



## Sexual Harassment

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### Background

Unheard of until the 1970s, [SEXUAL HARASSMENT](#) has become a dominant concern of employers, schools, and other organizations throughout the country. It is one of the most litigated areas of sexual [DISCRIMINATION](#) law, and virtually all major companies, government organizations, colleges and universities and even the military now have sexual harassment policies in place. Even the president of the United States has been subject to a sexual harassment lawsuit.

The definition of sexual harassment has always been controversial. Black's Law Dictionary defines it as "'A type of employment discrimination consisting in verbal or physical abuse of a sexual nature," and it has also been held to exist in educational situations. But beyond this, there is the question of what kind of behavior translates into sexual harassment and what the relationship of the parties must be for sexual harassment to occur.

These issues have been fought over at the federal level for many years. Although sexual harassment law is still not clearly defined, there has emerged over the years a consensus of the basic outlines of what sexual harassment is and what needs to be done by companies and other groups to prevent it.

### Types of Sexual Harassment

The Equal Employment Opportunity Commission (**EEOC**) defines sexual harassment this way: "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 work environment."

Generally speaking, the EEOC guidelines divide sexual harassment into two different types:

- **QUID PRO QUO** sexual harassment is the easiest kind of sexual harassment to understand. Quid pro quo is a Latin term that translates as "something for something," and quid pro quo sexual harassment is simply an employer or other person in a position of power demanding sexual favors in return for advancement or as the basis for some other employer decision. To establish a case of quid pro quo

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sexual harassment, individual employees must show that they were subjected to conduct of a sexual nature that was unwelcome, unsolicited, and not incited or instigated by the employee; that the conduct was based on their sex; and that the employees' reaction to the conduct was used as the basis for an employment decision involving compensation, privileges, or conditions of employment. An example of quid pro quo sexual harassment would be a boss demanding his employee to have sex with him in return for a promotion. Quid pro quo sexual harassment is the easiest kind of sexual harassment to prove, but it is also uncommon compared to the other type of sexual harassment.

- Hostile-environment sexual harassment is created in situations in which an employee is subject to unwelcome verbal or physical sexual behavior that is either extreme or widespread. There is no threat to employment in this kind of harassment, but the harassment causes the employee subject to it enough psychological strain as to alter the terms, conditions and privileges of employment. Hostile environment harassment includes such circumstances as hearing sexual jokes, seeing pornographic pictures, and receiving repeated invitations to go on dates. This type of sexual harassment [LITIGATION](#) currently is most seen by courts and is the kind most difficult to prove. Most recent Supreme Court and appeals court cases regarding sexual harassment have been hostile-environment cases.

## History

Sexual harassment law has had a history in the United States only since the 1964 **CIVIL RIGHTS Act**, and even then, the first sexual harassment cases were not brought under the Act until the 1970s. Since then, the trend has been for courts to broaden their interpretation of what constitutes sexual harassment under the law, with some exceptions.

### ***Title VII and EEOC Guidelines***

Title VII of the Civil Rights Act of 1964 marked the first time sexual discrimination was banned in employment. Title VII prohibits discrimination by employers, employment agencies, and labor organizations with 15 or more full-time employees on the basis of race, color, religion, sex, or national origin. It applies to pre-interview advertising, interviewing, hiring, discharge, compensation, promotion, classification, training, apprenticeships, referrals for employment, union membership, terms, working conditions, working atmosphere, seniority, reassignment, and all other "privileges of employment."

In the years immediately following the passage of Title VII, sexual harassment claims were rarely brought under the [STATUTE](#), and when they were, courts dismissed their claims as not applying to the statute. Finally in the mid-1970s, courts began to accept sexual harassment as a form of gender discrimination under Title VII.

This trend received an enormous boost with the EEOC's passage of the first guidelines against sexual harassment in 1980. The guidelines which courts are not required to follow, specifically stated for the first time that "harassment on the basis of sex is a violation of Title VII," and then the guidelines go on to define sexual harassment. However, these standards remained ambiguous enough as to create some disagreement among appeals courts as to what actually constitutes sexual harassment and defines hostile environment sexual harassment.

