

# SEXUAL HARASSMENT AND VIOLENCE in the WORKPLACE:

The Role of Advocates, Counselors and Medical Professionals  
in Obtaining Remedies for Victims

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## Objectives:

- ✓ EEOC, who we are, what we do
- ✓ Law on Sexual Harassment
- ✓ Retaliation
- ✓ Hurdles to Proving a Case
- ✓ Case Study: EEOC v. Harris Farms
- ✓ How Advocates and Health/Mental Care Professionals can Help

# EQUAL EMPLOYMENT OPPORTUNITY COMMISSION

- ▶ Federal Agency located nationwide
- ▶ Enforces anti-discrimination laws concerning employment
- ▶ Assistance regardless of immigration status
- ▶ All services are free (Investigation, Mediation, in certain instances Litigation)
- ▶ Subpoena power
- ▶ Must file a charge of discrimination with EEOC before filing suit in federal court

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## What does the EEOC do?

- ▶ Investigates Charges of Employment Discrimination
- ▶ Conducts Mediations/Conciliations of Complaints of Discrimination
- ▶ Prosecutes Charges of Employment Discrimination
- ▶ Educates the Public regarding Employment Discrimination Issues
- ▶ Provides Advocacy and Advice

# Temporary Restraining Orders

- ▶ EEOC can seek **Temporary Restraining Orders (TROs)** to stop irreparable harm to complainants/witnesses.

## Examples:

- ▶ Prevent deportation of key witness. (EEOC v. Saipan Grand Hotel)
- ▶ Prevent intimidation of witnesses (EEOC v. Evans Fruit)
- ▶ Prevent termination of complainant (EEOC v. Peter's Bakery)

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## EEOC Charges alleging Sexual Harassment

- ▶ **Sexual harassment** was 13% of *charges* in FY2013
- ▶ Sexual harassment *lawsuits* are 25% of EEOC national litigation docket; 30–35% of San Francisco District Office's litigation in recent years (large agricultural and service industries)

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# Sexual Harassment Is Unlawful

Title VII of the Civil Rights Act of 1964 prohibits discrimination on the basis of race, color, sex, national origin and religion in hire, all terms and conditions of employment, termination; prohibits retaliation against those who complain or assist in complaining.



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## Types of Sexual Harassment

- “Quid Pro Quo” Sexual Harassment – Making the submission to unwelcome sexual advances or other verbal or physical conduct of a sexual nature a term or condition of employment either explicitly or implicitly.
- Sexually Hostile Work Environment – Severe or pervasive unwelcome verbal and/or physical conduct of a sexual nature.



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# Hostile Environment

Harassment must be severe or pervasive enough to alter an employee's working conditions that it creates intimidating, hostile or offensive work environment.

- Grabbing, touching, fondling
- Leering, blocking egress, gesturing
- Flashing, sexual pictures, internet porn
- Sexual advances, requests for sexual favors
- Dirty/sexual jokes, comments
- Questions about sex life, personal relationships



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## Severe or Pervasive

- ▶ One act, if sufficiently severe can establish a claim:
  - Rape, Assault, Battery
- ▶ Pervasive acts, although much less severe, can establish a claim:
  - Repeated unwelcome requests for dates
  - Repeated sexually offensive jokes
  - Repeated unwelcome hugging, patting, crowding
  - Over-intrusiveness regarding sex/personal life



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# Quid Pro Quo

Latin meaning “This for that”

Conditioning certain terms of employment, e.g. hire, keeping a job, promotion, getting more hours to work, etc. on sexual favors

No employer defense to quid pro quo harassment (tangible employment action)

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## Employer Defenses – Supervisor

When the harasser is a supervisor an employer may raise a defense where:

- 1) that it took steps to deter harassment (policies, training, awareness) and once made aware, took prompt and corrective action (up to and including termination of harasser), AND
- 2) the victim employee unreasonably failed to notify the employer or use company’s preventive measures.

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## Employer Defenses – Supervisor

Defense not available where harassment culminates in a “tangible action” that taken against employee. A tangible action is any change that has an adverse effect on the employee’s job or working conditions. Examples of tangible action:

- ▶ Demotion
- ▶ Termination
- ▶ Undesirable Transfer
- ▶ Unwarranted Discipline, Suspension

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## Employer Defenses – Co-Worker

When the harasser is a co-worker/3<sup>rd</sup> Party an employer may raise a defense where:

- 1) employer knew or should have known about the harassment, and
- 2) failed to take prompt and corrective action to stop the harassment and to deter future harassment.

