NOTE ON GENDER DISCRIMINATION AND SEXUAL HARASSMENT

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It may very well be that ever since organizations began, some organizational members have taken advantage of others, treating them unfairly because of their demographic characteristics, including gender. In the United States, however, a series of laws and court decisions have influenced the way organizational members must treat each other. Specifically, Title VII of the Civil Rights Act of 1964 explicitly made discrimination in the workplace based on sex unlawful. Subsequent court decisions have also established that sexual harassment is a form of gender-based discrimination, and therefore an unlawful employment practice.

In the 1991 Senate confirmation of the nomination of Clarence Thomas to the U.S. Supreme Court, Anita Hill (who had worked as Thomas' subordinate at the Department of Education and the Equal Employment Opportunity Commission) grabbed the nation's attention with her allegations that Thomas had sexually harassed her. Although Thomas' nomination was in fact confirmed, national TV exposure ensured that sexual harassment as a pervasive and significant problem in the workplace had come "out of the closet."

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Gender Discrimination Lawsuits

One of the largest reported settlements in a sex discrimination lawsuit occurred in October 2002 when a court approved a $47 million settlement involving a class action lawsuit in which women alleged that Rent-A-Center unlawfully fired or forced out women from the company after it was acquired by Renter's Choice.[1] Even larger was the 2010 jury-ordered payment of $250 million by Novartis, the pharmaceutical giant, to female employees who claimed:

> *For years, the company paid them less than similarly situated men, discriminated against them in assignments and other career-enhancing opportunities, and denied them promotions in favor of ... men.*[2]

In spite of the enormous pay-out, Novartis' problems do not appear to have gone away, as in 2015 a second lawsuit, this time for $110 million was filed by women who claimed that the company had a "boy's club atmosphere" that was hostile to women and kept them from being promoted to high-paying positions.[3]

In 2004, a court allowed approximately 1.5 million current and former female Wal-Mart employees to file a class-action lawsuit against Wal-Mart for alleged systematic discrimination against women in salaries, bonuses, and training. If this class-action lawsuit had gone forward, it would likely have been the largest sex discrimination lawsuit in U.S. history. In August 2013, the U.S. federal court denied the women class certification, which meant that if the women wanted to pursue the claims against Wal-Mart, each one would have to file a lawsuit individually. In 2016, Wal-Mart quietly settled out of court with five of these women, and suits may continue to be brought against the company.[4]

Sexual Harassment Lawsuits

Several well-known companies have faced major sexual harassment lawsuits. In the late 1990s, Mitsubishi Motors faced several sexual harassment lawsuits concerning women employees at its factory in Illinois. Mitsubishi settled one harassment suit with 27 women for an estimated

amount of $9.5 million. In addition, the EEOC brought action against Mitsubishi for sexual harassment on behalf of more than 300 women in a class action lawsuit. In 1998, Mitsubishi settled that suit for 34 million dollars.[5]

Dial Corp. agreed to pay $10 million and submit to 2 ½ years of independent monitoring to settle a sexual harassment lawsuit involving approximately 1,000 employees at its Illinois factory.[6] PepsiCo, which owns SoBe, settled a class action sexual harassment lawsuit for $1.79 million.[7] In 2011, Ashley Alhford was awarded $40 million after being sexually assaulted by her boss, who had harassed her for over a year at Aaron's Rent-to-Own in St. Louis. The largest sexual harassment payment to date, $167 million in 2012, was likely the award to Ani Chopourian, a physician's assistant at Mercy General Hospital, where doctors "constantly asked her for sex" and called her a "stupid chick."[8] Babies "R" U.S., Inc., a division of Toys "R" U.S., Inc., settled a same-sex harassment lawsuit involving a male employee for $205,000.[9]

The Civil Rights Act of 1964

In 1964, the United States Congress passed the Civil Rights Act, which was signed into law by President Lyndon Johnson. The Act established a number of important legal protections for employees and applicants for employment. It applies to all organizations in the United States engaged in interstate commerce with 15 or more employees working 20 or more weeks a year, as well as state and local governments, employment agencies, and labor organizations. Title VII, that part of the Civil Rights Act that refers to employment, prohibits discrimination in any terms or conditions of employment based on race, color, religion, sex or national origin. The Act also established the Equal Employment Opportunity Commission (EEOC), which is responsible for enforcing EEO laws. The Civil Rights Act was passed by Congress in order to respond to America's civil rights movement of the 1960s, one year after Martin Luther King's moving *I Have a Dream* speech in front of the Washington Monument. Although the initial

focus of the civil rights movement was the establishment of equal treatment for people of all races, the Act includes protection against sex discrimination. This protection was added to the original civil rights bill by Congressmen from Southern states in the belief that if protection against sex discrimination were included, it would derail passage of the entire Civil Rights Act!

