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(EVAWI)

Sexual Harassment and Sexual Assault: Understanding the Distinctions and Intersections

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Introduction

In the #MeToo and #TimesUp era of accountability, victims who have been sexually harassed or sexually assaulted in the past have been empowered to come forward and reveal their victimization. Yet there is often confusion on the part of the public, and even within law enforcement, about how to differentiate between sexual harassment and sexual assault. This uncertainty is complicated by the fact that in some cases, the offending behavior can fall into both camps, prompting the question as to whether to proceed civilly, criminally, or both.

In this Training Bulletin, we provide a brief summary of the distinctions and intersections between sexual harassment and sexual assault. We then provide some detailed information on each topic, but primarily refer interested readers to other resources. For example, EVAWI offers thousands of pages of training material on criminal sexual assault, particularly related to the law enforcement response and investigation. Other resources are available for detailed information on sexual harassment and responses in educational or employment settings.

Distinctions: A Quick Breakdown

Procedures related to civil sexual harassment and criminal sexual assault differ in terms of scope, relief for the victim, consequences for both individual and organizational defendants, and the standards of proof, among other factors. While these issues are very complex, we will try to provide a simple and straightforward summary, to at least clarify some of the key concepts and distinctions.

Sexual Harassment

First, it is important to understand that sexual harassment is an *organizational issue*, which pertains both to educational institutions as well as workplaces. When someone is sexually harassed at school or work, it can be reported within the organizational structure, and an administrative investigation should then be initiated. During that process, the victim is typically referred to as a *complainant* and the alleged perpetrator is a *respondent*. The standard of proof for an administrative investigation is typically a *preponderance of the evidence* (which translates to “more likely than not”), although some campuses use the higher standard of *clear and convincing evidence*.

Victims of sexual harassment at school or work can also file a civil lawsuit, but this will typically be against the organization, rather than the individual accused of sexual harassment.¹ Within the civil court system, the victim is a party to the case and is referred to as a *plaintiff*. The organization is the *defendant*.

¹ Victims can file a lawsuit against an individual who harassed them within an organization, but this will typically be pursued under tort law (e.g., infliction of emotional distress), rather than a civil rights violation by the organization.

In civil court, the victim (or the victim's attorney) will bear the up-front burden of litigation costs, but a successful plaintiff is entitled to an award of attorneys' fees and costs under special laws for civil rights cases. As the plaintiff in the civil lawsuit, the victim may seek both injunctive relief, such as a change in the organization's policies and procedures, and damages (money) for the harm caused by the sexual harassment. The burden of proof in a civil court case is a *preponderance of the evidence*.

Sexual Assault

Sexual assault is a crime, regardless of where it is committed. If a sexual assault is reported to law enforcement, this will typically result in a criminal investigation being conducted (if the elements of a crime have been established). This investigative process could potentially lead to a suspect being charged with a crime. Charges are filed by the municipal, tribal, state, or federal government. Throughout the process, the victim is referred to as a *victim*, but the alleged perpetrator is called a *suspect* during the investigation and a defendant during the prosecution. The victim is not a party to the legal proceedings; the state is a party and the victim is a witness. In other words, the state does not "represent" the victim.

If the case goes to trial, the victim may be called as a witness, usually the primary witness in the case. The organization has no role in a criminal prosecution.

The consequences of a criminal conviction by a judge or jury can include incarceration, probation, parole, and fines, as well as restitution for out-of-pocket costs to the victim. Restitution could cover some financial losses resulting from the crime, such as costs for treatment of physical injuries and emotional trauma. A criminal court cannot order an organization to change its response to sexual harassment. There are no litigation costs for the victim in criminal court, as the state is bringing the charges. Victims are also frequently eligible for [Crime Victim Compensation \(CVC\)](#) which can reimburse costs such as medical and dental expenses, counseling costs, and lost wages or support. However, there are eligibility requirements for CVC, such as timely reporting and cooperation with the law enforcement investigation and potential prosecution.

