Harassment In The Workplace

A comprehensive guide to preventing harassment in the workplace and what you need to do to comply with the law.

personnel concepts

EMPLOYER KNOWLEDGE SERIES

Harassment In The Workplace

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Chapter 1

What is Harassment?

About this Manual

This manual is designed to make employers aware that any harassment by an employee, including sexual harassment and vicarious harassment by a supervisor, is against the law. Sexual harassment can be male to female or female to male or same sex. Vicarious harassment applies to harassment by a supervisor based on race, color, sex (whether or not of a sexual nature), religion, national origin, protected activity, age, or disability.

All claims of harassment should be taken seriously. The consequences of not doing so could be detrimental to your company.

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Every effort has been made by Personnel Concepts to ensure accuracy and completeness of the information contained in this manual. This manual follows the guidelines set forth by the State Department of Fair Employment, as well as the Federal Government's Equal Employment Opportunity Commission. This manual and program are provided with the understanding that Personnel Concepts or any of its authorized distributors cannot be held responsible for errors or omissions or changes in the law, regulations or interpretations thereof. The user of this Harassment Compliance Program is urged to seek legal counsel to verify the applicability of this program. This manual is in no way intended to be a legal interpretation of any law or regulation.

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Interpretation of Sexual Harassment

The regulations of the Equal Employment Opportunity Commission, hereinafter referred to as the EEOC, define sexual harassment as unwanted sexual advances or unwanted visual, verbal or physical conduct of a sexual nature. This definition encompasses many forms of offensive behavior, including harassing of a person of the same sex as the harasser.

The following are a few examples of sexual harassment:

1. Unwanted sexual advances.
2. Offering employment benefits in exchange for sexual favors.
3. Threatening reprisals after a negative response to sexual advances.
4. Visual conduct: leering, making sexual gestures, displaying of sexually suggestive objects such as pictures, cartoons or posters.
5. Verbal conduct: making or using derogatory comments; epithets; slurs and jokes; sexual advances or propositions; verbal abuse of a sexual nature, such as graphic verbal commentaries about an individual's body; sexually degrading words used to describe an individual; suggestive or obscene letters, notes or invitations.
6. Physical conduct: touching, assaulting, impeding or blocking movements.

Any form of sexual harassment is against the law.

Typical Sexual Harassment Case Studies

The following are the three most common types of sexual harassment complaints filed with the Equal Employment Opportunity Commission:

Case Study (1)
An Employee is fired or denied a job or an employment benefit because he/she refused to grant sexual favors or because he/she complained about the harassment.

Note (1) Case (1)
Benefits can include the following: 1) a day off (sick or other); 2) vacation time; 3) extended break time; 4) bonus pay including overtime pay and pay raises; 5) job or shift transfer; 6) denial of employment classification, i.e., salaried, full-time, part-time, seasonal, temporary to full-time staff position (outside contractors such as a temporary personnel firm) or denial of promotions to new positions, etc.

Note (2) Case (1)
Retaliation for complaints about harassment is illegal, even if it cannot be demonstrated that the harassment actually occurred. (See "Liability Case Study: Third-Party Claim of Harassment").

Case Study (2)
An Employee quits because he/she can no longer tolerate an offensive work environment (referred to as a "Constructive Discharge" harassment case). If it is proven that a reasonable person, under like conditions, would resign to escape the harassment, the employer may be held responsible for the resignation as if the employee had been discharged.

Note (1) Case (2)
In 1991, the U.S. Court of Appeals for the 9th Circuit issued a "blockbuster" decision when it ruled that the new standard to be applied to sexual harassment cases was whether a "reasonable person" would have found the behavior offensive.

Recent case law on sexual harassment has veered away from the "reasonable person" analysis and more towards a "reasonable victim" standard. It is very important to understand the difference between the two. Under the "reasonable person" test, a gender-neutral approach is used to determine whether the alleged conduct was offensive. In contrast, however, the "reasonable victim" test assumes that men and women have different standards for judging offensive sexual conduct, and implicit in this assumption is the idea that women are more likely

than men to be offended by certain conduct. Under the "reasonable victim" test, if a woman were the alleged victim, the standard to be applied would be whether a reasonable woman would have found the behavior sexually offensive, whereas, if a man were the alleged victim, the standard to be applied would be whether a reasonable man would find the behavior offensive.

Case citation: Ellison vs. Brady, 924 F.2d 872 9th Cir. 1991.

Case Study (3)
An employee is exposed to an offensive work environment. Exposure to various kinds of behavior or to unwanted sexual advances alone may constitute harassment.

Note (1) Case (3)
Male employees admitted to "picking on" female employees by using offensive sexual behavior but did not feel that such behavior constituted sexual harassment because no propositions were made to the female employees. The Court found in favor of the female employees and awarded the female employees damages for sexual harassment.

Case citations: EEOC Decision No. 81-18, CCH EEOC Decision II 6758 (1981); Meritor Savings Bank vs. Vinson, 54 U.S.L.W. 4703 (1986).

Interpretation of Vicarious Liability

The regulations of the EEOC define vicarious liability as harassment by supervisors based on race, color, sex (whether or not sexual in nature), religion, national origin, protected activity, age, or disability. Supervisors include individuals with immediate or successively higher authority over an employee, individuals authorized to make tangible employment decisions affecting the employee, or individuals authorized to direct another employee's day-to-day work activities. Harassers can also include individuals who do not have actual authority over an employee if the employee reasonably believed the harasser had such authority.

The following are a few examples of vicarious harassment:

1. Racial or ethnic slurs, jokes, or derogatory comments.
2. Verbal or physical conduct based on race or nationality that creates an offensive or hostile work environment or interferes with an employee's work performance.
3. Tangible employment actions: hiring and firing; promotion or failure to promote; demotion; undesirable reassignment; and decisions causing a significant change in benefits, compensation decisions, or work assignment.

Any Form of vicarious harassment is against the law.

Typical Vicarious Harassment Case Studies

The following are examples of employer liability for vicarious harassment by supervisor:

Case Study (1)
An employee is not granted a promotion due to discrimination related to his or her religious beliefs.

Case Study (2)
An employee in a doctor's office is subjected daily to the practice of racially segregating patients.

Note (1) Case (2)
Racial segregation of patients in a medical facility could be discriminatory based on violations in "the terms, conditions, or privileges" of employment, thereby violating Title VII.

Case Study (3)
A woman gains a position in a company and later resigns her position. She claims she has been racially harassed due to the nature of her work environment where her coworkers frequently tell racial jokes, exchange racial banter, and display offensive cartoons in the office. In order to feel accepted she was expected to participate in the behavior or at least accept it.

Note (1) Case (3)
Employer liability has turned on whether a complainant has alleged adverse employment consequence, such as firing or demotion. If a complainant can prove that a hostile work environment lead to resignation, the employer may be held liable unless an affirmative defense for employer liability can be established.

Citations: Rogers v EEOC, 454 F. 2d 234, (1971); Dennis v. City of Fairfax, 55 F. 3d 151,153 (CA4 1995).

Chapter 2

Employer Liability

Employer Liability

All employees are covered by the harassment section of Title VII of the Civil Rights Act of 1964, hereinafter referred to as Title VII. If harassment occurs, an employer may be held liable even if management was not aware of the harassment. An employer might avoid liability if the alleged harasser is a rank and file employee and if there is a program to prevent harassment. However, the alleged harasser, as well as any management representative who knew about the harassment and condoned or ratified it, could be held liable for damages.

Additionally, most State Fair Employment Departments require an entity to take "all reasonable steps to prevent harassment from occurring." If an employer has failed to take such preventative measures, that employer can be held liable for harassment.

An act of harassment by itself is against the law. A victim may be entitled to damages even though no employment opportunity has been denied and there is no actual loss of pay or benefits.

Liability Case Study: Third-Party Claim of Harassment

A California Appellate Court ruled that a male employee, who was allegedly fired for complaining about sexual harassment perpetrated against a female employee, could file a claim alleging retaliation under the FEHA. The female employee who the male employee alleged was sexually harassed did not believe that she had been harassed. The Court, however, held that the harassment victim's belief was not determinative. The FEHA only requires that the person alleging to be a victim of retaliation by complaining about the harassment has a sincere, reasonable belief that the harassment took place.

Take note that any claim of harassment, either by the alleged victim or a third party, should be taken seriously. Even if the alleged victim of harassment does not believe that any harassment occurred, do not take disciplinary action against the third party for reporting the alleged harassment.

