

AFGE's Guide On:

Sexual Harassment

The American Federation of Government Employees (AFGE) is a labor organization affiliated with the AFL-CIO representing approximately 700,000 employees of the United States federal government and the government of the District of Columbia.

Under the leadership of the National Vice President for Women's and Fair Practices, the Women's and Fair Practices Departments are devoted to promoting the civil, human, women's and workers' rights of Federal and D.C. government workers.

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(2022)

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What Is Sexual Harassment?

Sexual harassment is defined as unwelcome conduct towards you in a sexual way or because of your gender, and that behavior affects your job or your job environment. Title VII of the Civil Rights Act of 1964 prohibits sexual harassment in the workplace. Therefore, you can take action and do something about it.

Federal Employees who believe that they have been subjected to sexual harassment may bring a claim of discrimination before the Equal Employment Opportunity Commission (“EEOC”), Merit Systems Protections Board (“MSPB”) or in Arbitration.

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(a)



Practice Point: Both men and women can be subjected to sexual harassment. Similarly, the harasser can be male or female, and the harasser and the target can be of the same gender.

Behaviors That Might Constitute Sexual Harassment¹

¹ Adapted from <http://www.un.org/womenwatch/osagi/pdf/whatish.pdf> (last accessed May 20, 2015)

Verbal, Physical and Visual Conduct That May Constitute Sexual Harassment:

VERBAL:

- Direct demand for sexual favors.
- Kissing sounds, whistling, smacking, or other noises suggesting sex or cat calling.
- 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.
- Making sexual innuendoes or sexually obscene comments.
- Using gender-based or sexual orientation-based slurs.
- 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.
- Spreading rumors or lies about a person’s sex life.
- Making derogatory comments about a certain gender or sexual orientation (i.e. “women are...” or “gay people all...”).
- 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.

Behaviors That Might Constitute Sexual Harassment

PHYSICAL:

- Actual or attempted rape or sexual assault.
- Touching or rubbing oneself sexually in front of another person.
- Stalking.
- Intentionally brushing up against a person.
- Blocking someone's movement.
- Invading someone's personal space in a way that indicates a desire for sexual activity.
- Touching that is sexual while massaging, touching a person's clothing, hair or body, hugging, kissing, patting, stroking, grabbing, pinching, hand on knee.

VISUAL:

- View, send and create pornography.
- Sexually suggestive or explicit posters, pin-ups, calendars, cartoons, magazine clippings, and graffiti.
- Sending sexually explicit e-mail messages or displaying a sexually suggestive screen saver or computer wallpaper.
- Sending or sharing texts or messages of a sexual nature.
- Leering, ogling, looking someone up and down, and staring at an individual's private body parts.

Mixed Signals

The question of whether the employee welcomed the conduct becomes more difficult when the employee does not communicate unwelcome conduct clearly to the harasser. For example, a supervisor asks an employee on a date. If the employee says, “I cannot go on a date with you tonight”, rather than “no”, the supervisor may continue to ask. The employee may express his/her true feelings for several reasons including fear of offending the supervisor, desire not to embarrass the supervisor, or general politeness. No matter the reason for the indefinite response, it is likely unclear to the supervisor that the request for dates is unwelcome.



Practice Point: 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 participate in the conduct, it may later be found that the employee welcomed the conduct - even if the employee only took part in it because of peer or other pressure.

Sexual Favoritism

Under the law, there is a third type of sexual harassment called **sexual favoritism**. Sexual favoritism may occur when a supervisor rewards employees who participate in sexual activities but does not reward employees who have not participated in sexual activities. This is true even if the employee who has not participated was never asked to participate.

In cases of sexual favoritism, 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.

The EEOC, 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. However, 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.

Sexual Favoritism Examples

- 1) An employee reported to her supervisor that the workplace was "run like a brothel." In the workplace, senior employees were having affairs with junior employees and rewarding them with cash bonuses and promotions. The employee was not involved in any affairs personally. After the employee complained, she received poor reviews and her supervisor threatened to fire her.²

The employee may raise a claim of sexual favoritism harassment under Title VII.

