

INTRODUCTION

Sexual harassment has always been wrong. We don't really need regulations or laws to tell us. Federal managers have always had sufficient reason for taking it seriously, and most have. Even before it became one of the major HR issues of the last few decades, right-thinking federal agencies always dealt quickly and severely with instances of supervisors taking advantage of their authority by forcing sexual favors from employees and with employees who forced their passions on their coworkers.

Morality is only part of the issue. Much larger than the issue of sexual conduct is the more fundamental concern about how abuses of authority effect the mission of the organization. When supervisors are allowed to abuse subordinates and they allow bad employees to abuse good ones, good employees leave. For the good of the organization, managers cannot let people abuse each other for any reason, e.g., sexual, religious, racial, political.

Unfortunately, too many people have lost sight of that point, and the issue of sexual harassment has become deeply politicized. It is not an issue of women against men, liberals against conservatives, or the progressive minded against reactionaries. It is about the uniquely American view that people should treat each other with decency, trust, respect, and loyalty.

But waving the flag is easy. Doing something about the problem is not easy. That is what this book is about. Doing something about the problem. Combating sexual harassment requires a multi-pronged attack that includes setting rules, promulgating policies, educating employees, monitoring compliance, and taking action against people who do not comply.

Disciplinary actions are admittedly only part of the solution, but they are a major part. Through disciplinary actions the government enforces basic standards of right and wrong. Much of the problem that the federal government has had in combating sexual harassment is that many have lost sight of the fact that sexual harassment is about basic standards of right and wrong.

The easiest way to deal with sexual harassment issues is to treat them as moral issues rather than as obscure legal technicalities. To give an analogous situation, if a manager sees several employees beating up another employee, he or she doesn't reach for a law book to look up the definitions of assault, battery, attempted murder, maiming, or whatever other legal terms the legislature has used to proscribe violent behavior. He or she puts a stop to the fight, finds out who did what to whom, and if somebody did something wrong, takes a formal disciplinary action against the offender. Whatever legal

term is used to charge the person in the disciplinary letter has no bearing on the basic moral issues.

So it is with sexual harassment cases. You'll find it much easier to handle these situations if you worry less about legal technicalities and more about the moral issues. Treat them as basic questions of misconduct and watch how much clearer the problems and solutions become.

This book is for people in agency management responsible for:

- handling allegations or situations of sexual harassment, and
- taking appropriate corrective action against offenders.

Although it is written for federal managers who supervise civilian employees, it is also for the people who have to act on their behalf and advise them when taking actions—personnelists, EEO staff, and agency or IG investigators. Although the focus of the book is on the civilian system, I shall also touch on its application to military personnel, where appropriate.

Sexual harassment cases pose unique problems that you do not find in other types of disciplinary cases. Evidence is scanty and trying to figure out who did what to whom is a difficult factfinding analytic process. Even when you find out what happened, you must then determine whether the conduct was actionable. There is often a fine line between normal romantic gestures and prohibited sexual harassment. Even if you do determine that the conduct was actionable, what action do you take?

We must remember, too, that combating sexual harassment is a management function, not an EEO department function. Management sets the rules of the workplace, follows up to make sure that employees are compliant, and takes action against those who do not comply. It is not the responsibility of your EEO office to stop people from sexually harassing employees; it is up to you.

In the [first chapter](#), we begin by defining sexual harassment. In [Chapter Two](#) we discuss how to conduct an inquiry into an allegation of sexual harassment by an employee. [Chapter Three](#) follows with an analysis of how to evaluate what you find out during your inquiry. [Chapter Four](#) discusses your options once you have figured out what happened. [Chapter Five](#) focuses on the mechanics of a disciplinary action for sexual harassment.

One minor technical note, though, I should mention before we begin. As with my other books, I have deliberately omitted legal citations to laws and cases. I am not writing a legal tract for lawyers on sexual harassment, but a guide for supervisors on how to handle the problem. The information is accurate, but I don't want to clutter the text with lengthy citations and obscure legal references. For our practitioners looking for a detailed authoritative guide to

case law, refer to *Federal Sector Sexual Harassment Law* ([Dewey Publications, Inc. 2008](#)) by Ernest C. Hadley and Eleanor J. Laws.

Most of the references I use are fairly common, and almost all of the cases are in the standard legal reporting services. If you are curious about a case I mention and you can't find it, feel free to contact me through my publisher. I'll send it to you or tell you where to find it.

CHAPTER ONE

DEFINING SEXUAL HARASSMENT

Though we avoid dwelling on the legalities of sexual harassment, it is worth spending a brief chapter to discuss what sexual harassment is so that we can understand what we are trying to prevent.