Section 703 of Title VII of the Civil Rights Act of 1964 identifies as unlawful the following:

(a) It shall be an unlawful employment practice for an employer

(1) to fail or refuse to hire or to discharge any individual, or otherwise to discriminate against any individual with respect to his compensation, terms, conditions, or privileges of employment, because of such individual's race, color, religion, sex, or national origin; or

(2) to limit, segregate, or classify his employees or applicants for employment in any way which would deprive or tend to deprive any individual of employment opportunities or otherwise adversely affect his status as an employee, because of such individual's race, color, religion, sex, or national origin.

[Subsections (b) and (c) refer to employment agencies and labor organizations]

(d) It shall be an unlawful employment practice for any employer, labor organization, or joint labor-management committee controlling apprenticeship or other training or retraining, including on the job training programs to discriminate against any individual because of his race, color, religion, sex or national origin in admission to, or employment in, any program established to provide apprenticeship or other training.

(e) Notwithstanding other provisions of this subchapter,

(1) it shall not be an unlawful employment practice for an employer to hire an employee, for an employment agency to classify, or refer employment any individual, for a labor organization to classify its membership or to classify or refer for employment any individual, or for an employer, labor organization, or joint labor-management committee controlling apprenticeship or other training or retraining programs to admit or employ any individual in such program, on the basis of his religion, sex, or national origin in those certain instances where religion, sex or national origin is a *bona fide* occupational qualification reasonably necessary to the normal operation of that business or enterprise, and

(2) it shall not be unlawful employment practice for a school, college, university or other educational institution of learning to hire employees of a particular religion if such school […] is, in whole or in substantial part, owned, supported, controlled or managed by a particular religion or by a particular religious corporation, association or society, or if the curriculum of such school […] is in whole or in substantial part, owned, supported, controlled or managed by a particular religious corporation [….].

[Subsection (f) provides that actions taken by employers in relation to individuals who are members of the communist party do not constitute "unlawful employment practice" as described in the Act.]

The Equal Employment Opportunity Commission

The EEOC is the federal agency responsible for enforcing Title VII and other federal equal employment opportunity laws (such as the Equal Pay Act, Age Discrimination in Employment Act, Americans with Disabilities Act, Pregnancy Discrimination Act, Genetic Information Nondiscrimination Act, and others). The Commission is composed of five Commissioners who are appointed by the President and confirmed by the Senate.

The EEOC has three main areas of accountability: 1) investigating and resolving charges of discrimination in employment, 2) gathering information for the Executive and Legislative branches of government, and 3) issuing equal employment opportunity regulations and guidelines.

Individuals who believe they have been the victims of unlawful discrimination may file a charge with the EEOC through one of its 53 offices across the country. The EEOC may launch an investigation, or select the charge for the EEOC's mediation program if both the complainant and employer express an interest in mediation. If a settlement is not reached through mediation, an investigation is conducted by the EEOC.

The EEOC will dismiss a charge if it finds that a violation is not established. When a charge is dismissed, the complainant may still file a lawsuit on his or her own behalf. If the EEOC finds that unlawful discrimination ***has*** occurred, the complainant will be given a letter of determination that details the EEOC's finding. The EEOC will attempt conciliation - negotiations that do not involve the courts - to remedy the alleged discrimination. If the case is not settled, the EEOC will decide whether to bring suit in federal court on behalf of victims of unlawful discrimination. If the EEOC decides not to initiate a lawsuit, a "right to sue" letter will be issued to the complainant and the complainant may bring a lawsuit. In addition, the complainant can

request a "right to sue" letter from the EEOC 180 days after the charge was filed and then file a lawsuit.

U.S. organizations with 100 or more employees are required to file annual reports with the EEOC, indicating the number of women and members of under-represented groups in different job categories. This information is provided to Congress and the President. However, it is also used by the Commission to identify possible violators of equal opportunity employment laws.

Finally, the EEOC issues regulations and guidelines that detail the EEOC's interpretations of the law. While these regulations and guidelines are not law, courts often defer to the EEOC's interpretations and have supported the EEOC views in numerous landmark decisions.

Although its mandate is ambitious, it is important to note that the EEOC, like all government agencies, must be responsive to the decisions and political agendas of publicly elected officials. Its budget and headcount, for example, have been severely constrained under some administrations. With an increasing number of complaints to investigate, limited resources, and pressures from the administration, the Commission needs to "pick its battles" carefully – pursuing some charges with full vigor, while providing only minimal resources to others.

Gender-Based Discrimination in Employment

Webster defines the verb discriminate *as* "to distinguish by discerning or exposing differences; to make a distinction; to make a difference in treatment or favor on a basis other than individual merit (such as in favor of your friends)."[10] Managers by necessity discriminate – not all applicants for employment are hired, not all employees are promoted or given pay increases, etc. Discrimination based on gender and other characteristics protected by EEO laws, however, is unlawful.

