

# Understanding Sexual Harassment

## A Guide for Journalists, Activists, Organizational Leaders and other Non-Lawyers Committed to Gender Equality and Institutional Change

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Since the watershed events of November 2017, legal academics have been tapped by the media to comment on the problem of sexual harassment and possible solutions. This is no easy task. Sexual harassment is often misunderstood. Those who are victimized by it, those who perpetrate it, and those who write about it often have different understandings of what sexual harassment is. The law's definition and treatment of sexual harassment is nuanced and does not always accord with common sense. Reform can seem elusive and the best ways of redressing sexual harassment can sometimes be counter-intuitive. Recognizing these challenges, this guide aims to define and describe sexual harassment, respond to common questions, and suggest possible changes to improve conditions of employment for women and for all workers.

### Understanding the Problem

We can't fix a problem if we don't really understand it. The first step in eliminating sexual harassment is knowing how to recognize it and realizing why it's harmful.

**1. Sexual harassment is a type of gender discrimination.** Sexual harassment is a form of gender discrimination. It is a way of asserting male power, maintaining traditional gender roles at work, keeping women out of the most desirable jobs, and making women feel beholden to men for their success.

**2. Sexual Harassment does not always involve sexual behavior.** Bosses demean women, insist that they perform personal favors or humiliating tasks, subject them to angry tirades, and force them to tolerate other abuses of power. Coworkers take credit for women's accomplishments, deny them team support, keep them outside the information "loop," and comment or convey that they don't belong. These forms of sexual harassment happen more frequently than the sexualized misconduct that has captured the public's attention.

**3. Sexual harassment happens with other forms of sex discrimination.** Sexual harassment is prevalent in jobs where women are scarce in leadership or greatly outnumbered in their jobs. The absence of women fosters stereotypes such as "men are bosses" and "women are assistants" that make gender segregation and male control seem natural.

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\* Many of the ideas contained in this Guide draw from Vicki Schultz, *Open Statement on Sexual Harassment from Employment Discrimination Law Scholars*, 71 Stan. L. Rev. Online 17 (2018), available at <https://www.stanfordlawreview.org/online/open-statement-on-sexual-harassment-from-employment-discrimination-law-scholars/>, prepared on behalf of ten employment discrimination law scholars, including the SH (United Legal Educators Against Sexual Harassment) EQUALITY.

4. **Not all sex at work is sexual harassment.** Consensual workplace relationships are not sexual harassment. Neither, in many cases, is an occasional off-color joke or casual expressions of sexual interest, particularly between co-workers. Treating all sex as sexual harassment doesn't solve the problem, and may make sex discrimination worse by making men reluctant to work closely with women.

5. **Men and LGBTQ+ people are harassed based on sex, too.** Because sexual harassment is a way of maintaining gender roles, LGBTQ+ people are often victims. Gay men are hazed for being "weak" or not "manly" enough for their jobs. Lesbian women are shunned or humiliated for not appearing feminine or being sexually pleasing to men. Transgender people often experience severe harassment, including physical abuse.

6. **Harassment based on race or ethnicity intersects with sexual harassment.** Women of color experience higher rates of sexual harassment. Stereotypes about the sexuality of women of color can fuel harassment. Women of color are also more likely to be in jobs where they are isolated and vulnerable to harassment.

### **The State of the Law**

Harassing women simply work because they are women is wrong, regardless of what the law says. But it is important to know the law of sexual harassment in order to understand what legal remedies are available to victims and what changes are needed to eliminate sexual harassment.

Currently, for harassment to be actionable – that is, for the law to require an employer to pay damages to the victim – the objectionable conduct must be:

1. **Severe or pervasive.** Although a single severe event, like a physical assault, can sometimes be enough, the law usually requires multiple incidents of harassment.
2. **Unwelcome to the victim.** Behavior is not unlawful if the victim does not perceive it as harmful. The law requires that the behavior negatively affects the victim in her job.
3. **Objectively offensive.** Behavior is not unlawful, despite the victim's perception, if it is obviously trivial or would not be perceived as harassment by most people.
4. **Based on sex.** This means the harassment must target the victim because of her sex, not that the behavior itself is sexualized.