- 2) An employee alleges that he lost a promotion for which he was qualified because the co-worker who obtained the promotion was engaged in a sexual relationship with their supervisor. The Agency's investigation discloses that the relationship at issue was **not** consensual. Instead, the supervisor regularly harassed the co-worker in front of other employees, demanded sexual favors as a condition for the co-worker's promotion, and then audibly boasted about his "conquest."³

In this instance, the employee 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, the employee 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.

² Broderick v. Ruder, 685 F. Supp. 1269 (D.D.C. 1988).

³ King v. Palmer, 778 F.2d at 880 (1985)

What Can I Do If I Am Subjected To Sexual Harassment?

A. Report the Harassment

- You **MUST** tell a supervisor (it does not have to be a supervisor in your chain of command) if you are subjected to unwelcome conduct.
- You **SHOULD** document the notice of the unwelcome conduct. If the notice is in writing, keep a copy and if the notice is given in person, make sure that you have a witness. In your discussion or letter that you should (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”).
- You **MUST** follow your agency’s Sexual Harassment Policy. Every agency has a sexual harassment policy, however few employees know of or have been trained on the policy.
- You **MUST** report any additional harassment that occurs after you notify the Agency that you were sexually harassed. However, if the harassment does stop after you report it, you may not prevail in an EEO complaint.
- You **MUST** contact the EEO Office within 45 days of a discriminatory event.



Practice Point: 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.

For more information on filing an EEO claim, see the Women’s and Fair Practices Departments’ manual, *Fighting Discrimination*.

B. Document the Harassment

You should gather evidence of the harassment, even if you are unsure if you wish to file a claim:

- Keep a record of the incidents including the date, time, 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 made 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 targets 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.



Practice Point: Gather evidence of your good job performance. Often, a harasser tries to attack the target'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 Agency claims you are lying about the harassment in order to cover up your poor work performance.



Practice Point: In order for the Agency to be ultimately liable in situations of a hostile work environment, the Agency must KNOW about the harassment and fail to take immediate and effective action.



Practice Point: When an allegation of sexual harassment is made, the Agency should conduct an internal investigation pursuant to the Agency's Sexual Harassment Policy.

How Can I Prove Sexual Harassment?

In order to prevail in a claim of sexual harassment you must first show that:

1. Your membership in a protected class of sex/gender;
2. You were subjected to unwelcome (i.e., harassing) conduct;
3. The conduct that you complained of was based on your membership in the protected class of sex/gender;
4. The unwelcome conduct had the purpose or effect of unreasonably interfering with your work performance and/or creating an intimidating, hostile, or offensive work environment; and
5. There is a basis for “imputing” (attributing) liability to the Agency.⁴

In McCleod v. Social Security Administration, the Complainant filed a formal EEO complaint alleging that she was sexually harassed by her supervisor between October 1992 and March 1994. The Agency thereafter issued a final agency decision finding no discrimination. On appeal, the Commission concluded that the Complainant was subjected to sexual harassment when the supervisor continuously told her he wanted to have sex with her, that he wanted to do various sexual things to her and that he wanted to touch her body. Further, although the Complainant engaged in some conversations that involved sexual terms and off-color jokes, the Commission held that this did not excuse the supervisor's more extreme, abusive and persistent comments. The Commission found that the "steady stream of offensive, gender-oriented comments, notes and messages for well over a year," is clearly indicative of an abusive working environment.

For more information on sexual harassment claims, see the Women's and Fair Practices Departments' manual, *Fighting Discrimination* and booklet *How to Prove Discrimination*.

⁴ McCleod v. Social Security Administration, EEOC Appeal Number 01963810 (August 1999).

What Are The Two Types of Sexual Harassment Claims?

There are two types of sexual harassment claims:

1. Quid Pro Quo
2. Hostile Environment

A. Quid Pro Quo Sexual Harassment⁵

“Quid Pro Quo” 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 tangible employment action against the employee.

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. The Complainant in a quid pro quo sexual harassment claim is the direct target of the harassment.

How do I know if it is a quid pro quo harassment claim?

Factors you may consider include whether the actions were:

- Frequent
- Stated or implied
- Welcome
- Demanded in return for a sexual favor
- In exchange for a job benefit or in exchange for not taking a tangible employment action
- By a supervisor or person in authority

⁵ Burlington Industries, Inc. v. Ellerth, 118 S. Ct. 2257 (1998); Faragher v. City of Boca Raton, 118 S. Ct. 2275 (1998).