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# Supervisor v. Co-Worker/3<sup>rd</sup> Party

## Who Qualifies as a Supervisor?

- Individual in Supervisory Chain of Command
- Has authority to undertake or recommend tangible employment actions
- Has authority to direct employee's daily work activities
- Individual Outside Supervisory Chain of Command who the victim employee reasonably believed to have authority to undertake or recommend tangible employment actions

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## “Alter Ego” of Employer

An employer is liable for unlawful harassment when the harasser is of sufficiently high rank to be considered the employer's proxy. No affirmative defense is available. Examples:

- ◆ President
- ◆ Company Owner
- ◆ Partner
- ◆ High Corporate Officer

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# It's All About Power

- ▶ Sexual assault and harassment illustrate the disparity of power
- ▶ Usually Supervisor or Co-Worker w/Authority
- ▶ Victim Employee: needs job, limited English, limited education, fear of retaliation
- ▶ Company: has money, connections, holds the livelihood card, may employ victim's family, controls the conditions of work, can fire her and siblings, etc.; *enables the predator*

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## LITTLE V. WINDERMERE RELOCATION, Inc.

301 F.3d 958 (9<sup>th</sup> Cir. 2001)

- ▶ Little's job was to "develop on-going business relations" with clients
- ▶ Boss: "Do whatever it takes to get the account."
- ▶ Little drugged/raped by client during dinner to discuss account.
- ▶ Told two managers who encouraged her to keep quiet. No action taken to protect victim. Soon after complaining to the Boss, she was demoted and fired.

Company liable for sexual harassment?

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# RETALIATION

It is illegal for an employer to fire, demote, harass or otherwise take an adverse action against an employee for:

- ❖ Filing a complaint/charge of discrimination
- ❖ Participating in an employment discrimination procedure (such as an investigation or lawsuit)

Employee protected, even if complaint/charge is determined to be meritless.

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# RETALIATION

Elements of a claim of retaliation:

1. Engaged in “protected activity” ie complained about discrimination.
2. Complainant subjected to “adverse action”
3. There is a “nexus” between the complaint and the adverse action.

Issue: Would the adverse action, *discourage a reasonable employee to file a claim??*

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# RETALIATION

- ▶ EEOC Charges of Discrimination with Retaliation Claims (All Charges):
  - ▶ FY2012 - 38%
  - ▶ FY2013 - 41.1%
  - ▶ FY2014 - 41%
- ▶ Nearly 100% of sexual harassment lawsuits also have retaliation claim

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## Remedies

- ▶ \$\$ for victims of harassment or retaliation : back pay, reinstatement, compensatory damages (emotional distress, pain and suffering), punitive damages
- ▶ \$\$ for those who were retaliated against as witnesses
- ▶ Federal Caps on damages up to \$300,000
- ▶ Termination of harasser; bar future hiring
- ▶ New company policies to encourage complaints without fear of retaliation (as part of court order); training of supervisors and employees

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# 8%

Percentage of rapes that occur while the victim is at work.

Duhart, D. T. (2001). *Violence in the workplace, 1993-99*. Retrieved from the U.S. Department of Justice, Bureau of Justice Statistics: <http://www.bjs.gov/content/pub/pdf/vw99.pdf>

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## Case Study: EEOC v. Harris Farms

- ▶ Olivia Tamayo was a farmworker at Harris Farms
- ▶ Raped at gunpoint (twice in the fields and once in her house) by supervisor who threatened to kill her and her husband if she reported rapes.
- ▶ Supervisor claimed consensual relationship
- ▶ Harris Farms believed supervisor, but jury did not.

**Unanimous jury verdict of \$1 million**

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# FRONTLINE: RAPE IN THE FIELDS

