



Sexual Harassment Training: Managers & Supervisors

February 10, 2021

Vincent C. Camacho, Esq.
Vice President, Legislative Affairs

Introduction

- Sexual harassment is a form of sex discrimination that violates **Title VII of the Civil Rights Act of 1964 (Title VII)**, a federal law or **Article 2 of Title 22 of the Guam Code Annotated**, a Guam law.
- Employers should provide sexual harassment prevention training.
- This presentation explains what sexual harassment is and also covers:
 - Anti-harassment policy.
 - The responsibilities of supervisors and managers.
 - Supervisor liability for sexual harassment.
 - What constitutes retaliation and why it is prohibited.

Overview of Title VII

- Title VII prohibits discrimination on the basis of the following protected classes:
 - Sex (e.g. gender, pregnancy, sexual orientation, and gender identity).
 - Race.
 - Color.
 - Religion.
 - National origin.
- Title VII prohibits **adverse employment actions** against **protected classes**, including:
 - Termination.
 - Failure to hire.
 - Demotion.

Overview of Article 2 of Title 22 GCA

- Section 5201 prohibits discrimination on the basis of the following protected classes:
 - Sex (e.g. gender, pregnancy, sexual orientation, and gender identity).
 - Race.
 - Color.
 - Age.
 - Religion.
 - National origin.
 - **Honorably discharged veteran or military status.**
 - **Ancestry**
- Title VII prohibits **adverse employment actions** against **protected classes**, including:
 - Termination.
 - Failure to hire.
 - Demotion.

What is Sexual Harassment?

- A form of sex discrimination that violates Title VII and Guam law.
- Any harassment based on someone's sex or gender.
- Any unwelcome sexual advance or conduct of a sexual nature, when any of the following is true:
 - 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.
 - The advance or conduct unreasonably interferes with an employee's work performance by creating an intimidating, hostile, or offensive work environment.

Types of Sexual Harassment

Sexual harassment exists in two forms:

- *Quid pro quo.*
- **Hostile work environment.**

Quid Pro Quo Harassment

- *Quid pro quo* is Latin and it means "this for that."
- *Quid pro quo* harassment 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.

Hostile Work Environment Harassment

- Involves harassment in the workplace that is:
 - Unwelcome.
 - Based on 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:
 - Turning work discussions into sexual topics.
 - Repeatedly asking out an employee who is not interested.

Who Can Be a Harasser?

- Supervisors.
- Co-workers.
- Customers.
- Clients.
- Vendors.
- Individuals or groups doing business with the employer or on the premises.

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, such as:
 - Touching or brushing against an individual's clothing, body, or hair.
 - Initiating unwanted sexual activity, such as kissing, touching, or hugging.
 - Rubbing or touching anyone sexually.
 - Exposing oneself.

Examples of Sexual Harassment (cont'd)

- Verbal actions, such as:
 - 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 appearance.
 - Using expressions that can be belittling such as "honey," "dear," "sweetheart," "lady supervisor," or the like.

Examples of Sexual Harassment (cont'd)

- Non-verbal actions, such as:
 - 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.

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 Not Limited to the Workplace

Sexual harassment can occur outside the workplace, for example during:

- Annual meetings.
- Business trips.
- Holiday parties.
- Sporting events.

Anti-Harassment Policy

- All employees, other workers, and representatives (including vendors/patients/customers/subscribers/clients and visitors) are prohibited from harassing employees and other covered persons:
 - Based on that individual's sex or gender (including gender, pregnancy, sexual orientation, and gender identity).
 - Regardless of the harasser's sex or gender.
- Employer will not tolerate any form of sexual harassment, regardless of whether it is:
 - Verbal.
 - Physical.
 - Visual.