In criminal court, the burden of proof is *beyond a reasonable doubt*; this is considerably higher than the standard used in civil court, which is a preponderance of the evidence.²

Sexual Harassment Can Be Addressed in Both the Civil and Criminal Justice Systems

Perhaps not surprisingly, sexual harassment within an organization can include acts that meet the legal definition of criminal sexual assault, in which case they can be reported within the organization and/or reported to law enforcement and/or pursued within the civil courts. For example, if someone is forcibly raped at work or school, or

² For more information, please see the excellent article, "[What's the difference between sexual abuse, sexual assault, sexual harassment and rape?](#)" written by Cook, Cortina, and Koss (2018) in *The Conversation*.

in another employment context (e.g., by a supervisor, at a work-related function, or even by a customer or client), this could constitute both a criminal act as well as sexual harassment.

If sexual harassment is reported both within the organization and to law enforcement, the administrative investigation and criminal investigation can proceed at the same time. Law enforcement may prefer that the organization delay its investigation until the criminal justice system has completed its process, and criminal defendants will typically not want to testify on the record in a civil matter before the hearing on the criminal matter. However, complainants have an interest in a prompt investigation and both workplaces and educational institutions are required to provide remedies for complainants in a timely way. This is particularly true because the investigation can result in changes within the organization that will make it possible for them to safely stay in school or on the job without further harassment or abuse. Victims may also need the organization to provide interim accommodations and safety measures while the administrative process is proceeding.

There are a variety of ways to coordinate administrative and criminal investigations. In some institutions of higher education, the campus law enforcement agency conducts the investigation for both criminal and administrative purposes. Others temporarily delay their administrative investigation while the criminal investigation is taking place. Some campuses establish a Memorandum of Understanding (MOU) with campus or local law enforcement, to outline the roles and responsibilities of both systems.

In fact, some campuses have established an MOU with local law enforcement outlining the roles and responsibilities of a co-investigation. This is where the criminal justice investigation proceeds as usual, but campus administrators are invited to watch interviews or review statements “in real time.” This allows victims, witnesses, and respondents to provide their primary statement once, with the goal of reducing both the trauma of unnecessary interviews and also the inconsistencies that can result from different interview strategies and the documentation completed by multiple interviewers. It also increases interagency communication and allows campuses to take interim safety measures more quickly, despite the often lengthy process of a criminal justice investigation and potential prosecution. However, implementing this type of model requires careful consideration of a number of complex issues, including confidentiality protections and the different purposes of the two systems. The questions that need to be asked for a criminal versus administrative investigation might differ in some cases. Later in the Training Bulletin, we provide several resources to help with this process.

Hopefully, this first section has given you a basic framework for understanding the distinctions between sexual harassment and sexual assault, as well as their potential intersections. However, a bit more detail is provided below for each of these topics, along with additional resources for interested readers.

Sexual Harassment

Any organization that has employees is subject to a wide range of federal, state, and local laws and regulations. Some of these are defined by the United States Equal Employment Opportunity Commission (EEOC) and are found in [Title VII of the Civil Rights Act of 1964](#).

According to the Civil Rights Act of 1964, it is illegal to discriminate on the basis of race, color, religion, national origin, and sex. Some forms of sex discrimination relate to the terms or conditions of employment, such as hiring, firing, compensation, and discipline. Sexual harassment is a category of sex discrimination prohibited by Title VII.

Definition of Sexual Harassment

Specifically, the [EEOC defines sexual harassment](#) as follows:

It is unlawful to harass a person (an applicant or employee) because of that person's sex. Harassment can include 'sexual harassment' or unwelcome sexual advances, requests for sexual favors, and other verbal or physical harassment of a sexual nature (para. 1).

Importantly, the EEOC definition goes on to note that harassment does *not* have to be sexual in nature; it also covers offensive remarks about sex, such as “making offensive comments about women in general” (para 2). The standard is that the actions occur “because of that person’s sex.” It also clarifies that a person of either sex can be a harasser or a victim. The U.S. Supreme Court has ruled that same-sex harassment is harassment for purposes of Title VII.³ Perpetrators of sexual harassment can be supervisors or co-workers within the organization, or customers and clients.

The definition also includes important language about what is *not* sexual harassment:

Although the law doesn't prohibit simple teasing, offhand comments, or isolated incidents that are not very serious, harassment is illegal when it is so frequent or severe that it creates a hostile or offensive work environment or when it results in an adverse employment decision (such as the victim being fired or demoted) (para 4).