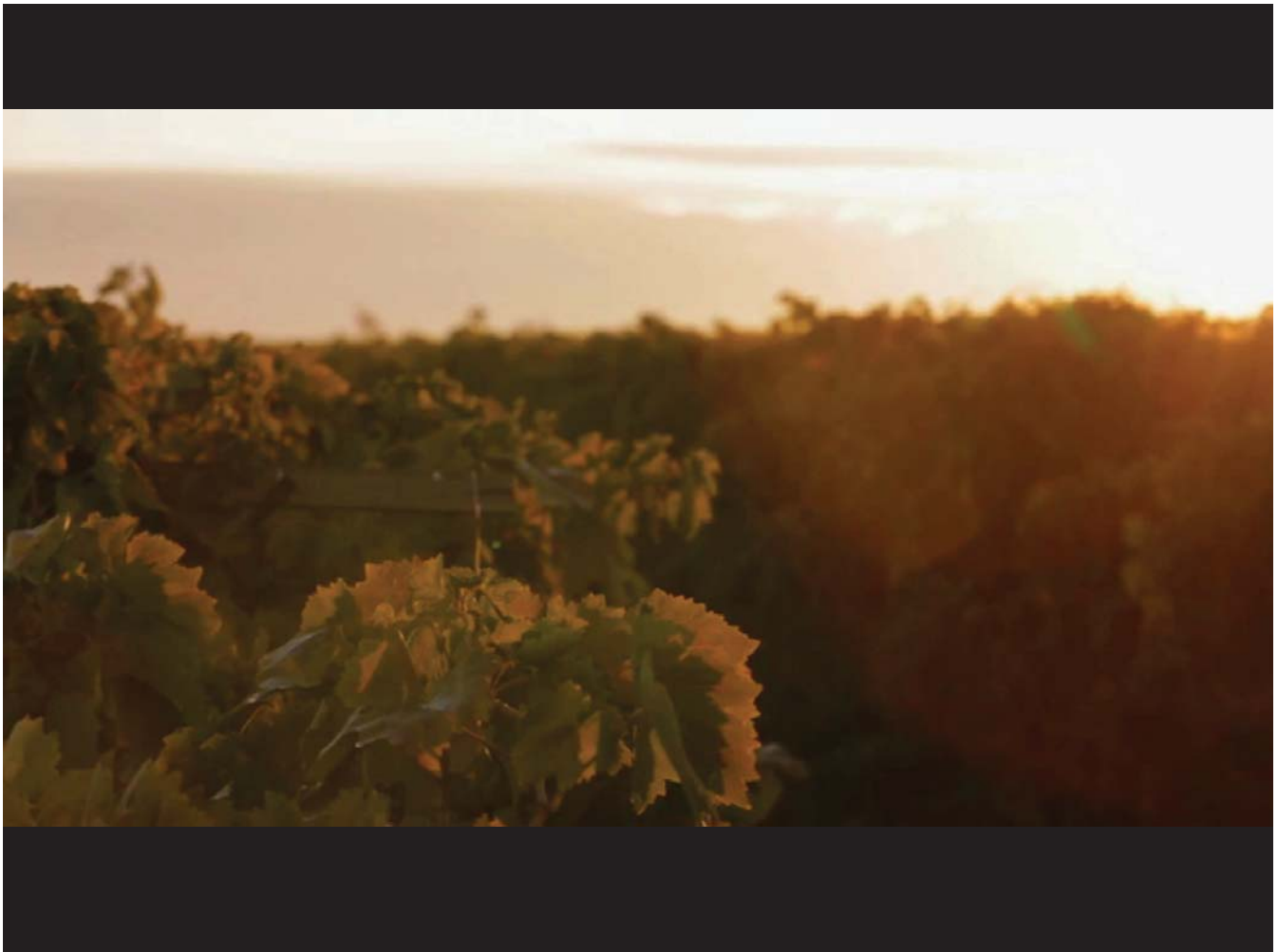
Produced by Frontline and Univision

Correspondent: Lowell Bergman

June 2013

Full version available at

<http://video.pbs.org/video/2365031455/>.



# First Contacts

- ▶ If the assault just happened, get medical attention. \*Caution victim not to wash, urinate, change clothes or do anything that might eliminate evidence.
- ▶ Encourage the victim to let you contact law enforcement.
- ▶ Do your best to put the victim in a place of safety and privacy. If the victim is scared, stay with her at all times until other help arrives.
- ▶ Contact the local rape/sexual assault crisis center.

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# Hurdles to Proving Harassment

## Why don't victims complain/take action?

- ▶ Fears she won't be believed
- ▶ Stigma; shame
- ▶ Want to forget
- ▶ Fears impact on intimate/familial relationships
- ▶ Fears employer retaliation or ruined career – needs job to support family,
- ▶ Distrust of the police
- ▶ Harasser has threatened additional harm

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# Cultural/Linguistic Competencies

- ▶ Language: victims more comfortable and describe harm better in first language
  - linguistically competent or have a qualified interpreter; interpreter must be sensitive
- ▶ Vulnerable Workers: unable to find another job, education barriers, language limitations, co-work with family members, lack of jobs in area
- ▶ Teenagers: submission to authority, peer pressure, stigma, immaturity

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# Hurdles to Proving Harassment

Some victims don't want to complain because of their immigration status.