Disparate Treatment and Adverse Impact

Disparate treatment and adverse impact are two of the primary theories used to establish discrimination claims under Title VII. In cases involving **disparate treatment** discrimination, a plaintiff attempts to demonstrate that he or she was intentionally treated differently because of her gender (or another characteristic protected under EEO laws). Intent is an important component of the disparate treatment theory. For example, if an organization were to refuse to promote a woman to managerial positions, this would be a case of disparate treatment. Not all cases of discrimination are intentional, however.

Under the **adverse impact** theory, unintentional discrimination may be unlawful. When a uniform neutral standard is applied to both men and women, yet systematically has a negative effect on members of one sex, then adverse impact discrimination has occurred. (Adverse Impact is also referred to as Disparate Impact). For example, some police departments in the United States formerly had height requirements that systematically kept out women; this requirement has either been voluntarily abandoned or struck down as unlawful by the courts. In addition, the standards that employers use for hiring, promotion, admittance to training, etc., must be shown to be job-related. Standards that are not directly related to the job and that result in adverse impact discrimination against either women or men will be found unlawful.

In its landmark *Price Waterhouse v. Hopkins* decision, the Supreme Court noted that discrimination may also be based on **mixed-motives**. In a mixed-motive case, the employer considers both proper (e.g., job performance) and improper considerations (e.g., impermissible sex stereotypes) in making its employment decision. In the *Price Waterhouse* case, Ann Hopkins, a senior manager at Price Waterhouse was twice passed over for partner. She sued her firm, claiming that although her work had been highly praised and that she had generated more business and billed more hours than any other partnership candidate, she was treated

differently than males were and denied partnership. The record established that Price Waterhouse had a sex-based stereotype of the characteristics of a partner, but Price Waterhouse asserted that in any case Hopkins would not have been made a partner because of her "interpersonal skills."[11] The record showed that Hopkins was counseled by the firm to walk, dress, and act more femininely to improve her chances to make partner. The Court found that if Price Waterhouse could demonstrate that Hopkins' "interpersonal problems" alone were the reason the firm decided not to admit her to the partnership, it could avoid liability. Price Waterhouse could not.[12]

Burden of Proof

The burden of proof for complainants and employers varies depending on the theory of discrimination that is being used to establish a discrimination claim. In a disparate treatment case, the complainant must establish that he or she was subjected to different treatment because of gender. Under *McDonnell Douglas Corp. v. Green*, the complainant must establish: that s/he is a member of a group that has protection under Title VII; that s/he applied and was qualified for a job for which the employer sought applicants; that, despite his/her qualifications, s/he was rejected for that job; and that the employer continued to seek applicants for the positions having the same qualifications as did the plaintiff. [13] Once a *prima facie* case is established, the complainant creates a rebuttable presumption that the employer unlawfully discriminated against him/her. The burden of production (of evidence) then shifts to the employer to show a "legitimate, nondiscriminatory" reason for the employment decision. Where the employer meets the burden of production, the complainant must establish that the employer's proffered reason was not the true reason for the employment decision but merely a pretext for discrimination.

In an adverse impact theory case, once a complainant establishes that an employment practice excluded significant numbers of a group of individuals who have protection under Title VII, the

employer has to establish that its employment practices were justified and necessary (job necessity).[14]

Gender Identity

Although courts do not consider that Title VII extends to sexual orientation, the EEOC has put forth that discrimination on the basis of gender identity does constitutes a violation of Title VII. In 2011, Mia Macy applied for a job at a laboratory of the U.S. Bureau of Alcohol, Tobacco, Firearms and Explosives and was informed by phone that she "had the job" as long as her background check did not uncover any problems. Macy informed her employer that she was "in the process of transitioning from male to female." About a week later, she was told that she could not be hired due to "budget restrictions."[15] It later turned out that the position had been filled by another applicant. When Macy complained to the EEOC, the agency concluded that, "claims of discrimination based on transgender status, also referred to as claims of discrimination based on gender identity, are cognizable under Title VII's sex discrimination prohibition."[16]

Lawful Exceptions

Not all cases of gender-based discrimination are unlawful. Title VII provides that discrimination is not unlawful "in those certain instances where religion, sex, or national origin can be a **bona fide occupational qualification** reasonably necessary to the normal operation of that business or enterprise"[17] A *bona fide* occupational qualification (BFOQ) is a legitimate characteristic that must be present in all employees to perform a particular job. According to the EEOC's guidelines, the BFOQ exception is not applicable to situations involving the refusal to hire a woman when it is based on the assumption of employment characteristics of women in general (e.g., turnover rate higher among women); refusal to hire is based on sex stereotypes (e.g., women cannot be aggressive salespersons); refusal to hire is based on the preferences of co-

workers, clients, customers, or the employer; and the fact that the employer may have to provide separate facilities.[18]

