

Sexual harassment at work

Taking legal action about sexual harassment at work



Overview

All workers are protected from sexual harassment at work. This includes one-off incidents as well as ongoing incidents. Sexual harassment can happen to men, as well as women, and can be perpetrated by colleagues of the same or the opposite sex.

Laws against sexual harassment have been in place since 1975, but several extra protections have been added over the years. The main employment law framework is now contained in the Equality Act 2010 ('the Act'). Claims can be made in the Employment Tribunal by workers (men or women), job applicants, employees and apprentices.

What is Sexual Harassment?

Sexual harassment is:

- Unwanted conduct of a sexual nature or that is related to gender reassignment or sex, which has the purpose or effect of violating the dignity of a worker, or creating an intimidating, hostile, degrading, humiliating or offensive environment for them; or
- Less favourable treatment received because a worker has previously rejected, or submitted to, an earlier act that amounts to sex discrimination or sexual harassment.

For example it will be harassment for a manager whose repeated advances to a more junior female worker have been consistently rebuffed, subsequently to give the woman a poor performance review because she had rejected him.

It will also be harassment for a manager to ridicule a more junior female worker as 'easy' in front of colleagues because (even though she did not in fact want him to) she had previously allowed him to kiss her on repeated occasions; or

- Unwanted conduct on the ground that the worker intends to undergo, is undergoing or has undergone gender reassignment that has the purpose or effect of violating their dignity or creating a hostile, degrading, humiliating or offensive environment for them. This is covered in more detail in our 'Gender Reassignment Factsheet'.

Unwanted Conduct

An essential characteristic of the conduct is that it is unwanted, must take place at work and in the course of employment, although it can also extend to work social events outside normal working hours (i.e. Christmas parties). Typical examples include:

- Written or verbal comments of a sexual nature;
- Sexually suggestive remarks;
- Unwanted physical contact (i.e. touching);
- Displaying explicit images or sending correspondence with explicit comments;

- Offensive jokes and questions about their personal lives (i.e. it need not be physical); and
- Sexual assaults (sexual assaults and other physical threats may also be criminal matters).

In considering the conduct, the Employment Tribunal will consider the worker's own subjective experience together with whether it was reasonable for the conduct to have had the particular effect it did.

An act can still be considered sexual harassment even if the alleged harasser did not mean for it to be. It also does not have to be intentionally directed to a specific worker. This applies to one-off incidents and ongoing incidents. Employment Tribunals have often rejected the notion of "banter" as a justification for the conduct or sexist remarks. It is not always clear at the outset where the line is drawn, however, as a rule of thumb, if the worker makes it clear to the perpetrator that the conduct was unwanted, it will assist any claim for sexual harassment.

What is not covered?

There is no express protection from harassment which relates to the protected characteristics of marital status, civil partnership status, pregnancy or maternity. However, in circumstances where the victim of harassment is protected by the

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Act against being subject to any other detriment, there may be another means of seeking redress, by bringing a direct discrimination claim. For more information see our 'Sex Discrimination' and 'Pregnancy and Maternity Discrimination' factsheets.

Employer's Duties and Obligations

All employers have a duty of care to protect their workers from unlawful discrimination in whatever form it may take place. Employers can therefore be liable for acts of harassment committed by one worker against another worker (known as 'vicarious liability').

However, if an employer can show that it took all reasonable steps to stop its employees from partaking in such conduct, then it may escape liability. Such reasonable steps may include having a well drafted anti-harassment policy and ensuring all workers are aware of the policy, providing workers with suitable harassment training and adopting a top-down zero tolerance approach to workplace harassment and making this clear to their workers.

As individuals can be held personally liable for harassment of their colleagues it is often advisable that in such circumstances the worker considers bringing a claim against the individual(s) in question.

Third Party Harassment

An employer has currently no explicit liability under the Act for the harassing actions of third parties (i.e. persons who are neither its workers nor agents). However the inclusion of third party harassment is the subject of a current government consultation.

Currently victims of sexual harassment by a third party can bring their claim in the civil courts under the Protection from Harassment Act 1997. Such an action

would not be against the victim's employer, but directly against the third party.

Burden of proof

The Act provides that if an individual establishes clear facts which could enable the Employment Tribunal to infer or conclude that sexual harassment has occurred, it is then for the employer to provide evidence to justify the treatment. In the absence of an adequate explanation from the employer, the Employment Tribunal must draw an inference of harassment.

Where an employer has failed to comply with relevant statutory Codes of Practice, the Employment Tribunal may also draw inferences from their failures. For example, this may include failures in relation to the way in which they have investigated the worker's complaint or grievance, failure to respond to an Equalities Questionnaire or their recruitment process.

What should you do if you have been sexually harassed?

Firstly, we recommend keeping a journal of the relevant incidents to assist in any later proceedings. In addition, consider:

- If possible, raising the issue directly with the perpetrator and making it clear that the conduct is unwanted;
- Talking to HR, a colleague, your manager, a friend or even a family member;
- Raising an informal or formal grievance in line with the employer's Grievance Policy, Equalities Policy/Dignity at Work policies or Anti-Bullying and Harassment policies;
- Taking legal advice promptly to help you navigate this difficult process and meet time limits (see below); and

- Issuing proceedings at an Employment Tribunal or Civil Court as may be necessary.
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Equalities Questionnaires

You can serve an Equalities Questionnaire to obtain information regarding your complaint. ACAS have prepared a guidance on 'asking and responding to questions of discrimination in the workplace' which is available on their website at www.acas.org.uk

Mandatory ACAS Early Conciliation

If you are thinking about bringing an Employment Tribunal claim, you will first need to notify details of your claim to ACAS, who will then offer Early Conciliation to try to resolve the dispute.

The conciliation period can be up to one month and may be extended by a further period of 14 days. If the claim does not settle, ACAS will issue a certificate confirming that the mandatory conciliation process has concluded which permits you to proceed to bring your claim.

Bringing a claim

A claim for sexual harassment must be brought in the Employment Tribunal within three months less one day of the treatment you are complaining about. Where a series of acts amounts to a continuing course of conduct, the claim may be brought within three months less one day from the end of the conduct. Lodging a grievance or being in an appeal process does not affect this time limit.

If you have raised a complaint via your employer's Grievance procedure they will need to follow the ACAS Code of Practice on Discipline and Grievance Procedures (which can be downloaded from the ACAS website). This is aimed at assisting parties to resolve disputes

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within the workplace. If your claim is successful but the Tribunal considers that you have failed to comply with the Code, your compensation could be reduced by up to 25%. (There are also penalties on the employer if it does not comply with the Code).

Starting the ACAS Early Conciliation process may operate to extend the time limit for lodging an Employment Tribunal claim. The process makes the calculation of time limits in Employment Tribunal cases more complicated. Claimants are advised to be aware of limitation issues and seek legal advice promptly. For further information on the ACAS early conciliation process visit: www.acas.org.uk

Remedies

If successful an Employment Tribunal may grant any one or a combination of the following remedies in light of what it considers just and equitable:

- A declaration on the rights of the parties;
- A recommendation that the employer takes a particular course of action;
- Re-engagement or reinstatement if the individual succeeds in an unfair dismissal claim; and
- Compensation (plus interest) for loss or past and future earnings (if any), loss of congenial employment, injury to feelings and in some cases injury to health. Whilst there is no limit on the amount of compensation that can be awarded, a worker can only seek compensation for the damages which was directly caused by their employer's harassment.



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