Legal Q & A

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Q What constitutes sexual harassment in the workplace?

A Sexual harassment is a form of sex discrimination that violates Title VII of the federal Civil Rights Act of 1964 (Title VII) and state law. *See* 42 U.S.C. § 2000e-2(a); Tex. Labor Code §§ 21.051, .142; *Meritor Sav. Bank, FSB v. Vinson*, 477 U.S. 57 (1986).

Not all conduct of a sexual nature in the workplace constitutes sexual harassment. Rather, only unwelcome sexual conduct that is made a term or condition of employment (commonly referred to as "quid pro quo") or that creates a hostile working environment constitutes sexual harassment. *See* 29 C.F.R. § 1604.11(a); Tex. Labor Code § 21.141(2) (sexual harassment is defined as "an unwelcome sexual advance, request for a sexual favor, or any other other verbal or physical conduct of a sexual nature if: (1) submission to the advance, request, or conduct is made a term or condition of an individual's employment, either explicitly or implicitly; (2) submission to or rejection of the advance, request, or conduct by an individual is used as the basis for a decision affecting the individual's employment; (3) the advance, request, or conduct has the purpose or effect of unreasonably interfering with an individual's work performance; or (4) the advance, request, or conduct has the purpose or effect of creating an intimidating, hostile, or offensive working environment"). Examples of unwelcome conduct include, but are not limited to, innuendos, jokes, or gestures of a sexual nature; displaying of sexually-suggestive objects, photos, or drawings; flirting; touching, or other bodily contact; and blocking or impeding physical movement.

Additionally, the United States Supreme Court has recognized that sexual harassment conduct so intolerable that it compels an employee to resign is a valid claim under Title VII (commonly referred to as "constructive discharge"). *See Pennsylvania State Police v. Suders*, 542 U.S. 129, 133 (2004).

Courts have also held that both women and men can be sexually harassed and that same-sex sexual harassment is actionable under Title VII. *See Oncale v. Sundowner Offshore Servs., Inc.*, 523 U.S. 75 (1998); *Dillard Dep't Stores, Inc. v. Gonzales*, 72 S.W.3d 398, 407 (Tex.App.—El Paso 2002, pet. denied). Thus, the gender of the harasser or the person being harassed makes no difference.

Effective September 1, 2021, the timeframe by which a victim of sexual harassment has to file a sexual harassment claim with the Texas Workforce Commission was expanded from 180 days to 300 days after the date the alleged harassment occurred. Tex. Labor Code § 21.202(a-1).

Q How serious must the conduct be in order to rise to actionable sexual harassment?

A For quid pro quo sexual harassment, a victim must show that he or she suffered a "'tangible employment action' that 'resulted from his [or her] acceptance or rejection of his [or her] supervisor's alleged sexual harassment.'" *La Day v. Catalyst Tech. Inc.*, 302 F.3d 474, 481 (5th Cir. 2002). A tangible employment action constitutes 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. *Burlington Indus. Inc. v. Ellerth*, 524 U.S. 742, 761 (1998).

For sexual harassment to create an "abusive" or "hostile" work environment, the harassment must be sufficiently severe or pervasive to alter the terms and conditions of employment. *Harris v. Forklift Sys., Inc.*, 510 U.S. 17, 21 (1993) (quoting *Meritor*, 477 U.S. at 66); *Faragher v. City of Boca Raton*, 524 U.S. 775, 786 (1998); *Ellerth*, 524 U.S. at 786. Such work environment must be deemed both objectively and subjectively offensive—one such that a reasonable person would find hostile or abusive and one that the victim does in fact perceive to be so. *Faragher*, 524 U.S. at 788. Unless the conduct is extremely serious, "simple teasing," "offhand comments," and isolated incidences will not, by themselves, support a sexual harassment claim. *Id.* (quoting *Oncale*, 523 U.S. at 81). Whether conduct is severe or pervasive is a fact-specific inquiry and courts will look at the totality of the circumstances to make this determination, including, but not limited to: (1) the frequency of the conduct; (2) its severity; (3) whether it was physically threatening or humiliating or a mere offensive utterance; (4) whether it unreasonably interferes with the employee's work performance; and (5) whether the conduct complained of undermined the victim's workplace competence. *Harris*, 510 U.S. at 23; *Butler v. Ysleta Indep. Sch. Dist*. 161 F.3d 263, 270 (5th Cir. 1998).