### ***Meritor Savings Bank v. Vinson***

*Meritor Savings Bank v. Vinson*, decided in 1986, marked the first time the Supreme Court considered a sexual harassment case under Title VII. The case involved a female employee at a bank who alleged she was

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forced to have sex by her supervisor, fearing the loss of her job if she refused. The [EVIDENCE](#) showed the employee had repeatedly advanced through the bank by merit, that she had never filed a complaint about the supervisor's behavior, and that she was terminated only because of lengthy sick leave absence. Yet the Supreme Court ruled that she had a case against her former employer on the basis of hostile environment sexual harassment.

For sexual harassment to be actionable, the court declared, it must be "sufficiently severe or pervasive to alter the conditions of [the victim's] employment and create an abusive working environment." In this case, the Court held, the facts were "plainly sufficient to state a claim for 'hostile environment' sexual harassment." The Court also added that on the facts of the case, the plaintiff had a claim for quid pro quo sexual harassment as well.

The Meritor case was a landmark for sexual harassment rights in that it established the legal legitimacy of both quid pro quo and hostile environment sexual harassment claims before the Supreme Court. It also rejected the idea that there could be no sexual harassment just because the sexual relations between the plaintiff and the [DEFENDANT](#) were voluntary. The results opened a floodgate of sexual harassment litigation.

### ***Harris v. Forklift Systems, Inc.***

The 1993 case of Theresa Harris marked the Supreme Court's next foray into sexual harassment law. Harris was a manager who claimed to have been subjected to repeated sexual comments by the company's president, to the point where she was finally forced to quit her job. The question before the Court was whether Harris had to prove she had suffered [TANGIBLE](#) psychological injury or whether her simply finding the conduct abusive was enough to prove hostile environment sexual harassment.

In allowing Harris to proceed with her case, the Court took a "middle path" between allowing conduct that was merely offensive and requiring the conduct to cause a tangible psychological injury. According to the Court, the harassment must be severe or pervasive enough to create an environment that a reasonable person would find hostile or abusive and also is subjectively perceived by the alleged victim to be abusive. Proof of psychological harm may be relevant to a determination of whether the conduct meets this standard, but it is not necessarily required. Rather, all of the circumstances must be reviewed, including the "frequency of the discriminatory conduct; its severity; whether it is physically threatening or humiliating, or a mere offensive utterance; and whether it unreasonably interferes with an employee's work performance." The Harris case further broadened sexual harassment law, making it much easier for plaintiffs to prove harm from sexual harassment.

### ***Oncale v. Sundowner Offshore Services, Inc.***

Oncale, a 1998 case, marked the Supreme Court's [RATIFICATION](#) of the same-sex sexual harassment case. The Court held that male-on-male and female-on-female sexual harassment violated Title VII in the same way a male-female sexual harassment situation would violate it. The Court said harassing conduct did not have to be motivated by sexual desire to support an inference of discrimination on the basis of sex.

### ***Faragher v. Boca Raton and Burlington Industries, Inc. v. Ellerth***

Faragher and Burlington Industries both stood for the same proposition: employers are vicariously liable for the actions of their supervisors in sexual harassing employees even if they did not ratify or approve of their actions, or even if they had policies prohibiting sexual harassment in place. However, the Supreme Court, decided in these two 1998 cases that employers could defend themselves against supervisor sexual harassment cases by proving (a) that the employer exercised reasonable care to prevent and correct promptly any sexually

harassing behavior; and (b) that the plaintiff employee unreasonably failed to take advantage of any preventive or corrective opportunities provided by the employer or to avoid harm. Even with these two caveats, however, the Supreme Court expressly held that these defenses were not available "when the supervisor's harassment culminates in a tangible employment action, such as discharge, demotion, or undesirable reassignment."

### ***Clark County School District v. Breeden***

The 2000 case of *Clark County School District v. Breeden* was the first time the Supreme Court narrowed the scope of Title VII sexual harassment claims. Ruling in the case of an employee who said she had been retaliated against for reporting a sexually offensive mark made by a supervisor, the Court ruled that for sexual harassment conduct to be severe and offensive enough to be actionable, it had to be more than teasing, offhand comments, or an isolated incident, unless that incident was extremely serious. The case served notice that courts had to be careful to find a balance in sexual harassment cases in the process of determining what constitutes creating a hostile environment.

### ***Other Legal Issues***

Although the Supreme Court has the final word on sexual harassment cases, litigation has proved broad enough that there are many unsettled questions that still remain in regards to sexual harassment.