PLEASE NOTE: Many states have specific laws that affect employers regarding all forms of harassment in the workplace. Check with your specific state requirements where more stringent standards may exist.

Vicarious Employer Liability for Unlawful Harassment by Supervisors

In Burlington Industries, Inc. v. Ellerth, and Farragher v. City of Boca Raton, the Supreme Court made clear that employers are subject to vicarious liability for unlawful harassment by supervisors. The standard of liability set forth in these decisions is premised on two principles:

1. An employer is responsible for the acts of its supervisors, and
2. employees should be encouraged both to prevent harassment and avoid or limit the harm from harassment.

The Court held that an employer is always liable for a supervisor's harassment if it results in a tangible employment action. However, if it does not, the employer may be able to avoid liability or limit damages by establishing an affirmative defense that includes the following necessary elements:

1. The employer exercised reasonable care to prevent and promptly correct any harassing behavior and
2. The employee unreasonably failed to take advantage of any preventative or corrective opportunities provided by the employer or to avoid harm otherwise.

The rule in Ellerth and Faragher regarding vicarious liability applies to harassment by supervisors based on race, color, sex (whether or not of a sexual nature), religion, national origin, protected activity, age, or disability. Thus, employers should establish anti-harassment policies and complaint procedures covering all forms of unlawful harassment.

Who Qualifies as a Supervisor?

Harassers who qualify as supervisors include individuals in a supervisory chain of command as well as individuals outside the supervisory chain of command. Harassers in a supervisory chain of command are those individuals with "immediate (or successively higher) authority over an employee." Thus, it is critical to determine whether a person who engaged in unlawful harassment had supervisory authority over the complainant. An individual qualifies as a employee's supervisor if:

1. The individual is authorized to undertake tangible employment decisions affecting the employee. Tangible employment decisions are decisions that significantly change another employee's employment status. Such actions include, but are not limited to, hiring, firing, promoting, demoting, and reassigning the employee.
2. The individual is authorized to direct another employee's day-to-day work activities even if that individual does not have the authority to undertake or recommend tangible job decisions. Such an individual's ability to commit harassment in enhanced by his or her authority to increase the employee's workload or assign undesirable tasks. Hence it is appropriate to consider such a person a "supervisor" when determining whether the employer is vicariously liable. However, someone who directs only a limited number of tasks or assignments would not qualify as a "supervisor." For example, an individual whose delegated authority is confined to coordinating a work project of limited scope is not a "supervisor."

Harassers who qualify as "supervisors" may also include individuals outside the supervisory chain of command. In some circumstances an employer may be subject to vicarious liability for harassment by a supervisor who does not have actual authority over the employee. Such a result is appropriate if the employee reasonably believed that the harasser had such power. The employee might have such a belief if the chains of command are unclear. Alternatively, the employee might reasonably believe that a harasser with broad delegated powers has the ability to significantly influence employment decisions affecting him or her even if the harasser is outside the employee's chain of command. If the harasser had no actual supervisory power over the employee, and the employee did not reasonably believe that the harasser had such authority, then the standard of liability for co-worker harassment applies.

Harassment by Supervisors

Tangible Liability Standard:

An employer is always liable for harassment by a supervisor on a prohibited basis that culminates in a "tangible employment action." No affirmative defense is available in such cases. The Supreme Court recognized that this result is appropriate because an employer acts through its supervisors, and a supervisor's undertaking of a tangible employment action constitutes an act of the employer.

Definition of "Tangible Employment Action:"

A tangible employment action is "a significant change in employment status." Unfulfilled threats are insufficient. Characteristics of such actions include the means by which the supervisor brings the official power of the enterprise to bear on subordinates as demonstrated by the following: it requires an official act of the enterprise; it usually is documented in official company records; it may be subject to review by higher level supervisors; and it often requires the formal approval of the enterprise and use of its internal processes.

Examples of tangible employment actions include:

1. Hiring and firing; promotion and failure to promote;
2. Demotion;
3. Undesirable reassignment;
4. A decision causing a significant change in benefits;
5. Compensation decisions; and
6. Work assignment.

Any employment action qualifies as tangible if it results in a significant change in employment status.

When harassment culminates in a tangible employment action, the employer cannot raise the affirmative defense. This sort of claim is analyzed like any other case in which a challenged employment action is alleged to be discriminatory. If the employer produces evidence of a non-discriminatory explanation for the tangible employment action, a determination must be made whether that explanation is a pretext designed to hide a discriminatory motive.

Harassment Not Resulting in a Tangible Employment Action:

When harassment by a supervisor creates an unlawful hostile environment but does not result in a tangible employment action, the employer can raise an affirmative defense to liability damages consisting of these two necessary elements which it must prove by a preponderance of the evidence:

1. The employer exercised reasonable care to prevent and correct promptly any harassment; and

2. the employee unreasonably failed to take advantage of any preventive or corrective opportunities provided by the employer or to avoid harm otherwise.

If an employer can prove that it discharged its duty of reasonable care and that the employee could have avoided all of the harm but unreasonably failed to do so, the employer will avoid all liability for unlawful harassment. If an employer cannot prove that it discharged its duty of reasonable care and that the employee unreasonably failed to avoid the harm, the employer will be liable.

In most circumstances, if employers and employees discharge their respective duties of reasonable care, unlawful harassment will be prevented and there will be no reason to consider questions of liability. An effective complaint procedure encourages employees to report harassing conduct before it becomes severe or pervasive and if an employee promptly utilizes that procedure, the employer can usually stop the harassment before actionable harm occurs. In some circumstances, however, unlawful harassment will occur and harm will result despite the exercise of requisite legal care by the employer and employee.

Alternatively, if an employee complained about harassment before it became severe or pervasive, remedial measures undertaken by the employer might fail to stop the harassment before it reaches an actionable level, even if those measures are reasonably calculated to halt it. In these circumstances, the employer will be liable because the defense requires proof that it exercised reasonable legal care and that the employee unreasonably failed to avoid the harm.

Harassment is the only type of discrimination carried out by a supervisor for which an employer can avoid liability, and that limitation must be construed narrowly. The employer will be shielded from liability for harassment by a supervisor only if it proves that it

exercised reasonable care in preventing and correcting the harassment and that the employee unreasonably failed to avoid all of the harm. If both parties exercise reasonable care, the defense will fail. In some cases, an employer will be unable to avoid liability completely, but may be able to establish the affirmative defense as a means to limit damages. The defense only limits damages where the employee reasonably could have avoided some but not all of the harm from harassment.

EMPLOYER'S DUTY TO EXERCISE REASONABLE CARE:

The first prong of the affirmative defense requires a showing by the employer that it undertook reasonable care to prevent and promptly correct harassment. Such reasonable care generally requires an employer to establish, distribute, and enforce an anti-harassment policy and complaint procedure and to take other reasonable steps to prevent and correct harassment.

The second prong of the affirmative defense requires a showing by the employer that the aggrieved employee "unreasonably failed to take advantage of any preventive or corrective opportunities provided by the employer or to avoid harm otherwise." Faragher,118 S. Ct. at 2293; Ellerth, 118 S. Ct. at 2270.

This element of the defense arises from the general theory "that a victim has a duty 'to use such means as are reasonable under the circumstances to avoid or minimize the damages' that result from violations of the statute." Faragher, 18 S. Ct. at 2292, quoting Ford Motor Co. v EEOC, 458 U.S. 219, 231 n. 15 (1982). Thus an employer who exercised reasonable care as described in subsection (V) above is not liable for unlawful harassment if the aggrieved employee could have avoided all of the actionable harm. If some but not all of the harm could have been avoided, then an award of damages will be mitigated accordingly. A complaint by an employee does not automatically defeat the employer's affirmative defense.

If, for example, the employee provided no information to support his or her allegation, gave untruthful information, or otherwise failed to cooperate in the investigation, the complaint would not qualify as an effort to avoid harm. Furthermore, if the employee unreasonably delayed complaining, and an earlier complaint could have reduced the harm, then the affirmative defense could operate to reduce damages.

Proof that the employee unreasonably failed to use any complaint procedure provided by the employer will normally satisfy the employer's burden. However, it is important to emphasize that an employee who failed to complain does not carry a burden of proving the reasonableness of that decision. Rather, the burden lies with the employer to prove that the employee's failure to complain was unreasonable.

