



A SEXUAL HARASSMENT  
**Survival Guide for Employees**

by  
ERIC BACHMAN

A SEXUAL HARASSMENT

# Survival Guide for Employees

by  
ERIC BACHMAN

BACHMAN  
— LAW —

[www.ebachmanlaw.com](http://www.ebachmanlaw.com)  
Washington, D.C. | June 2017

## AUTHORS

**Eric Bachman** is Chair of the Discrimination and Retaliation practices at Zuckerman Law and is the editor of the Glass Ceiling Discrimination Blog ([www.glassceilingdiscriminationlawyer.com](http://www.glassceilingdiscriminationlawyer.com)). Previously, Bachman served as Deputy Special Counsel, Litigation and Legal Affairs at the U.S. Office of Special Counsel (OSC) and Special Litigation Counsel and Senior Trial Attorney in the Civil Rights Division of the Department of Justice. Bachman's wins include a \$100 million settlement in a disparate impact Title VII class action, a record-setting Whistleblower Protection Act settlement at OSC, and a \$16 million class action settlement against a major grocery chain. Bachman began his career as a public defender and has served as lead or co-counsel in numerous jury trials.

**Jason Zuckerman** is a Principal at Zuckerman Law and has extensive experience representing employees in discrimination, harassment and retaliation claims before federal and state administrative agencies and courts. In addition to litigating employment cases in private practice for 15 years, Zuckerman served as Senior Legal Advisor to the Special Counsel at the U.S. Office of Special Counsel. In that capacity, he investigated retaliation claims, expanded training of agency managers and supervisors concerning prohibited personnel practices, and developed a memorandum of understanding with the EEOC to hold accountable employees who engage in discrimination or retaliation.

Zuckerman Law is committed to vigorous and effective representation of victims of harassment, discrimination and retaliation. If you have suffered unlawful conduct in the workplace, call us for a free initial consultation at 202-262-8959 or 202-769-1681.

## DISCLAIMER

*Case results depend upon a variety of factors unique to each case, and case results do not guarantee or predict a similar result in any future case undertaken by Zuckerman Law.*

Zuckerman Law  
is committed to  
vigorous and  
effective  
representation  
of victims of  
harassment,  
discrimination  
and retaliation.

## CONTENTS

|  |   |
|--|---|
| INTRODUCTION.....  | 1 |
| QUESTIONS AND ANSWERS ON WORKPLACE SEXUAL HARASSMENT .....   | 2 |
| What is workplace sexual harassment? .....   | 2 |
| Must the harassment come from my supervisor? .....   | 2 |
| Who is a “supervisor” in sexual harassment cases? .....  | 2 |
| Must the harassment be between a man and a woman? .....  | 2 |
| What is <i>quid pro quo</i> harassment? .....  | 2 |
| What is a hostile work environment? .....  | 3 |
| How do I prove my workplace is a hostile work environment? .....   | 3 |
| Does it matter if it is a supervisor versus a co-worker who is harassing me? .....                                     | 4 |
| Can a single incident of harassment suffice to establish liability? .....  | 4 |
| What damages or remedies are available for victims of sexual harassment? .....   | 4 |
| What is an employer’s affirmative defense in a sex harassment case? .....  | 5 |
| Is an employer prohibited from retaliating against an employee because<br>the employee reported harassment? .....      | 6 |
| What type of retaliation is prohibited against an employee who reports<br>unlawful discrimination or harassment? ..... | 6 |
| Can an employer be held liable for customer sexual harassment? .....   | 6 |
| What is the deadline for filing a sex harassment or retaliation claim? .....   | 7 |
| How can employees combat harassment at work? .....   | 7 |
| KEY TAKEAWAYS .....  | 8 |

## INTRODUCTION

More than fifty years after the enactment of the Civil Rights Act of 1964, too many workers are denied equal opportunity in the workplace and face egregious harassment and retaliation. According to a recent [EEOC report](#), approximately 40% of women have experienced one or more specific sexually-based behaviors in the workplace, such as unwanted sexual attention or sexual coercion. And too often, victims of harassment who report the harassment suffer retaliation.