Practice Point: It does not matter whether the agency knew or should have known of the harassment, or even if the employer forbids such conduct



Practice Point: Tangible employment action is defined as a significant change in employment status, “such as hiring, firing, failing to promote, reassignment with significantly different responsibilities, demotion, undesirable reassignment, compensation decisions or a decision causing a significant change in benefits.”⁶ If there is no tangible loss, there must be an analysis as to whether a hostile sexual harassment environment was created.



Practice Point: In a quid pro quo sexual harassment claim, one incident is enough. In a quid pro quo sexual harassment claim, the conduct must be considered unwelcome by 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. If a harassed individual participates in the sexual act(s) because the harassed individual was concerned for his or her job, that participation does not prove that the harassment was welcome.



Practice Point: If the Complainant proves quid pro quo sexual harassment, the Agency may automatically be held liable if there was a tangible employment action against the harassed individual. This is true even if the Agency did not have an opportunity to correct the supervisor's behavior.

⁶ Burlington Industries Inc. v. Ellerth, 118 S.Ct. 2257 (1998).

B. Hostile Environment Sexual Harassment

Hostile environment sexual harassment is unwelcome sexual conduct based on the target's gender that "unreasonably interferes with work performance" or creates an "intimidating, hostile, or offensive work environment".

In a hostile environment sexual harassment matter, the harasser can be a supervisor, co-worker or even a non-employee such as a vendor, consultant or customer. Anyone who is effected by the harassment can file a hostile environment sexual harassment claim.

Unlike a quid pro quo sexual harassment claim, a tangible loss/adverse action is not required in a hostile environment sexual harassment claim. Examples of incidents that could be considered part of a hostile environment sexual harassment claim include demeaning or sexual pictures, sexual jokes, and lewd sexual comments and gestures. Claims of a few isolated incidents of harassment are usually not sufficient enough to state a claim of hostile environment sexual harassment.⁸



Practice Point: The standard for proving the conduct was unwelcome differs between hostile environment sexual harassment and quid pro quo sexual harassment. In quid pro quo claims, 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, consensual dating, mutual joking, and consensual touching do not generally amount to unwelcome conduct in a hostile environment sexual harassment.

Hostile Environment Sexual Harassment Example

Male coworker made several offensive comments to female employee about her sexual orientation, including "you need a man in your life" and "I do not think same sex couples should be allowed to get married." Female employee asserted that the comments occurred on a weekly

⁸ Munchbach v. United States Postal Service, EEOC Appeal Number 01A11681 (June 2002).

basis, and other coworkers corroborated that the comments occurred. Female employee was able to establish that she was subjected to a hostile work environment because of her sex.⁹

⁹ Phyllis F. v. Dep't of Homeland Security, EEOC Appeal No. 0120150799 (Feb. 16, 2021)

Is This A Hostile Environment Sexual Harassment Claim?

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**.

One way to establish that the unwelcomed behavior was severe and/or pervasive is to show that your work environment is hostile, intimidating or abusive. You should evaluate:

1. Whether the conduct was in question was verbal or physical, or both;
2. Whether the conduct was repeated, and if so, how frequently
3. Whether the conduct was hostile or obviously offensive;
4. Whether the harasser was a supervisor or a co-worker;
5. Whether more than one person joins in the harassment; and/or
6. Whether the harassment was directed at more than one individual.¹⁰



Practice Point: To be actionable, the unwelcome conduct must be “severe and/or pervasive enough to create an objectively hostile work environment – an environment that a reasonable person would find hostile or abusive.”¹¹



Practice Point: There is a difference between filing an EEO complaint and complaining through the Agency’s internal anti-harassment program. The EEO process is designed to make individuals whole as a result of discrimination that has already occurred and can result in damage awards and equitable relief paid by the Agency. The purpose of the Agency’s internal anti-harassment process is to inform the Agency of instances of harassment and give the Agency an opportunity to take immediate and appropriate corrective action, including conducting an internal investigation and the use of disciplinary actions, to eliminate harassing conduct regardless of whether an EEO complaint is filed.

