



### Sexual Harassment – A Common Problem on Campus

Gender discrimination against employees is specifically prohibited by Title VII of the Civil Rights Act of 1964 and subsequent amendments. Sexual harassment in colleges and universities is often not reported and occurs more often than most people think. It can occur among co-workers or between a supervisor and a subordinate or even with a student. Visitors and volunteers on campus can also cause sexual harassment ... and liability.

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### How is Sexual Harassment Defined?

When an employee or student of your institution is sexually harassed, the wrongdoer is exercising power. Generally speaking, sex is the mechanism for exerting this power.

Accordingly, a student may become the victim of sexual harassment when a faculty member, administrator, or other employee of the institution abuses the power inherent in the institution's relationship with a student. Such harassment may be direct (such as coercion or threats made to a particular student) or indirect (such as inappropriate jokes or comments in the classroom).

And, workplace sexual harassment is commonly referred to as either "hostile environment" or "quid pro quo":

Unwelcome sexual advances, requests for sexual favors, job-related threats for rejecting sexual advances, and other verbal or physical conduct of a sexual nature that has the purpose or effect of unreasonably interfering with an individual's work performance or has the purpose of creating an intimidating, hostile, or offensive working environment. This type of harassment has been commonly described as **hostile environment** sexual harassment.

Sexual harassment also includes unwelcome sexual advances, requests for sexual favors, and other verbal or physical conduct of a sexual nature that is rejected by an individual and the rejection results in an *adverse tangible employment action* to the individual, made or caused by someone with authority or influence over that person's employment. This type of harassment has been commonly described as **quid pro quo** harassment.

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### What are Examples of Adverse Tangible Employment Actions?

Examples of adverse tangible employment actions include firing, demoting, decreasing pay, withholding a raise or promotion, reassigning to significantly different duties, changing benefits, transferring to an undesirable location, reducing job responsibilities, diminishing the job title, and/or making working conditions so bad that an employee feels compelled to resign.

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### Who Can Create Sexual Harassment?

- Faculty and Staff
- Students
- Deans and Other Administrators
- Parents
- Trustees
- Applicants
- Vendors
- Visitors

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### Who Can Create Sexual Harassment? - continued

Sexual harassment most commonly occurs as men harassing women. However, when based on gender, it is also prohibited in all jurisdictions for:

- Men to harass other men,
- Women to harass men, and
- Women to harass other women.

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### What Type of Conduct Can Create Sexual Harassment?

Sexual conduct that is welcome is not sexual harassment. To constitute sexual harassment, the sexual conduct must be **unwelcome**. Examples of sexual conduct include unwelcome touching, sexual comments, jokes, innuendo, requests for sexual favors, displays or writings. For example, a sexual advance could be unwelcome if it is: (1) rejected initially; (2) initially accepted and later rejected; or (3) accepted through coercion.

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### What Type of Conduct Can Create Sexual Harassment?

The unwelcome sexual conduct must be **severe** or **pervasive**, meaning:

**Severe** enough to alter an employee's workplace experience (or a student's campus experience), even though the conduct occurred rarely or even one time; or

**Pervasive** enough to be more than merely an accidental or isolated event, thus becoming a defining condition – even if no single act, viewed by itself, would be harassment.

A common question is, "Can one joke be sexual harassment?" The answer, in most cases, is "no." And, in the classroom context, professors (and students) enjoy the rights (and benefits) of academic freedom. However, each act must be examined in light of the surrounding circumstances.

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### What Type of Conduct Constitutes Sexual Harassment?

In addition to being severe or pervasive, unwelcome sexual conduct must also satisfy two tests:

- The **objective** test – Would the conduct offend any *reasonable person* in that same job position; and
- The **subjective** test – Was the specific person actually offended?

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### The Objective and Subjective Tests

To claim sexual harassment, the complaining person must show that the unwelcome sexual conduct would offend any *reasonable person* in that position – the **objective** test. In other words, would the conduct in question have the same offensive effect on most other people as it had on the offended person? What about the person who seems to be bothered by everything? A hypersensitive person may have difficulty meeting the objective test.

Additionally, the complaining person must meet a **subjective** test – the person targeted by the conduct must actually have been offended. The **subjective** test is met if the action is not the type that the complaining person typically initiates or participates in without personal objection.

For example, a woman who tells jokes with sexual content will have a difficult time proving that such jokes told in her presence offend her. However, that same woman, subjected to an unwanted physical attack, could meet the subjective test despite her enjoyment of sexual jokes, because the attack is unwelcome and severe.

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### How to Identify Sexual Harassment

Sexual harassment victims rarely report harassment. According to experts, most victims don't report harassment because of fear—fear of being ignored, retaliated against, having their private life exposed, or being isolated from fellow employees or students.

There are, however, certain warning signs that *may* indicate sexual harassment:

- Refusing to work with, or asking not to work alone with, another person;
- Asking for a job or classroom transfer or leaving employment for no apparent reason;
- Missing work or class, being consistently tardy, or having a drop in productivity, for no apparent reason;
- Personal arguments between employees or between an employee and student;
- An employee suddenly, for no apparent reason, becomes uncommunicative or hard to work with;
- A dating or sexual relationship, or the appearance of a dating or sexual relationship, between employees or an employee and student, whether consensual or not; or
- Signs of hostility between people who were once, or who are now, partners in a dating or sexual relationship.

