

Sexual Harassment Prevention in the A/E Workplace

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This article is based on the content of a webinar presentation prepared by the author for the American Council of Engineering Companies (ACEC).^{*} In the webinar and this article we do the following:

- Examine the law, regulations and guidelines concerning sexual harassment;
- Understand what constitutes sexual harassment in order to identify and address it;
- Examine how the EEOC Guidelines are applied and enforced, and how your firm can be held liable for harassment by supervisors and non-supervisory employees;
- Identify the benefits of having (and the risks of not having) a robust policy against sexual harassment, and a related effective training program for employees
- Apply key principles from these learning objectives to situational hypotheticals.

The Sexual Harassment Problem

Forty percent of women surveyed state they've experienced sexual harassment in the workplace. This number increases to 60% when asked about experiencing sexually crude language, displays and sexual comments.

Common workplace-based responses by those who experience sex-based harassment are

- avoid the harasser (33% to 75%)
- deny or downplay the gravity of the situation (54% to 73%)
- attempt to ignore, forget or endure the behavior (44% to 70%).

Three out of four individuals that experience harassment never talk to their supervisor, manager, or union representative about the harassing conduct. Reasons for not reporting include fear of disbelief of their claim, inaction on their claim, blame, or social or professional retaliation. (*Study of Harassment in the Workplace*, EEOC, June 2016, hereinafter the "EEOC Study")

What are the Impacts of Sexual Harassment on Employees?

Sexual harassment has been tied to **psychological effects** such as negative mood, disordered eating, self-blame, reduced self-esteem, emotional exhaustion, anger, disgust, envy, fear, lowered satisfaction with life, and abuse of prescription drugs and alcohol.

Studies have linked sexual harassment to physical impacts, including decreased overall health perceptions and satisfaction, as well as headaches, exhaustion, sleep problems, gastric problems, nausea, weight loss or gain, respiratory, musculoskeletal, and cardiovascular issues. (EEOC Study).

What are the Impacts of Sexual Harassment on Firms?

Since 2010, employers have paid out \$698.7 million to employees alleging harassment through the EEOC administrative enforcement litigation process alone. These direct costs are called by EEOC “only the tip of the iceberg.” The EEOC study points out that, “Time, energy, and resources are diverted from operation of the business to legal representation, settlements, litigation, court awards, and damages.” Plus, the “true cost to the employer includes decreased productivity, increased turnover, and reputational harm.”

The Law Concerning Sexual Harassment

The Equal Employment Opportunity Commission (EEOC) is the federal agency responsible for enforcing the law. In 1980 the EEOC issued Guidelines declaring sexual harassment to be a violation of Section 703 of Title VII of the Civil Rights Act of 1964 which bans discrimination on the basis of sex, and establishing criteria for determining when unwelcome conduct of a sexual nature constitutes sexual harassment. The *Guidelines* do the following:

- Suggest affirmative steps an employer should take to prevent sexual harassment
- Define circumstances under which an employer may be held liable

Sexual Harassment Defined

Sexual harassment is not limited to a sexual nature but can include offensive remarks about a person’s sex (e.g., it is illegal to harass a woman by making offensive comments about women in general). Both the victim and the harasser can be either a woman or a man. The victim and the harasser can be the same sex. Harassment becomes unlawful when:

- Enduring the offensive conduct becomes a condition of continued employment,
- The conduct is severe or pervasive enough to create a work environment that a reasonable person would consider intimidating, hostile, or abusive
- When the conduct results in an adverse employment decision (such as the victim being fired or demoted).

Harassment May be Based on a Quid Pro Quo, or on a Hostile Work Environment

When a plaintiff proves a tangible employment action resulted from a refusal to submit to a supervisor's sexual demands, he or she establishes that the employment decision itself constitutes a change in the terms and conditions of

employment that is actionable under Title VII. This is a quid pro quo, meaning, “a favor or advantage granted in return for something,” or, “If you do this, you will get that”.

EEOC General Guidance for Employers and Employees

- “Employers should clearly communicate to employees that unwelcome harassing conduct will not be tolerated. They can do this by establishing an effective complaint or grievance process, providing anti-harassment training to their managers and employees, and taking immediate and appropriate action when an employee complains.
- Employers should strive to create an environment in which employees feel free to raise concerns and are confident that those concerns will be addressed.
- Employees are encouraged to inform the harasser directly that the conduct is unwelcome and must stop. Employees should also report harassment to management at an early stage to prevent its escalation.”

Employer Liability for Harassment

The standard for employer liability for hostile work environment harassment depends typically on whether or not the harasser is the victim’s supervisor. The U.S. Supreme Court recognized that this result is appropriate because an employer acts through its supervisors, and a supervisor’s undertaking of a **tangible employment action** constitutes an act of the employer.” According to the Court,

- “The employer is automatically liable for harassment by a supervisor that results in a negative employment action such as termination, failure to promote or hire, and loss of wages.
- If the supervisor's harassment results in a hostile work environment, the employer can avoid liability only if it can prove that:
 - 1) it reasonably tried to prevent and promptly correct the harassing behavior; and
 - 2) the employee unreasonably failed to take advantage of any preventive or corrective opportunities provided by the employer.
- The employer will be liable for harassment by non-supervisory employees or non-employees over whom it has control (e.g., independent contractors or customers on the premises), if it knew, or should have known about the harassment and failed to take prompt and appropriate corrective action.”

How can an A/E Firm Establish an Affirmative Defense

The Supreme Court in *Faragher v. City of Boca Raton*, [524 U.S. 775](#) (1998) established an affirmative defense for the employer allowing employer to escape liability for some types of sexual harassment by showing they had taken steps to prevent and promptly respond to claims, and that the employee had not taken advantage of options provided by the employer. The decision states that a written

anti-harassment policy and an “effective” complaint procedure would normally meet the employer’s legal burden to demonstrate preventative action.

What is reasonable care according to the EEOC?

EEOC Guidance states that, “It is generally necessary for employers to establish, publicize, and enforce anti-harassment policies and complaint procedures.”

The Supreme Court stated in *Ellerth*, 118 S. Ct. at 2270, “Title VII is designed to encourage the creation of anti-harassment policies and effective grievance mechanisms, [and although this] is not necessary in every instance as a matter of law, failure to do so will make it difficult for an employer to prove that it exercised reasonable care to prevent and correct harassment.”

Creating an Effective Reporting Process for your Firm

According to EEOC Guidance, “The policy should encourage employees to report harassment *before* it becomes severe or pervasive.” “Therefore, to discharge its duty of preventive care, the employer must make clear to employees that it will stop harassment before it rises to the level of a violation of federal law and actually follow through on such promise.”

It is advisable for an employer to designate at least one official outside an employee’s chain of command to take complaints of harassment. For example, if the employer has an office of human resources, one or more officials in that office could be authorized to take complaints. A complaint process is not effective if employees are always required to complain first to their supervisors about alleged harassment, since the supervisor may be a harasser.

The Benefits of an Anti-harassment Policy

A successful anti-harassment policy can benefit your firm by helping to attract the best people to your organization, creating a positive working environment for employees, promoting respectful and professional relationships among employees, and avoiding liability.

** The webinar/workshop on which this paper is based was co-authored and presented for ACEC by Kent Holland, J.D., and Joanne Dekker, J.D. of ConstructionRisk, LLC, together with Beverly Tompkins, J.D., Vice President and Corporate Counsel of Simpson Gumpertz & Heger Inc. (SGH).*