

# Everything You Should Know About Sexual Harassment in the Outdoor Industry

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**December 6, 2017**

**BAKER DONELSON**

EXPAND YOUR EXPECTATIONS<sup>SM</sup>

# Goals for Today

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- Explain why you need to take sexual harassment seriously
- Help you understand the law
- Present you with of a step-by-step checklist for investigating and dealing with workplace harassment claims.



# Harvey Weinstein

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# Accusations Against Harvey Weinstein

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- Invited a young Ashley Judd to a hotel for a business breakfast meeting. Had her sent up to his room where he appeared in a bathrobe and asked if he could give her a massage or she could watch him shower. Gwyneth Paltrow and Angelina Jolie have also made similar allegations.
- Reached at least eight settlements with women over a number of years, including in 1990, 1997, 1998, and 2015. Settlements were between \$80,000 and \$150,000.
- In 2015, a female employee wrote a multi-page memo, detailing two years of inappropriate conduct towards her and female colleagues.
- Accusations have a common narrative: Women reported to a hotel for work reasons and discovered Weinstein had other intentions.
- Allegation that everybody at The Weinstein Company knew of the inappropriate behavior but either turned a blind eye or was too scared to say anything.

# News Spotlight on Sexual Harassment in the Outdoor Industry

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NEWS

## The outdoor industry's 'locker room talk'

BRIDGET CROCKER · OCT 20, 2016

MOUNTAIN

### Writer Jayme Moyer Investigated Sexual Harassment in the Colorado Rafting Industry

 61  6  0 FRIDAY JUNE 9, 2017

## HARASSMENT IN THE OUTDOORS

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# Out Here, No One Can Hear You Scream

The dangerous culture of male entitlement and sexual hostility  
hiding within America's national parks and forests.

STORY KATHRYN JOYCE

VIDEO & PHOTO EMILY KASSIE

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# Investigative Report of Misconduct at the Grand Canyon River District

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- Report by the U.S. Department of the Interior (DOI) released in January 2016
- The DOI investigated the allegations of 13 former and current National Park Service employees who worked in the Grand Canyon National Park's (GRCA) River District
- In addition to the original 13 complainants, the DOI identified 22 other individuals who reported experiencing or witnesses sexual harassment and a hostile work environment
- The DOI found evidence of a long-term pattern of sexual harassment and hostile work environment
- Incidents of sexual harassment had been reported to supervisors and managers but were not properly investigated or reported to HR or EEO, violating DOI's mandatory reporting requirement

# Publications on Sexual Harassment in the Outdoor Industry

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- The articles alleged:
  - The outdoor industry had a *laissez faire* approach to sexual harassment.
  - Women employees were far outnumbered by male employees, which created a “boys will be boys” culture.
  - Owners and supervisors failed to take appropriate action when sexual harassment was reported.
  - Bullying of female employees who reported sexual harassment.
  - Harassment of female employees who rejected the sexual advances of their male coworkers.

## Responses to the Publications

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- More female employees in the outdoor industry came forward to add their stories of sexual harassment.
- Some people sought to downplay the issue.
- The media attention has not stopped. Articles on the issue have been published in the latter half of this year.



## Concerns Unique to Outdoor Industry

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- Employees and customers spend extended hours together
- Some people may have preconceived notions that outdoor activities are for men
- Outdoor environment may cause a person to forget that he/she is on the job and should act professionally
- No easy escape for harassed person during a trip
- Not easy for a harassed person to report inappropriate behavior during a trip
- Employees spend a lot of time together with unsupervised down time

# Sexually Discriminatory/Harassing Behavior

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- Sharing sexually inappropriate pictures, such as pornography
- Distributing sexual suggestive notes, letters, or drawings
- Telling lewd jokes or sharing sexual anecdotes
- Staring in a sexually suggestive or offensive manner
- Making sexual comments about appearance, clothing or body parts
- Inappropriate touching, including pinching, patting, rubbing or purposefully brushing up against another person
- Asking sexual questions, such as questions about someone's sexual history or sexual orientation
- Bullying someone because he/she rejected sexual advances

# Who Can Commit Workplace Harassment/Discrimination?

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- Owner
- Supervisor
- Co-worker
- Guest



# Problems Caused by Harassment/Discrimination

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- May negatively affect the client experience
- Work disruption as employees are distracted by investigations
- Reduced employee morale
- Inability to recruit skilled employees because potential employees avoid companies with bad reputations
- Gossip and rumors within the organization
- Costs associated with lawsuits
- Divisiveness amongst employees
- Public embarrassment and damaged reputation of the company/industry
- Safety issue if employees bully each other

## Title VII of the Civil Rights Act of 1964

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- Prohibits discrimination on the basis of sex, including sexual harassment.
- Harassment claims under Title VII are divided into two categories:
  - Quid Pro Quo Harassment
  - Hostile Work Environment Harassment

## Quid Pro Quo

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- Applies with a supervisor seeks sexual favors in return for a job benefit or to avoid a job detriment
- To establish a claim for quid pro quo harassment, an employee must show:
  - He/she is a member of a protected group
  - Unwelcomed sexual advances were made.
  - The harassment was sexually motivated.
  - The employee's reaction to the advances affected tangible aspects of his/her employment.
  - Harasser had authority over the employee.

