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**Legal Q & A**  
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**Q. What constitutes sexual harassment in the workplace?**

Sexual harassment is a form of sex discrimination that violates Title VII of the federal Civil Rights Act of 1964 (the Act) and Texas law. The Equal Employment Opportunity Commission (the federal agency charged with enforcing the discrimination laws) defines sexual harassment as “unwelcome sexual advances, requests for sexual favors, and other verbal or physical conduct of a sexual nature” that affects an employee in any one of three ways: (a) submission to such conduct is made explicitly or implicitly a term or condition of a person’s employment; (b) submission to or rejection of such conduct by an individual is used as a basis for employment decisions affecting that individual; or (c) such conduct has the purpose or effect of unreasonably interfering with an individual’s work performance or creating an intimidating, hostile, or offensive working environment.

Courts have held that both women and men can be discriminated against because of their sex. Thus, the gender of the harasser or the person being harassed makes no difference. *Oncale v. Sundowner Offshore Services, Inc.*, 118 S.Ct. 998 (1998); *See also Dillard Dept. Stores, Inc. v. Gonzales*, 72 S.W.3d 398, 407 (Tex.App.—El Paso 2002, pet. denied) (holding that same-sex sexual harassment is actionable under the Act).

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

Examples of unwelcome conduct includes, but is 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. However, these actions alone (or a mere offensive utterance) will not, by themselves, support a sexual harassment claim. The alleged harassment must be sufficiently severe or pervasive enough to alter the conditions of the victim’s employment and create an abusive working environment. *Harris v. Forklift Systems, Inc.*, 510 U.S. 17, 21 (1993).

**Q. Can a city be held liable for an official or employee’s harassment?**

An employer may be held vicariously liable for a supervisor’s harassment without regard to the employer’s culpability. *Faragher v. City of Boca Raton*, 118 S.Ct. 2275 (1998). The strict liability standard is triggered only when the harasser is the plaintiff’s supervisor. The harassment need not occur at the job site or during work hours. *Burlington Industries v. Ellerth*, 524 U.S. 742 (1998).

The standard for holding an employer liable for harassment perpetrated by a coworker or third party requires that the plaintiff prove that the employer *knew or should have known*

of the harassment and failed to take prompt remedial action. This means that once an employee reports harassment to a supervisor, or a supervisor knows or notices anything that might be considered harassment, the employer must take prompt action to stop the harassment and prevent it from occurring. If the employer fails to take such necessary actions to stop the harassment, the employer could be held liable.

**Q. What defenses are available to employers?**

If the harassment resulted in a tangible employment action (such as termination, demotion, or unfavorable job assignment), the employer does not have the option of proving any defense. If no tangible employment action resulted from the harassment, the employer has the option of raising an affirmative defense to avoid liability. For example, an employer may seek to prove that: (1) it had an adequate policy against sexual harassment with a complaint process; and (2) the employee/plaintiff failed to take advantage of the policy to stop the harassment. *Watts v. Kroger Co.*, 1999 WL 147832 (5<sup>th</sup> Cir. 1999).

**Q. What are the possible penalties for sexual harassment?**

In addition to any civil liability (for example, money damages) that may come from a sexual harassment lawsuit, 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 Ann. § 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?**

Retaliation is defined as taking certain employment actions, such as discipline or termination, against a person who: (1) opposes a discriminatory practice; (2) makes or files a charge; (3) files a complaint; or (4) testifies, assists, or participates in any manner in an investigation, proceeding, or hearing. Title VII and state law make it illegal to retaliate in any way against an employee who reports sexual harassment, whether it is on the employee’s own behalf or that of another employee. It is also illegal to retaliate against an employee who participates in an investigation or related proceeding as a victim or a witness. Moreover, if an employee sues for retaliation related to a protected activity, such as filing a sexual harassment complaint, the employee need not prove that the sexual harassment allegation has merit. Rather, the employee must prove only that the employee complained in good faith about the harassment and that the company took some adverse employment action against the employee because of the complaint.

**Q. How can cities prevent harassment and limit their liability?**

Because sexual harassment continues to be an important topic for all employers, cities should take all necessary preventive measures to avoid litigation and liability from harassment cases. Such preventive measures include, but are not limited to: (1) having and enforcing a strong harassment policy and complaint process; (2) distributing a copy of the policy to all employees, including seasonal, temporary, and contract employees; (3) immediately and thoroughly investigating all complaints; (4) making prompt, effective responses to employee complaints; and (5) appropriately training, screening, and monitoring supervisors.