To effectively combat harassment and retaliation, it is critical to know your rights and how to overcome the defenses that employers typically assert in these cases. This guide lays out general answers to common questions asked by employees who are faced with sexual harassment or retaliation at work. Potential claims of sexual harassment should, however, be reviewed on a case-by-case basis with attention paid to the specific conduct that occurred in your workplace and the laws that apply in that state and in that workplace. Information contained in this guide should not be relied on as legal advice. You should consult an attorney for advice on your specific situation.

According to a recent EEOC report, approximately 40% of women have experienced one or more specific sexually-based behaviors in the workplace, such as unwanted sexual attention or sexual coercion.

## QUESTIONS AND ANSWERS ON WORKPLACE SEXUAL HARASSMENT

### WHAT IS WORKPLACE SEXUAL HARASSMENT?

It is illegal to harass an employee because of that person's sex. According to the Equal Employment Opportunity Commission (EEOC), this **unlawful sexual harassment** includes unwanted sexual advances, requests for sexual favors, and other verbal or physical harassment of a sexual nature.

Mere teasing or isolated comments/incidents that are relatively minor do not rise to the level of illegal sexual harassment. Harassment becomes unlawful when the conduct and/or statements become so frequent or severe that it creates a hostile work environment or results in an adverse employment action (for example, firing, demoting, or suspending the victim).

### MUST THE HARASSMENT COME FROM MY SUPERVISOR?

No, unlawful harassment can be from your direct supervisor, but it can also come from a co-worker or another manager who does not supervise you.

### WHO IS A "SUPERVISOR" IN SEXUAL HARASSMENT CASES?

A supervisor is an employee whom the employer has empowered to take tangible employment actions against the victim; that is, to make a significant change in employment status, such as hiring, firing, failing to promote, reassignment with significantly different responsibilities, or a decision causing a significant change in benefits.

### MUST THE HARASSMENT BE BETWEEN A MAN AND A WOMAN?

No, both the victim and the harasser can be of the same sex (for example, a man harassing a man can be actionable harassment).

### WHAT IS *QUID PRO QUO* HARASSMENT?

**Quid pro quo harassment** is a type of sexual harassment. "Quid pro quo" means "this for that" or "something for something" and is a particularly repulsive form of harassment. It occurs when a supervisor either conditions a job benefit on sexual favors, or punishes the employee for refusing to do so.

It can take many forms and one example is for a supervisor to tell a female employee that the **only way she will get (or keep) the job is to have sex with the supervisor.**

Harassment becomes unlawful when the conduct and/or statements become so frequent or severe that it creates a hostile work environment or results in an adverse employment action (for example, firing, demoting, or suspending the victim).

Quid pro quo harassment can also happen in less stark terms. For example, in the corporate setting a senior manager may dole out plum accounts or assignments, or even promotions, based on whether the female employee agrees to go out to dinner with him, on a date, etc.

### WHAT IS A HOSTILE WORK ENVIRONMENT?

A [hostile work environment](#) is another form of sexual harassment. A hostile work environment is one filled with discriminatory intimidation, ridicule, and insult that is sufficiently severe or pervasive to alter the conditions of the victim's employment and create an abusive working environment.



### HOW DO I PROVE MY WORKPLACE IS A HOSTILE WORK ENVIRONMENT?

To prove a [hostile work environment claim](#), an employee must prove that the underlying acts were severe or pervasive. To determine if the environment is hostile, the courts consider the totality of the circumstances, including the conduct's severity. Severe harassment includes physical touching, implicit physical coercion, extreme language, or obscene behavior.

The harassment must be both unwelcome and offensive to you, as well as being objectively offensive (meaning that a reasonable person would find the harassment hostile and abusive).

To determine whether harassment violates Title VII, courts consider the following factors:

- 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.



## DOES IT MATTER IF IT IS A SUPERVISOR VERSUS A CO-WORKER WHO IS HARASSING ME?

Yes, the employer may automatically be liable if a supervisor's harassment of an employee causes an adverse action such as termination, lost wages, or a suspension.