For conduct to be actionable as a "constructive discharge" claim, it must be much worse than severe or pervasive. In other words, a constructive discharge claim is a '"worse case' harassment scenario, harassment ratcheted up to the breaking point." *Suders*, 542 U.S. 147-48. An employee bringing a constructive discharge claim must "show working conditions so intolerable that a reasonable person would have felt compelled to resign." *Id*. 524 U.S. at 147.

A city may adopt a policy that provides a lower threshold than federal or state law for what constitutes sexual harassment. In that case, a harasser's conduct could violate city policy without necessarily violating state or federal law.

Q Can a city be held liable for a sexual harassment perpetrated by its officials or employees?

A Yes. A city may be held vicariously liable for the actions of its supervisors, which result in a tangible employment action, without regard to whether the city knew about the sexual harassment. *Ellerth*, 524 U.S. at 742; *Faragher*, 524 U.S. at 775. This strict liability standard is triggered only when the harasser is a supervisor with the authority to recommend or take tangible employment decisions that affect an employee. *Ellerth*, 524 U.S. at 761; *Vance v. Ball State Univ.*, 570 U.S. 421, 431 (2013).

If sexual harassment by a supervisor does not lead to a tangible employment action, the city may still be liable unless it can show that: (1) it exercised reasonable care to prevent and promptly correct any harassment; and (2) the employee unreasonably failed to complain to management or to avoid harm otherwise. *Ellerth, 524 U.S. 742; Faragher*, 524 U.S. at 807.

A city may be held liable for the conduct of co-workers and nonemployees, such as vendors or customers if the victim can prove that the employer knew or should have known of the sexual harassment and failed to take prompt remedial action to end the harassment. 29 C.F.R. § 1604.11(d); *Rodriguez-Hernandez v. Miranda-Velez*, 132 F.3d 848 (1st Cir. 1998); *Lockard v. Pizza Hut, Inc*., 162 F.3d 1062 (10th Cir. 1998); *see also* Tex. Labor Code § 21.1065 (employers may be held liable for sexual harassment of an unpaid intern if the employer knew or should have known that the sexual harassment was occurring and failed to take immediate and appropriate corrective action).

A recent amendment to Texas law, effective September 1, 2021, provides that liability for sexual harassment may be imposed if an employer fails to take "immediate and appropriate corrective action." Tex. Labor Code § 21.142. Although this new standard has not been interpreted by a court, it appears to be a more stringent standard than the federal requirement to "take prompt and effective remedial action." *See* 42 U.S.C. § 2000e-2(a); 29 C.F.R. § 1604.11(d).

Q Can an individual city official or employee be held personally liable for sexual harassment?

A Until recently, individual city employees and officials in Texas could not be held personally liable for sexual harassment. But, Senate Bill 45, adopted by the 87th Texas Legislature and effective September 1, 2021, has fundamentally altered the liability landscape for sexual harassment in Texas. *See* Tex. Labor Code §§ 21.141-.142. The bill expanded the definition of "employer" to include "any person who acts directly in the interests of an employer in relation to an employee." *Id*. § 21.141(1). Under this new definition, it is possible that elected officials, supervisors, human resource professionals, and other employees may be subject to individual liability for sexual harassment if they: (1) know or should have known that the conduct constituting sexual harassment was occurring; and (2) fail to take immediate and appropriate corrective action. *Id*. § 21.142.

Q What defenses to sexual harassment liability are available to a city?