Failure to Complain

A determination as to whether an employee unreasonably failed to complain or otherwise avoid harm depends on the particular circumstances and information available to the employee at that time. An employee should not necessarily be expected to complain to management immediately after the first or second incident of relatively minor harassment. Workplaces need not become battlegrounds where every minor, unwelcome remark based on race, sex, or another protected category triggers a complaint and investigation.

An employee might reasonably ignore a small number of incidents, hoping that the harassment will stop without resorting to the complaint process. The employee may directly say to the harasser that he or she wants the misconduct to stop and then wait to see if that is effective in ending the harassment before complaining to management. If the harassment persists, however, then further delay in complaining might be found unreasonable. There might be other reasonable explanation for an employee's delay in complaining or entire failure to utilize the employer's complaint process. For example, the employee might have had reason to believe that:

1. using the complaint mechanism entailed a risk of retaliation;
2. there were obstacles to complaints; and
3. the complaint mechanism was not effective.

To establish the second prong of the affirmative defense, the employer must prove that the belief or perception underlying the employee's failure to complain was unreasonable.

Risk of Retaliation:

An employer cannot establish that an employee unreasonably failed to use its complaint procedure if that employee reasonably feared retaliation. Surveys have shown that employees who are subjected to harassment frequently do not complain to management due to fear of retaliation. To assure employees that such a fear is unwarranted, the employer must clearly communicate and enforce a policy that no employee will be retaliated against for complaining of harassment.

Obstacles to Complaints:

An employee's failure to use the employer's complaint procedure would be reasonable if that failure was based on unnecessary obstacles to complaints. For example, if the process entailed undue expense by the employee, inaccessible points of contact for making complaints, or unnecessarily intimidating or burdensome requirements, failure to invoke it on such a basis would be reasonable. An employee's failure to participate in a mandatory mediation or other alternative dispute resolution process also does not constitute unreasonable failure to avoid harm. While an employee can be expected to cooperate in the employer's investigation by providing relevant information, an employee can never be required to waive rights, either substantive or procedural, as an element of his or her exercise of reasonable care, nor must an employee have to try to resolve the matter with the harasser as an element of exercising due care.

Perception that Complaint Process was Ineffective:

An employer cannot establish the second prong of defense based on the employee's failure to complain if that failure was based on a reasonable belief the process is ineffective. For example, an employee would have a reasonable basis to believe that the complaint process is ineffective if the procedure required the employee to complain initially to the harassing supervisor. Such a reasonable basis also would be found if he or she was aware of instances in which co-workers' complaints failed to stop harassment. One way to increase employee's confidence in the efficacy of the complaint process would be for the employer to release general information to employees about corrective and disciplinary measures undertaken to stop harassment.

Other Efforts to Avoid Harm:

Generally, an employer can prove the second prong of the affirmative defense if the employee unreasonably failed to utilize its complaint process. However, such proof will not establish the defense if the employee made other efforts to avoid harm. For example, a prompt complaint by the employee to the EEOC or a state fair employment practices agency while the harassment is ongoing could qualify as such an effort. If the employee could have avoided some of the harm by complaining earlier, then damages could be mitigated accordingly.

Harassment by "Alter Ego" of Employer

Standard of Liability:

An employer is liable for unlawful harassment whenever the harasser is of a sufficiently high rank to fall "within that class . . . who may be treated as the organization's proxy." Faragher, 118 S. Ct. at 2284.94. Officials who qualify under this definition include the president, owner, partner, or corporate officer of a company. In such circumstances, the official's unlawful harassment is imputed automatically to the employer. Thus, the employer cannot raise the affirmative defense, even if the harassment did not result in a tangible employment action.

Conclusion:

An act of harassment, whether sexual or vicarious in nature, by itself is against the law. A victim may be entitled to damages even though no employment opportunity has been denied and there is no actual loss of pay or benefits. The Supreme Court's rulings in Ellerth and Faragher create an incentive for employers to implement and enforce strong policies prohibiting harassment and effective complaint procedures. The rulings also create an incentive for employees to alert management about harassment before it becomes severe and pervasive. If employers and employees undertake these steps, unlawful harassment can often be prevented, thereby effectuating an important goal of the anti-discrimination statutes.

How the Law is Enforced

Employees or job applicants who believe that they have been harassed may, within one year of the harassment, file a complaint of discrimination under Title VII. The EEOC serves as a neutral fact finder and attempts to help the parties voluntarily resolve disputes. If the EEOC finds evidence of sexual or vicarious harassment and settlement offers fail, the EEOC may file a formal accusation against the employer and the alleged harasser. The accusation will lead to either a public hearing before the EEOC or a lawsuit filed in civil court on the complainant's behalf. If the Commission finds that harassment occurred, it can order remedies including fines or damages for emotional distress to be paid by each employer or alleged harasser charged. In addition, the EEOC can order hiring or reinstatement, back pay, promotion, and changes in the policies or practices of the involved employer. A civil court can award damages in any amount it deems appropriate under the circumstances.

How Fines are Imposed by the Equal Employment Opportunity Commission

How the EEOC assesses damages due to sexual harassment:

A. The preponderance of evidence must show that the victim sustained an actual injury as a result of the discrimination based on the following:

1. Physical and mental well-being.

2. Personal dignity and privacy.

3. Ability to work.

4. Ability to earn a living and advance in career.

5. Effect on the victim's family.

6. Relationships, personal reputation and success in the job market.

B. The EEOC may also examine the duration of the alleged emotional injury and whether it was made worse by the employer's failure to correct the activity.

C. The EEOC may also assess "administrative penalties" against private employers whom it finds liable for discrimination or sexual harassment.

In assessing these fines, the EEOC is allowed to consider the following:

1. Was the employer's conduct willful, intentional or purposeful?

2. Did the employer refuse to prevent or eliminate the discriminatory practices?

3. Did the employer commit multiple violations of the EEOC regulations?

4. Did the employer's conduct involve intimidation and/or harassment?

With respect to a class action complaint (a complaint filed by a group of employees), the EEOC could order penalties of, for example, $50,000.00 per victim. Multiple complaints involving any number of victims may be brought against an employer for harassment. These damages could amount to a considerable sum of money.

Example:

Maximum Award to each Victim	$50,000.00
6 Victims	6 X
Total Assessed Damages	$300,000.00

A complaint of harassment or discrimination does not necessarily limit a victim to the remedies discussed herein. A complaint may also be filed with state human rights agencies or brought against an employer in the form of a civil suit where the Court may award unlimited damages in any amount it deems appropriate.

Chapter 3

Preventing Harassment

Preventing Harassment

The best way to avoid a sexual or a vicarious harassment claim is to prevent any harassment from occurring in the first place. Employee awareness and education concerning all forms of harassment is the first step. The following Harassment Prevention Program will help employees recognize sexual and vicarious harassment, develop appropriate methods of handling allegations of harassment, and understand the serious consequences of harassment claims.

Implementation Procedures

1. Do a visual inspection of your facility:

    A. Remove any pictures, cartoons or posters that could be considered sexually or racially offensive to employees. This includes calendars that show men or women in suggestive poses, in bathing suits, etc.

2. Take a moment to reflect on how your staff interacts. (See "A"). Does this interaction include any of the following?

    A. Sexually explicit or offensive jokes.

    B. Jokes of racial, ethnic, or other discriminatory origin.

    C. Derogatory comments, epithets or slurs.

    D. Physical gestures that are sexually or racially suggestive in nature.

    * When you conduct staff meetings on harassment, discuss any prior incidents that could serve as examples.

3. Place educational posters in areas that are frequented by all employees and applicants.

4. Schedule a meeting with all management employees and supervisors of your company and do the following:

    A. Read Section I of this manual in its entirety.

    B. Talk about the types of harassment outlined in Section I, review the case studies and have an open discussion about the case studies. Do any of them apply to your company?

    C. Distribute copies of the employer information sheets.

    D. Distribute your company's policy statement and complaint procedures regarding harassment. (A sample policy statement is included with this program). Redistribute it periodically, and keep copies posted in central locations and incorporate them in an employee handbook.

E. Elect a three person board to serve as a Grievance Committee to investigate any claims of harassment. (In the case of a small employer, where a three person Board is impractical, the owner may serve as the Board and may request an employee representative to serve as a second Board member [ideally a person of the opposite sex of the owner]). The Board should include the following persons:

i) A Senior Manager;

ii) Personnel Manager or a similar person;

iii) Employee representative

The Board must include at least one male and one female.

The Board should follow the investigative guidelines outlined in this program when a complaint of harassment is made. The Board members should act independently of each other as outlined in the investigative procedures.