Off-the-cuff comments demand further inquiry. For example, the comment: "Joe is weird," from an employee, should create an inquiry of: "What do you mean by that?" or "In what way is Joe weird?"

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## The Risk of Liability and Your Institution's Defense

To evaluate the risks of liability for sexual harassment, you should first focus on whether the employee or student suffered adverse action because of sexual harassment. For example, your institution will be liable if an employee suffers *an adverse tangible employment action* because of a supervisor's sexually harassing conduct.

*If* an employee can show that he or she suffered an *adverse tangible employment action* because of a supervisor's sexually harassing conduct of any type, then *the employer, your institution, will be liable* for the harassment. This is true even if the supervisor (or anyone else on campus) had no knowledge that sexual harassment was occurring. The institution will be automatically liable even if it had policies against sexual harassment in place, and took prompt remedial action. Automatic liability is also known as strict liability.

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## Avoiding Liability

Fortunately, your institution can better defend itself in court if it has done the right things on campus. For example, two recent U.S. Supreme Court cases created an affirmative defense for claims involving certain types of harassment – i.e., if there has been no harassment by a supervisor and no resulting adverse tangible employment action, but an employee has been subjected to sexual harassment.

The U. S. Supreme Court has indicated that, in most such cases, an institution may avoid liability *if* it can prove *two* things:

1. That the institution exercised reasonable care to prevent or to promptly correct any sexually harassing behavior in the workplace; and
2. That the employee unreasonably failed to take advantage of any preventative or corrective opportunities provided by the institution or failed to otherwise avoid harm.

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## Managing the Risks

First and foremost, you must never make sexual advances, or engage in other unwelcome sexual conduct, toward any employee or student. Second, if you know of any type of harassment on your campus, you must immediately inform your supervisor and/or another person who manages these issues. And, everyone should cooperate in any investigation of a sexual harassment complaint.

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## The Five Core Principles

Sexual harassment on campus can be effectively managed – and in most cases completely prevented – by applying five basic, but important, principles of risk management. And, even when the harassment cannot be completely prevented, you will be in a much better position to deal with the situation.

By following the “five core principles,” you can protect your institution -- including your colleagues, your students, and **yourself** – from sexual harassment and all of the legal and other problems it causes. The five core principles for dealing with sexual harassment are:

- No tolerance;
- Observation;
- Communication
- Empathy; and
- Fairness.

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## Sexual Harassment – *Applying the Five Core Principles*

### No Tolerance:

Show “no tolerance” for sexual advances, requests for sexual favors or other sexual conduct, which may create a sexual harassment claim. You should never take a chance by assuming that sexually related conduct is welcome. Outside appearances can be deceiving, and the employee or student subjected to the conduct may change his or her mind after a period of time or may not remember the incident quite like you remember it.

While it’s true that sexual banter is not uncommon, it can lead to sexual harassment allegations. Innocent behavior can even be a signal to a potential wrongdoer that harassment is permissible. What begins as ill-mannered remarks or childish behavior can quickly turn into a traumatic event for an employee or student – and the entire institution – possibly resulting in litigation.

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## Sexual Harassment – *Applying the Five Core Principles*

### Observation:

Remember that each person is different. What appears to be a harmless joke or innuendo to you may actually be unwelcome to another. Outwardly, an employee or student may seem accepting of sexual statements, jokes or innuendo ... but he or she may, in reality, be offended. Be observant, and don’t let outside appearances fool you regarding whether the behavior in question is welcome.

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### **Sexual Harassment – *Applying the Five Core Principles***

#### **Communication:**

Quick communication is the key to preventing harassment. Know which employees to contact on campus when harassment is discovered or alleged. Concentrate on communicating the facts: "I saw Joe force a kiss on Carol." Avoid giving your personal interpretation: "Carol didn't seem to mind the kiss."

A common mistake is to try to correct or manage the problem without assistance from others. Never try to manage harassment alone. Communicate the information to your supervisor and/or another person on campus who is responsible for dealing with allegations of harassment.

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### **Sexual Harassment – *Applying the Five Core Principles***

#### **Communication - continued:**

Never downplay a report of harassment (no matter how informal), argue with an employee or student about the accuracy of a report, or ignore a report altogether. A harassment report is an allegation only and should be promptly investigated by your institution or, if appropriate, by third-party investigators.

Keep any harassment report as confidential as possible. Only those individuals within your institution who have a "need to know" should be made aware of the report.

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### **Sexual Harassment – *Applying the Five Core Principles***

#### **Empathy:**

Employ empathy. You should always keep in mind that harassment reports are traumatic and emotionally charged for the accuser, the accused, and even the witnesses.

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## **Sexual Harassment – *Applying the Five Core Principles***

### **Fairness:**

Finally, be fair to the accused. Always remember that the accused should be considered innocent (although short-term protective steps may need to be taken) until a thorough investigation is conducted which may prove otherwise.

During and after an investigation, you must prevent retaliation against the person or persons who brought a harassment report and against those who provided information in the investigation of a harassment report. Retaliation for bringing a harassment complaint or for cooperating in an investigation can come in many forms, including termination, loss of privileges or benefits, demotions, cut in salary, verbal or physical abuse, or isolation from colleagues. One good way to prevent retaliation may be to separate the accused and the accuser until the investigation is complete. Also, remember that, in many instances, retaliation can occur after the investigation and imposition of discipline. Fairness to all parties concerned can go a long way toward preventing claims.