Is it Sexual Harassment?
Test your knowledge.

Be prepared to recognize and respond appropriately to complaints
Sexual harassment claims are rarely clear-cut.

A pat on the shoulder. A compliment on an outfit. A flirtatious remark. On an average workday, any of these could pass unnoticed — or just as easily lead to a sexual harassment complaint.

That’s why it’s vital to understand your organization’s legal liability. Knowing what warrants immediate attention requires a basic understanding of the law and its practical application in the workplace.

Are you ready to recognize and respond appropriately to a situation or complaint involving sexual harassment? Find out. Test your knowledge with this true/false quiz.

1. People of the same sex can be found guilty of sexually harassing each other.

**TRUE**

**Why it’s true:** The law prohibits discrimination against any protected class, regardless of whether the “actor” or “accused” is a member of the same protected class as the claimant. What matters is the behavior and whether it violates the law.

**The Legal Basis:** Sexual harassment is a form of sex discrimination that violates Title VII of the Civil Rights Act of 1964. Title VII generally applies to employers with 15 or more employees, including federal, state and local governments. Title VII does not bar claims of discrimination “because of sex” merely because plaintiff and defendant, or person charged with acting on behalf of defendant, are of the same sex. For example, a jury may reasonably find discrimination on basis of sex if a female victim is harassed in such sex-specific and derogatory terms by another woman as to make it clear that the harasser is motivated by general hostility to the presence of women in workplace. *Oncale v. Sundowner Offshore Services, Inc.*, 523 U.S. 75, (1998). Civil Rights Act of 1964, § 703(a)(1), as amended, 42 U.S.C.A. § 2000e–2(a)(1).

2. Employers must ensure that even the most sensitive employee is not subjected to any behavior or conduct he/she finds harassing. We must be kind and considerate of everyone’s feelings.

**FALSE**

**Why it’s false:** While it’s always good to be respectful, kind and considerate of employees and co-workers, the law does not enforce general civility — it solely prohibits behavior and conduct that has a discriminatory or retaliatory impact.
For example, being rude to a coworker, or to all coworkers (being an “equal opportunity jerk”), may violate company policy, but would not necessarily be against the law.

**The Legal Basis:** Title VII does not prohibit all verbal or physical harassment in the workplace; it is directed only at discrimination “because of” sex. Conduct that is not severe or pervasive enough to create an objectively hostile or abusive work environment, i.e., an environment that reasonable person would find hostile or abusive, is beyond Title VII’s purview. This crucial requirement for Title VII sexual harassment claim ensures that courts and juries do not mistake ordinary socializing in the workplace, such as male-on-male horseplay or intersexual flirtation, for discriminatory “conditions of employment.” *Oncale v. Sundowner Offshore Services, Inc.*, 523 U.S. 75, (1998). Civil Rights Act of 1964, § 703(a)(1), as amended, 42 U.S.C.A. § 2000e–2(a)(1). Title VII is not a civility code, and not all profane or sexual language or conduct will constitute discrimination in the terms and conditions of employment.

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**A witness to sexual harassment directed at another employee, can bring his/her own claim of harassment, even if the employee was not part of the conversation and was eavesdropping.**

**TRUE**

**Why it’s true:** Witnesses are people too! Anyone subject to sexually harassing behavior has standing to bring a claim of harassment — whether or not the behavior was directed specifically at the individual.

**The Legal Basis:** The plaintiff can prove a hostile work environment under Title VII by showing severe or pervasive discrimination directed against her protected group, even if she herself is not individually singled out in the offensive conduct. Evidence that co-workers aimed their insults at a protected group may give rise to the inference of an intent to discriminate on the basis of sex, even when those insults are not directed at the individual employee. Words and conduct that are sufficiently gender-specific and either severe or pervasive may state a claim of a hostile work environment, even if the words are not directed specifically at the plaintiff. *Reeves v. C.H. Robinson Worldwide, Inc.*, 594 F.3d 798 (11th Cir. 2010). Civil Rights Act of 1964, § 703(a)(1), 42 U.S.C.A. § 2000e–2(a)(1).
Third parties such as customers and vendors cannot create liability for sexual harassment. How could they? They aren’t the employer’s workers, nor does the employer have any control over them.

**FALSE**

**Why it’s false:** Employers have a responsibility to ensure that employees are not subjected to sexual harassment, regardless of the identity of the “actor” or “accused.” This means that employers must ensure that no person in the workplace engages in sexually harassing behavior, and this responsibility extends to visitors, customers, delivery people, vendors, consultants and others. The employer must likewise ensure that employees are trained to recognize sexual harassment and understand the complaint process they should follow.

**The Legal Basis:** An employer may be found liable for the sexually harassing conduct of its customers if the employer fails to take immediate and appropriate corrective action in response to a hostile work environment of which the employer knew or reasonably should have known. When the alleged sexual harassment is committed by co-workers or customers, a Title VII plaintiff must show that the employer either knew, that is, had actual notice, or should have known, that is, had constructive notice, of the harassment and failed to take immediate and appropriate corrective action. *Watson v. Blue Circle, Inc.*, 324 F.3d 1252, (11th 2003). Civil Rights Act of 1964, § 701 et seq., as amended, 42 U.S.C.A. § 2000e et seq.

An employer is responsible for ensuring that an accused is afforded his/her “due process” rights in the investigation of sexual harassment allegations. We are all citizens and have constitutional rights!

**FALSE**

**Why it’s false:** Employees who work for private employers are not entitled to “due process,” or Constitutional rights. Employers should take swift and appropriate action in response to claims of sexual harassment. Quickly neutralizing the situation without harm to the accused or the claimant, launching a fair and thorough investigation, and taking appropriate remedial action (if applicable) are all important components of an appropriate response.