In other words, the EEOC [policy guidance for evaluating and enforcing Title VII actions](#) includes an explicit statement that not all conduct of a sexual nature is proscribed by Title VII. Sexual conduct is only illegal when it is unwelcome *and* when “submission to such conduct is made either explicitly or implicitly a term or condition of an individual’s

³ *Oncale v. Sundowner Offshore Servs.*, 523 U.S. 75 (1998) (recognizing male-on-male sexual harassment); *Hively v. Ivy Tech. Community College*, 830 F.3d 698 (7th Cir. 2016) (holding en banc that sexual orientation discrimination is a form of gender discrimination for Title VII purposes); *Zarda v. Altitude Express, Inc.*, 883 F.3d 100 (2d Cir. 2018)(sexual orientation is a protected characteristic under Title VII).

employment.”⁴ Moreover, Title VII is not the only remedy for employees: Many states and localities have additional laws which prohibit sexual harassment in the workplace and which may be broader than the federal law. Discussion of state and local laws is beyond the scope of this article, however.

Types of Sexual Harassment: Quid Pro Quo

According to the EEOC, there are two basic types of sexual harassment: *quid pro quo* and *hostile work environment*. These are summarized in an excellent document published by the National Institute of Justice (1995), entitled [Civil Rights and Criminal Justice: Primer on Sexual Harassment](#). However, forms of sexual harassment can and do occur together.

First, quid pro quo sexual harassment is defined as follows:

Loosely translated, ‘quid pro quo’ means ‘something for something.’ This type of harassment occurs when an employee is required to choose between submitting to sexual advances or losing a tangible job benefit. An essential aspect of quid pro quo harassment is the harasser’s power to control the employee’s employment benefit. This kind of harassment most often occurs between supervisor and subordinate (p. 2).

Who is a supervisor? According to the U.S. Supreme Court, this includes anyone who is “empowered by the employer to take tangible employment actions against the victim.”⁵ This means the person does not have to be formally defined as a supervisor (for example, in an organizational chart, or job description). It has more to do with his or her power over the victim. Supervisory authority includes having the power and ability 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.”⁶

Hostile Work Environment

The [National Institute of Justice](#) document goes on to offer a nicely worded summary of what defines a hostile work environment:

Hostile work environment harassment is unwelcome conduct that is so severe or pervasive as to change the conditions of the claimant’s employment and create an intimidating, hostile, or offensive work environment. In the landmark case of Meritor Savings Bank v. Vinson,⁷ the U.S. Supreme Court found that a hostile work environment amounts to unlawful sex discrimination even in the absence of the loss of a tangible job benefit (p. 2).

⁴ 29 C.F.R § 1604.11 (a) (1).

⁵ *Vance v. Ball State University*, 133 S. Ct. 2434, 2439 (2013).

⁶ *Burlington Industries, Inc. v. Ellerth*, 524 U.S. 742, 761 (1998).

⁷ *Meritor Savings Bank v. Vinson*, 477 U.S. 57, 65 (1986).

Sexual conversation and conduct can contribute to a hostile work environment, but so can non-sexualized behavior such as stereotypic or derogatory name-calling, insulting remarks or threats, hazing, or the display of sexually explicit materials (e.g., posters, magazines). This definition generally excludes isolated incidents, unless they are extremely serious.

Organizational Liability

Subject to certain exceptions, the EEOC and case law provide that employers are held liable for sexual harassment by a supervisor.⁸ In other words, if a supervisor engages in conduct that constitutes quid pro quo sexual harassment or hostile work environment that results in, for example, the employee's termination or loss of pay, the organization is strictly liable, because the supervisor is essentially *acting as the organization*, in relation to the victim as a subordinate. Anyone investigating a report of sexual harassment involving a supervisor will need to exercise extreme caution, because organizations will often "circle the wagons" to protect themselves against such liability.

However, in many hostile work environment situations where there is no termination, demotion, or loss of pay, the employer can still escape liability by proving that (1) it exercised reasonable care to prevent and promptly correct any sexually harassing behavior; and (2) the employee unreasonably failed to take advantage of any preventive or corrective opportunities provided by the employer (e.g., in its sexual harassment policy) or to otherwise avoid harm.

Employers can also be held responsible for harassment by non-supervisor employees as well as third parties if they knew or should have known of the harassment and did not take prompt corrective action. However, organizations might not be held liable for a hostile work environment created by non-supervisory co-workers, if they can demonstrate that *they took reasonable measures to prevent and respond to sexual harassment* as an organization, and that *they didn't know, and would not reasonably be expected to know*, about the behavior.