There are very few jobs in which sex qualifies as a BFOQ. One example of a job in which sex is a BFOQ would be male stripper. In that case, an employer may discriminate against women for this job without violating Title VII. Over the years, the courts have clearly established that the BFOQ exemption is an extremely narrow exception and have rejected attempts by employers to assert BFOQ as a defense to charges of sex discrimination. A leading case in this area is the 1991 Supreme Court decision in *Auto Workers v. Johnson Controls, Inc*.,[19] in which the court rejected employer's claim that the BFOQ was a defense for its refusal to hire some women for certain jobs. Johnson Controls adopted a "fetal protection policy" that prohibited fertile women of childbearing age from holding a number of jobs in its car battery manufacturing plant. Johnson Controls asserted that a BFOQ existed because these women would be exposed to lead, which caused birth defects in children. The Supreme Court, however, ruled that BFOQs are limited to aspects that directly relate to an employee's (or potential employee's) ability to perform a job and that because a women's reproductive potential does not prevent her from performing the job, Johnson Control's policy did not qualify as a BFOQ. (The company had to redesign the production process to make is safe for all jobholders.)

Although the majority of the BFOQ cases involve attempts by an employer to exclude women from certain jobs, there are several cases that have held that employers may not exclude men from certain jobs because they are men, unless an employer is able to establish a BFOQ. For example, both Southwest and Pan Am Airlines unsuccessfully argued that sex was a BFOQ to do the job of flight attendant (then called stewardess), in the cases *Wilson v. Southwest Airlines Co.* and *Diaz v. Pan American World Airlines.* [20] In fact, in the *Diaz* case, Pan Am provided evidence including testimony from a psychiatrist that women have "the unique talent of calming passengers."[21]

Airlines and other employers may believe that employing women or men in certain jobs facilitates and improves service to customers and therefore has a positive impact on the business. In one case, an employer was sued for replacing men with women wearing sexy or alluring uniforms in jobs that did not strictly require women. In the case *Guardian Capital Corp. v. New York State Division of Human Rights,*[22] the Court rejected the employer's BFOQ defense to justify its replacing male wait staff with females wearing alluring uniforms in order to increase food sales. Customer preference will not support a BFOQ for sex discrimination except in very unusual circumstances. One such circumstance involved the Playboy Clubs.[23] In these cases, the Playboy Club was able to justify sex as a BFOQ for Playboy Bunnies because female sexuality was reasonably necessary to perform the job, which was found to be "titillating and enticing male customers."[24]

In 2008, Physicians Weight Loss Centers settled a lawsuit by the EEOC on behalf of men who the Centers refused to hire as weight loss counselors. The Centers alleged that being female was a BFOQ for this job. Part of the counselors' job was measuring the skin folds on the customers' bodies using calipers to determine their percentage of body fat. The court rejected Physicians Weight Loss Centers' argument that because customers preferred women, this rendered being female a BFOQ. The court ruled "preferences by customers have little, if any, legitimate role in make determinations of the legitimacy of discrimination under Title VII." [25]

A second defense to a claim of sex discrimination is **job relatedness.** Even if an employer's practices result in discrimination, the company may be able to defend itself on the grounds that the criteria used were directly related to a person's ability to do a job. For example, an airline can require a pilot's license for the job of pilot, even if doing so were to keep a disproportionate number of women out of that job.

A third defense to charges of discrimination is seniority. For example, some organizations have formal, **universally applied seniority systems** that are used as a criterion upon which to make

decisions regarding promotions, layoffs, etc. Even if the application of these rules results in disproportionate consequences for men and women, the courts have ruled that universally applied seniority criteria are legitimate and do not result in unlawful discrimination.

The fourth type of defense is called **business necessity**. Under this defense, an employer can justify employment practices or decisions that result in discrimination when these practices are necessary for the "safe and efficient operation of the business."[26] When employment practices that result in discrimination are put in place to ensure the safety of employees and customers, the business necessity defense has been successful. For example, in *Levin v. Delta Airlines* and *Burwell v. Eastern Airlines,*[27] courts upheld the validity of an airline's mandatory pregnancy leave for flight attendants in order to promote passenger safety.

In other cases, it has been argued that the "central mission" of an enterprise is an appropriate basis for the business necessity defense. Courts, however, have placed strict restrictions of the use of this defense. A business necessity defense cannot be used unless it can be demonstrated that the employer has no other equally acceptable defense, and that decisions made out of business necessity have a lesser impact on members of groups that enjoy protection under Title VII (in this case, women).[28] For example, when Wynn Oil Company removed a female sales representative from her job because customers in South America did not want to deal with women, the court found that this form of discrimination based on gender was unlawful: business necessity was an insufficient defense.[29]

Sexual Harassment

Although Title VII of the Civil Rights Act of 1964 specifically provides that discrimination based on gender is unlawful, it does not define the concept of sexual harassment, nor was it clear that the Act intended to protect against it. However, the EEOC interpreted Title VII to include

protection against sexual harassment. Supreme Court decisions have validated the EEOC's interpretation. Sexual harassment is defined as:

> **Unwelcome sexual advances, requests for sexual favors, and other verbal or physical conduct of a sexual nature constitute sexual harassment when:**
>
> **(1) submission to such conduct is made either explicitly or implicitly a term or condition of an individual's employment,**
>
> **(2) submission to or rejection of such conduct by an individual is used as a basis for employment decisions affecting such individual, or**
>
> **(3) 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.**

Quid Pro Quo and Hostile Work Environment

There are two categories of sexual harassment: ***quid pro quo*** sexual harassment and **hostile work environment** sexual harassment. *Quid pro quo* harassment involves an individual who has been forced to choose between suffering a job-related detriment and submitting to unwelcome sexual demands. An example of *quid pro quo* harassment is a case in which a supervisor requires an employee to engage in sex as a condition of keeping his or her job. In contrast, hostile environment sexual harassment involves an individual who has been required to endure a work environment in which behavior of co-workers, supervisors, customers, or third parties creates an intimidating, hostile, or offensive working environment that interferes with an individual's job performance. A leading case recognizing hostile environment sexual harassment is *Harris v. Forklift Systems, Inc.*[30] Teresa Harris, a manager at an equipment rental firm, Forklift Systems, was subjected to numerous comments by the company president's such as, "You're a woman, what do you know?," and a suggestion that the two of them "go to the Holiday Inn to negotiate her raise." Another harassing comment occurred after Harris had negotiated a deal with a customer, and the company president asked her, in front of other

employees," What did you do, promise the guy … some [sex] Saturday night?"[31] The Court found that these comments constituted a hostile working environment.

In the 1976 case of *Williams v. Saxbe*,[32] a court first recognized sexual harassment as a form of sex discrimination under Title VII. Cases of *quid pro quo* harassment, if substantiated, are easy to recognize since they often involve women or men suffering an adverse employment action when they refuse to submit to a supervisor's advances. However, courts have struggled with cases involving sexually hostile work environments. In 1986, the Supreme Court, in Meritor *Savings Bank v. Vinson*,[33] recognized the concept of **hostile environment sexual harassment**. Mechelle Vinson claimed that she had been harassed and forced to acquiesce to numerous sexual encounters with her bank branch manager in order to keep her job at the bank. The court ruled that unlawful sexual harassment occurs when sexual advances are "unwelcome." The court in Meritor held that an employer violates Title VII when it knew, or should have known, that its female employees are subjected to severe or pervasive, unwelcome sexual comments and/or touching – and the employer fails to take prompt and effective remedial action.[34]

The EEOC guidelines address the standards in determining if conduct was unwelcome based on a "reasonable person" standard: behavior that is considered sexual harassment is not what a particular woman (or man) may consider to be harassment, nor even what a majority of Americans might think, but rather what a "reasonable person" would judge it to be.

Notwithstanding the EEOC's guidelines and numerous court decisions on sexual harassment, there appears to be uncertainty as to what constitutes "unwelcome" behavior. In a hostile work environment case, the sexual harassment must be sufficiently severe or pervasive to alter the conditions of complainant's employment and create an abusive environment. In determining whether the unwelcome conduct created a hostile environment, the EEOC considers the following factors in determining whether a hostile environment has been created:

- whether the conduct was verbal, or physical, or both;
- whether the conduct was a one-time occurrence or was repeated;
- whether the conduct was hostile and patently offensive;
- whether the alleged harasser was a co-worker or a supervisor;
- whether others joined in perpetrating the harassment; and
- whether the harassment was directed at more than one individual.[35]

Thus, a single incident or a few isolated instances of offensive sexual conduct or remarks generally will be insufficient to create a hostile work environment. As one Court noted, Title VII does not create a claim of sexual harassment "for each and every crude joke or sexually explicit remark on the job" made by employees or supervisors.[36] However, the EEOC and the courts have ruled that one incident may constitute sexual harassment where the harasser touched the employee in an offensive manner.[37]

In July 2016, a former TV host of "Fox and Friends" and "The Real Story" on Fox New, Ms. Gretchen Carlson, filed a $20 million suit against Fox News Chairman Roger Ailes. Carlson alleged that Mr. Ailes had sexually harassed her for years and, when she refused his advances, he created a hostile work environment; later he refused to renew her contact with the TV program.[38] Shortly after, Fox News anchor Megyn Kelly published a memoir titled *Settle for More*, in which she claimed that Ailes had made inappropriate remarks about her clothing and hinted that he could help her advance in her career "in exchange for sexual favors."[39] Eventually, more than 20 women came forward to allege sexual harassment by Ailes.[40] In July 2016, Ailes was forced to resign from Fox.[41]

Men and Women and Sexual Harassment

In 2015, the EEOC received 6,800 claims alleging sex-based harassment, a decrease from a high of 7,944 in 2010.[42] While both men and women can be sexually harassed, 80% to 85% of sexual harassment claims to EEOC are by women. In one study of working people in Los Angeles, Konrad and Gutek (1986) found that women were nine times more likely than men to report

having quit a job because of sexual harassment, five times more likely to have transferred, and three times more likely to have lost a job.[43] The issue of what constitutes sexual harassment has led to several studies concerning what is perceived by individuals to constitute "unwelcome" sexual behavior. Not surprising, studies have found important differences between what men consider to be harassment and what women think it is.[44]

One study found that whereas 64% of female respondents felt that "uninvited sexual remarks" by a co-worker constituted sexual harassment, only 47% of male respondents agreed.[45] (See Exhibit 1.) In addition, identical behavior by supervisors and co-workers is not always interpreted the same way. (See Exhibit 2).