# Hostile Work Environment

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- More commonly alleged than quid pro quo harassment.
- More subjective. Does not require a tangible job consequence or financial injury.
- To establish a claim for hostile work environment harassment, an employee must show that the alleged harassment was:
  - Unwelcome
  - Because of gender
  - Attributable to the employer
  - Severe or pervasive enough to change the conditions of employment and create an abusive environment

## State Laws

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- Many states have anti-discrimination laws
  - Includes California, Colorado, Nevada, New Mexico, Oregon, Utah, Washington, Wyoming
- Some states require employers to conduct sexual harassment prevention training on a regular basis
  - Includes California



# Gender Identity and Sexual Orientation

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- Unclear whether discrimination based on gender identity or sexual orientation is prohibited sex discrimination under federal law.
  - EEOC has taken the position that Title VII prohibits discrimination against transgender individuals and discrimination based on gender identity or sexual orientation.
  - Case law in federal courts is still developing.
- A significant number of states have laws prohibiting discrimination on the basis of gender identity and/or sexual orientation.

# Personal and Individual Liability

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- Victims could file a lawsuit against the harassing employee.
  - Assault
  - Battery
  - Intentional infliction of emotional distress
  - Invasion of privacy
- Supreme Court has not addressed whether employees can be held individually liable under Title VII.
  - Most federal courts of appeal have held Title VII does not provide individual employee liability

# Anti-Harassment Policy

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- Establish an Anti-Harassment Policy, which should include:
  - Statement prohibiting all forms of unlawful harassment
  - Complaint procedure
  - Statement prohibiting retaliation
  - Consequences of violation the Policy
  - Statement that Policy does intend to dissuade employees from engaging in activities protected under state or federal law, including the Nation Labor Relations Act

## Anti-Harassment Policy and Reporting Requirements

[EMPLOYER NAME] is committed to providing a work environment free from all forms of conduct that can be considered harassing, coercive, or disruptive -- sexually or otherwise. Actions, words, jokes, or comments based on an individual's sex or any other legally protected characteristic will not be tolerated.

Sexual harassment is defined as unwanted sexual advances, or visual, verbal, or physical conduct of a sexual nature. This definition includes many forms of offensive behavior and includes gender-based harassment of a person of the same sex as the harasser. **This definition also includes inappropriate conduct by clients or other members of the public as well as co-workers.** The following is a partial list of sexual harassment examples:

- Unwanted sexual advances.
- Offering employment benefits in exchange for sexual favors.
- Making or threatening reprisals after a negative response to sexual advances.
- Visual conduct that includes leering, making sexual gestures, or displaying sexually suggestive objects or pictures, cartoons, or posters.
- Verbal conduct that includes making or using sexually derogatory comments, epithets, slurs, or jokes.
- Verbal sexual advances or propositions.
- Verbal abuse of a sexual nature, graphic verbal commentaries about an individual's body, sexually degrading words used to describe an individual, or suggestive or obscene letters, notes, or invitations.
- Physical conduct that includes touching, assaulting, or impeding or blocking movements.
- Verbal or physical conduct that explicitly or implicitly implies that an individual should not be a guide unless they can handle sexual jokes or similar behavior.
- Creating or circulating sexually suggestive, unwelcome emails, texts, tweets, photos or blog postings.

Unwelcome sexual advances (either verbal or physical), requests for sexual favors, and other verbal or physical conduct of a sexual nature constitute sexual harassment when: (1) submission to such conduct is made either explicitly or implicitly a term or condition of employment; (2) submission or rejection of the conduct is used as a basis for making employment decisions; or (3) the conduct has the purpose or effect of interfering with work performance or creating an intimidating, hostile, or offensive work environment.



If you experience or witness sexual or other unlawful harassment while performing work for [COMPANY NAME], you must report it immediately to a supervisor. Incidents occurring while on trips should be reported to the trip leader. A Harassment Complaint Form, which may be submitted anonymously, is provided for your convenience. If a supervisor/trip leader is unavailable or you believe it would be inappropriate to contact that person, you must immediately contact [SPECIFIC INDIVIDUAL/POSITION - HR OR UPPER MANAGEMENT]. If your complaint is not resolved, you must report it to [HIGH-LEVEL MANAGER]. You can raise concerns and make reports without fear of reprisal or retaliation. [COMPANY NAME] will not tolerate retaliation against individuals who make good-faith reports or claims of unlawful harassment.

