What Is Sex-Based Harassment?

Title VII of the Civil Rights Act of 1964, as well as many state and municipal laws, prohibits sex-based harassment in the workplace.¹ The Equal Employment Opportunity Commission (EEOC) has issued authoritative guidelines on sexual harassment under Title VII, imposing on employers “an affirmative duty” to prevent and eliminate sexual harassment.² The guidelines define sexual harassment as follows:
Unwanted sexual advances, requests for sexual favors, and other verbal or physical conduct of a sexual nature constitute sexual harassment when any one of three criteria is met: (1) Submission to such conduct is made either explicitly or implicitly a term or condition of the individual’s employment; (2) Submission to or rejection of such conduct by an individual is used as the basis for employment decisions affecting such individual; (3) Such conduct has the purpose or effect of unreasonably interfering with an individual’s work performance or creating an intimidating, hostile, or offensive work environment.

The EEOC has since made clear that “harassment not involving sexual activity or language may also give rise to Title VII liability . . . if it is ‘sufficiently patterned or pervasive’ and directed at employees because of their sex,” and that the employer may be vicariously liable for such harassment. Prohibitions on such conduct apply to supervisors, co-workers, peers, clients, judges, professors, students, and vendors.

A variety of abusive behaviors that are directed at individuals on the basis of sex may constitute sex-based harassment. Examples include unwanted touching, groping, or sexual advances; quid pro quo requests for sexual favors; or demeaning, condescending, or sexualized comments or jokes. With increasing frequency, sex-based harassment has taken on more subtle forms, such as interruptions or dismissive comments, comments on appearance or decorum, or subtle threats or intimidations. Inappropriate behavior can come from colleagues, adversaries, or even judges; many women anecdotally report that opposing counsel and court personnel, including judges, still refer to them using pet names or mistake them to be secretaries or paralegals.

In Chapter 5 of the manual, we provide guidance on developing and implementing workplace policies against sex-based
harassment. One key consideration in developing that policy is how to define “sex-based harassment.” What will constitute legally actionable harassment often is situational and fact specific. However, if the goal is to prevent and eliminate sex-based harassment from the legal profession, practitioners should look beyond what is required by law, to policies that develop a culture of zero tolerance of sex-based harassment. The following formulation for defining sex-based harassment has been suggested by Fran Sepler, a human resources consultant and expert on workplace harassment investigations:

Sex-based harassment means inadvertent or intentional behavior, language, humor, displays or other acts that are a) directed at a person because of their sex, sexual identity or sexual orientation or b) offensive based on content that is sexual in nature or demeaning towards individuals based on sex, sexual orientation and sexual identity—to the degree it affects someone’s ability to perform their job or to be reasonably comfortable in the workplace. This includes conduct that may not yet rise to a level where it is actionable.8

This definition is consistent with the ABA’s recent amendment to Model Rule 8.4(g), which now defines “professional misconduct” to include any “[c]onduct that the lawyer knows or reasonably should know is harassment or discrimination on the basis of . . . sex, . . . sexual orientation, gender identity, [or] marital status . . . in conduct related to the practice of law.”9

Legal employers also should be mindful of the various and subtle ways sex-based harassment may manifest. For example, although not per se illegal in most jurisdictions, gender bullying is prevalent in the legal workplace and is often a precursor to more severe forms of sex-based harassment. There are also a host of unconscious behaviors that perpetuate stereotypes and
sex-based treatment that many fail to recognize in themselves. Legal employers therefore are advised to adopt bias training and institute harassment policies that prohibit a wide scope of inappropriate workplace conduct, as such conduct is itself harmful to employees, and often is a precursor to more severe behavior.

**Important Case Law**

It was not until 1986, when the Supreme Court decided *Meritor Savings Bank v. Vinson*, that sex-based harassment was recognized as a form of illegal sex discrimination actionable under Title VII of the Civil Rights Act of 1964. The Court interpreted Title VII’s language prohibiting discrimination in the “terms, conditions, or privileges of employment” as covering the psychological, as well as financial, aspects of employment. The Court held that Title VII gives “employees the right to work in an environment free from discriminatory intimidation, ridicule, and insult,” even where tangible employment benefits such as pay and promotion are not affected.

Seven years later, in *Harris v. Forklift Systems, Inc.*, the Supreme Court again focused on harassment that creates a hostile work environment. In *Harris*, the Court held that conduct need not seriously affect a complainant’s psychological well-being to be actionable. Rather, hostile work environment harassment violates Title VII so long as it is both subjectively offensive to the complainant and objectively offensive to “a reasonable person.” Factors relevant in determining whether an environment is hostile or abusive include “the frequency of the 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.”
It’s not always easy to know what to say when someone tells you they’ve been sexually assaulted, especially when that person is a family member, friend, or loved one. If you’re looking for information on how to support a child, click here. Consider the following ways of showing support:

- **Listen.** Communicate without judgment.

