge of discrimination, not just a trivial harm. Burlington Northern and Santa Fe Ry. Co. v. White, 548 U.S. 53 (2006).
- 2007** A federal appellate court finds that an employer can be held liable for one co-worker creating a hostile environment for another only if it is negligent in discovering or remedying the harassment. A plaintiff alleging that co-worker has been harassing him or her must show either that they notified the employer about the harassment or that the harassment was so pervasive that the employer reasonably knew about it through other means (e.g. another co-worker reports the harassment to a supervisor or manager. In Bombaci, the plaintiff reported the harassment to a senior employee, believing that employee to be a supervisor (based on that employee’s duties and responsibilities), who then reported the information to a supervisor. Although the plaintiff’s belief that she was reporting the harassment to a supervisor was not reasonable, the court finds that because the senior employee did report the harassment to a supervisor, that supervisor had an obligation to take action. In that the supervisor failed to do so, the employer was held liable for negligence in remedying the sexual harassment. Bombaci v. Journal Community Publishing Group, Inc., 482 F.3d 979 (7th Cir. 2007).

**2009** The Supreme Court finds that anti-retaliation protection covered an employee who spoke out about discrimination when being questioned as part of an investigation. This decision overruled the two lower court decisions, which had held that the protection only applied to an employee reporting discrimination on his or her own initiative. Someone can “oppose” a discriminatory practice under Title VII with no action beyond disclosing their position, whether volunteering the information or responding to a question. Crawford v. Metropolitan Government of Nashville and Davidson County, Tenn., 555 U.S. 271 (2009).

In Sandoval v. American Bldg. Maintenance Industries, Inc., employees introduced evidence of prior sexual harassment claims to show that the employer should reasonably have discovered the hostile environment. The Eighth Circuit Court of Appeals held that while the evidence could not be used to prove that the employees found the workplace subjectively hostile, because they were not aware of it, it was highly relevant to prove the sexual harassment was severe and pervasive. Sandoval v. American Bldg. Maintenance Industries, Inc., 578 F.3d 787 (8th Cir. 2009).

**2010** The Ninth Circuit Court of Appeals found that a male employee was sexually harassed by a female co-worker and that the employer was liable. The District Court ruled that the co-workers conduct did not meet the objective criteria for sexual harassment because a reasonable person would not have found the conduct hostile or abusive since most men would have welcomed the behavior. The Court of Appeals reasoned that it should not be assumed that because a man receives sexual advances from a woman that those advances are welcomed. Unwelcomed sexual advances are unacceptable no matter who advances on whom and the law should reflect this. EEOC v. Prospect Airport Services, 621 F.3d 991 (9th Cir. 2010).

**2011** Female firefighter wins sexual harassment suit after four enduring years of sexual harassment at the hands of male coworkers and supervisors. Harassment by her male coworkers and supervisors were found to be severe and pervasive when she was repeatedly and verbally abused through sexist slurs and crude jokes. At one point she had a bathing suit stolen from her locker and, when it was replaced, found it stained with what appeared to be semen. Male coworkers walked in on her in the shower, and the fire department refused to put a curtain up in the shower to give her privacy. Smart v. City of Miami Beach, Fla., 10-21667-CIV, 2011 WL 5825654 (S.D. Fla. Nov. 16, 2011).

**2012** Male employee was subjected to sexual harassment in the form of ongoing sexual banter and behavior directed at him by his male supervisor, including (1) repeated requests that he remove his clothes on the job; (2) brushing and touching (including once on his buttocks, and multiple times in his hair); (3) propositioning and other explicit sexual comments via text messages.

The Fifth Circuit Court Appeal found that the record sufficiently demonstrated a sex motivation when the supervisor sent a text message to the Plaintiff that read “I want cock” which could be taken as an explicit sexual proposition, as could the supervisor’s invitation to the Plaintiff to stay at his house and wear his underwear. The supervisor

repeatedly physically touched and caressed Plaintiff's body, which was apparently offensive enough that another supervisor having witnessed the behavior, felt compelled to complain to their supervisor. The court imputed liability against the Company due to its failure to take effective steps to correct the behavior.

The Court, citing Oncala v. Sundowner Offshore Services and La Day v. Catalyst Technology, opined that a claim of same-sex harassment can be shown by providing credible evidence that the harasser is homosexual which include evidence the harasser intended to have sexual contact with the plaintiff rather than simply humiliating him/her for reasons unrelated to sexual interest or evidence the harasser has previously made same-sex advances to other employees. Cherry v. Shaw Coastal, Inc., 668 F.3d 182 (5th Cir. 2012).

- 2012** The U.S. Equal Employment Opportunity Commission held that discrimination based on gender identity, change of sex, and/or transgender status is discrimination on the basis of sex, prohibited by Title VII of the Civil Rights Act of 1964, as amended. A transgender woman that lived as a man applied for a position at the Bureau of Alcohol, Tobacco, Firearms, and Explosives (ATF). During the background check process Plaintiff informed ATF that she was in the process of transitioning from male to female. Five days after the background check, Plaintiff received an email stating that the position was no longer available due to budget cuts. The EEOC asserted jurisdiction over her entire claim. The Commission clarified that the definition of sex includes both biological differences and gender, which includes "cultural and social aspects associated with masculinity and femininity. Mia Macy, EEOC DOC 0120120821, 2012 WL 1435995 (Apr. 20, 2012).