F. Meet with the Board to discuss investigative procedures and Board member responsibilities.

5. Managers and supervisors are to be instructed to pass out the employee "Harassment Policy" and "Company Policy Statement" to each of their employees. Managers and supervisors should provide training to all employees to ensure that they understand their rights and responsibilities. Each manager or supervisor should then conduct one-on-one meetings with each of their employees.

Chapter 4

Complaint Procedures

What to do When a Claim of Harassment is Made

An employer should take immediate and appropriate action when he or she knows that harassment has occurred. An employer must take effective action to stop any further harassment and to deal with any effects of harassment. At a minimum, the law requires the employer to do the following:

1. Fully inform the complainant of his/her rights and any obligations to secure those rights.

2. Verbally inform the employee of your policy forbidding any form of harassment. Assure the employee that his or her confidentiality will be protected and that there is no threat of retaliation related to such a complaint.

3. Inform the employee of your intentions to investigate his or her claim immediately and impartially, and establish a preliminary date for completion of the investigation.

4. Fully and effectively investigate each complaint. The investigation must be immediate, thorough, objective and complete. All those with information on the matter should be interviewed. A determination must be made and the results communicated to the complainant, to the alleged harasser, and, as appropriate, to all others directly concerned. (See Investigation Procedures for more information in chapter 5).

5. If harassment is proven, prompt and effective remedial action must be taken as follows: First, appropriate action must be taken against the alleged harasser and communicated to the complainant. Second, steps must be taken to prevent further harassment. Third, appropriate action must be taken to remedy the complainant's loss, if any.

Chapter 5

Investigative Procedures

Investigative Procedures (Quid Pro Quo Harassment - Offering Benefit in Exchange for Sexual Favors)

Investigation of claims of "Quid Pro Quo" Harassment must be done in a way to protect the rights of both the claimant and the alleged harasser. Interviews must be done in private on a one on one basis, and the results of these interviews must only be discussed on a "need-to-know basis," usually only with the parties involved and your Grievance Board.

Interviews of persons involved, including witnesses, should be conducted in a professional, non-biased manner. It is recommended that a male interview male witnesses and a female interview female witnesses.

The following steps should be followed when investigating the claim:

1. Interview the claimant and have the claimant complete the form entitled "Employee Harassment Complaint Form." Ask for specific details including the name of each witness to the incident. Inform the claimant not to discuss this claim with the alleged harasser and to notify you immediately if a confrontation takes place between the complainant and the alleged harasser.

2. Interview the alleged harasser. Explain to the alleged harasser the specific charges that have been brought against him or her. Allow the alleged harasser to give a verbal or written statement regarding the allegations. Ask the alleged harasser if a denial of the claim can be substantiated by naming witnesses to support such a denial. Express to the alleged harasser what the investigative procedures will be. Advise the alleged harasser of the preliminary date for completion of the investigation.

   * Communicate to the alleged harasser that this claim must not be discussed with the complainant, nor should any unnecessary contact with the complainant be made until the time that a ruling is made regarding the claim. If possible, keep the parties separate until a ruling is made. The alleged harasser must understand that failure to follow this policy will result in possible suspension and/or termination.

3. Call a meeting of the Grievance Board to discuss the claim and to formulate a plan of action to interview all witnesses named by both parties. Document this meeting in the Harassment Investigation Report.

4. Interview and take written statements from all witnesses to the alleged incident. Document dates, times and names of witnesses on the Harassment Investigation Report.

5. Determine the credibility of each witness. This procedure may be difficult, but the following will prove helpful:

A. Is the witness prone to be biased due to a personal friendship with either party?

B. Was the witness present at the time of the alleged incident? (Ask co-workers, if possible).

C. Is there any reason for the witness to give a false or misleading statement?

6. Always assume that the claimant is telling the truth unless a preponderance of evidence shows otherwise.

7. Take into account past experiences with the parties involved. Is there a history of this type of allegation? If so, what was the outcome and who was involved.

8. Call a meeting of the Grievance Board after all interviews have been completed and all the evidence has been accumulated.

9. Discuss all information and evidence at this meeting and make a decision as to the validity of the claim.

10. If the claim is valid, decide if the victim sustained any type of loss i.e.:

A. Was denied a promotion;

B. Denied a pay raise or status change;

C. Denied a benefit such as time off, etc;

D. Unjustly disciplined.

11. If a loss occurred, you must take immediate action, retroactive to the date of the incident, to compensate the complainant for the loss.

12. Inform the complainant of the decision, of any compensation due him or her, and of disciplinary action being taken against the harasser. Discuss what the Company intends to do to ensure that such harassment does not recur. Follow through with the policy to assure that the harassment does not continue.

Take Note:
It may be wise to consult legal counsel immediately when this type of claim is made. This is important because, if a civil suit is filed, your company's activities in investigating the underlying sexual harassment complaint will be subject to discovery. Your investigation is conducted under the direction of an attorney. In some cases, discovery can be avoided, based on assertion of the Attorney-Client Privilege.

Investigative Procedures (Hostile, Offensive or Intimidating Environment)

It is considered harassment if the environment that the complainant is exposed to is considered to be offensive to the complainant. This type of harassment can be difficult to identify because it usually involves multiple employees and an atmosphere that is considered acceptable by many employees, but which others find offensive. This atmosphere or environment may consist of the following:

1. Visual conduct:

   A. Leering.

   B. Making sexual gestures.

   C. Displaying of sexually suggestive objects, such as pictures, cartoons, posters or calendars.

2. Verbal conduct:

   A. Making or using derogatory sexual or discriminatory comments.

   B. Epithets, slurs or jokes of sexual discriminatory origin.

3. Physical conduct:

   A. Touching.

   B. Assault (considered "Quid Pro Quo").

   C. Blocking movements.

When a complaint is made regarding this type of harassment, take immediate action to correct the problem by following the procedures below:

1. Have complainant complete the Employee Harassment Complaint Form. Get names of witnesses.

2. Interview witnesses to the alleged conduct.

3. Call a meeting of the Grievance Board.

A. Discuss the claim.

B. Present witness statements.

C. Determine if the claim is valid and violates the company's harassment policies.

D. Formulate a plan to correct the environment and document this plan.

4. If the claim is valid, follow these guidelines:

A. Verbally warn all employees involved that they have violated the company's harassment policy and explain why.

B. Inform complainant of the action taken to rectify the problem.

5. Monitor the environment to assure that any unacceptable behavior does not occur again.

Possible consequences for not rectifying this type of harassment situation can include the following:

1. The complainant files a claim with the EEOC alleging emotional distress and requests that action be taken to ensure an environment free from harassment. This can be done due to your prior knowledge of the alleged offensive environment and failure to correct same. Administrative fines and possible damages may be imposed against your Company. (See Case Study (3), Section I).

2. The complainant quits to avoid an offensive environment condoned by the company. Considered "Constructive Termination," this may expose you to maximum damages imposed by the EEOC including reinstatement, back pay, and damages for emotional distress. A civil suit may be brought against you where there is no limit to the amount of damages that can be awarded. (See Case Study (2), Section I).

Disciplinary Action

Disciplinary action against an employee who is determined to have committed harassment may include the following depending on the seriousness of the harassment:

1. Written warning with a probationary period and a statement of immediate termination if the harassment occurs again.

2. Demotion to a non-supervisory position, if applicable.

3. Transfer to a different department, shift, or facility.

4. Termination. This is recommended if the employee is a repeat offender and has been given prior written warnings regarding similar behavior. (Consult legal counsel to determine if this type of action is appropriate in the case of a first offense).

PLEASE NOTE: Consult legal council to verify applicability of your disciplinary action. Possible defamation lawsuits or wrongful termination lawsuits may be brought against you if it is proven that your disciplinary action was unjust.

Legal Citations

1. Williams v. Maremont Corp., No. 86-1263, 10th Cir., 1989.
2. Hall v. Gus Construction Company, 842 F.2d 1010, 8th Cir., 1988
3. Nelson v. Fisher, Civ. Act. No. 88-1133, 4th Cir., 1989.
4. Meritor Sav. Bank v. Vinson, 477 U.S. 57, 1986.
5. Brooms v. Regal Tube Company, CA7, No. 87-2522, 1989.
6. Robinson v. Indiansville Shipyards. Inc., D.C. M.FL, No. 86-927 Civ-J 12, 1991.
7. Newsday v. Ll Typographical Union No. 915, CA2, 54 FEP Cases 24, 1990.
8. Ellison vs. Brady, 924 F.2d 872 9th Cir., 1991.

