

# Sexual Harassment – How Employers Can Avoid Being Pinned Against The Boards

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Sexual harassment is a common phrase in the workplace and most of you have likely attended countless seminars regarding behavior in the workplace and when conduct goes out of bounds.

Sexual harassment comes in various forms and even an allegation of sexual harassment can greatly impact your business. Even when the conduct does not involve contact or overt harassment of a colleague, it can still be characterized as unlawful sexual harassment. Let's revisit the basics in the event that you have not recently attended a seminar or need a refresher course on sexual harassment.

## **Sexual Harassment - What is it?**

Sexual harassment consists of unwelcome sexual advances, requests for sexual favors or verbal or physical that is sexual in nature. Generally, there are two types of unlawful sexual harassment in New Jersey, hostile work environment harassment and quid pro quo (this for that).

## **Hostile Environment Harassment – What is it?**

Hostile work environment harassment involves conduct which is intended or has the effect of interfering with one's work environment or creating an intimidating, hostile or offensive working environment. However, it is not enough that a colleague or supervisor has treated you in a harassing or unprofessional manner. It is essential to any cause of action that the complained of conduct be as a result of one's sex and that a reasonable person of the same sex would consider the conduct severe and pervasive. For example, if a supervisor or colleague treats all employees, regardless of their gender, the same, that does not constitute sexual harassment in New Jersey. In most cases, one incident of sexual harassment is not sufficient to result in a viable cause of action for hostile

environment harassment.

## **Quid Pro Quo Harassment – What is it?**

It is important to know what the Latin phrase quid pro quo means. Generally, it means “this for that” and signifies a give and take relationship. Quid pro quo harassment is where harassing sexual conduct is made a condition of an employee’s employment or where a decision by the employee to participate in unwelcomed sexual conduct is a basis for employment decisions. The harassment must be based upon sex in order to be characterized as quid pro quo harassment.

## **When Can an Employer be Liable for Sexual Harassment?**

In New Jersey, employers can be liable for sexually harassing conduct committed by supervisors, non-supervisory employees and even third-parties who are not employed by the employer.

1. Supervisory Liability - Employers can be liable for sexual harassment engaged in by supervisors when the supervisor is acting within the scope of his or her employment and making decisions such as discipline, promotions, pay and benefits. The employer may also be liable for actions taken by a supervisor outside of the scope of employment if the employer intended the conduct, was negligent and when the supervisor acts on behalf of the employer and it was relied upon by the employee.
2. Non-Supervisory Employee Liability – Generally, an employer is not responsible for harassing conduct by co-workers. An employer’s liability for hostile work environment harassment is a function of an employer’s reaction to conduct rather than the conduct itself.
3. Third-Party Liability – Employers may be liable for sexual harassment committed by third-parties if the employer knew or should have known about the conduct, had authority over the harasser and failed to take corrective action.

## **How Can an Employer Avoid Liability?**

The most effective way to minimize employer liability for sexual harassment claims is to have a sexual harassment policy and a comprehensive complaint procedure. The following are recommended ways to avoid liability:

1.     Anti-Sexual Harassment Policy: All employers should have a clear anti-harassment policy which is distributed to employees and requires signatures of employees acknowledging receipt. The policy should clearly state the prohibited conduct, prohibit retaliation resulting from complaints, set forth the complaint process, preserve confidentiality, prompt and thorough investigation and ensure that immediate corrective action be taken if harassment is confirmed to have occurred. Failure to have an anti-harassment policy may be evidence of negligence.
2.     Training: All employees should receive training on sexual harassment, including officers, supervisors and non-supervisory personnel. Training may be performed by a trained employee such as a human resources staff member or a consultant.
3.     Response to Complaints: Employer should take every complaint of harassment seriously. Complaints should be investigated promptly and confidentially. If a complaint is sustained, the employer should take immediate corrective action including discipline and potentially termination of the harasser.
4.     Observation: Employers should monitor the work environment to ensure that it is free of harassment. If your business is fortunate to have a trained human resources employee, that staff member should be charged with monitoring harassment.

The best way to handle sexual harassment is to prevent it from occurring. Although you cannot always avoid sexual harassment claims, you can take steps to discourage a harassing environment and train employees. If nothing else, you can use your anti-harassment efforts as evidence should a claim arise. If you have an anti-harassment policy, make sure all of the players play by the rules, no matter what level the employee. If you allow your employees to make up the rules or play the way they want, it may cost you. Listen to the coach.