¹⁰ Crane v. Postmaster General, EEOC Appeal Number 01924585 (April 1993).

¹¹ Harris v. Forklift Systems, Inc., 510 U.S. 17 (1993).

Severe And/Or Pervasive, What Do You Think?

- 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. See 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. See 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. See 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. See 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. See 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. See Bruno v. Monroe County, 383 Fed.App. 845 (11th Cir. 2012).

Severe and pervasive.

7) A male employee did not conform to sex- or gender-based stereotypes of men. His coworkers and managers were aware he is gay and subjected him to harassment including unwanted physical touching of the crotch and buttocks, mocking behaviors (making kissing sounds, wolf whistles, winks) and comments, and slurs such as "faggot," "fag," "pussy," and "sissy." EEOC v. Scottsdale Wine Café, (D. Ariz., No. 2:17-cv-00182, filed Jan. 20, 2017, resolved March 21, 2018)

Severe and pervasive.

Agency Liability

Agency liability in a sexual harassment claim varies based on whether the harassment is quid pro quo harassment or hostile environment sexual harassment and whether or not the harasser was a supervisor.¹²

A. Harassment by a supervisor:

- When the harassment is by a **SUPERVISOR**, in a **QUID PRO QUO** sexual harassment claim, the Agency is automatically (vicariously) liable unless it can show that there was no tangible employment action.
- When the harassment is by a **SUPERVISOR**, in a **HOSTILE ENVIRONMENT** sexual harassment claim, the Agency is held liable unless it can show:
 1. The Agency exercised reasonable care to prevent and promptly correct the behavior;
and
 2. The employee unreasonably failed to take advantage of any preventative or corrective opportunities offered by the employer.

Harassment by a non-supervisor:

- When the harassment is by a **CO-WORKER**, in a **HOSTILE WORK ENVIRONMENT** sexual harassment claim, the Agency is held liable unless it can show:
 1. The Agency did not know of the harassment; **and**
 2. The Agency failed to take immediate and appropriate corrective action.

¹² Burlington Industries, Inc. v. Ellerth, 118 S.Ct. 2257 (1998), and Faragher v. City of Boca Raton, 118 S. Ct. 2275 (1998)

- When the harassment is by a **NON-EMPLOYEE**, in a **HOSTILE WORK ENVIRONMENT** sexual harassment claim, the Agency is held liable unless it can show:
 1. The Agency did not know of the harassment; **and**
 2. The Agency failed to take immediate and appropriate corrective action.



Practice Point: There are three common situations in which a court will determine that the Agency knew or should have known 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; and
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.



Practice Point: An employer has a duty to promptly and effectively investigate any complaints of alleged harassment of which it becomes aware, which includes taking necessary action to end the harassment and prevent further misconduct, pursuant to the Agency's internal Anti-Harassment Policy.¹³

¹³ Thompson v. United States Postal Service, EEOC Appeal Number 0120060791 (Jan. 2008)

What Type Of Damages Can I Receive?

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. Compensatory damages are capped at \$300,000 for federal EEO cases.

What are some examples of pain and suffering that may be claimed in a sexual harassment case?

- **Psychological Effects on the Complainant**

Targets of sexual harassment may suffer a wide range of emotional reactions. While some complainants 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.

- **Physical Effects on the Complainant**

Complainants may suffer from a variety of physical ailments as a result of their harassment. Examples of physical ailments 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; and a lowered immune system due to stress attacks.

- **Economic Effects on the Complainant**

In addition to the psychological and physical effects, targets of sexual harassment also may suffer negative economic effects. The negative economic effects can come about for several reasons. The complainant may lose his or her job for refusing to submit to sexual advances, and have to settle for a lower paying position. The complainant 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. 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 target of harassment may wind up with high medical, counseling, or attorney bills because of the harassment.



Practice Point: The cap on compensatory damages is a ceiling: an employee is not automatically entitled to \$300,000.



Practice Point: Backpay is not included in \$300,000 compensatory damages cap.

What Is The Role Of The Representative?

In an EEO matter the Complainant designates the individual who will be the Complainant's representative. While a Union steward is often the Complainant's representative, any other Union officer, Union member, agency employee or any other individual may represent the Complainant.