Chapter 6

Sample Policy Statements

Evaluating the Workplace

1. Measure the "static" in the work environment. Is there friction between individuals or groups that seems discriminatory? Do complaints or grievances set one sex or distinguishable group against the other?

2. Measure the "comfort level." Can colleagues of the opposite sex invite each other out to lunch without launching a "consorting" campaign? Is there a distinct lack of camaraderie between males and females? Between employees with different ethnic background?

3. Measure the office gossip quotient. Just how much backbiting and mudslinging goes on in the normal course of a business day? Are there a lot of whispered conversations and averted glances when members of the opposite sex walk by? Does the office rumor mill often grind out sexually oriented figments of people's imaginations?

4. Measure the professional acceptance level. Do males congregate in "old boy" networks and freeze out female interlopers? Do females overreact to criticism or act defensively and walk around with "chips on their shoulders?" Is there a noticeable lack of shared business communication and idea exchange?

If you undertake such a "measurement project" in your own area of responsibility and uncover any of the above problems, here are four things you can do:

A. Bombard your employees with harassment material. Get everyone alerted to the existence of potential problems and potential solutions.

B. Set a good example. Evidence a completely neutral attitude. Exhibit your professional persona equally to all employees. Get across the idea that you see all fellow workers as just that, not members of the same or opposite sex or any ethnic origin.

C. Work for changes in others' attitudes. If you ask for altered behavior, don't accept "business as usual." No "boys will be boys" (or vice versa) excuses. You can't expect overnight changes, but you can monitor daily efforts.

D. Work to change your own attitude. For instance, are all your behavior patterns consistent and acceptable? If you are blunt in your criticism of male employees, are you equally hard on females?

Harassment has no place in the workplace. Ignoring the problem is tolerating the problem, and it is determined that harassment of any type will not be tolerated. Each manager will be responsible for:

1. Issuing a strong Management statement prohibiting sexual and vicarious harassment in the workplace. The statement will inform employees of company policy, their rights to redress, and the availability of complaint resolution channels and assistance with incidents of harassment. The statement will also make clear that harassment is considered a form of employee misconduct and that discipline will be enforced against individuals engaging in any form of harassment and against supervisory and managerial personnel who knowingly allow such behavior to continue.

2. Giving this policy and this statement wide distribution. It will be provided to all employees and, where appropriate, included in new employee orientation and publicized in employee publications.

3. Assuring understanding and sensitivity by all management through training programs or other appropriate means.

4. Conducting immediate and thorough investigations of all harassment claims and enforcing appropriate disciplinary action. Particular efforts will be made to conduct investigations with due regard for confidentiality to ensure protection of the complainant and the accused. Complainants will be informed of the internal remedies available. The complaint procedure must provide for follow-up to determine if the harassment has been effectively stopped.

Each manager and supervisor will be responsible for:

1. Applying and implementing of this policy within their area, including the initiation and support of programs and practices designed to develop understanding, acceptance, commitment, and compliance within the framework of this policy.

2. Assuring that all employees are informed of this policy.

3. Taking affirmative steps to encourage individuals who believe that they have been harassed to report such incidents to management.

4. Cooperating fully with any ongoing investigations regarding any incident of harassment.

5. Ensuring compliance with this policy through periodic appraisals of all supervisors and subordinates.

6. Complying with all legal requirements, as well as working with personnel to stay aware of any changes in the law or its interpretation.

7. Ensuring that each employee complies with both the spirit and the letter of this policy.

Harassment (Employee Handbook)

This Company believes that each individual we employ has the right to be free from harassment because of race, color, sex (whether or not of a sexual nature), religion, national origin, protected activity, age, or disability. Sexual harassment is defined as including:

A. Unwelcome physical contact.

B. Sexually explicit language or gestures.

C. Uninvited or unwanted sexual advances.

D. Offensive overall environment, including the use of vulgar language, the presence of sexually explicit photographs or other materials, and the telling of sexual stories.

Vicarious harassment includes but is not limited to:

A. Slurs, Jokes, or derogatory comments that are racially, religiously, or gender biased in nature.

B. Any verbal or physical gesture which demoralizes and is directed toward an individual's national origin, age, or disability.

C. Discrimination by an individual in a supervisory position affecting any employee's status (hiring, promotion, demotion, undesirable reassignment, etc.).

It cannot be stressed enough that this company will not tolerate any form of harassment. Should you feel you are being harassed, please follow these guidelines to help us remedy the problem.

Harassment by other employees should be brought to the attention of your Manager. The Manager will investigate the matter, and if the allegation is proven, the responsible employee will be disciplined, up to and including discharge. A second proven charge of harassment against any employee may result in immediate discharge.

Should you feel that your Manager has not investigated the matter to your satisfaction, contact the Personnel Manager immediately.

Should the harassment originate from your Manager, contact the Personnel Manager immediately.

Harassment Policy

Clearly stated, any form of harassment will not be tolerated by the company or from any source, whether management, co-workers or visitors. The following policy is intended to protect and educate our employees with respect to their rights and obligations as well as to define the company's responsibilities in responding to complaints of sexual or other forms of harassment.

Sexual harassment is defined as unwanted sexual advances or visual, verbal or physical conduct of a sexual nature. This definition includes many forms of offensive behavior such as:

1. Unwanted sexual advances.
2. Offering employment benefits in exchange for sexual favors.
3. Making or threatening reprisals after a negative response to sexual advances.
4. Visual conduct: leering, making sexual gestures, displaying of sexually suggestive objects, pictures, cartoons or posters.
5. Verbal conduct: graphic commentaries about an individual's body, propositions, derogatory comments, epithets, slurs, jokes, degrading words describing an individual, suggestive or obscene letters, notes or invitations.
6. Physical conduct: touching, assaulting, impeding or blocking movements.

In 1986, the Supreme Court recognized what is known as "hostile-environment harassment," any on-the-job sexually oriented activity that creates a hostile or offensive working environment but does not involve economic factors. The EEOC further recognizes sexual harassment as occurring 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.
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.

In 1998, the Supreme Court recognized that employers are responsible for unlawful vicarious harassment by supervisors on all covered bases

including race, color, sex (whether or not of a sexual nature), religion, national origin, protected activity, age, or disability. Vicarious harassment is defined as:

1. Harassment by "a supervisor with immediate (or successively higher) authority over the employee."

Supervisor is defined as:

2. An individual with the authority to undertake or recommend tangible employment decisions affecting the employee, or

3. An individual with authority to direct the employee's daily work activities.

Tangible employment decisions include:

1. Hiring and firing; promotion and failure to promote

2. Demotion.

3. Undesirable reassignment.

4. A decision causing a significant change in benefits, compensation decisions, and work assignments.

If any employee believes he or she is a victim of any form of harassment or any employee witnesses or observes harassment of another employee, the allegations should be immediately reported to a Supervisor, Regional Manager, or the Personnel Manager.

I have read this Companies Harassment Policy and agree to follow all policies and procedures as outlined within.

Signature_____ Date_____

Complaint Reporting Procedure

1. Submit a complaint, preferably in writing, to your Supervisor, Manager or Personnel Manager.
   Include the following:

   A. The name(s) of the alleged harasser(s).
   B. The date(s) of the alleged incidents(s).
   C. Description of the alleged harassment.
   D. Time.
   E. Location.
   F. The name(s)of witness(es).
   G. As much detail as possible.

2. If possible, find witnesses or other substantiation.

3. Provide any other documentation or evidence of the reported incident(s) to assist with the investigation.

An immediate, thorough and objective investigation of any alleged incident will take place if a grievance, complaint or report of questionable actions is received.

Complaint Investigation Procedure

1. The Company will appoint an individual to investigate each complaint.

2. Interviews will be conducted with the complainant, alleged harasser, and, as appropriate, all others directly concerned by either the Supervisor, Regional Manager, and/or personnel from the corporate office.

4. The investigation process will include a disinterested third party, such as a personnel official, to ensure a fair, reasonable and objective process.

5. The investigation may include personnel records, telephone records and any other appropriate materials.

6. Upon completion of an investigation, a determination will be made and the results will be communicated to the complainant, the alleged harasser, and any other parties involved, if appropriate.

7. Proven harassment will be promptly and effectively corrected. Appropriate action will be taken against the harasser and communicated to the complainant. Steps will also be taken to prevent any further harassment and may include:

A. Counseling with the harasser(s).
B. Transfer of the harasser(s).
C. Probation, with a warning of suspension or discharge for continuing or recurring offenses.
D. Suspension with or without pay (depending on the seriousness of the offense).
E. Discharge for cause.