Anti-Harassment Policy (cont'd)

- Sexual harassment includes harassment that is not sexual in nature, as well as unwelcome sexual advances or requests for sexual favors or any other conduct of a sexual nature, when any of the following is true:
 - Submission to the advance, request, or conduct is made either explicitly or implicitly a term or condition of employment.
 - Submission to or rejection of the advance, request, or conduct is used as a basis for employment decisions.
 - Such advances, requests, or conduct have the purpose or effect of substantially or unreasonably interfering with an employee's work performance by creating an intimidating, hostile, or offensive work environment.
- Harassment is prohibited both at the workplace and at Employer-sponsored events.

Anti-Harassment Policy (cont'd)

- If you are subjected to any conduct that you believe violates this policy or witness any such conduct, you must promptly contact your direct supervisor or, ideally within ____ days of the offending conduct.
- Your complaint should be as detailed as possible, including the names of any individuals involved and any witnesses.
- Employer strictly prohibits any form of discipline, reprisal, intimidation, or retaliation for:
 - Reporting harassment.
 - Pursuing any harassment claim.
 - Cooperating in related investigations.

Romance in the Workplace (sample)

If any employee enters into a consensual relationship that is romantic or sexual in nature with an employee who reports directly or indirectly to that employee, or if one of the parties is in a supervisory capacity in the same department in which the other party works, the parties must notify the HR director or other appropriate corporate officer. Because of potential issues regarding quid pro quo harassment, the Company has made reporting mandatory. This requirement does not apply to employees who do not work in the same department or to parties where neither one supervises or otherwise manages responsibilities over the other.

Reporting Procedures and Supervisor Responsibilities

- Supervisors should understand harassment policy and reporting procedures.
- Supervisors should communicate policy and reporting procedures to all employees reporting to them or under their control.
- Employees should be directed to report complaints immediately to either the employee's direct supervisor or to the Human Resources Department.
- Supervisors should report all employee complaints to Human Resources.
- Supervisors should respond promptly and appropriately to complaints or questions about discrimination.

Reporting Procedures and Supervisor Responsibilities (cont'd)

- Although confidentiality will be maintained to the fullest extent possible, supervisors should never guarantee confidentiality of reports or investigations about reports.
- Supervisors should maintain a respectful workplace and not permit inappropriate behavior to go unchecked. Human Resources should be consulted when uncertain about appropriate activities or behavior.
- Supervisors should be models of good behavior and not participate in any harassing behaviors.

Reporting Procedures and Supervisor Responsibilities (cont'd)

- Human Resources or the employer's legal counsel will conduct investigations.
- Supervisors should support Employer in its responsibility to investigate complaints of discrimination.
- At the conclusion of the investigation, supervisors should work with Human Resources to implement any disciplinary action, and work to ensure the workplace is free of harassment.

Supervisor Liability for Sexual Harassment

Supervisors should understand their potential liability for misconduct. In some states, supervisors can be held individually liable for violations of anti-discrimination laws, such as harassment.

Supervisors may be found liable for other legal claims including assault and battery, intentional infliction of emotional distress, and defamation.

Employer Liability for Sexual Harassment

An employer is **strictly liable** for harassment by supervisors if it results in a tangible employment action (such as termination or demotion).

An employer may be held liable even without any tangible employment action if the employee can prove **hostile work environment** harassment.

What is Retaliation?

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

Remedies for Sexual Harassment

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

Hypothetical 1

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.

What are Jeff's responsibilities, if any?

Answer to Hypothetical 1

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 employer 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 nighttime word processing position where she won't have to see him at work.

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?

Answer to Hypothetical 2

- 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.
- 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 could have informed Human Resources sooner so they could take appropriate action.

Answer to Hypothetical 2 (cont'd)

- 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're 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.

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

Could this be considered sexual harassment?

Answer to Hypothetical 3

- 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 employer has a workplace romance policy that forbids relationships between supervisors and employees.
- Even if the employer's policy does not forbid supervisors from dating their subordinates, the situation does raise some legal exposure for the employer, 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 employer.

Questions