These questions include the proper standard to be imposed in sexual harassment cases, whether a "reasonable person" should be more like a reasonable man or a reasonable woman. Also, whether employers can be held liable for "second-hand sexual harassment," sexual harassment not directed at the plaintiff. Another issue is whether it constitutes sexual harassment when a supervisor creates an equally hostile environment for both men and women. These are just some of the issues currently unresolved in the area of sexual harassment law.

## **Education and Sexual Harassment**

Employers are not the only ones who have to deal with sexual harassment issues. Educators also deal with sexual harassment cases, in both the areas of teacher-student sexual harassment and student-on-student sexual harassment. Until very recently, it was unclear whether such cases were legitimate, but two important Supreme Court cases dealing with education and sexual harassment decided in the 1990s seem to have settled the matter.

### ***Title IX***

Unlike employment sexual harassment cases brought under Title VII, cases involving sexual harassment of students are brought under Title IX of the Educational Amendments of 1972. Title IX states that "no person in the United States shall, on the basis of sex, be excluded from participation in, be denied the benefits of, or be subjected to discrimination under any education program or activity receiving Federal financial assistance."

For many years, there was confusion as to whether a sexual harassment case could be brought under Title IX. Some courts allowed them, and others did not. Then in 1992, the Supreme Court decided the case of *Franklin v. Gwinnett County Schools*, the first time the court had given an opinion in on the matter.

### ***Franklin v. Gwinnett County Public Schools***

In this case, the Supreme Court determined for the first time that a high school student who was allegedly subjected to sexual harassment and abuse could seek monetary damages under Title IX for alleged intentional gender-based discrimination. The case involved a high school girl who claimed a coach at her school was persistently harassing her, including at one point forcing her to have intercourse with him. The girl claimed that school officials knew about the harassment but made no efforts to stop it. Eventually, the girl switched to another school.

The Court said that damages were available for an action brought to enforce Title IX prohibiting exclusion from participation in, denial of benefits of, or discrimination under any education program or activity receiving Federal financial assistance, since there was no indication in text or history of statute that Congress intended to limit available remedies. In this case, the coach's action in harassing the girl prevented her from fully participating in educational opportunities at her school, thus violating Title IX.

### ***Davis v. Monroe County Board of Education***

In this 1999 case, the Supreme Court expanded the reach of Gwinnett to cover student-on-student sexual harassment. A narrow majority of the court ruled that a school district could be held liable for damages if the school district acts with deliberate indifference to known student-on-student sexual harassment that is so severe as to effectively deny the victim access to an educational program or benefit.

The Court did rule that school districts retain flexibility when it comes to sexual harassment and that damages were not available for acts of teasing and name-calling, even where these comments target differences in gender. But in this case, involving physical contact and sexual slurs allegedly so harsh and pervasive it caused the victim to consider suicide, a claim under Title IX could be established.

### ***State Laws and Sexual Harassment***

Although most sexual harassment claims are brought under federal law, many states have civil rights laws that cover much of the same ground as Title VII and provide an additional state cause of action for sexual harassment. These states often require such complaints to be adjudicated before a specific board or court. States that have civil rights laws prohibiting discrimination on the basis of gender and, therefore, providing a possible cause of action for sexual harassment, include in the following:

- ALASKA: Complaint to be filed before Alaska Commission for **HUMAN RIGHTS**, also provides for private state action
- ARIZONA: Complaints filed with Civil Rights Division
- ARKANSAS
- CALIFORNIA
- COLORADO: Complaints filed with Colorado Civil Rights Commission
- CONNECTICUT: Complaints filed with Commission on Human Rights and Opportunities
- DELAWARE: Complaints filed with state's labor department
- DISTRICT OF COLUMBIA
- FLORIDA: Complaints filed with Florida Human Relations Commission
- GEORGIA
- HAWAII: Complaints filed with State Civil Rights Commission
- IDAHO: Complaints filed with Idaho Commission on Human Rights
- ILLINOIS: Complaints filed with the Department of Human Rights
- INDIANA: Complaints filed with Indiana Civil Rights Commission
- IOWA: Complaints filed with Civil Rights Commission