Female employees are encouraged to file complaints with a female manager, and male employees are encouraged to file complaints with a male manager if it is more comfortable.

If a complainant is not comfortable reporting alleged incident(s) to his or her Supervisor or Manager, submit the complaint to the Personnel Manager for assistance and investigation.

Chapter 7

Employee Forms

Claimant and Alleged Harasser Report

Claimant Section

Claimant _____ Position _____

Alleged harasser _____ Position _____

Date of alleged harassment _____ Date submitted _____

Identify type of harassment _____

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Claimant's statement _____

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Were you denied a benefit? Yes _____ No _____

If yes, explain _____

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I acknowledge my statement above to be the truth.

Claimant's signature _____ Date _____

Alleged harasser section

Alleged harasser's name _____ Position _____

Alleged harasser's statement _____

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I acknowledge my statement above to be the truth.

Alleged harasser's signature _____ Date _____

Witness name _____ Dept. _____

Witness name _____ Dept. _____

Witness name _____ Dept. _____

Grievance Committee member _____ Date _____

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Alleged harasser's statement _____

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Alleged harasser's signature Date

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Witness name Dept.

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Witness name Dept.

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Witness name Dept.

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Employee Harassment Complaint

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Position _____ Department _____

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Employee Harassment Complaint

Claimant's name _____ Date _____

Position _____ Department _____

Alleged harasser's name _____ Date of alleged harassment _____

Position _____ Department _____

Claimant's statement _____

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Were you denied a benefit? Yes _____ No _____

If yes, explain _____

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I acknowledge my statement above to be the truth.

Claimant's signature _____ Date _____

Witness name _____ Dept. _____

Witness name _____ Dept. _____

Witness name _____ Dept. _____

Grievance Committee member _____ Date received _____

HRS - 2 Employee Forms ©2000-2004 U.S.A. Compliance Products, Incorporated

Alleged Harasser's Response

Claimant's name _____ Date of alleged harassment _____

Position _____ Department _____

Alleged harasser's name _____ Date submitted _____

Position _____ Department _____

Alleged harasser's statement _____

I acknowledge my statement above to be the truth.

Alleged harasser's signature _____ Date _____

Witness name _____ Dept. _____

Witness name _____ Dept. _____

Witness name _____ Dept. _____

Grievance Committee member _____ Date received _____

HRS - 3 Employee Forms ©2000-2004 U.S.A. Compliance Products, Incorporated

Alleged Harasser's Response

Claimant's name _____ Date of alleged harassment _____

Position _____ Department _____

Alleged harasser's name _____ Date submitted _____

Position _____ Department _____

Alleged harasser's statement _____

I acknowledge my statement above to be the truth.

Alleged harasser's signature _____ Date _____

Witness name _____ Dept. _____

Witness name _____ Dept. _____

Witness name _____ Dept. _____

Grievance Committee member _____ Date received _____

HRS - 3 Employee Forms ©2000-2004 U.S.A. Compliance Products, Incorporated

Alleged Harasser's Response

Claimant's name _____ Date of alleged harassment _____

Position _____ Department _____

Alleged harasser's name _____ Date submitted _____

Position _____ Department _____

Alleged harasser's statement _____

I acknowledge my statement above to be the truth.

Alleged harasser's signature _____ Date _____

Witness name _____ Dept. _____

Witness name _____ Dept. _____

Witness name _____ Dept. _____

Grievance Committee member _____ Date received _____

HRS - 3 Employee Forms ©2000-2004 U.S.A. Compliance Products, Incorporated

Alleged Harasser's Response

Claimant's name _____ Date of alleged harassment _____

Position _____ Department _____

Alleged harasser's name _____ Date submitted _____

Position _____ Department _____

Alleged harasser's statement _____

I acknowledge my statement above to be the truth.

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Witness name _____ Dept. _____

Witness name _____ Dept. _____

Grievance Committee member _____ Date received _____

HRS - 3 Employee Forms ©2000-2004 U.S.A. Compliance Products, Incorporated

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Position _____ Department _____

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Position _____ Department _____

Alleged harasser's statement _____

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Witness name _____ Dept. _____

Witness name _____ Dept. _____

Grievance Committee member _____ Date received _____

HRS - 3 Employee Forms ©2000-2004 U.S.A. Compliance Products, Incorporated

Alleged Harasser's Response

Claimant's name _____ Date of alleged harassment _____

Position _____ Department _____

Alleged harasser's name _____ Date submitted _____

Position _____ Department _____

Alleged harasser's statement _____

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Witness name _____ Dept. _____

Witness name _____ Dept. _____

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Position _____ Department _____

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Position _____ Department _____

Alleged harasser's statement _____

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Witness name _____ Dept. _____

Witness name _____ Dept. _____

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HRS - 3 Employee Forms ©2000-2004 U.S.A. Compliance Products, Incorporated

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Claimant's name _____ Date of alleged harassment _____

Position _____ Department _____

Alleged harasser's name _____ Date submitted _____

Position _____ Department _____

Alleged harasser's statement _____

I acknowledge my statement above to be the truth.

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Witness name _____ Dept. _____

Witness name _____ Dept. _____

Witness name _____ Dept. _____

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HRS - 3 Employee Forms ©2000-2004 U.S.A. Compliance Products, Incorporated

Alleged Harasser's Response

Claimant's name _____ Date of alleged harassment _____

Position _____ Department _____

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Position _____ Department _____

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I acknowledge my statement above to be the truth.

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Witness name _____ Dept. _____

Witness name _____ Dept. _____

Witness name _____ Dept. _____

Grievance Committee member _____ Date received _____

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Alleged Harasser's Response

Claimant's name _____ Date of alleged harassment _____

Position _____ Department _____

Alleged harasser's name _____ Date submitted _____

Position _____ Department _____

Alleged harasser's statement _____

I acknowledge my statement above to be the truth.

Alleged harasser's signature _____ Date _____

Witness name _____ Dept. _____

Witness name _____ Dept. _____

Witness name _____ Dept. _____

Grievance Committee member _____ Date received _____

HRS - 3 Employee Forms ©2000-2004 U.S.A. Compliance Products, Incorporated

Sexual Harassment Investigation

Instructions: This report is considered confidential and for Grievance Committee use only. Attach all required forms, documentation, memos to employees, etc.

Date investigation opened _____

❑ Employee harassment complaint form — Date completed _____

❑ Alleged harasser's response form — Date completed _____

❑ Witness statement form — Date completed _____

Initial Grievance Board meeting — Date _____

Plan of action _____

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Second Grievance Board meeting — Date _____

Is the claim valid? ❑ yes ❑ no

Notes (See investigative procedures) _____

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Action taken _____

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Grievance Committee member — Date received

HRS - 4 Employee Forms ©2000-2004 U.S.A. Compliance Products, Incorporated

Sexual Harassment Investigation

Instructions: This report is considered confidential and for Grievance Committee use only. Attach all required forms, documentation, memos to employees, etc.

Date investigation opened _____

❑ Employee harassment complaint form — Date completed _____

❑ Alleged harasser's response form — Date completed _____

❑ Witness statement form — Date completed _____

Initial Grievance Board meeting — Date _____

Plan of action _____

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Second Grievance Board meeting — Date _____

Is the claim valid? ❑ yes ❑ no

Notes (See investigative procedures) _____

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Action taken _____

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Grievance Committee member — Date received

HRS - 4 Employee Forms ©2000-2004 U.S.A. Compliance Products, Incorporated

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Plan of action _____

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Second Grievance Board meeting — Date _____

Is the claim valid? ❑ yes ❑ no

Notes (See investigative procedures) _____

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Action taken _____

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Initial Grievance Board meeting — Date _____

Plan of action _____

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Second Grievance Board meeting — Date _____

Is the claim valid? ❑ yes ❑ no

Notes (See investigative procedures) _____

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Action taken _____

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Grievance Committee member — Date received

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Plan of action _____

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Second Grievance Board meeting Date _____

Is the claim valid? ❑ yes ❑ no

Notes (See investigative procedures) _____

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Action taken _____

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Grievance Committee member Date received

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Second Grievance Board meeting — Date _____

Is the claim valid? ❑ yes ❑ no

Notes (See investigative procedures) _____

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Action taken _____

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Grievance Committee member — Date received

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Second Grievance Board meeting — Date _____

Is the claim valid? ❑ yes ❑ no

Notes (See investigative procedures) _____

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Action taken _____

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Grievance Committee member — Date received

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Plan of action _____

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Second Grievance Board meeting — Date _____

Is the claim valid? ❑ yes ❑ no

Notes (See investigative procedures) _____

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Action taken _____

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Grievance Committee member — Date received

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Second Grievance Board meeting — Date _____

Is the claim valid? ❑ yes ❑ no

Notes (See investigative procedures) _____

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Action taken _____

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Grievance Committee member — Date received

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Initial Grievance Board meeting — Date _____

Plan of action _____

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Second Grievance Board meeting — Date _____

Is the claim valid? ❑ yes ❑ no

Notes (See investigative procedures) _____

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Action taken _____

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Grievance Committee member — Date received

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Witness Statement

Claimant's name _____ Date _____

Position _____ Department _____

Alleged harasser's name _____ Date of alleged harassment _____

Position _____ Department _____

Witness _____ Date _____

Position _____ Department _____

I, _____ hereby voluntarily make the following statement regarding a harassment claim filed by _____. I make this statement without coercion from any source. This statement is a true recollection of the event or events I witnessed regarding the above claimant's harassment claim. The statement below is my complete statement and is true the best of my knowledge.

