

THE RISK OBSERVER

SEXUAL HARASSMENT: OVERVIEW

Sexual harassment is a pernicious problem in workplaces and schools. Administrators, supervisors and teachers need to be concerned about the negative effect of sexual harassment on productivity of staff and students, morale, absenteeism, legal costs, and settlement costs.

Sexual harassment is a form of sexual discrimination prohibited in the workplace by Title VII of the Civil Rights Act of 1964 and in schools by Title IX of the Civil Rights Act of 1964. The interpretation of the law continues to evolve as cases come before the courts.

Generally, sexual harassment can be defined as:

- Unwelcome sexual conduct that is a term or condition of employment; or
- A basis of decision regarding education or employment; or
- Unreasonably interfering with education or employment.

Unwanted sexual conduct can include a wide range of behaviors including, but not limited to:

- Sexual communication including verbal comments, written communications and computer messages;
- Sexual jokes, drawings, e-mail, pictures or gestures;
- Sexual advances or requests for sexual favors;
- Sexual touching, pulling at clothes

There are two categories of sexual harassment:

Quid Pro Quo and Hostile Environment. **Environmental or hostile environment sexual harassment** is defined by the EEOC as “unwelcome sexual conduct that unreasonably interferes with an individual’s job performance or creates an intimidating, hostile or offensive environment can constitute sex discrimination even if it leads to no tangible or economic consequences.”

Quid Pro Quo Sexual Harassment is defined by EEOC as “when submission to or rejection of such conduct by an individual is used as the basis for employment decisions affecting such individual.”

EEOC has also recognized that the line between “Quid Pro Quo” and “hostile environment” is not always clear, and that the two forms of harassment can occur together.

Generally, one isolated incident is not enough to establish environmental harassment, unless the isolated incident is very severe. The harassment must be so severe and pervasive as to alter the terms of the victim’s employment and create an abusive environment. Factors to be considered in determining whether an environment is hostile are:

- Was the conduct verbal, physical, or both?
- How frequently was it repeated?
- Was the conduct hostile and patently offensive?
- Was the harasser a co-worker or a supervisor?



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- Did others join in the harassment?
- Was the harassment directed at more than one person?

The following standards have evolved in determining whether an environment is hostile:

- The standard to be used is that of a reasonable person.
- The behavior must be threatening or humiliating, not merely annoying.
- The behavior must be severe or frequent.
- The behavior must be capable of unreasonably interfering with one's employment or education.
- All circumstances surrounding the behavior must be considered, not just one factor such as evidence of harm to the victim.

Hostile environment sexual harassment claims also frequently accompany claims of constructive discharge. The EEOC has taken the position that the employer is liable for constructive discharge when it imposes intolerable working conditions in violation of Title VII when those conditions foreseeably would compel a reasonable employee to quit, whether or not the employer specifically intended to force the victim's resignation.

School District Liability:

Employees may bring an action for remediation against the school district under Title IX of the Education Amendments of 1992, Title VII of the Civil Rights Act of 1964, and individual state Human Rights Laws. Students and their parent can bring suit under Title IX of the Education Amendments.

The district is brought to suit when an employee or student is the alleged harasser because it is the district as employer, which controls the work place and the culture, which reflects standards of behavior for employees and students. The district has the power and duty to promulgate and enforce such standards.

The first defense against claims of sexual harassment is for the Board of Education to adopt and communicate a policy, which informs staff and students, what behavior is expected and what behavior will not be tolerated. The policy must inform employees and students how they can effectively bring a charge of harassment to the proper authority without fear of retaliation and how such allegations will be handled. Sanctions and penalties must be specified.

Merely having a policy on sexual harassment is not enough. The district must distribute the policy to staff and students, make sure that its provisions are understood through in-service training for **all** staff members, and provide for at least annual review of the policy and procedures and awareness training for students. More frequent re-enforcement may be necessary for students.



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When presented with an allegation of harassment, the district must conduct a prompt investigation, and make a determination. Both the alleged harasser and the complainant have the right to expect the charges to be investigated and a determination made. Too often, administrators can't believe that an accused staff member could have engaged in the alleged behavior, and fail to act, putting others at risk as well as increasing the liability of the district.

The investigation must be impartial, and must be perceived to be impartial by those affected by the process. Detailed questions must be asked and corroboration sought whenever possible. Unless staff members have been specifically trained in investigation procedures, the investigation is best conducted by an outside agency.

Information obtained in the investigation must be kept in strict confidence, except information, which may give rise to a charge of assault or molestation rather than harassment. If students are witnesses who will be interrogated, their parents should be notified in advance. All parties to the conflict should be warned not to discuss the matter with others except that the complainant may always take the matter to the appropriate federal or state agency charged with pursuing such matters.

Alternative routes must be established for the presentation of claims of harassment. A person making such a charge must be able to avoid dealing with his or her supervisor if the supervisor is alleged to be part of the problem. The employee must have a reasonable expectation of confidentiality and fairness.

If an allegation of harassment appears to be valid, the district must act swiftly and vigorously to correct the situation. This must be done without prejudice to the person making the charge

- The policy is reviewed with staff by every site administrator at the beginning of each school year, as well as upon the hiring of new employees. The policy is also published in student handbooks, and is reviewed periodically with students in age appropriate ways.
- Allegations of sexual harassment are promptly investigated by an impartial and expert person or persons; determination and follow-up are consistent.
- Legal expertise is obtained, and the property and casualty insurance company is informed **whenever** an allegation of harassment is made.
- District policy contains clear language stating that sexual harassment between sexes, same sex, between adults as well as students, is prohibited.
- The policy enables employees and students to report sexual harassment to at least one person not in his/her chain of command.



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- The district has age appropriate curricula and programs for instructing students and parents on sexual harassment and its prevention and remediation.
- The district periodically surveys staff and students to determine whether the sexual harassment program is effective.



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