- ▶ Title VII makes no distinction based on immigration status, undocumented workers are protected against all sexual harassment on the job.
- ▶ EEOC will not ask status.
- ▶ EEOC will fight company inquiries into immigration status during litigation.
- ▶ EEOC is specifically designated as an agency that can certify for a U-Visa where charging party or witness is victim of "serious crime activity"

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# Hurdles to Proving Harassment

## Statue of Limitations

A charge of discrimination must be filed within 180 days of the last discriminatory act (300 days in jurisdictions that have a fair employment practice agency). If a charge is not timely filed, the claim is time barred.

Sometimes a victim just isn't emotional/mentally capable of making a complaint for a long period of time.....

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## Equitable Tolling

EEOC v. Willamette Tree Company  
CV 09-690-PK (D. Ore.)

Farm worker repeatedly raped at knife point and threatened with death of self and loved ones, failed to file EEOC charge within 300 days (missed deadline by 62 days) because of the psychological trauma she endured.

Can she still pursue claims? Yes!

*See also, Stoll v. Runyon*, 165 F.3d 1238 (9th Cir. 1999)

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# Hurdles to Proving Harassment

Attacking the victim: “Sluts and Nuts Defense”

- ▶ She’s after money.
- ▶ She’s promiscuous and liked what happened\*
- ▶ She’s a spurned woman out for revenge.
- ▶ She’s mentally unstable.
  - Didn’t report abuse to police/employer.
  - Didn’t tell family/friends.
  - Didn’t stop him.
  - Continued to go to work/be around abuser.

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# Hurdles to Proving Harassment

Attacking the victim – “She’s a liar.”

- ▶ Why did you wait to complain?
- ▶ Why did you change your story?
- ▶ Why didn’t you stop the [harassment]?
- ▶ Why did you come back to work?
- ▶ Why didn’t you tell your [loved one]?
- ▶ Isn’t it true that you were attracted to/were nice to/had a friendly relationship w/[harasser]?
- ▶ You’re asking for money in this lawsuit, aren’t you?

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# Hurdles to Proving Harassment

No witnesses to harassment: “He said, she said.”

- ▶ Usually there are witnesses that saw something relevant.
  - Other victims
  - Changes in victim’s behavior
  - Observance of victim’s reaction to harasser
- ▶ Phone/Text Messages/Emails
- ▶ Physical Evidence:
  - ripped clothing, signs of a struggle
- ▶ Corroborating (or not) Testimony
  - Details regarding assault/rape
  - Descriptions of body

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# EEOC v. Krause’s Sofa Factory

- ▶ Saleswoman in custom sofa showroom.
- ▶ Supervisor repeatedly made requests for dates, made sexually related comments and engaged in unwanted touching.
- ▶ Harassment culminated in incident in which supervisor held down saleswoman and licked the side of her face.
- ▶ There were no witnesses to the actual act.

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# Mental Health Professionals

- ▶ As a treating healthcare provider
  - Help prepare for testimony
  - Treat emotional distress, depression
  - Provide expert testimony as treating physician
    - Corroboration of assault
  - Determine current status and future prognosis
- ▶ As an expert witness
  - Explain why victim didn't complain
  - Explain effect on victim and family (damages)
  - Explain victim's behavior which exhibits distress
  - Provide statistics regarding sexual assault

Both: Support compensatory damages.

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## Supporting the Victim

- ▶ Support and information on how to assert rights – language/educational/emotional barriers, understanding litigation process
- ▶ Help finding services: financial, housing, employment
- ▶ Praise for courage to seek justice for self and others
- ▶ Stop harasser
- ▶ Family relationships – Inter-family counseling, help with disclosure

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# The BIG Prize: Injunctive Relief

- ▶ Money helps victim, but changes at Harris Farms, and other employers, help thousands
- ▶ Mandatory Training of All Supervisors
- ▶ Monitoring Of All Discrimination Complaints
- ▶ Reporting of Complaints at Harris Farms, Details of Complaints, Investigation, Result
- ▶ Posting - Harris Farms Found To Have Discriminated against Olivia, EEOC Contact Info
- ▶ Consent Decree of Five Year Duration



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