In a review of the literature, Riger (1991: 499) summarized the following differences between men's and women's perceptions of sexual harassment:

> *Men label fewer behaviors at work as sexual harassment* (Kenig & Ryan, 1986; Konrad & Gutek, 1986; Lester et al., 1986; Powell, 1986; Rossi & Weber-Burdin, 1983).
>
> *Men tend to find sexual overtures from women at work to be flattering, whereas women find similar approaches from men to be insulting* (Gutek, 1985).
>
> *Both men and women agree that certain blatant behaviors, such as sexual assault or sexual bribery, constitute harassment, but women are more likely to see as harassment more subtle behavior such as sexual teasing or looks or gestures* (Adams et al., 1983; Collins & Blodgett, 1981; Kenig & Ryan, 1986; U.S. Merit Systems Protection Board, 1981).
>
> *Even when they do identify behavior as harassment, men are more likely to think that women will be flattered by it* (Kirk, 1988).
>
> *Men are also more likely than women to blame women for being sexually harassed* (Kenig & Ryan, 1986; Jensen & Gutek, 1982).[46]

How Common is Sexual Harassment in the Workplace?

Studies have been carried out to determine how pervasive sexual harassment is in the workplace. One of the earliest studies was conducted by *Redbook* magazine in 1976. Ninety

percent of *Redbook* respondents reported they had encountered sexual harassment on the job.[47] Although the results of this survey can criticized because of probable response bias, the extent of the problem appeared to be vast. In 1978, Cornell University conducted a survey and found that 70% of women workers responded that they had been victims of sexual harassment.[48] From its survey of 23,000 people in 1981, the National Merit Systems Protection Board found that 42% of respondents believed that they had been sexually harassed.[49] Also in 1981, a study conducted jointly by *Redbook* and the *Harvard Business Review* found that 63% of responding managers reported sexual harassment in their companies.

A decade later, in spite of the publicity over sexual harassment in the workplace and a number of lawsuits, it seemed that little had changed. In 1991, *Time* magazine conducted a poll and found that 34% reported experiencing sexual harassment at work. This survey was done in October, shortly after the Clarence Thomas hearing.

Exhibit 1
What Uninvited Behavior from a Co-worker Constitutes Sexual Harassment?

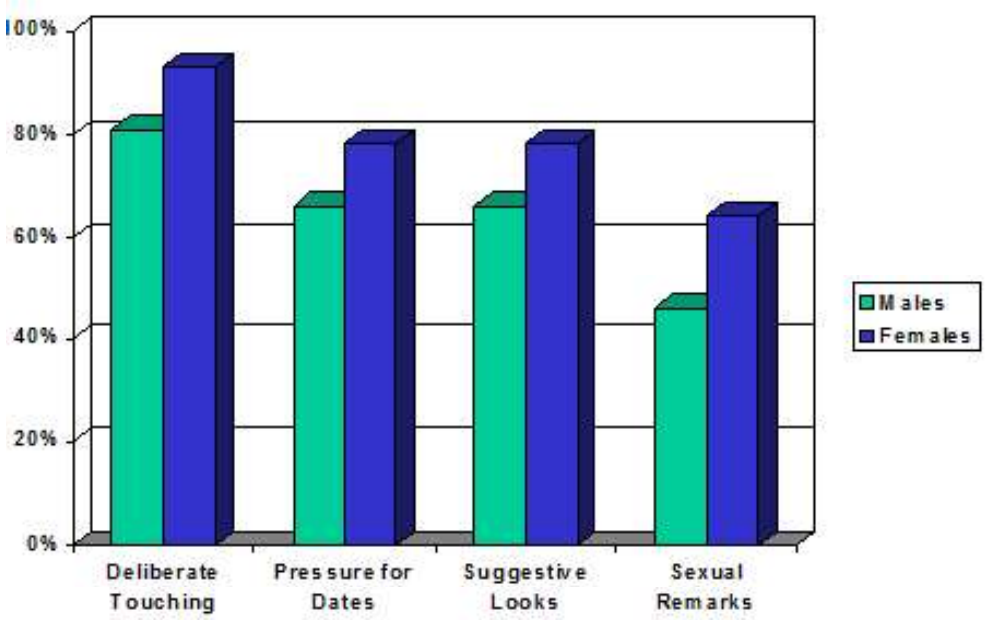
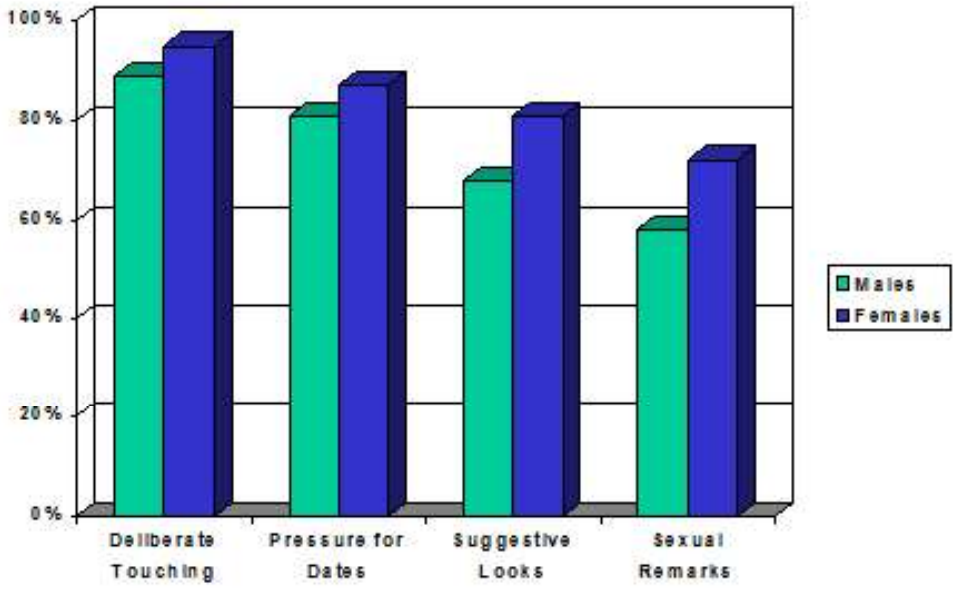