Witness' statement (Please use an additional sheet of paper if necessary) _____

Witness' signature _____ Date _____

(For Grievance Committee purposes only)

Notes (See investigative procedures) _____

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Witness Statement

Claimant's name _____ Date _____

Position _____ Department _____

Alleged harasser's name _____ Date of alleged harassment _____

Position _____ Department _____

Witness _____ Date _____

Position _____ Department _____

I, _____ hereby voluntarily make the following statement regarding a harassment claim filed by _____. I make this statement without coercion from any source. This statement is a true recollection of the event or events I witnessed regarding the above claimant's harassment claim. The statement below is my complete statement and is true the best of my knowledge.

Witness' statement (Please use an additional sheet of paper if necessary) _____

Witness' signature _____ Date _____

(For Grievance Committee purposes only)

Notes (See investigative procedures)_____

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Witness Statement

Claimant's name _____ Date _____

Position _____ Department _____

Alleged harasser's name _____ Date of alleged harassment _____

Position _____ Department _____

Witness _____ Date _____

Position _____ Department _____

I, _____ hereby voluntarily make the following statement regarding a harassment claim filed by _____. I make this statement without coercion from any source. This statement is a true recollection of the event or events I witnessed regarding the above claimant's harassment claim. The statement below is my complete statement and is true the best of my knowledge.

Witness' statement (Please use an additional sheet of paper if necessary) _____

Witness' signature _____ Date _____

(For Grievance Committee purposes only)

Notes (See investigative procedures)_____

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Witness Statement

Claimant's name _____ Date _____

Position _____ Department _____

Alleged harasser's name _____ Date of alleged harassment _____

Position _____ Department _____

Witness _____ Date _____

Position _____ Department _____

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Witness' signature _____ Date _____

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Notes (See investigative procedures)_____

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Witness Statement

Claimant's name _____ Date _____

Position _____ Department _____

Alleged harasser's name _____ Date of alleged harassment _____

Position _____ Department _____

Witness _____ Date _____

Position _____ Department _____

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Witness' signature _____ Date _____

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Notes (See investigative procedures)_____

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Witness Statement

Claimant's name _____ Date _____

Position _____ Department _____

Alleged harasser's name _____ Date of alleged harassment _____

Position _____ Department _____

Witness _____ Date _____

Position _____ Department _____

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Witness' signature _____ Date _____

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Notes (See investigative procedures)_____

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Witness Statement

Claimant's name _____ Date _____

Position _____ Department _____

Alleged harasser's name _____ Date of alleged harassment _____

Position _____ Department _____

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Witness' signature _____ Date _____

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Notes (See investigative procedures)_____

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Witness Statement

Claimant's name _____ Date _____

Position _____ Department _____

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Position _____ Department _____

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Position _____ Department _____

Alleged harasser's name _____ Date of alleged harassment _____

Position _____ Department _____

Witness _____ Date _____

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Witness' signature _____ Date _____

(For Grievance Committee purposes only)

Notes (See investigative procedures)_____

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Witness Statement

Claimant's name _____ Date _____

Position _____ Department _____

Alleged harasser's name _____ Date of alleged harassment _____

Position _____ Department _____

Witness _____ Date _____

Position _____ Department _____

I, _____ hereby voluntarily make the following statement regarding a harassment claim filed by _____. I make this statement without coercion from any source. This statement is a true recollection of the event or events I witnessed regarding the above claimant's harassment claim. The statement below is my complete statement and is true the best of my knowledge.

Witness' statement (Please use an additional sheet of paper if necessary) _____

Witness' signature _____ Date _____

(For Grievance Committee purposes only)

Notes (See investigative procedures) _____

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Notice of Determination

Claimant's name _____ Date submitted _____

Alleged harasser's name _____ Date of alleged harassment _____

The Grievance Committee has determined the following: _____

Grievance Committee member's signature _____ Date _____

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Notice of Determination

Claimant's name _____ Date submitted _____

Alleged harasser's name _____ Date of alleged harassment _____

The Grievance Committee has determined the following: _____

Grievance Committee member's signature _____ Date _____

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Notice of Determination

Claimant's name _____ Date submitted _____

Alleged harasser's name _____ Date of alleged harassment _____

The Grievance Committee has determined the following: _____

Grievance Committee member's signature _____ Date _____

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Notice of Determination

Claimant's name _____ Date submitted _____

Alleged harasser's name _____ Date of alleged harassment _____

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Grievance Committee member's signature _____ Date _____

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Alleged harasser's name _____ Date of alleged harassment _____

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Grievance Committee member's signature _____ Date _____

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Alleged harasser's name _____ Date of alleged harassment _____

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Grievance Committee member's signature _____ Date _____

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Notice of Determination

Claimant's name _____ Date submitted _____

Alleged harasser's name _____ Date of alleged harassment _____

The Grievance Committee has determined the following: _____

Grievance Committee member's signature _____ Date _____

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Notice of Determination

Claimant's name _____ Date submitted _____

Alleged harasser's name _____ Date of alleged harassment _____

The Grievance Committee has determined the following: _____

Grievance Committee member's signature _____ Date _____

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Notice of Disciplinary Action

Claimant's name _____ Date submitted _____

Alleged harasser's name _____ Date of alleged harassment _____

The disciplinary action for _____ is the following:

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I acknowledge the above disciplinary action.

Employee signature _____ Date _____

Grievance Committee member's signature _____ Date _____

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Notice of Disciplinary Action

Claimant's name _____ Date submitted _____

Alleged harasser's name _____ Date of alleged harassment _____

The disciplinary action for _____ is the following:

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I acknowledge the above disciplinary action.

Employee signature _____ Date _____

Grievance Committee member's signature _____ Date _____

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Notice of Disciplinary Action

Claimant's name _____ Date submitted _____

Alleged harasser's name _____ Date of alleged harassment _____

The disciplinary action for _____ is the following:

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I acknowledge the above disciplinary action.

Employee signature _____ Date _____

Grievance Committee member's signature _____ Date _____

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Notice of Disciplinary Action

Claimant's name _____ Date submitted _____

Alleged harasser's name _____ Date of alleged harassment _____

The disciplinary action for _____ is the following:

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I acknowledge the above disciplinary action.

Employee signature _____ Date _____

Grievance Committee member's signature _____ Date _____

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Notice of Disciplinary Action

Claimant's name _____ Date submitted _____

Alleged harasser's name _____ Date of alleged harassment _____

The disciplinary action for _____ is the following:

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I acknowledge the above disciplinary action.

Employee signature _____ Date _____

Grievance Committee member's signature _____ Date _____

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Notice of Disciplinary Action

Claimant's name _____ Date submitted _____

Alleged harasser's name _____ Date of alleged harassment _____

The disciplinary action for _____ is the following:

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Employee signature _____ Date _____

Grievance Committee member's signature _____ Date _____

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Alleged harasser's name _____ Date of alleged harassment _____

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I acknowledge the above disciplinary action.

Employee signature _____ Date _____

Grievance Committee member's signature _____ Date _____

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Notice of Disciplinary Action

Claimant's name _____ Date submitted _____

Alleged harasser's name _____ Date of alleged harassment _____

The disciplinary action for _____ is the following:

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I acknowledge the above disciplinary action.