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- KANSAS: Complaints filed with Kansas Commission on Civil Rights
- KENTUCKY: Complaints filed with Commission on Human Rights
- LOUISIANA
- MAINE: Complaints filed with Human Rights Commission
- MARYLAND
- MASSACHUSETTS: Complaints filed with Commission Against Discrimination
- MICHIGAN: Complaints filed with Civil Rights Commission
- MINNESOTA: Complaints filed with Commission of the Department of Human Rights
- MISSOURI: Complaints filed with Commission on Human Rights
- MONTANA: Complaints filed with Commission on Human Rights
- NEBRASKA: Complaints filed with Equal Opportunity Commission
- NEVADA: Complaints filed with Nevada Equal Rights Commission
- NEW HAMPSHIRE: Complaints filed with Commission on Human Rights
- NEW JERSEY: Complaints filed with Division of Civil Rights
- NEW MEXICO: Complaints filed with Commission on Human Rights
- NEW YORK: Complaints filed with Commission on Human Rights
- North Dakota
- OHIO: Complaints filed with Commission on Civil Rights
- OKLAHOMA: Complaints filed with Commission on Human Rights
- OREGON: Complaints filed with Bureau of Labor and Industries
- PENNSYLVANIA: Complaints filed with Human Relations Commission
- RHODE ISLAND: Complaints filed with Commission on Human Rights
- SOUTH CAROLINA: Complaints filed with Commission on Human Affairs
- SOUTH DAKOTA: Complaints filed with Division of Human Rights
- TENNESSEE
- TEXAS: Complaints filed with Commission on Human Rights
- UTAH: Complaints filed with State Industrial Commission
- VERMONT
- WASHINGTON: Complaints filed with Commission on Human Rights
- WEST VIRGINIA: Complaints filed with Commission on Human Rights
- WISCONSIN: Complaints filed with Department of Industry, Labor, and Human Relations
- WYOMING: Complaints filed with Fair Employment Commission

### Additional Resources

*"Davis v. Monroe County Board of Education: Title IX Recipients' 'Head In The Sand' Approach to Peer Sexual Harassment May Incur Liability,"* Romano, Patricia, *Journal of Law and Education*, January, 2001.

*Draw the Line: A Sexual Harassment Free Workplace.* Lynch, Frances, Oasis Press, 1995.

*Sex, Power and Boundaries: Understanding and Preventing Sexual Harassment.* Rutter, Peter, Bantam Books, 1996.

*"So Much for Equality in the Workplace: The Ever-Changing Standards for Sexual Harassment Claims Under Title VII,"* Rushing, Emily E., *St. Louis University Law Journal*, Fall 2001.

*U. S. Code, Title 20: Education, Chapter 38: Discrimination Based on Sex or Blindness.* U. S. House of Representatives, 1999. Available at: [http://uscode.house.gov/title\\_20.htm](http://uscode.house.gov/title_20.htm)

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*U. S. Code, Title 42: The Public Health and Welfare, Chapter 21: Civil Rights, Subchapter VI: Equal Employment Opportunities.* U. S. House of Representatives, 1999. Available at:  
[http://uscode.house.gov/title\\_42.htm](http://uscode.house.gov/title_42.htm)

"*What the General Practitioner Needs to Know to Recognize Sexual Harassment Claims,*" Miller, Gerald L., Alabama Lawyer, July, 2001.

## Organizations

### ***Feminist Majority Foundation***

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Arlington, VA 22209 USA  
Phone: (703) 522-2214  
Fax: (703) 522-2219  
E-Mail: [femmaj@feminist.org](mailto:femmaj@feminist.org)  
URL: [http://www.feminist.org/911/1\\_supprt.html](http://www.feminist.org/911/1_supprt.html)  
Primary Contact: Eleanor Smeal, President

### ***National Organization For Women (NOW)***

733 15th St. NW, 2nd Floor  
Washington, DC 20005 USA  
Phone: (202) 628-8NOW (8669)  
Fax: (202) 785-8576  
URL: <http://www.now.org/>  
Primary Contact: Kim Gandy, President

### ***U. S. Equal Employment Opportunity Commission***

1801 L Street, NW  
Washington, DC 20507 USA  
Phone: (202) 663-4900  
URL: <http://www.eeoc.gov/>  
Primary Contact: Cari M. Dominguez, Chairperson

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