



# NONPROFIT ADVISOR

For DAV Departments and Chapters

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CAN WE STOP WORRYING ABOUT SEXUAL HARASSMENT?

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Sexual harassment cases are always in the news, and usually involve some bad conduct in the workplace. This naturally raises the question of whether it is necessary even to worry about sexual harassment when there *is* no workplace, as is the case in some DAV departments and many DAV chapters. This issue of our newsletter responds to that question.

## **Can actionable sexual harassment occur outside the employer-employee context?**

The answer to this question is a resounding “yes!” It has always been the case that, even in the workplace, third parties could be victims or perpetrators of harassment. For example, if an outside salesperson comes into a workplace and makes repeated and unwelcome sexual comments to an employee, the employee is a victim of sexual harassment.

The same logic has been applied to non-workplace contexts to find and punish incidents of sexual harassment.

## **But I thought that the federal law on sexual harassment only covered the workplace. Right or wrong?**

Generally correct. But don’t forget that there are state, county and city codes that often cover the same ground as the federal law, but encompass even more potential perpetrators and victims. For

example, some state codes adopt the federal definition of “sexual harassment,” but prohibit it across the board whether or not it happens to arise in an employment context.

## **What, then, is sexual harassment?**

The definitional problem becomes a bit thorny when one gets out of the employment context. This is because most of the cases defining “sexual harassment” have emerged from workplace disputes. Certainly, the major decisions of the United States Supreme Court on the issue are labor-related decisions.

In the labor context, “sexual harassment” means, generally, one of the following two kinds of illegal behavior: (1) conditioning the receipt of some form of employment benefit (assignments, promotions, raises, continued employment) on the unwilling provision of sexual favors; or (2) creating an uncomfortable (hostile) working environment by repeated or extreme unwelcome conduct of a sexual nature (jokes, comments, leering, touching). The alert reader will notice immediately that these definitions refer explicitly to the workplace.

In order to understand what constitutes sexual harassment in a non-workplace environment, it is necessary to extract the essence of the above and “retrofit” the definition for broader use.



### **OK, so what is sexual harassment in a non-workplace environment?**

There is quite a bit of literature, and some case law, on this question. In general, sexual harassment in a non-employment context is unreasonably disrespectful conduct with a sexual component that is directed at a person and is not welcomed by that person.

### **What about some examples?**

Sure. Consider these:

- The male director of a club takes a membership application from a woman who is sitting at his desk and repeatedly comes around to her side of the desk and peers at her breasts while purporting to “help” her with the application.
- A female customer in a store is ushered into a changing room with a “broken” lock which a male salesperson repeatedly opens “by accident.”
- A bartender in a chapter bar refuses to make a cocktail for a female patron until she delivers a kiss to him.

### **All the victims are women. What is that about?**

The sexes in the examples could have been reversed but the bottom line and the sad truth is that incidents of sexual harassment are still, for the most part, incidents of men abusing women. Nonetheless, they are not limited to those kinds of cases and there are plenty of examples of women harassing men, as

well as same-sex harassment by both genders.

### **So if we are not in a state that expands the harassment laws to all kinds of activities (not just employment), are we in the clear?**

No. Even if the law does not explicitly provide a cause of action for non-workplace harassment, the types of conduct described above could become the basis for many other kinds of legal actions: battery, invasion of privacy, intentional infliction of emotional distress, etc. The bottom line is where there is a plaintiff with a will, he or she will find a way.

### **Any ideas on prevention?**

Glad you asked. There is a growing body of literature that suggests that the development of a culture of civility within an organization can go a long way toward eliminating sexual harassment and other interpersonal problems that plague, and can ultimately destroy, organizations. One of the best short summaries of civility comes from no less an authority than the father of our country, George Washington, who said:

*Every action done in company, ought to be done with some sign of respect to those who are present.*

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