LEGAL BASES FOR PROHIBITION OF SEXUAL HARASSMENT

The Civil Rights Act of 1964 prohibits discrimination based upon race, color, religion, sex, and national origin. Other laws that apply to the federal service also prohibit discrimination based upon age (over forty) and disability. The Civil Rights Act does not specifically mention sexual harassment as a form of illegal discrimination. The concept of sexual harassment as a prohibited act stems from two important interpretations, namely the principle of a harassment-free workplace and the prohibition against gender-based actions.

A HARASSMENT-FREE WORKPLACE

The idea of a harassment-free workplace is not new. Shortly after the Civil Rights Act was passed, employees were winning lawsuits against companies that had either harassed or tolerated harassment against them because of one of the prohibited grounds. For example, in one case an employer was held liable for repetitive, virulent, and vicious anti-Semitic acts by coworkers against a Jewish employee that caused him to resign. The company argued that it had not actually taken a personnel action against the employee because he had resigned, and it did not officially take part in the harassment and was not responsible for what its employees did to one another.

The court ruled in favor of the employee and termed his resignation a “constructive discharge” meaning that he had been, in effect, forced to resign because of the intolerable working conditions. The court further found that the intolerable working conditions were caused by illegal discrimination that brought the situation under the Civil Rights Act. Although the supervisor had not officially condoned the acts and had not taken part in them, his failure to do anything to stop them was, in effect, an act of discrimination against the employee because of his religion.

In another case, an employer was found guilty of racial discrimination for not stopping vicious ongoing racially motivated harassment by coworkers

and supervisors. Not only does management have an obligation not to discriminate against employees, it also has an obligation to make sure that employees do not create an intolerable work environment based upon one of the prohibited factors.

A GENDER-BASED ACTION

The concept of a discrimination-free or harassment-free workplace has been around for years. The second concept is that sexual harassment is a gender-based action. In the 1970s, before the EEOC regulations on sexual harassment, the courts were already finding that certain types of sexual advances were violations of the Civil Rights Act because they were happening to people, usually women, because of their gender. The assumption is that if a male supervisor, for example, makes improper sexual advances towards a female subordinate or demands sexual favors from her in exchange for favorable employment decisions, he is doing this because the subordinate is a woman. If she were not a woman, he would not have targeted her to harass (and no, I've not yet seen the case where the supervisor tries to defend himself by maintaining that he is an equal opportunity harasser who makes sexual advances against both men and women).

EEOC REGULATIONS

When the Equal Employment Opportunity Commission (EEOC) issued its sexual harassment regulations in 1981, it was not a radical change. The EEOC was simply codifying conventional wisdom in the legal field about harassment based upon one of the seven prohibited factors. The regulations stated that sexual harassment was a form of sex discrimination and defined it as:

Unwelcome sexual advances, requests for sexual favors, and other verbal or physical conduct of a sexual nature 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.

The first and the second are virtually identical—sex for job favors or retaliation for not granting sex. According to the federal courts, what the EEOC described was basically two types of sexual harassment: (1) tangible employment actions and (2) hostile work environment.

TANGIBLE EMPLOYMENT ACTIONS

This is the easiest to understand. It is the abuse of authority for sexual purposes. Tangible employment actions or “*quid pro quo*”, the Latin term for “this for that”, harassment is the type of sexual harassment that the EEOC describes in (1) and (2) in the definition. This type of sexual harassment involves a supervisor requiring the employee to submit to sexual advances. If the employee submits, then he or she receives an employment benefit, e.g., a promotion, positive performance appraisal, or is spared from a negative employment action.

It can also involve taking a retaliatory action, e.g., negative performance appraisal, demotion, suspension, against an employee who refuses those advances. Both the acts of requiring sex for employment favors and doing bad things to people who do not provide sex are “*quid pro quo*” sexual harassment, otherwise known as tangible employment actions. The federal government has long disciplined supervisors who abuse their authority in order to obtain sex.

HOSTILE WORK ENVIRONMENT

The *quid pro quo* theory of sexual harassment is obvious; the hostile work environment sexual harassment concept is not always as obvious. Agencies and individuals have struggled to understand it. Many agencies have lost disciplinary cases on appeal when they erroneously charged employees with creating a hostile work environment that did not meet the definition. Fortunately, over thirty years has passed since the regulations, and we have had enough court and appellate decisions on the topic that we can form an accurate picture of what conduct constitutes hostile work environment sexual harassment. During that time, five major points have emerged that have sufficiently clarified the definition.

Sexually Offensive Conduct

The offensive conduct must be sexual. Courts have made several major distinctions between generally offensive conduct, sex-based conduct, and sexually offensive conduct. The distinction is important because much of the initial government training on sexual harassment suggested that anything somebody did that offended someone else of the opposite sex was sexual harassment. Fortunately, this view has not prevailed. This is not to say that generally offensive conduct or sex based conduct is not wrong or actionable. It is indeed, but it is not sexual harassment. This may seem to be needless hairsplitting, but it is a distinction of major importance when agencies try to discipline employees. Profanity or vulgarity—even though offensive—does not necessarily constitute sexual harassment.