When a member seeks assistance the representative should listen and be understanding and responsive. The representative should try to get as many details as possible however, it may be very difficult for the member of harassment to talk in detail about the events. Additionally, unless the member gives express permission to the representative, the representative should keep the member's identity confidential. Once the member has given an account of the events, the representative should go through the events again and ask questions.



Practice Point: If after discussing the harassment with the member, the member chooses to pursue the matter, inform the member of the various choices and take the necessary steps to file a grievance or EEO complaint.



Practice Point: The local Union may consider designating two members (one male and one female because a target of sexual harassment may only feel comfortable discussing the harassment with a representative of the same gender) as the Union contacts for sexual harassment complaints. The Union should ensure that the Union contacts get additional training on addressing sexual harassment matters.

For more information see the Women's and Fair Practices Departments' manual, *Fighting Discrimination*.

How Can the Union Address Sexual Harassment?

The Union can take steps to address sexual harassment by:

- Negotiating collective bargaining agreement provisions that address sexual harassment.

Some important protections the union should seek to include are:

- Requiring 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 grievance to skip the initial steps of the grievance process.
- Ensuring that the Agency's policy on Sexual Harassment is placed in a prominent area and that each employee has a copy of the policy.
 - Distributing education material to inform members about sexual harassment, including this booklet and other materials.
 - Sponsoring trainings and seminars for stewards and members on sexual harassment and attending any training offered or conducted by AFGE and the Agency.
 - Including articles on sexual harassment in a local's or council's newsletter.

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 Department.

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: 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: 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 the employee's 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: 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.

Common Sexual Harassment Investigation Questions:

Below are common questions that are used by an agency investigator for an internal sexual harassment investigation or an EEO investigator for a formal EEO complaint of sexual harassment.

1. Please identify the name, title and your working relationship to the individual you are alleging sexually harassed you.
2. Please identify the date of each occurrence and describe what occurred that you allege to be sexual harassment.
3. Did you inform a management official of the alleged acts of sexual harassment?
4. If so, who did you tell (name and title), when (what date) did you report the incident that occurred to you; and what did you report?
5. Describe the incidents that occurred to you that you reported.
6. For all the incidents you have described, were there any witnesses to the alleged incidents that occurred?
7. If so, please identify the name, title, email and phone number for each of the witnesses that observed the behavior toward you and describe what each of the witnesses may have seen or heard.
8. When you filed the report of the alleged sexual harassment toward you, what actions did management take regarding your complaint?
9. Was an investigation conducted? If so, when was the investigation conducted, who conducted the investigation, and what actions were taken as a result of the investigation?

10. Did you express your objections to the remarks/action to the individual who made the remarks (or behavior)? If so, what did you say regarding the remarks made to you/or the actions you have alleged as harassment?*
11. Did you tell the alleged harasser to stop the behavior and/or remarks? IF so, what did you say and when (what date/s) did you tell the alleged harasser to cease the behavior?*
12. What was the alleged harasser's response to you when you requested that the behavior cease?
13. Were you informed of the outcome of the investigation? If so, what were you told about the findings of the investigation?
14. Why do you believe your sex was a factor?
15. If the Complainant has contacted the EEO Office, was it within 45 days of the unwelcome conduct?

*Note, there is no requirement that the employee confront the harasser.

Relevant 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 is 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. Sundowner Offshore Services, 523 U.S. 75 (1998)

The Complainant alleged that he was subjected to various sex-related actions by his male co-workers. When the Complainant notified his supervisors of the harassment, the Agency failed to take action to stop the harassment. Fearing that he would be raped or forced to have sex, the Complainant eventually decided to quit. Complainant then filed an action in District Court, claiming his employer had discriminated against him because of his sex. While the lower courts found that the Complainant did not have a cause of action because the alleged harassers were of the same sex as the Complainant, 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. Boca Raton, 524 U.S. 775 (1998)

Supreme Court held 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 acts that caused the hostile work environment because the employer 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.

Ellerth v. Burlington Industries, 524 U.S. 742 (1998)

Supreme Court held 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.

