

# Harassment in the workplace

## How to recognize wrongful workplace conduct

**E**mployers have a responsibility to create an environment that errs on the side of caution in protecting their employees against workplace harassment, says Kerri L. Keller, Attorney at Brouse McDowell.

“An effective policy will describe the sort of conduct that is prohibited, state who is protected by the policy and who must abide by it, and warn all employees that they must follow the policy,” Keller says. “It must provide a procedure for dealing with complaints and ensure that all complaints will be addressed promptly and impartially.

“There should also be a prohibition against retaliation. Taking measures such as the creation and enforcement of an appropriate policy can help insulate against liability should an employee file a lawsuit and allege harassment.”

*Smart Business* spoke with Keller about what employers need to know about workplace harassment.

### What constitutes illegal workplace harassment?

Workplace harassment is unlawful when an individual is harassed on the basis of his or her gender or other protected status, such as age, race or religion. Sexual harassment may be the most prevalent type of workplace harassment, but it is not the only type of workplace harassment. The Equal Employment Opportunity Commission (EEOC) defines sexual harassment as ‘unwelcome sexual advances, requests for sexual favors and other verbal or physical conduct of a sexual nature.’ It can be illegal to harass a woman by making offensive comments about women in general, states the EEOC, even if the comments are not sexual in nature. Importantly, the harassing party can be either a woman or a man, and the victim and harasser can both be the same

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sex. So, a woman can harass a man, or vice versa.

### So even a joke can be illegal harassment?

The law does not prohibit teasing, or an offhand comment, or joke. Also, an isolated incident that is not serious will generally not qualify as harassment that is illegal in nature. As the EEOC notes, ‘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).’

### What does this mean for an employer?

Employers must understand the types of harassment. Quid pro quo harassment is harassment committed by a person who can take formal employment actions, such as hiring and firing. Quid pro quo essentially means ‘this for that.’

For instance, quid pro quo harassment would occur if a supervisor conditioned an employee’s career advancement on sexual favors. Hostile work environment is the other type of harassment. It differs because the harasser does not need to be in a position to take formal employment actions. The harasser can be a co-worker, or someone who is not an employee of the employer, such as a client or even a customer.

### Is it only sexual conduct that employers need to worry about?

No. A hostile work environment does not always need to be sexual in nature, i.e. it can involve harassment based on gender. For instance, a woman can allege a hostile work environment if the men tell jokes of a sexual nature, even if they do not directly involve the woman who feels harassed by them. But, notably, a hostile work environment can also result from comments about a person’s race, age, disability, national origin or religion.

### What is the difference between an environment that is not hostile and one that is?

In order for a work environment to be deemed hostile, it must be subjectively abusive and offensive to the person who is being harassed, and objectively offensive enough that a ‘reasonable person’ would find the environment to be hostile or abusive.

The second prong is of particular importance, as it generally serves to protect employers from those employees who may be overly sensitive. Employers usually do not have to worry about liability from isolated incidents or the telling of a perhaps inappropriate joke, unless those incidents or jokes would rise to the level of being objectively offensive to a reasonable person. ●