

OVERVIEW OF U.S. SEXUAL HARASSMENT LAW

The following is a brief description of certain features of U.S. workplace sexual harassment law.¹ In the U.S., victims of sexual harassment may bring civil suit against their employers.² The U.S. Supreme Court has recognized sexual harassment as a violation of Title VII of the Civil Rights Act of 1964, a federal statute that prohibits employment discrimination “because of . . . sex.”³ Most U.S. states also have civil rights statutes that have been interpreted to bar sexual harassment.⁴ The scope of federal and state law may differ, and federal law does not pre-empt state claims.

To prove a claim of workplace sexual harassment, a plaintiff must generally establish the following:

- **“Because of Sex.”** Because sexual harassment is a species of sex discrimination under federal law, a plaintiff must demonstrate that she was targeted “because of sex,” in other words, because she is a woman. Men may also bring claims alleging they were targeted because of their sex. There is no requirement that the harasser be of a different sex than the victim, nor is there any requirement that the harassing words or conduct be of a sexual nature. Courts generally presume that harassment motivated by sexual desire was “because of sex.” Courts have also found harassment was “because of sex” where the harasser expressed hostility toward men or women in the workplace, where men or women were singled out for worse treatment, and where the harasser targeted the victim because of his or her failure to conform to gender stereotypes. Federal courts do not agree on whether discrimination on the basis of sexual orientation is actionable under Title VII. State laws may define sexual harassment differently. Some states define sexual harassment as verbal or physical conduct “of a sexual nature.” One state (California) has clarified that “sexually harassing conduct need not be motivated by sexual desire.” Some states expressly prohibit discrimination based on sexual orientation and gender identity.
- **“Severe or Pervasive.”** A plaintiff must demonstrate the harassment was “severe or pervasive,” both as an objective matter, meaning in the estimation of a reasonable person, and as a subjective matter, meaning in the victim’s own estimation. Harassment need not cause psychological or tangible economic harm to meet this standard. The U.S. Supreme Court has held that factors to consider include “the frequency of the discriminatory conduct; its severity; whether it is physically threatening or humiliating, or a mere offensive utterance; and whether it unreasonably interferes with an employee’s work performance.” A single incident—such as sexual assault or a quid-pro-quo demand for sexual favors—may be sufficient. Lower federal courts have been criticized for raising the bar for what counts as severe or pervasive. One U.S. state (Minnesota) is considering a law to clarify that harassment need not be severe or pervasive to be actionable.
- **Unwelcome.** It is not a defense to sexual harassment that the victim voluntarily submitted to sexual interaction. What matters is that the harassment was unwelcome. The Federal Rules of Evidence limit a defendant’s use of evidence about a victim’s sexual predispositions or behaviors.
- **Employer Liability.** Under Title VII, only employers are liable; individual harassers may not be sued. An employer is automatically liable for sexual harassment if (a) the harasser took a “tangible

¹ Other federal statutes have been interpreted to bar sexual harassment in education, housing, and health care. Some state laws forbid sexual harassment in public accommodations, such as restaurants, stores, and hotels.

² State and federal criminal laws prohibit sexual assault, gender-based hate crimes, and stalking.

³ Federal law also forbids discrimination, and hence harassment, on the bases of race, national origin, religion, color, age, disability, and pregnancy.

⁴ Victims of sexual harassment may also allege common-law torts under state law, such as assault, battery, and intentional infliction of emotional distress, but these claims have been difficult to prove.

employment action” against the victim, meaning some sort of official act of the enterprise, such as a demotion, or (b) the harasser is one of the company’s highest officials. If there is no basis for automatic liability, but the harasser was the victim’s supervisor, the employer has the burden to prove the *Faragher/Ellerth* defense. To do so, the employer must show it “exercised reasonable care to prevent and correct promptly any sexually harassing behavior, and that the plaintiff employee unreasonably failed to take advantage of any preventive or corrective opportunities provided by the employer or to avoid harm otherwise.” If there is no automatic liability, and the *Faragher/Ellerth* defense does not apply because the harasser was not a supervisor, then the plaintiff has the burden to prove the employer was negligent. To do so, a plaintiff must show the employer knew about the harassment and failed to take appropriate action. The negligence standard usually applies in cases where the harasser was a coworker or customer. Some state statutes allow suit against individual perpetrators as well as employers. Some state courts have declined to adopt the *Faragher/Ellerth* defense, imposing automatic liability for harassment by supervisors.

- **Damages.** Under Title VII, victims of sexual harassment may be entitled to injunctive relief, lost wages and other such restitution, and compensatory and punitive damages. Compensatory and punitive damages are capped, with the amount depending on the size of the employer, up to a combined maximum of \$300,000. Several states have no caps on damages, others have caps similar to those under federal law, and others do not allow recovery of any compensatory or punitive damages.

U.S. workplace sexual harassment law also has the following notable features:

- **Procedural Hurdles.** Before bringing suit, plaintiffs must first file a “charge” with a federal agency, the Equal Employment Opportunity Commission (EEOC). Plaintiffs have a short timeframe, generally 300 days, but sometimes as few as 180 days, in which to bring a charge. If the harassment was a continuous pattern of conduct, the time period begins to run from the last incident.
- **Loopholes for Untraditional Employment Relationships.** Only “employees” are covered by Title VII. Independent contractors (such as some sharing-economy workers, actors, and freelancers) and co-owners (such as some partners in law, accounting, or consulting firms) are uncovered. These workers may, however, have claims under state law. California and New York, for example, explicitly cover independent contractors. Title VII does not apply to small employers, defined as those with fewer than 15 employees, although many state laws have lower or no minimums.
- **Mandatory Arbitration and Nondisclosure Agreements.** As a condition of hire, many U.S. employers require that their employees sign agreements limiting rights to redress for sexual harassment. These agreements may require that charges of sexual harassment be settled in private arbitration rather than public litigation. They may limit damages, bar class-wide claims, and require confidentiality. Whether or not there is an agreement to arbitrate, employers generally require nondisclosure agreements as a condition of any settlement of a sexual harassment claim. While arbitration agreements do not bind the EEOC when it brings suit seeking relief on behalf of an employee, the EEOC brings few lawsuits because its resources are limited. A proposed federal law would bar pre-dispute agreements to arbitrate sex discrimination claims, and several states are considering laws to limit nondisclosure agreements in sexual harassment cases.
- **Mandatory Trainings.** Three U.S. states—California, Connecticut, and Maine—require certain private sector employers to conduct sexual harassment trainings.
- **Anti-Retaliation.** Title VII forbids retaliation against employees who complain of sexual harassment, but the U.S. Supreme Court has made it difficult for plaintiffs to demonstrate retaliation.