If a supervisor creates a hostile work environment for an employee (with no adverse action like being fired), then the employer can prevail only if it can prove:

- it reasonably tried to prevent and promptly correct the harassing behavior; and
- the employee unreasonably failed to take advantage of any preventive or corrective opportunities offered by the employer, such as reporting the harassment to the employer.

If a non-supervisory employee harasses another employee, then the employer will be liable for the harassment if the employer knew, or should have known, about the hostile work environment and failed to promptly correct it.

## CAN A SINGLE INCIDENT OF HARASSMENT SUFFICE TO ESTABLISH LIABILITY?

Yes, a single act of severe harassment can be actionable in certain, limited circumstances. Examples include:

- female supervisor grabbed waiter's penis through his pockets;
- use of racial epithet such as "ni[\*\*]er";
- deliberate and unwanted touching of plaintiff's intimate body parts (for example, where a supervisor shoved employee's face against his crotch); and
- an extended barrage of obscene verbal abuse.

Yes, a single act of severe harassment can be actionable in certain, limited circumstances.

## WHAT DAMAGES OR REMEDIES ARE AVAILABLE FOR VICTIMS OF SEXUAL HARASSMENT?

Several different types of [remedies](#) are available under Title VII of the 1964 Civil Rights Act if you prevail in your sexual harassment claim, including:



- Back pay – the lost pay and benefits you would have received absent the adverse personnel action (e.g., salary from the date of a termination or demotion until the date of the trial);
- Compensatory damages – damages to compensate emotional distress and reputational harm that you suffered because of the sexual harassment;
- Punitive damages – damages to punish the company if it acted with malice or reckless indifference;
- Lost future earnings;
- Equitable relief, such as an order reinstating you; and/or
- Attorney’s fee and litigation expenses

Importantly, different federal, state and local laws may apply to your case and may allow different types and amounts of damages (Title VII, for example, has a cap on the amount of compensatory and punitive damages you can recover).

### WHAT IS AN EMPLOYER'S AFFIRMATIVE DEFENSE IN A SEX HARASSMENT CASE?

The employer is automatically liable and has no defense if a supervisor’s harassment of an employee causes an adverse action such as termination, lost wages, or a suspension.

However, an employer does have a defense (known as a *Faragher/Ellerth* defense) if a supervisor creates a hostile work environment for an employee (but no adverse action is taken against the employee, like being fired). Under this scenario, the employer may prevail if it proves:

- it reasonably tried to prevent and promptly correct the harassing behavior; and
- the employee unreasonably failed to take advantage of any preventive or corrective opportunities offered by the employer



Finally, if the situation involves a co-worker (non-supervisory employee) harassing another employee, then the employer will be liable for the harassment if the employer knew, or should have known, about the hostile work environment and failed to promptly correct it.

#### IS AN EMPLOYER PROHIBITED FROM RETALIATING AGAINST AN EMPLOYEE BECAUSE THE EMPLOYEE REPORTED HARASSMENT?

Yes, opposing or reporting unlawful employment actions, including sexual harassment, is protected under Title VII. Indeed, employees are protected for reporting employment actions that are not unlawful but that an employee reasonably believes to be unlawful. And employees are protected against retaliation for reporting discrimination during an internal investigation.

#### WHAT TYPE OF RETALIATION IS PROHIBITED AGAINST AN EMPLOYEE WHO REPORTS UNLAWFUL DISCRIMINATION OR HARASSMENT?

The anti-retaliation provision of Title VII proscribes not only tangible employment actions, such as termination of employment, but also any act that would “have dissuaded a reasonable worker from making or supporting a charge of discrimination.” *Burlington Northern & Santa Fe Railway Co. v. White*, 548 U.S. 52, 68 (2006). Note that retaliatory harassment does not require a showing that the harassment was severe or pervasive.

#### CAN AN EMPLOYER BE HELD LIABLE FOR CUSTOMER SEXUAL HARASSMENT?

Yes, courts have held that an employer may be found liable for the harassing conduct of its customers. The focus of the inquiry in a hostile work environment claim, as the name suggests, is on whether the workplace is replete with discriminatory intimidation, ridicule, and insult. Employers may be held liable in these circumstances if they do not remedy or prevent the hostile work environment about which they knew, or should have known.



