

# Sexual Harassment in the Non-Profit Workplace: Prevention, Investigation, and Remediation

This Year In Nonprofit Law

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The (incomplete) list of powerful men accused of sexual harassment after Harvey Weinstein

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**CNN** — It's only been a few weeks since the sexual assault allegations against media mogul — Harvey Weinstein — exploded into public view, but there have been new allegations made against other powerful men in various industries around the world.

From computer giant to a social boss, all their sexual harassment claims to the title of CEO/Co-founder/CEO/COO/COO, the controversy has spread to a global national conversation on sexual harassment. Since the #MeToo movement, there has been a lot of talk about the issue in the workplace. Prominent actors and actresses have come to view with stories that are being followed closely in the public eye.

This list of men who've been accused of sexual harassment follows and includes on or off CNN's reporting. There are no accusations against other powerful men at this time. As the days and weeks go on, it's not out of the ordinary to keep posting. There is also a list of powerful men who have filed lawsuits, such as former CNN anchor, against their former employers.



# Workplace Harassment

- Workplace harassment is:
  - Unwelcome, unwanted or offensive conduct based on or because of an employee's protected class status



# Types of Workplace Harassment

- Sexual Harassment
- Quid Pro Quo Harassment
- Hostile Work Environment
- Bullying in the Workplace
- Third-Party Harassment
- Retaliation



## What is Sexual Harassment?

- A form of sex discrimination that violates Title VII and equivalent state and local laws
- **Quid pro quo:**
  - Submission to the advance or conduct is made explicitly or implicitly a condition of employment
  - Submission to or rejection of the advance or conduct is used as a basis for employment decisions
- **Hostile Work Environment:** The advance or conduct unreasonably interferes with an employee's work performance by creating an intimidating, hostile, or offensive work environment



## Quid Pro Quo Harassment

- *Quid pro quo* is Latin and means “this for that”
- Applies where a supervisor seeks sexual favors either:
  - In return for a job benefit (for example, a promotion or raise)
  - To avoid a job detriment (for example, a demotion or pay cut)
- *Quid pro quo* harassment also occurs when an employee's reaction to an advance negatively affects his employment
- Examples:
  - A manager tells her employee that she will give him a raise if he goes on a date with her.
  - An employee is passed over for a promotion after rejecting her supervisor's advances.
  - An employee in a romantic relationship with a manager receives preferential treatment.



## Hostile Work Environment Harassment

- Involves harassment in the workplace that is:
  - Unwelcome
  - Based on a protected class status (sex or gender)
  - Attributable to the employer
  - Severe or pervasive enough to change the conditions of employment and create an abusive environment
- Need not be targeted at the offended individual to give rise to a hostile work environment claim



## Examples of Sexual Harassment

- Sexual harassment comes in many forms and is not limited to physical actions. Harassment also includes verbal or non-verbal conduct that rises to the level of being “severe or pervasive.”
- Examples of sexual harassment include:
  - Physical actions:
    - Touching or brushing an individual’s clothes, body or hair
    - Initiating unwanted sexual activity (kissing, touching or hugging)
    - Rubbing or touching anyone sexually in the presence of another
    - Exposing oneself



## Examples of Sexual Harassment (cont'd)

- Examples of sexual harassment include:
  - Verbal actions:
    - Repeating requests for a date with someone who has not returned an interest
    - Telling unwelcome jokes or stories, often with sexual innuendo
    - Initiating unwelcome flirtations
    - Making or using derogatory comments, epithets, slurs, and jokes
    - Making graphic verbal commentaries about an individual's body or using sexually degrading words to describe an individual
    - Using expressions that can be belittling, such as "honey," "dear," "sweetheart," or "lady supervisor"



## Examples of Sexual Harassment (cont'd)

- Examples of sexual harassment include:
  - Non-Verbal actions:
    - Staring or looking someone up and down
    - Blocking or impeding an individual's movement
    - Following someone inappropriately
    - Giving unwelcome gifts
    - Making sexual gestures
    - Displaying sexually suggestive objects, pictures, cartoons, books, or magazines
    - Winking, blowing kisses, or licking lips
    - Standing or sitting too close to someone





## Who Can Be a Harasser?

- Supervisors
- Co-Workers
- Customers
- Clients
- Vendors
- Individuals or groups doing business with the company or on the premises