Exhibit 2
What Uninvited Behavior from a Supervisor Constitutes Sexual Harassment?



According to the National Association for Female Executives, women who hold positions as executives or who work in male-dominated companies are more likely to be victims of sexual harassment than are non-executives or women working in companies that have a large female employee population. This 1992 survey found that 60% of respondents reported being harassed.[50] A 1994 Harris Survey found that 31% of women disclosed that they had been sexually harassed in the workplace.[51]

Today sexual harassment has been reported in nearly all industry sectors and job categories. Although not in an employment situation, university students, including graduate business students, also report experiencing sexual harassment. [52] In 2011, a survey of just under 2,000 school children by the American Association of University Women found that 56% of girls and 40% of boys aged 12-18 reported that they had been sexually harassed in school or digitally (on Facebook or through texts or emails), typically by their peers.[53] In 2015, *Cosmopolitan*

magazine reported that 33% of the 2,235 females surveyed reported that they had experienced sexual harassment in their workplace.[54]

Where – in that range between 31% and 90% – the rate of sexual harassment in the workplace actually is, it is clear that the problem is pervasive.

Many Types of Harassment and Harassers

Although just about anybody in the workplace can be a harasser, it is not uncommon for harassers to occupy more powerful positions than the people they harass. A survey by *Working Women* found that of people who reported being harassed, 83% indicated that their harasser occupied positions of greater power than they did.[55]

One example of a case involving a man as the victim of sexual harassment occurred in 1995 when David Papa, a former store manager at Domino's Pizza brought suit against Domino's and was awarded $237,000 in back pay, plus interest, in a sexual harassment lawsuit. Papa was fired after he rejected the advances of his female supervisor who had made unwelcome sexual advances toward him. The court found that the supervisor's comments and actions created a hostile work environment.[56] According to *Psychology Today*,

> *Men who deviated from 'traditional' stereotypes of masculinity, whether by belonging to a sexual minority or who were actively involved in feminist causes were far more likely to experience some form or harassment. […B]acklash was particularly common against heterosexual men who challenge traditional gender roles.*[57]

A sexually hostile environment also can be created by discriminatory dress requirements. Several cases have held an employer liable for a work environment that fosters an environment in which employees are subjected to harassment by customers. For example, in the case *EEOC v. Sage Realty Corp.*,[58] a court ruled that an employer violated Title VII by firing a woman lobby attendant after she refused to wear a revealing uniform that subjected her to sexual comments and harassing behavior from nonemployees. In *EEOC v. Newtown Inn Assoc.*,[59] a court held

employer liable for sexual harassment of employees caused by the provocative theme night attire and dancing required of cocktail waitress.