## WHAT IS THE DEADLINE FOR FILING A SEX HARASSMENT OR RETALIATION CLAIM?

Title VII requires plaintiffs to file a [charge of discrimination](#) with the Equal Employment Opportunity Commission (EEOC) within 180 days of the alleged act of retaliation. 42 U.S.C. § 2000e-5(e)(1). The limitations period expands to 300 days where the plaintiff has filed a charge with a state or local agency that is authorized to grant or seek relief from the challenged practice. Federal employees seeking to remedy discrimination, harassment, or retaliation must contact an EEO counselor to initiate a complaint 45 days from the day the discrimination occurred.

## HOW CAN EMPLOYEES COMBAT HARASSMENT AT WORK?

- If there are witnesses to the harassment, work with an attorney to get signed statements corroborating that the harassment took place.
- If there are text messages or emails evidencing harassment, work with an attorney to properly preserve this proof so that it will be admissible at trial.
- Consult the company's anti-harassment policy and report the harassment.
- Document any retaliation that you experience for reporting the harassment.
- If you are a federal government employee or a state or local (city, county) government employee, different complaint filing procedures may apply. The EEOC's website has a handy [online assessment tool](#) that provides information on how to file a complaint.
- Be cautious in gathering evidence. For example, in some states, surreptitious recording is unlawful.
- Document the harm you suffer because of the harassment, including the impact on your personal and professional relationships.
- Talk with an experienced employment attorney to discuss your legal rights and options, including applicable deadlines for filing an EEOC charge of discrimination.

Title VII requires plaintiffs to file a charge of discrimination with the Equal Employment Opportunity Commission (EEOC) within 180 days of the alleged act of retaliation.

## KEY TAKEAWAYS

When considering whether you may be working in a hostile work environment, remember:

- It's not enough for the comments or behavior to be simply rude or offensive; there must be **severe** or **pervasive** statements or actions that are based on your race, sex, national origin, or other protected characteristic;
- The use of incendiary racist/sexist comments can create a hostile work environment even if they are said only once;
- Physical touching/harassment, as opposed to verbal statements, is often viewed by courts as stronger evidence under the “severe or pervasive” test;
- Discriminatory statements of actions by your supervisor—as compared to your subordinate or co-worker—can also make for a stronger case;
- If you can prove your supervisor's sexual harassment led to an adverse employment action against you (such as termination, suspension, or demotion), then your employer will be automatically liable for the discrimination; and
- You can be the victim of illegal sexual orientation/gender stereotyping discrimination even if your employer simply thinks (but does not know) that you are lesbian, gay, bisexual, or transgender.


The use of  
incendiary racist/  
sexist comments  
can create a hostile  
work environment  
even if they are  
said only once.



Men also experience harassment, and the harasser can be the same sex as the victim.

- 1 National Women's Law Center, *Workplace Justice Sexual Harassment in the Workplace* (November, 2016), available at <https://nwlcc.org/wp-content/uploads/2016/11/Sexual-Harassment-Fact-Sheet.pdf>.
- 2 *Ibid.*
- 3 NPR, *All Things Considered, Underreporting Makes Sexual Violence At Work Difficult To Address* (February 23, 2016), available at <http://www.npr.org/2016/02/23/467826376/underreporting-makes-sexual-violence-at-work-difficult-to-address>.



A photograph of four business professionals (three men and one woman) in business attire, sitting on a modern, low-profile sofa. They are gathered around a small, light-colored wooden coffee table. One man is shaking hands with another man who is leaning over the table. A laptop is open on the table, along with some papers and a coffee cup. The scene is dimly lit, with a warm, orange-toned light source creating a professional yet intimate atmosphere.

Bachman Law represents victims  
of sexual harassment in  
Washington, D.C., Maryland and  
Virginia and we can discuss your  
matter with you without any fee  
for a preliminary consultation.

# BACHMAN LAW

To learn more about your rights, call Bachman Law at (202) 769-1681  
[info@ebachmanlaw.com](mailto:info@ebachmanlaw.com) | [www.ebachmanlaw.com](http://www.ebachmanlaw.com)