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## The New Landscape for Sexual Harassment Claims in Texas

**Harrison M. Smith**

Author Contact Information:

Harrison M. Smith  
Schmoyer Reinhard LLP  
Fort Worth, TX

[hsmith@sr-llp.com](mailto:hsmith@sr-llp.com)  
210.447.8033

## **The New Landscape for Sexual Harassment Claims in Texas**

For over three decades, Texans have proudly echoed the phrase, “Don’t mess with Texas.” On September 1, 2021, the full bellow of the phrase rang in the ears of Texas employers, as the Lone Star State enacted some of the nation’s most stringent laws prohibiting sexual harassment in the workplace. The new Texas laws, which amended Chapter 21 of the Texas Labor Code (“Chapter 21”), cemented arguably the most significant changes to the Texas Commission on Human Rights Act (“TCHRA”) since its adoption in 1983. The amendments broadened protections for Texas employees to pursue workplace sexual harassment claims, imposed requirements on Texas employers that are more strict than federal law, and expanded potential liability for employers and their agents. Indeed, the landscape has changed for sexual harassment claims in Texas – so much so that as of September 1, 2021, Texas’ famed phrase may sound more like “Don’t mess with Texas *employees*.”

### **I. THE LAY OF THE LAND – SEXUAL HARASSMENT OVERVIEW**

To understand the impact of the new Texas laws governing workplace sexual harassment, it is important to examine the legal history of, and statistics related to, sexual harassment.

#### **A. Sexual Harassment Defined**

Sexual harassment is a form of sex discrimination that violates Title VII of the Civil Rights Act of 1964 (“Title VII”). Title VII determines federal liability for employers with 15 or more employees and applies to private employers, state and local governments, the federal government, employment agencies, and labor organizations. Almost all of the states have enacted similar antidiscrimination laws prohibiting sex discrimination but vary in application.

Under Title VII and most state-law counterparts, the term “sexual harassment” is not defined within the statutes. However, federal and state courts have addressed sexual harassment claims based on the prohibition of sex discrimination under Title VII. Sexual harassment has been defined by the Code of Federal Regulations, which implements Title VII. Sexual harassment is defined as follows:

Unwelcome sexual advances, 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 an individual’s employment, (2) submission to or rejection of such conduct by an individual is used as the basis for employment decisions affecting such individual, or (3) such conduct has the purpose or effect of unreasonably interfering with an individual’s work performance or creating an intimidating, hostile, or offensive working environment.<sup>1</sup>

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<sup>1</sup> 29 C.F.R. § 1604.11(a) (2022).

The United States Supreme Court has adopted this definition, and, over several decades, federal and state courts have followed this precedent to define the contours of what constitutes sexual harassment.<sup>2</sup> The amendments to Chapter 21 now codify remarkably similar language.<sup>3</sup>

## **B. Enforcing Workplace Antidiscrimination Laws and Statistics on Sexual Harassment**

### 1. EEOC and FEPAs

The U.S. Equal Employment Opportunity Commission (“EEOC”) is responsible for enforcing Title VII, as well as other federal workplace antidiscrimination laws, and it investigates charges of discrimination (including sex discrimination and sexual harassment) and retaliation against employers who are covered under applicable federal law. Additionally, many states and local governments have their own agencies, called “Fair Employment Practices Agencies” (“FEPAs”), which are responsible for enforcing the state and local laws prohibiting discrimination and administering discrimination claims filed under their laws. In Texas, the Texas Workforce Commission Civil Rights Division (“TWC”) enforces the state antidiscrimination law. Where the EEOC and a FEPA have a work sharing agreement, discrimination claims covered by Title VII and the state or local law will be dual filed with both agencies.

### 2. Statistics

For over two decades, the EEOC has issued reports on statistics related to workplace discrimination claims filed with the agency and the various FEPAs. On March 31, 2022, the EEOC released detailed statistics on the 61,331 charges of workplace discrimination the agency received in Fiscal Year (“FY”) 2021, which ended on September 30, 2021. Despite a decline since the peak of the #MeToo movement in FY 2018, sex-based harassment claims accounted for 10,035 charges filed with the EEOC in FY 2021. Of the 10,035 charges alleging sex-based harassment, 5,581 included sexual harassment allegations, representing over 55 percent.<sup>4</sup> Interestingly, 5,581 is the lowest total of sexual harassment charges filed with the EEOC in nearly 25 years.<sup>5</sup> Considering claims that were dual filed with the EEOC and applicable FEPAs, the total number of charges alleging sexual harassment in FY 2021 increases to 8,191.<sup>6</sup> Males filed just over 16 percent of all sexual harassment allegations.<sup>7</sup>

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<sup>2</sup> See *Meritor Sav. Bank, FSB v. Vinson*, 477 U.S. 57, 65 (1986); *Burlington Indus. Inc. v. Ellerth*, 524 U.S. 742, 754, 761 (1998); *Faragher v. City of Boca Raton*, 524 U.S. 775, 786, 790-91 (1998); *Penn. State Police v. Suders*, 542 U.S. 129, 133 (2004); *La Day v. Catalyst Tech., Inc.*, 302 F.3d 474, 481-83 (5th Cir. 2002); *B.C. v. Steak N Shake Oper., Inc.*, 512 S.W.3d 276, 279 (Tex. 2017); *Waffle House, Inc. v. Williams*, 313 S.W.3d 796, 804-06 (Tex. 2010); *TDFPS v. Whitman*, 530 S.W.3d 703, 710 (Tex. App.—Eastland 2016, no pet.).

<sup>3</sup> See TEX. LABOR CODE ANN. § 21.141(2) (West); see also discussion *infra* Part II.B.1.

<sup>4</sup> See EEOC, Charges Alleging Sex-Based Harassment (Charges filed with EEOC) FY 2010 - FY 2021, Tables, <https://www.eeoc.gov/statistics/charges-alleging-sex-based-harassment-charges-filed-eeoc-fy-2010-fy-2021>.

<sup>5</sup> See *id.*

<sup>6</sup> See EEOC, EEOC & FEPA Charges Filed Alleging Sexual Harassment, by State & Gender FY 1997 - FY 2021, Table, <https://www.eeoc.gov/statistics/eeoc-fepa-charges-filed-alleging-sexual-harassment-state-gender-fy-1997-fy-2021>. This is a decrease from 9,671 charges alleging sexual harassment filed in FY 2020. See *id.*

<sup>7</sup> See EEOC, *supra* note 4.

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