Employers need to be aware of the pervasiveness of sexual harassment and that the EEOC and courts have held employers liable for harassment by supervisors, co-workers, customers, and third parties, including in cases in which the employer asserted that it had no direct knowledge of such harassment.[60] In *Faragher v. City of Boca Raton*, the Supreme Court held that an employer could be held liable for sexual harassment committed by its supervisors even if it had no direct knowledge of that harassment. The Court noted that in these types of cases an employer may defend itself by showing that it reasonably tried to prevent or correct sexual harassment and that the employee "unreasonable failed" to alert the company about the harassment. Thus, an organization that does not have an effective sexual harassment policy and company practices against sexual harassment could be held liable for harassment, even if it had no direct knowledge of the harassment. After the *Faragher* decision, many organizations adopted written anti-harassment policies and formal complaint procedures. In addition, organizations instituted mandatory training programs for their employees.

Claims of sexual harassment by third parties are also recognized by the courts in both *quid pro quo* and hostile environment claims. In these cases, Title VII protection is extended to persons who are injured by gender-based conduct directed at someone else or not directed at anyone in particular.[61] The EEOC's regulations and Policy Guidelines on Sexual Favoritism address such cases.[62]

Courts also view same-sex harassment as unlawful. In 1998, the Supreme Court, in *Oncale v. Sundowner Offshore Services, Inc.*,[63] established that same-sex harassment, not just harassment between different sexes, could be actionable under Title VII. Joseph Oncale, an oil-rig worker, alleged male co-workers and his boss physically and verbally abused him with sexual comments and threats. The Court held that such conduct and statements could constitute unlawful sexual

harassment because nothing in Title VII necessarily bars a claim of discrimination "because of …sex," when the plaintiff and the defendant [or the person charged with action on behalf of the defendant] are of the same sex.

In addition to federal law (Title VII), many states and cities in the U.S. have laws that prohibit sexual harassment in the workplace. Specific definitions and remedies often differ from federal law. Employers should be advised to review laws of their state and city to determine additional responsibilities and liabilities.

Legal Liability and Costs of Discrimination

Before the Civil Rights Act of 1991 was enacted, there were several cases that resulted in media headlines over the high cost imposed on employers for sex discrimination, particularly sexual harassment cases. In 1986, an Ohio woman won a $3.1 million verdict against her employer in a case of *quid pro quo* sexual harassment, in which she was told that providing oral sex was necessary in order to keep her job.[64] In 1991, a California court awarded $3.1 million to two female police officers who were subjected to a hostile work environment.[65] In 1992, the law firm of Baker & McKenzie was found liable for sexual harassment committed by one of its partners who, among other things, grabbed the breast of a secretary while pouring M&Ms into her shirt pocket. The jury awarded Rena Weeks, the lawyer's secretary, $6.9 million in punitive damages and $1.85 million in legal fees. The award was later reduced by the judge to $3.5 million.

Caps on Damage Awards

The Civil Rights Act of 1991 provided caps on damage awards. Congress enacted the Civil Rights Act of 1991 mostly because members of Congress believed that recent Supreme Court decisions had diminished the impact of the Civil Rights Act of 1964, not because of large

damage awards against employers. In addition to clarifying the burden of proof in discrimination cases and prohibiting the use of quotas, the 1991 law provided for the right to a jury trial and the right to receive compensatory and punitive damages in sex discrimination cases. ***Compensatory damages*** are awarded to the plaintiff to compensate for financial, physical, or psychological harm resulting from the discrimination. ***Punitive damages*** are awarded to the plaintiff as a means of punishing the defendant for wrongdoing. Such punitive and compensatory damages are capped at $50,000 to $300,000, depending on the size of the employer. However, in class actions, employers can be liable for each victim at the capped rate. Thus, under the Civil Rights Act of 1991, in class action lawsuits, employers could be ordered to pay damage awards in the millions or more.[66]

Harm from Sexual Harassment

In addition to job consequences, victims of sexual harassment experience both psychological and physical harm. A counseling service (the Working Women's Institute for Information, Referral, and Counseling Service) found that 90% of harassed women experienced psychological stress symptoms (nervousness, fear, and anger) while 63% experienced physical symptoms such as headaches, nausea, and fatigue.[67] While an employee need not suffer physical or psychological harm to successfully prevail in obtaining punitive damages,[68] such injuries may affect an employee's ability to perform a job and his/her morale. Organizations that have sexual harassment in its workplace may also suffer decreased productivity, increased turnover, and risk injury to their public image.[69]

Sexual harassment claims by employees may also place employers at risk for wrongful termination and defamation lawsuits filed by the alleged harasser. Legal scholars have noted that generally juries are unsympathetic to discharged harassers.[70] Employer liability in such cases is most likely found when the employer fails to conduct an investigation or negligently conducts such an investigation.

Conclusion

Gender-based discrimination and sexual harassment have become serious issues for U.S. organizations. For more than 50 years, federal law has prohibited discrimination based on the gender of employees or applicants for employment. Legally defensible justifications for employment practices that do result in discrimination against one gender include *bona fide* occupational qualifications, job relatedness, universally applied seniority systems, and business necessity. The EEOC and the courts have also found that sexual harassment is unlawful gender-based discrimination.

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