Employee signature _____ Date _____

Grievance Committee member's signature _____ Date _____

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Notice of Disciplinary Action

Claimant's name _____ Date submitted _____

Alleged harasser's name _____ Date of alleged harassment _____

The disciplinary action for _____ is the following:

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I acknowledge the above disciplinary action.

Employee signature _____ Date _____

Grievance Committee member's signature _____ Date _____

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Chapter 8

Employment Regulations

[§§766-770]
C. Union or Employer Discrimination-Civil Rights Legislation

1. Introduction: [§ 766] In addition to being an unfair labor practice under the NLRA, union or employer discrimination on the basis of race or sex may violate the Civil Rights Act of 1866 and/or Title VII of the 1964 Civil Rights Act (as amended in 1972). An employee's rights under these Acts are independent of his claims under the NLRA or the collective bargaining contract (see infra. § 770).

While civil rights and employment discrimination law plays an important and ever increasing role in the workplace, it is outside the scope of basic law school courses in labor law-which focus on union organization and collective bargaining-and it is too voluminous to treat adequately in a Labor Law Summary. Accordingly the discussion in this section merely notes the major pieces of civil rights legislation and the possible impact of the collective bargaining contract on an employee's rights under that legislation.

2. Civil Rights Act of 1866: (§767] The 1866 Civil Rights Act [42 U.S.C. §§1981 et seq.] provides that all persons in the United States "shall have the same right . . . to make and enforce contracts, to sue, to be parties, to give evidence, and to the full and equal benefit of all laws and proceedings for the security of persons and property as is enjoyed by white citizens." Early cases found that only actual enslavement violated the Act, but it is now held to encompass strictly private rights in property or contract as well. [Jones v. Alfred H. Mayer Co., 392 U.S. 409 (1968)] The act applies to discrimination by either the union or the employer and also applies to racial discrimination against whites. [McDonald v. Santa Fe Trail Transportation Co., 427 U.S. 273 (1976)]

3. Title VII, Civil Rights Act of 1964-Fair Employment Practices Act: [§768] Title Vll of the 1964 Civil Rights Act [42 U.S.C. §§2000 et seq.] as amended by the Equal Employment Opportunity Act of 1972 (often referred to as the "Fair Employment Practices Act") prohibits discrimination by labor organizations, employers, or employment agencies on the basis of race, color, religion, sex, or national origin. The scope of activities covered is very broad and includes hiring; discharge; compensation; promotion; classification; training; apprenticeship; referrals for employment; union membership; and terms, conditions, and privileges of employment.

4. Impact of Collective Bargaining Contract on Rights Under 1866 or 1964 Acts: [§769] Collective bargaining agreements often contain nondiscrimination clauses together with procedures for arbitrating grievances under the contract. Moreover, a discriminatory discharge also might be said to be without just cause. In either event, the employee grievance may conceivably violate both the contract and the civil rights statutes.

a. Employee may pursue both remedies: [§770] An employee in this situation properly may seek arbitration of his claim under the contract and, if not successful, subsequently start proceedings under Title VII or under section 1983 of the 1866 Act (if applicable). [McDonald v. City of West Branch. supra, §532: Alexander v. Gardner-Denver Co.,415 U.S. 36 (1974):and see supra, §§530-532]

[§§771-775]

b. Rationale-independent rights: [§771] The Supreme Court in Gardner-Denver ruled that an employee's Title Vll rights are independent of rights under the contract, so the employee may properly pursue both. In McDonald (a section 1983 case), supra, the Court determined that a prior arbitration award had no res judicata or collateral estoppel effect in these circumstances, nor was it a "judicial proceeding" entitled to full faith and credit under 28 U.S.C. section 1738.

5. Other Civil Rights Legislation: [§772] Additional civil rights legislation has been passed by Congress in connection with the 1964 Civil Rights Act. The following statutes have generated considerable litigation in the employment area and deserve mention.

a. Equal Pay Act: [§773] As a prelude to Title Vll of the 1964 Civil Rights Act. Congress passed the Equal Pay Act in 1963. This Act requires equal pay for equal work, regardless of sex. However, the Act allows wage differentials if based upon a seniority system, a merit system, a system that measures earnings by quantity or quality of production, or any factor other than sex.

b. Age Discrimination in Employment Act: [§774] As originally enacted in 1967, this Act covered only those employees aged 40 to 65 who worked for private employers. However, the Act was amended in 1978 to cover employees up to age 70 as well as federal government employees. In structure, the Act is patterned after Title Vll.

c. Title IX, Educational Amendments of 1972: [§775] This Title has been construed to prohibit employment discrimination in federally funded education programs. [North Haven Board of Education v. Bell, 456 U.S. 512 (1982)]

FACTS ABOUT HARASSMENT

Sexual harassment and vicarious harassment by a supervisor are both forms of discrimination that violate Title VII of the Civil Rights Act of 1964.

Unwelcome sexual advances, requests for sexual favors, and other verbal or physical conduct of a sexual nature constitute sexual harassment when submission to or rejection of this conduct explicitly or implicitly affects an individual's employment; unreasonably interferes with an individual's work performance; or creates an intimidating, hostile or offensive work environment. In addition, any discriminating decisions made by persons in a supervisory position constitute harassment when they are tangible in nature, adversely affecting an individual's employment status in such a way as to inflict direct economic harm.

Harassment can occur in a variety of circumstances, including but not limited to the following:

1. The victim as well as the harasser may be a woman or a man. The victim does not have to be of the opposite sex.
2. The harasser can be the victim's supervisor, an agent of the employer, a supervisor in another area, a coworker, or a non-employee.
3. The victim does not have to be the person harassed, but could be anyone affected by the offensive conduct.
4. Unlawful sexual harassment may occur without economic injury to or discharge of the victim.
5. The harasser's conduct must be unwelcome.

It is helpful for the victim to directly inform the harasser that the conduct is unwelcome and must stop. The victim should use any employer complaint mechanism or grievance system available.

When investigating allegations of harassment, EEOC looks at the whole record: the circumstances, such as the nature of the sexual advances or other alleged harassment and the context in which the alleged incidents occurred. A determination on the allegations is made from the facts on a case-by-case basis.

Prevention is the best tool to eliminate any form of harassment in the workplace. Employers are encouraged to take steps necessary to prevent harassment from occurring. They should clearly communicate to employees that harassment of any type will not be tolerated. They can do so by establishing an effective complaint or grievance process and taking immediate and appropriate action when an employee complains.

Filing a Charge

Charges of sexual harassment or vicarious harassment by a supervisor may be filed at any field office of the U.S. Equal Employment Opportunity Commission. Field offices are located in 50 cities throughout the United States and are listed in most local telephone directories under U.S. Government. Information on all EEOC-enforced laws may be obtained by calling toll free on 800-669-EEOC. EEOC's toll free TDD number is 800-800-3302.

If you have been discriminated against on the basis of sex or any other qualifying factor, you are entitled to a remedy that will place you in the position you would have been in if the discrimination had never occurred. You may be entitled to hiring, promotion, reinstatement, back pay and other remuneration. You may also be entitled to damages to compensate you for future pecuniary losses, mental anguish, and inconvenience. Punitive damages may be available, as well, if an employer acted with malice or reckless indifference. You may also be entitled to attorney's fees.

This fact sheet is available in the following formats: print, Braille, large print, audiotape and electronic file on computer disk. For further information call the Office of Equal Employment Opportunity at (202) 663-4395 (voice) and (202) 663-4399 (TDD), or FTS 989-4395 (voice) and 989-4399 (TDD).

January 1992
EEOC-FS/E-4

Legal Citations

1. Williams v. Maremont Corp., No. 86-1263, 10th Cir., 1989.
2. Hall v. Gus Construction Company, 842 F.2d 1010, 8th Cir., 1988.
3. Nelson v. Fisher, Civ. Act. No. 88-1133, 4th Cir., 1989.
4. Meritor Sav. Bank v. Vinson, 477 U.S. 57, 1986.
5. Brooms v. Regal Tube Company, CA7, No. 87-2522, 1989.
6. Robinson v. Indiansville Shipyards. Inc., D.C. M.FL, No. 86-927 Civ-J-12, 1991.
7. Newsday v. Ll Typographical Union No. 915, CA2, 54 FEP Cases 24, 1990.
8. Ellison vs. Brady, 924 F.2d 872 9th Cir., 1991.
9. Burlington Industries, Inc. v. Ellerth, 118 S. Ct. 2257, 1998.
10. Faragher v. City of Boca Raton, 118 S. Ct. 2275, 1998.