In addition, the employer must bear responsibility for the conduct. Depending on who commits the harassment (a supervisor, owner, co-worker), employers may bear responsibility where:

1. **The employer has not taken steps to prevent harassment.** Courts generally require employers to adopt policies and host trainings aimed at preventing harassment.
2. **The employer does not adequately respond to the victim's complaints.** Courts require employers to correct harassment once it is reported.
3. **The employer knew about (or *should have known about*) the harassment.** In many cases, an employer is not responsible for harassment if the victim does not report the conduct.

## **A Way Forward**

There is no one solution to sexual harassment, just as there is no one solution to discrimination generally. Organizations, courts, lawmakers, bystanders, victims and the public all have a role. Changes to the workplace and changes in the law are especially important.

### *Changes to the Workplace*

**1. Improve policies and training to target the real problem: sexism.** Zero tolerance policies that outlaw all sexual behavior at work are not a solution. Policies should address all forms of discrimination and harassment and include clear examples of what is and what *is not* sexual harassment. Training and other pro-active steps should focus on creating a welcome environment for women and ensuring that women are included at all levels of the organization and in all aspects of work.

**2. Address the problem of sex segregation at work.** Organizations should strive to employ equal numbers of women in all positions, especially at the top. They should adopt long-term plans to integrate their workplaces that include identifying and cultivating women with potential for leadership. Managers and supervisors should be accountable for reducing segregation by setting and achieving concrete goals.

**3. Look beyond individual “bad apples.”** Sometimes sexual harassment is the result of a single predator, but more often it is an institutional problem. Organizations should train all employees on intervention, not just supervisors. Those accused should be investigated fairly and disciplined proportionately. Organizations should resist the urge to scapegoat and should not use sexual harassment as a pretext for disciplining or terminating workers for other reasons.

**4. Eliminate unchecked workplace power.** Organizations should reduce the unfettered discretion of owners and managers over subordinates. Performance should be measured objectively and promotion pathways should be transparent. No one person should have the power to destroy a worker’s career.

**5. Eliminate job conditions that make workers vulnerable.** Organizations should pay employees well enough so they are not forced to cater to customer or client taste for tips and bonuses. Sex appeal should not be a job requirement for any job outside the sex industry. Out-of-work activities should be conducted professionally. Organizations should implement safety plans and provide special resources to those who work in solitary and remote.

**6. Ensure protection for those who complain.** Organizations should scrupulously protect those who complain of harassment or any form of discrimination. They should maintain confidentiality to the extent possible and act affirmatively to quell rumors and head off subtle acts of retaliation. Sexual harassment training for all employees should include training on non-retaliation that includes clear examples of retaliatory behavior, such as shunning, refusals to cooperate, and hostile comments.

### *Changes to Law & Policy*

**1. Increase and strengthen appropriate legal enforcement mechanisms.** Agencies and activists should bring class-wide lawsuits challenging sexual harassment and discriminatory practices that lead to sex segregation and hierarchy. Agencies like the EEOC should be given adequate funding and invested with the necessary authority to achieve their mission of enforcing anti-discrimination laws.

2. **Change laws that limit victim's access to courts.** Lawmakers should reject court decisions that limit victims' ability to bring class action lawsuits. They should change laws that permit employers to force harassment victims into private arbitration and keep them out of court.

3. **Make information about harassment and harassers publicly available.** Information about past harassment should be available to future employers in a format that protects victim identity. Laws on employment references should encourage candidness and offer safe harbors for organizations that share information about harassment. Confidentiality provisions in private settlements that prohibit victims from speaking about past harassment should be limited.

4. **Improve working conditions broadly.** Employment laws should provide workers with greater job security and a living wage so that they are less vulnerable in their jobs and more capable of standing up against harassment and discrimination.

5. **Hold employers directly responsible for sexual harassment.** Lawmakers should reject court decisions that limit employers' liability for harassment and make employers directly responsible for harassment that happens in their organizations.

6. **Improve remedies for victims.** Currently the money damages that victims can receive for suffering harassment are "capped." These caps should be raised or eliminated. In addition to awarding damages, courts deciding harassment cases should order employers to make changes to their organizations that will put more women into positions where they are outnumbered or vulnerable.