A If, as a result of sexual harassment, an employee experiences a "tangible employment action," the city does not have the option of proving any defense, and is strictly liable for the harassment even the city did not know about the harassing conduct. If no tangible employment action resulted from the harassment, the city may raise an affirmative defense to avoid liability by showing that: (1) that the city exercised reasonable care to prevent and promptly correct any sexually harassing behavior, and (b) that the victim unreasonably failed to take advantage of any preventive or corrective opportunities provided by the city or to avoid harm otherwise. *Ellerth*, 524 U.S. at 764-65; *Faragher*,

524 U.S. at 807. For example, to avoid liability, a city can show that it had an adequate sexual harassment policy that included a complaint process and the victim failed to take advantage of the policy to stop the harassment. *See Watts v. Kroger Co.,* 170 F.3d 505, 510 (5th Cir. 1999). However, if an employee reports harassment to a supervisor, or a supervisor knows or notices anything that might be considered harassment, the city must take prompt action to stop the harassment and prevent it from occurring. If the city fails to take such necessary actions to stop the harassment, the city could be held liable.

Q What are the possible penalties for sexual harassment?

A Penalties for sexual harassment may include civil damages such as compensatory money damages, injunctive relief, back pay, front pay, or job reinstatement. In addition to such civil penalties, there may be criminal penalties that arise out of official misconduct. Under the Texas Penal Code**,** a public servant commits the offense of "official oppression" if, while acting or purporting to act in an official capacity, the servant: (1) intentionally subjects another to mistreatment or to arrest, detention, search, seizure, dispossession, assessment, or lien that the servant knows is unlawful; (2) intentionally denies or impedes another in the exercise or enjoyment of any right, privilege, power, or immunity, knowing such conduct is unlawful; or (3) intentionally subjects another to sexual harassment. Tex. Pen. Code § 39.03. An offense under this section is a Class A misdemeanor, punishable by a fine of up to $4,000 or up to one year in jail, or both.

Q What is "retaliation," and is it prohibited?

A Retaliation occurs when an employer takes action that could dissuade a reasonable individual from engaging in "protected activity" (i.e. opposing any practice made unlawful by Title VII or making a charge, testifying, assisting, or participating in a Title VII proceeding or investigation). *See* 42 U.S.C. § 2000e-3(a); Tex. Labor Code §21.055; *Burlington N. & Santa Fe Ry. Co. v. White,* 548 U.S. 53, 57 (2006).

If an individual sues for retaliation related to a protected activity, such as filing a sexual harassment complaint, the individual has to prove that the adverse action taken by the employee was taken because the individual engaged in a protected activity. Moreover, the individual need not prove that the sexual harassment allegation has merit. Rather, the individual need only show that he or she complained in good faith about the harassment and that the city took some adverse employment action against the individual because of the complaint.

Q How can a city prevent sexual harassment in its workplace and limit its liability?

A Although a city cannot fully prevent sexual harassment in the workplace, it can take the following preventive measures to protect its employees and limit its liability:

***(1) Establish a sexual harassment policy*.** The policy should clearly provide that the city does not tolerate sexual harassment or retaliation. The policy should

be distributed to all employees, including seasonal, temporary, and contract employees, and should be enforced uniformly. The city's policy should send a message from top city officials that harassment and retaliation will not be tolerated.

(2) Create a procedure for making complaints. The procedure should provide a mechanism for employees to report sexual harassment, and should include multiple avenues for employees to do so. Employees should not be limited to reporting complaints to their immediate supervisor as this individual may be the harasser; thus, the city should designate more than one individual to whom employees can make a complaint. The city should also mandate supervisors report all complaints of harassment, even if the complainant requests that the supervisor not tell anyone else, or does not wish to pursue the complaint.

(3) Promptly and thoroughly investigate all complaints. The complainant, alleged harasser, and all pertinent witnesses and others who may have relevant information should be interviewed. Additionally, the alleged harasser should not have any direct or indirect control over the investigation.

(4) Take swift and appropriate remedial action. The city should take appropriate action if the complaint is found to be justified.

(5) Appropriately train employees and supervisors. The city should conduct, on a regular basis, mandatory training for all supervisors and employees on the city's sexual harassment and anti-retaliation policy.