- **Be there.** If the survivor seeks medical attention or plans to report, offer to be there. Your presence can offer the support they need.

- **Offer support.** Encourage the survivor to get support. Share resources like the National Sexual Assault Hotline and online.rainn.org, but realize that only they can make the decision to get help.

- **Be patient.** Remember, there is no timetable for recovering from trauma. Avoid putting pressure on them to engage in activities they aren’t ready to do yet.

- **Encourage self-care.** Following an assault it is important to practice good self-care during this difficult time.

**National Sexual Assault Hotline**
800.656.HOPE | rainn.org

To search for your local sexual assault service provider, please visit centers.rainn.org

If you or someone you know has been affected by sexual violence, it’s not your fault. You are not alone. Help is available 24/7 through the National Sexual Assault Hotline: 800-656-HOPE and online.rainn.org, y en español rainn.org/es.
Rape, Abuse & Incest National Network

RAINN is the nation’s largest anti-sexual violence organization and the leading authority on sexual violence. We are a dynamic organization focused on victim services, public education, public policy, and consulting services. Our team develops and operates best-in-class services for survivors, informs and educates the nation about sexual violence, and improves the public policy and criminal justice response to these crimes.

**Victim Services**

RAINN created and operates the National Sexual Assault Hotline, available by phone (800.656.HOPE) and online in English (online.rainn.org) and Spanish (rainn.org/es). RAINN also operates Safe Helpline, a service for members of the U.S. military affected by sexual assault, through a contract with the Department of Defense. We work closely with more than 1,000 local sexual assault service providers to offer confidential support services, available 24/7, to survivors across the country.

**Public Education**

RAINN educates the public about sexual violence and works with national media and the entertainment industry to elevate sexual violence storylines and reach millions of households across the country. Our website (rainn.org) and social media platforms connect people to support and help us engage with communities. Through an annual college program, a national speakers bureau of more than 1,700 survivors, and other community activities, RAINN is able to mobilize the public to play a role in prevention and recovery.

**Public Policy**

RAINN works at the federal and state levels to improve the criminal justice system, prevent sexual assault, and ensure justice for survivors. We develop and promote public policy changes that make communities safer and support survivors. We also lead the national effort to end the rape kit backlog and reform state statutes of limitations laws.

**Consulting Services**

RAINN works with clients across public, private, and nonprofit sectors to develop targeted, effective sexual assault education and response programs. To do this, we offer a variety of specialized consulting services to meet each organization’s unique needs, including hotline services, program assessments, and education and training.

**RAINN has helped more than 2.5 million people since 1994**
National Sexual Assault Hotline
RAINN created and operates the National Sexual Assault Hotline, which has helped more than 2.5 million people since 1994. The hotline is available by phone (800.656.HOPE) and online chat in English (online.rainn.org) and Spanish (rainn.org/es). The service is free, confidential, and available 24/7.

Call
When someone calls 800.656.HOPE, they will be connected with a RAINN support specialist or a local center from RAINN’s network of more than 1,000 sexual assault service providers throughout the country. Staff offer advice, information, and support. In some areas, providers can offer additional local services, such as hospital accompaniment. Together, RAINN and these local providers are able to operate the hotline 24/7 to provide confidential support to survivors and their friends and family.

Chat
Talking about what happened can be an important part of moving forward and seeking help, but not everyone is comfortable talking over the phone. Survivors and loved ones can access help online (online.rainn.org) through a chat-based platform on a computer, phone, or tablet. RAINN’s staff provides support to thousands of survivors each month, many of whom are disclosing the experience for the first time.

“Sometimes typing it is actually easier until you’re ready to talk about it.”
— Sametha Moore, survivor of sexual violence, on using the National Sexual Assault Online Hotline

Help in Spanish
At rainn.org/es, survivors can access the Spanish-language Online Hotline, a peer support group, and Spanish-language educational content.

Help for the Military Community
RAINN created and operates the DoD Safe Helpline, a crisis support service for members of the military community affected by sexual assault. Safe Helpline provides live, confidential, anonymous support and information. Members of the DoD community can access Safe Helpline online (safehelpline.org), over the phone (877-995-5247), through a self-care app, and through a group chat service (safehelproom.org).

“RAINN helped me see that I am not alone.”
— Julianna Araujo, survivor of sexual abuse

Sexual Assault Statistics

1 out of every 6 American women has been the victim of an attempted or completed rape in her lifetime.

7 out of 10 rapes are committed by someone the victim knows.

Out of every 1000 sexual assaults, 994 perpetrators will walk free.

Every 98 seconds, another American is sexually assaulted.
National Sexual Assault Hotline
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Free. Confidential. 24/7.