**The Legal Basis:** An employer is not required to conduct a full-blown, due process, trial-type proceeding in response to complaints of sexual harassment in order to benefit from the Faragher-Ellerth defense to a Title VII claim; all that is required of an investigation is reasonableness in all of the circumstances, and the permissible
circumstances may include conducting the inquiry informally in a manner that will not unnecessarily disrupt the company’s business, and in an effort to arrive at a reasonably fair estimate of truth. Civil Rights Act of 1964, § 701 et seq., 42 U.S.C.A. § 2000e et seq. Baldwin v. Blue Cross/Blue Shield of Alabama, 480 F.3d 1287, (11th Cir. 2007).

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An employee cannot make a claim of sexual harassment based (in whole, or in part) on social media posts. Social media is personal!

FALSE

Why it’s false: Any conduct or behavior that occurs outside of work but is “carried” back into the workplace, or has an impact on the working environment, may contribute to a hostile working environment.

The Legal Basis: In Dragon v. State of Connecticut, the court found that the accused employee’s Facebook postings and comments supported the plaintiff’s hostile work environment claim. The accused employee made repeated comments to the plaintiff, in part on Facebook, over the course of two months, about the workplace harassment policy, her marriage, her body and her relationship with a female coworker. More specifically, the court found that the various incidents of harassment, including the Facebook posts, did not stand alone, and “must be evaluated in light of other evidence of discriminatory intent in the record.” Dragon 211 F.Supp.3d 441, (D. C.N. 2016).

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An employee’s social media posts (especially if they are set to “private”) cannot be used as evidence to verify or disprove a plaintiff’s claim of harassment and related damages. That’s the whole point of using the “privacy” settings! What I post is only my (and my 500 friends’) business and no one else’s!

FALSE

Why it’s false: Any information on an employee’s social media page that is relevant to claims made by that employee may be deemed as “admissible evidence” by the court. The privacy settings do not take those postings outside of the purview of the court.

The Legal Basis: In Reid v. Ingerman Smith, LLP. The court found that the plaintiff’s photographs and comments “posted on her publicly available Facebook pages
Provide probative evidence of her mental and emotional state, as well as reveal the extent of activities in which she engages.” Additionally, the court stated that the plaintiff’s “private postings may likewise contain relevant information that may similarly be reflective of her emotional state.” Reid 2012 WL 6720752, (E.D. N.Y. 2012). In another case, the court found that even had plaintiff used privacy settings that allowed only her “friends” on Facebook to see postings, she “had no justifiable expectation that h[er] ‘friends’ would keep h[er] profile private ...” U.S. v. Meregildo, 2012 WL 3264501 (S.D. N.Y. 2012).

**FALSE**

**Why it’s false:** While consensual relationships themselves are not necessarily a violation of the law, the risks associated with relationships in the workplace — especially a potential breakup — are significant. If the relationship ends, the employer runs the risk of bad feelings entering the workplace and turning into a claim of a hostile work environment. Employers should put in place a workplace romance policy that prohibits (at a minimum) relationships between employees and supervisors/management. Additionally, employers may want to consider the use of a “love” contract (relationship consent agreement).

**The Legal Basis:** In **Rodriguez v. Puerto Rico Ombudsman Management Office**, the plaintiff alleged that upon the end of her consensual workplace romance with her supervisor, she suffered sexual harassment and a hostile work environment. For example, the court found that it was an “uncontested fact that during [the] hearing the plaintiff testified that [her supervisor] submitted her to humiliations and acts of disrespect, and gave her the silent treatment and reprimanded her after they allegedly broke up.” After the plaintiff complained to human resources, she received various forms of discipline, culminating in the termination of her employment. The plaintiff made a claim for discrimination and retaliation under Title VII. **Rodriguez 2014 WL 1873298 (D. P.R. 2014).** “It shall be an unlawful employment practice for an employer to discriminate against any of his employees... because he has opposed any practice made an unlawful employment practice by this subchapter, or because he has made a charge, testified, assisted, or participated in any manner in an investigation, proceeding, or hearing under this subchapter.” 42 U.S.C. § 2000e–3(a). **In Univ. of Texas Sw. Med. Ctr. v. Nassar, ---U.S. ----, 133 S.Ct. 2517 (2013).**
FALSE

Why it’s false: Employers have an obligation to ensure that they provide a work environment free from sexual harassment of any kind. Additionally, employers who do the right thing may be eligible for a complete defense so long as the employer did not take a tangible employment action.

Employers should:
- Publish an anti-harassment/non-discrimination policy
- Include a compliant procedure that clearly identifies the individuals who may receive a complaint — it’s important to include options other than the employee’s own manager or supervisor
- Provide regular training for managers and employees
- Ensure a swift and appropriate response in the event of a complaint
  Remember: Employees are innocent until proven guilty! Don’t defame or damage the accused!

The Legal Basis: An employer avoids liability under the Faragher-Ellerth affirmative defense to a Title VII sexual harassment claim if: (1) it exercised reasonable care to prevent and correct promptly any sexually harassing behavior, and (2) the employee unreasonably failed to take advantage of any preventive or corrective opportunities it provided. Civil Rights Act of 1964, § 701 et seq., 42 U.S.C.A. § 2000e et seq.
Baldwin v. Blue Cross/Blue Shield of Alabama, 480 F.3d 1287, (11th Cir. 2007).

Finishing this quiz is just the beginning.

Business owners, managers, HR professionals and other leaders have a responsibility to safeguard employees against sexual harassment — and protect their companies against liability.

The information in this quiz can be a starting point. Share it with your management team, and make sure they know what the organization’s legal responsibilities are in the event of a sexual harassment complaint.
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