If the organization is found liable in a case of sexual harassment, the complainant may be entitled to damages. Physical injury is not required for the Court to award damages. Most injuries stem from emotional trauma and/or the financial losses resulting from a loss of work or wages, either due to illness and trauma resulting from the harassment, or a retaliatory demotion or firing. Often, complainants suffer at least as much harm, and sometimes far more harm, in retaliation for reporting the harassment, as compared to the original conduct. An employer may be found liable for retaliation even where the plaintiff fails to prove discrimination.

⁸ *Burlington Industries, Inc. v. Ellerth*, 524 U.S. 742 (1998); *Faragher v. City of Boca Raton*, 524 U.S. 775 (1998).

Title IX and Education

Just as Title VII of the Civil Rights Act prohibits sex discrimination (including sexual harassment and assault) in employment settings, [Title IX of the Education Amendments of 1972 Section 1681\(a\)](#) was designed to prohibit sex discrimination in federally-funded educational institutions:

No person in the United States shall, on the basis of sex, be excluded from participation in, be denied the benefits of, or be subjected to discrimination under any education program or activity receiving Federal financial assistance (para. 2).

Supreme Court decisions and guidance from the US Department of Education have interpreted this prohibition broadly, to include sexual harassment (harassment based on gender as well as quid pro quo and hostile environment) as well as sexual assault.

Schools must take steps to prevent, respond to, and rectify any such behaviors within their educational institution or risk violating Title IX and losing their federal funding.

While the discussion of Title IX often focuses on students, faculty and staff could also potentially be sexually harassed or sexually assaulted at an educational institution. In this case, they would have both Title VII and Title IX available to them as remedies.⁹

Essentially, Title IX requires schools to conduct their own investigations of sexual harassment or sexual assault committed against students, faculty, and staff, and to take action to address them, regardless of whether or not there is any criminal justice process involved. This applies to both on- and off-campus incidents, and to student-on-student, employee-on-employee, employee-on-student, and student-on-employee behavior, including a hostile environment. Title IX also requires schools to have policies and procedures that are equitable, fair, and impartial for all involved, and to appoint and publicize a Title IX Coordinator who can be contacted for assistance.

Additional federal requirements also apply. Clery Act regulations require educational institutions to conduct annual training of staff involved in the investigation of sexual harassment complaints, and the Violence Against Women Act (VAWA) was amended to include specific reporting requirements in the campus's Annual Security Report.



Understanding the rights and responsibilities outlined in Title IX can be confusing, and even overwhelming for faculty, staff, and students in institutions of higher education. Fortunately, there are many resources to assist campus administrators, security, and law enforcement, and administrators, in designing appropriate policies, protocols, and other responses to sexual violence. These include the [International Association of](#)

⁹ Title IX applies to employees as well as students, as the Supreme Court made clear in *North Haven Board of Education v. Bell*, 456 U.S. 512, 72 L. Ed. 2d 299, 102 S. Ct. 1912 (1982) (holding that Title IX broadly covers discrimination against any "person").



[Campus Law Enforcement Administrators \(IACLEA\)](#), which hosts an annual conference in addition to other training opportunities and tools. The American Association of University Women (AAUW) also offers a variety of resources, including the [Ending Campus Sexual Assault Tool Kit](#) and [Know Your Rights on Campus](#). The [Clery Center](#) also offers a variety of training opportunities and tools designed to assist campus administrators and others in increasing campus safety.

Sexual Assault

As noted at the outset, *sexual assault* generally refers to criminal conduct involving sexual penetration without consent, but the term is used to describe a range of specific offenses. In our training materials, we use it to describe a felony-level sexual offense committed against a person using force, threat or fear – or when the person cannot consent due to incapacitation. This incapacitation could be due to alcohol or drug use, a severe cognitive disability, or unconsciousness. Of course, people under a certain age also cannot legally consent.

Some states also include define misdemeanor sexual battery as “sexual assault;” this often includes non-penetration offenses such as unwanted sexual touching. However, sexual battery can also be a felony. For example, in California, forcibly restraining and touching a person, skin to skin (penetration is not required), is a felony and in some states like Florida, felony sexual assaults are referred to as sexual battery. In addition, a felony can be committed in the commission of a misdemeanor sexual battery (e.g., kidnapping, burglary, false imprisonment).