## Harasser's Intent is Irrelevant

- Sexual harassment may be unlawful, even if not motivated by sexual desire
- Gender is also irrelevant:
  - Men can harass women
  - Women can harass men
  - Men can harass men
  - Women can harass women



## Harassment is Not Limited to the Workplace

- Sexual and other harassment can occur outside of the workplace, for example during:
  - Annual meetings
  - Business trips
  - Holiday parties
  - Sporting events



## Third-Party Harassment

- Behavior not found offensive by some employees can facilitate an offensive environment for other employees.
  - Example: A group of employees talking about each other's sex lives in the presence of another person who feels very uncomfortable about such discussions.





## What is Retaliation?

- When an employee suffers an adverse employment action for engaging in protected activity, such as reporting harassment or cooperating in a related investigation.
- Retaliation is prohibited by law. Thus, supervisors should refrain from retaliating against any employee who reports harassment.
- “Adverse employment actions” include:
  - Termination; Demotion; Reassignment to a less desirable position or duties; Reduction of work hours; Failure to promote; Failure to award pay increases or raises



## How does a company prevent sexual harassment?

- Culture
- Policies
- Training
- Management sets the tone
- React appropriately



## Reporting Sexual Harassment

- Why is it important for employees to report sexual harassment?
  - Sexual harassment can cause:
    - Employees to be hurt emotionally
    - Productivity to go down
    - Absenteeism to go up
    - The work of the Company to be jeopardized
    - Employees to be fearful of others
    - Workplace morale to be reduced
    - Employee turnover



## Reporting Sexual Harassment

- Why do employees hesitate to report discrimination, workplace harassment, and sexual harassment?
  - Fear of losing their job
  - Fear of retaliation
  - Fear of getting someone in trouble
  - Fear of disrupting the workplace
  - Fear of being accused of having no sense of humor
  - Fear of being embarrassed
  - Fear of feeling like “less of a man/woman”
  - Fear of not being believed. Discrimination and harassment are generally subtle and inconspicuous



## Cost of Sexual Harassment

- Back pay
- Front pay
- Emotional distress damages
- Punitive damages
- Attorneys' fees and costs
- Reinstatement
- Lost time



## Supervisor Liability for Sexual Harassment

- Supervisors should understand their potential liability for misconduct.
- State law permits a supervisor to be held individually liable for discriminatory acts against employees.
- Supervisors may be found liable for other legal claims including: assault and battery, intentional infliction of emotional distress, and defamation.



## Company Liability for Sexual Harassment

- A company may be strictly liable for harassment by supervisors, particularly if it results in a tangible employment action (such as termination or demotion).
- A company may be held liable even without any tangible employment action if the employee can prove hostile work environment harassment.



## Supervisor's responsibilities

An employee reports harassment to his/her supervisor and says, "I don't want you to do anything about this. I just want you to listen and be aware of what is going on."

- How should the supervisor respond?



## Supervisor's responsibilities

### Answer:

- A supervisor cannot promise to “just listen and be aware.”
- Once a supervisor receives a report of harassment or discrimination, a supervisor has an obligation to take action.
- In fact, a supervisor has the responsibility to ensure the integrity of the workplace. A supervisor must exercise reasonable care to prevent and promptly correct any discrimination, workplace harassment or sexual harassment they know about or should know about.



## Your Duties as a Supervisor

- Set a good example.
- Be knowledgeable about the organization's harassment policy and reporting procedures
- If you witness harassing conduct, stop the conduct immediately.
- Do not let personal relationships or personal beliefs get in the way of your duties as a supervisor to watch out for harassment and discrimination.
- Employees should be directed to report complaints immediately to their immediate supervisor or Human Resources, or if the employee is not comfortable with those options, to another management official.



## Your Duties as a Supervisor (cont'd)

- Supervisors should report all complaints to Human Resources
- Human Resources should be consulted when uncertain about appropriate activities or behavior.
- If you are the subject of a harassment/discrimination claim, continue your duties as a supervisor and do **not** retaliate against the complaining employee(s).
- Implement appropriate disciplinary action in accordance with instructions from HR/Management and work to ensure that the workplace is free of harassment.