Vance v. Ball State University, 133 S. Ct. 2434 (2013)

The Supreme Court rejected in part the EEOC's definition of "supervisor." The Court held that an employee is a "supervisor" if the employer has empowered that employee "to take tangible employment actions against the victim, *i.e.*, to effect a 'significant change in employment status, such as hiring, firing, failing to promote, reassignment with significantly different responsibilities, or a decision causing a significant change in benefits.'" The Court went on to establish that the employer will be held liable for the hostile work environment harassment of a non-supervisor who may be deemed a supervisor under this decision would be an employee who holds a "lead" position.

Relevant EEO Cases

Spencer v. General Electric, 697 F. Supp. 204 (E.D. Va. 1988).

The supervisor of an office engaged in daily horseplay of a sexual nature with female subordinates. This behavior included sitting on their laps, touching them in an intimate manner, and making lewd comments. The subordinates joined in and generally found the horseplay funny and inoffensive. None of the horseplay was directed at the plaintiff. The supervisor additionally engaged in consensual relations with at least two of his subordinates. The court found that the supervisor's conduct would have interfered with the work performance and would have seriously affected the psychological well-being of a reasonable employee, and on that basis, it found a violation. The case supports the proposition that pervasive sexual conduct can create a hostile work environment for those who find it offensive even if the targets of the conduct welcome it and even if no sexual conduct is directed at the persons bringing the claim.

Montero v. AGCO Corp., 19 F.Supp. 2d 1143 (E.D. Cal.) 1998.

A federal district court, dismissed a hostile environment claim by the employee because she failed to report the harassment to management promptly.

Fuller v. City of Oakland, 47 F.3rd 1522 (9th Cir. 1995).

The 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.

Pruden v. Caldera, EEOC Case Number 01970573 (September 2000).

The EEOC determined 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.

Waskiewicz v. General Services Administration, EEOC DOC 05940824 (E.E.O.C. 2002).

The complainant established her claim of sexual harassment where pictures of scantily clad women and sex-based pranks continued to re-occur during a two and a half year period. The supervisors did not exercise reasonable care to prevent or correct the inappropriate behavior and accordingly the agency was held liable.

EEOC v. Prospect Airport Services, 621 F.3d 991 (9th Cir. 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 lower court ruled that the co-worker's 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.

Cerwinski v. Ins. Services Offices, 1996 WL 562988 (S.D.N.Y. Oct. 3, 1996).

A federal court upheld the dismissal of a female employee who made unfounded harassment charges against a male manager after their romantic relationship had ended.

Cherry v. Shaw Coastal, Inc., 668 F.3d 182 (5th Cir. 2012).

A 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 Company's failure to take effective steps to correct the behavior imputed liability.

The court held 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.

Complainant v. SSA EEOC Appeal No. 0120114216 (June 2014)

The EEOC did not find a basis for finding the Agency liable because the Complainant had consensual sexual relations with her supervisor and accordingly the conduct was not considered unwelcome.

Complainant v. Department of the Treasury Appeal No. 0120172604 (April 2019)

A male employee was the subject of sexual jokes that negatively stereotyped him as a gay male and included asking him about his sexual behavior and referring to him as a "tramp." The Complainant notified the Agency in an email on October 6, 2009, about the sexual harassment. Immediately after the employee reported the harassing comments, management began an investigation into the matter, an EEO Counselor was brought in to speak to the group at a

meeting to go over EEO guidelines; a Power Point on sexual harassment was presented at a group meeting; the Treasury Inspector General for Tax Administration (TIGTA) spoke to the group at the matter, the union president was made available for counseling, and a letter of reprimand was issued to the manager that made jokes about his sexual orientation. Since there were no further allegations or evidence that the manager made any more comments about Complainant's sexual orientation after he reported the matter on October 6, 2009, the EEOC found that the Agency took immediate and appropriate corrective action regarding the comments reported in 2009.

In 2014 the Complainant alleged that the same manager incorrectly inputted his time into the timekeeping system and routinely failed to process his cases into the Audit Information Management System. The EEOC found that the manager's antigay comments reported in 2009 are of a different nature than the timekeeping and case/form processing errors Complainant reported in 2014. Therefore, they did not find that Complainant's report of harassment in 2009 placed the Agency on notice that manager was prone to engage in the type of conduct alleged in 2014.