All allegations of harassment or discrimination will be quickly and discretely investigated. To the extent possible, your confidentiality and that of any witnesses and the alleged harasser will be protected against unnecessary disclosure. When the investigation is completed, you will be informed of its outcome. Anyone found to be engaging in any type of harassment or discrimination in violation of this policy may be subject to disciplinary action, up to and including termination of employment.

Any member of management or manager who becomes aware of possible sexual or other unlawful harassment must immediately advise [SPECIFIC INDIVIDUAL/POSITION - HR OR UPPER MANAGEMENT] so that it can be investigated in a timely manner. Upon completion of the investigation, if necessary, corrective measures will be taken. These measures may include, but are not limited to: training, counseling, warning, suspension, or immediate dismissal. Anyone, regardless of position or title, found through an investigation to have engaged in improper harassment or discrimination may be subject to discipline up to and including discharge.

[COMPANY NAME] prohibits any form of discipline or retaliation for reporting in good faith incidents of perceived harassment in violation of this policy, pursuing any such claim, or cooperating in the investigation of such reports.

# Sexual Harassment Training

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- Training should cover:
  - The Anti-Harassment Policy
  - Definitions and examples of harassment
  - Who can be held liable and for what
  - Conduct outside of the workplace
  - Concerns with social media use
  - Irrelevance of gender
  - Procedure for notifying the employer of harassment
  - Employee's responsibility to refrain from harassment and retaliation, follow the reporting procedure, and cooperate with investigations

**[COMPANY NAME]**  
**HARASSMENT COMPLAINT FORM**

If you have witnessed and/or have been subjected to behavior that you in good faith consider to be unlawful harassment while employed at [COMPANY NAME], please fill out this form and submit to your immediate supervisor or [SPECIFIC PERSON/POSITION] immediately. No [COMPANY NAME] employee will be subjected to any form of retaliation for submitting a complaint in good faith or for participating in an investigation.

- I have experienced and/or witnessed the following behavior:
  
  
  
  
  
  
  
  
  
  
- The following employees were involved in or witnessed the behavior:
  
  
  
  
  
  
  
  
  
  
- This behavior occurred at the following dates, times, and locations:

EMPLOYEE'S NAME (Optional): \_\_\_\_\_

EMPLOYEE'S SIGNATURE (Optional):  
\_\_\_\_\_

DATE: \_\_\_\_\_

# Harassment Investigation Checklist

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## Three Main Phases to the Investigation Process

1. Understanding the relevant facts
2. Deciding what to do
3. Taking appropriate action



# Understanding the Relevant Facts (10 Steps)

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1. Identify the source of the concern
  - How many people are involved?
  - Who has made the allegations—the allegedly harassed person or a third-party?
  
2. Understand the complaint or issue
  - Is it sexual harassment?
  - Quid pro quo or hostile work environment?

## Relevant Facts (continued)

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3. Decide whether to conduct an investigation
  - Does the alleged behavior qualify as harassment?
4. Decide on the scope of and correct approach to the investigation
  - How many interviews?
  - Who will conduct the interviews?

## Relevant Facts (continued)

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5. Follow investigation protocols during all interviews
  - Face to face interviews are preferable
  - Try to have two trusted managers in each interview
  - Interviewers should put the witness at ease
  - Ask effective questions and follow-ups
  - Stick to script and don't reveal confidential information
  - Share information on a need to know basis
  - Avoid potential NLRA violations relating to efforts to maintain confidentiality
  - Don't overpromise on confidentiality or circling back to the interviewees

## Relevant Facts (continued)

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6. Interview the accuser
7. Interview the accused
8. Interview all witnesses likely to have relevant facts
9. Consult with attorneys regarding documentation
10. Document the investigation findings carefully

## Deciding What to Do (6 Steps)

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1. Determining whether additional investigation is necessary
2. Weighing legal risks, costs, and related factors
3. Consult with attorneys regarding both of the above
4. Ensuring that all the proper stakeholders are involved
5. Have the proper people decide the issue
6. Document the decision correctly

# Taking Appropriate Action

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1. Implement the decision
2. Have an effective communication plan
3. Have a specific plan, including a schedule, for following up to ensure the decision has been implemented and the desired results have been achieved

# Love Contract

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- A consensual romance agreement is signed by two romantically-involved employees representing that their relationship is entirely consensual and acknowledging the employer's anti-harassment policies and rules.



# EEOC Complaint and Litigation-What to Expect

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- Most harassment lawsuits begin with an employee filing a charge with the Equal Employment Opportunity Commission (EEOC) or a similar state or local Fair Employment Practices Agency (FEPA).
- After a charge is filed, an employer is given the opportunity to investigate and prepare a position statement in response to the allegations.
- HIRE A LAWYER!
- The investigator will determine whether there is reasonable cause to believe that sexual harassment occurred.
- Even if the investigator finds no reasonable cause, the complainant can still file a lawsuit in court.