## Hypothetical

Jeff is a supervisor and Claudia, one of his employees, tells him that a co-worker keeps asking her out and making other remarks that make her uncomfortable at work. To Jeff, the situation doesn't sound like sexual harassment. Claudia wears tight clothes and short skirts and is known around the office to be quite a flirt. Jeff thinks Claudia is being overly sensitive and exaggerating the situation.

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What are Jeff's responsibilities, if any?



## Hypothetical

Jeff must report Claudia's complaint to Human Resources.

- Supervisors must report all employee complaints to Human Resources.
- Jeff's subjective opinion of the situation is not relevant.
- Supervisors have a duty to maintain a respectful workplace and not permit inappropriate behavior to go unchecked. If uncertain about appropriate activities or behavior, supervisors should consult Human Resources.
- Supervisors should also support the company in its responsibility to investigate complaints of discrimination. At the end of the investigation, supervisors should work with Human Resources to implement any disciplinary action.



## Hypothetical 2

Rebecca often tells her administrative assistant, James, who has been working for her for about six months, how attractive she finds him. James never says anything in response. Rebecca assumes he is flattered and continues saying things like, "You should wear tighter shirts so I can see your muscles" and "I bet you're really good in bed."

When James learns that another administrative assistant hired after him earns more money, James asks Rebecca for a raise. Rebecca says that she will consider it if James goes out to dinner with her. James makes it clear that he wants to keep their relationship purely professional and would prefer not to go out with her. Rebecca says she understands and that they can talk about it over dinner.

While having lunch with a friend in Human Resources, James mentions that his boss will only consider a raise if he goes out with her, which he is dreading because she constantly makes comments that make him feel uncomfortable.



## Hypothetical 2 (cont'd)

Human Resources investigates the comments and interviews Rebecca. Angry and embarrassed, Rebecca transfers James to a position on a later shift where she won't have to see him at work.

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Is Rebecca sexually harassing James?

What, if anything, should James do or say in response to his boss' constant comments?

Does Rebecca's transfer of James constitute retaliation?



## Hypothetical

Yes, Rebecca's conduct probably does amount to legally actionable harassment of James.

- Remember, the standard is that the conduct must be unwelcome, and must be so severe **or** pervasive as to create a hostile work environment.
- For six months, Rebecca has been regularly making inappropriate comments, which is a pervasive amount of time. Whether the comments have created a hostile work environment is based on both an objective and subjective standard. Here, an objective person would find that the sexually suggestive comments were offensive. James also subjectively found the comments unwelcome and offensive.





## Hypothetical 2: Analysis

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- For six months, Rebecca has been regularly making inappropriate comments, which is a pervasive amount of time. Whether the comments have created a hostile work environment is based on both an objective and subjective standard. Here, an objective person would find that the sexually suggestive comments were offensive. James also subjectively found the comments unwelcome and offensive.
- James should not have to silently endure his boss' sexually suggestive comments, which are inappropriate and offensive. James could have considered telling his boss that her comments made him uncomfortable and asked her to stop. If he did not feel comfortable confronting his boss directly, he should have informed Human Resources so they could take appropriate action.



## Hypothetical 2: Analysis

Yes, Rebecca's reassignment of James appears retaliatory.

- James reported harassing behavior to Human Resources, which is a protected activity.
- Assuming that the nighttime word processing role is a less desirable position, James' reassignment as a result of reporting harassment constitutes an "adverse employment action" and is prohibited.



## Hypothetical 3

Laura is very attracted to her boss, Will. Since they are both single, she asks him out for after-work drinks. After proceeding to dinner and having a few too many drinks, they both go back to Laura's apartment and Will ends up spending the night.

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Are there any potential problems here? What are the factors to consider?

Could this be considered sexual harassment?



## Hypothetical 3: Analysis

- Based on the few facts in the hypothetical, this situation appears to be mutually desired by two consenting adults. Whether or not a romantic relationship is allowed depends on if the company has a workplace romance policy that forbids relationships between supervisors and employees.
- Even if the company's policy does not forbid supervisors from dating their subordinates, the situation does raise some legal exposure for the company, and for Will. Because Will is Laura's boss, Laura could later allege that she felt pressured to sleep with Will in order to keep her job, or for a number of other job-related reasons.
- Employers and supervisors should be aware of how their sexual relations with a subordinate could have detrimental effects on the company.



Questions?