Not every act of unwanted sexual touching will constitute sexual battery, however. It is a crime that requires an element of intent. Most sexual battery statutes define the crime as unwanted touching *for purposes of* sexual arousal, sexual gratification, or sexual abuse. This definition excludes accidental touching or touching without the requisite criminal intent. Also, although they are not typically defined as sexual assault, sex crimes do often include other criminal offenses such as stalking, harassment, false imprisonment, threats, burglary, and many others.

 Although penal code definitions of criminal sex offenses vary state by state, most are conceptually similar and can be understood by analyzing their elements. EVAWI's OLT module, [Law and Investigative Strategy: What Kind of Sexual Assault is This?](#) can help law enforcement and others build knowledge to determine not only which specific criminal offenses were committed in different sexual assault scenarios, but also frame the investigative strategy based on the defense that is most likely to be raised.¹⁰

Because criminal charges are brought by prosecutors, not victims, they sometimes proceed despite the victim's wish to "drop charges." Prosecutors should always try to take the victim's wishes into consideration, but they do not technically represent victims in an attorney-client sense. This is different from civil litigation, where victims usually have their own lawyer.

Statutes of Limitations

Both civil and criminal sexual harassment and sexual assault cases are subject to applicable statutes of limitations. These are the time periods within which parties must initiate legal proceedings. For criminal cases, each offense has its own statute of limitations; more serious crimes have longer periods of time. When a statute of limitation expires, courts lose jurisdiction to hear the matter. However, there is a national trend to eliminate statutes of limitations for felony-level sex offenses. This has already been accomplished in a number of states, but others still retain laws regarding strict timeframes within which charges can be filed.

Sexual harassment claims also have time limits. The time limit for filing a complaint with the EEOC is 180 calendar days, which is extended to 300 days if there is a working agreement with a state anti-discrimination agency. If the harassment is ongoing, a complaint must be filed within 180 or 300 days of the last incident, but EEOC guidance states that it will look at all incidents when investigating the complaint, "even if the earlier incidents happened more than 180/300 days earlier." States and local governments also have anti-discrimination laws that apply to sexual harassment, and the statutes of limitations for these may vary. There are also time limits for filing a complaint in court. It is critically important to know the time limits for filing complaints, so remedies are not lost. However, campuses do not usually have time restrictions for filing a complaint within their administrative system. A university's policy should specify how and when it will respond. For example, many schools will conduct an investigation as long as the respondent is still affiliated with the institution (student, faculty, or staff) and will provide support and modifications to a complainant who is still affiliated with the institution.

¹⁰ For more information on penal code definitions for rape and sexual assault in each state or territory, a statutory compilation can be requested from [AEquitas: The Prosecutor's Resource on Violence Against Women](#). A statutory compilation can also be requested for the laws relating to domestic violence, rape shield laws, and reporting requirements for competent adult victims of sexual violence (among other topics). The legal definitions of sexual assault offenses in each state and territory can also be searched in the online database provided by [RAINN](#).

Conclusion

The distinctions between sexual assault and sexual harassment inform the approach to working with complainants, as does the overlap. These are often traumatic experiences that have a significant impact on victims. Although different in many important ways, both forms of abuse take their toll on victims physically, emotionally, and financially. Victims also frequently fear being ostracized by peers, particularly when they bring allegations against powerful figures who are well-liked within the organization (in the case of sexual harassment) or within the social circle or community (in the case of sexual assault). This highlights the importance of ensuring that victims have meaningful support throughout the process of reporting, investigation, and adjudication – regardless of which system they are engaged in. Services can be provided by system-based victim advocates working within a law enforcement agency or prosecutor’s office, campus or community-based victim advocates, Human Resources personnel, and Title IX Coordinators, among others.

This is why the investigation of both sexual harassment and assault will frequently involve documenting a history of perpetrator behavior. Although it is not always admissible in court, this information can potentially help a judge or jury view the behavior in the context of prior similar acts. This will often lend credibility to victim allegations and witness observations. Also, victims may be willing to testify in another person’s case, even if they are not able or willing to do so in their own.

Both sexual assault and harassment investigations can also take advantage of the reality that there is safety in numbers. Victims who believe they are the only one who has been targeted often fear retaliation and disbelief. As has been demonstrated through the #MeToo movement, knowledge that they are not alone can give some the courage to find their voice. Then once one victim comes forward, others are often empowered to do the same. Unprecedented power also comes in numbers.

