



# Sexual Harassment

# What Is Workplace Harassment?

# Workplace Harassment

- Workplace harassment rises to an unlawful level whenever unwelcome conduct on the basis of gender or other legally protected status affects a person's job
  - Both employers and employees have a responsibility to prevent and stop workplace harassment
- Sexual Harassment is defined by the Equal Employment Opportunity Commission (EEOC) as:
  - Unwelcome sexual advances
  - Requests for sexual favors
  - Other verbal/physical conduct of sexual nature when:
    - Submission to the conduct is made either explicitly or implicitly a term or condition of an individual employment
    - Submission to or rejection of the conduct by an individual is used as a basis for employment decisions affecting such individual
    - The conduct has the purpose or effect of unreasonably interfering with an individual's work performance or creating an intimidating, hostile, or offensive working environment

# Workplace Harassment

- The U.S. Supreme Court has explained there are two basic types of unlawful sexual harassment:
  - Harassment that results in a tangible employment action
    - Supervisor fires a subordinate for refusing to be sexually cooperative
      - Quid pro quo (this for that)
    - This kind of sexual harassment can be committed only by someone who can effectively make formal employment actions (hiring, firing, demotion, denial of promotion)
  - Hostile environment
    - Can result from the gender-based unwelcome conduct of supervisors, co-workers, customers, vendors, or anyone else with whom the victim interacts with on the job
      - Threats to impose a sexual quid pro quo
      - Discussing sexual activities
      - Telling off-color jokes
      - Unnecessary touching
      - Commenting on physical attributes
      - Displaying sexually suggestive pictures
      - Using demeaning or inappropriate terms
      - Using indecent gestures
      - Using crude language
      - Sabotaging the victim's work
      - Engaging in hostile physical conduct
      - Granting job favors to those who participate in consensual sexual activities

# Workplace Harassment

- The quid pro quo type of harassment described before happens with respect to sexual harassment
- The hostile environment type of harassment described above can happen with respect to any offensive conduct based on other protected statuses
  - Race
  - Color
  - Religion
  - National origin
  - Age
  - Disability
- Federal law protects all of these statuses
  - State or local law often protects other statuses like: sexual orientation
- The same harassment based on gender apply to harassment based on other protected statuses

# When Does A Work Environment Become Hostile?

# To create a hostile environment:

- Unwelcome conduct based on protected status must meet two requirements:
  1. It must be subjectively abusive to the person(s) affected
  2. It must be objectively severe or pervasive enough to create a work environment that a reasonable person would find abusive
    - To determine whether behavior is severe or pervasive enough to create a hostile environment, a judge considers:
      - The frequency of the unwelcome conduct
      - The severity of the conduct
      - Whether the conduct was physically threatening or humiliating, or just an offensive utterance
      - Whether the conduct unreasonably interfered with work performance
      - The effect on the employee's psychological well-being
      - Whether the harasser was superior in the organization

# The Antiharassment Policy



# Only unwelcome conduct can be harassment:

- Joking, comments, and touching are not harassment if they are welcome by the persons involved
- Conduct is unwelcome if the recipient did not initiate it and regards it as offensive
  - Some sexual advances are so blatant that the advance itself shows its unwelcomeness
    - Similarly how the showing of a noose (to suggest lynching) is so obviously offensive that no additional proof of unwelcomeness is needed
  - Outright rejection
    - When an employee tells a potential harasser that conduct is unwelcome and makes the employee uncomfortable
  - Ambiguous rejection
    - When an offended employee fails to communicate clearly for reasons of politeness, fear, embarrassment, or indecision
  - Soured romance
    - Employees have the right to end consensual sexual relationships with coworkers without fear or retaliation on the job
      - It is important that unwelcomeness of further sexual advances be made very clear

# Only unwelcome conduct can be harassment:

- What not to do
  - Sending “mixed signals” can defeat a case of sexual harassment
    - Complaints of sexual harassment have failed because the victim:
      - Invited the alleged harasser to lunch or dinner to parties after the supposedly offensive conduct occurred
      - Flirted with the alleged harasser
      - Wore sexually provocative clothing and used sexual mannerisms around the alleged harasser
      - Participated with others in vulgar language and horseplay in the workplace
    - If conduct is offensive, displeasure should be made known clearly and promptly
  - Even if YOU do not find the conduct personally offensive, remember that someone else might
    - Avoid behavior by asking yourself these questions:
      - Would my behavior change if someone from my family was in the room?
      - Would I want someone from my family treated this way?

# How Can You Tell If Conduct Is Unwelcome?

# Written policy

- A typical policy will contain these basic elements:
  - A prohibition of describing harassing conduct
  - A statement of who is protected by policy and who must abide by it
  - A warning that all employees, regardless of rank, must comply with the policy
  - A procedure that authorizes complaints of harassment through alternative channels of communication
    - To ensure that complaints can be investigated impartially as well as promptly
  - Assurances that complaints will be investigated discreetly preserving confidentiality to the extent that the needs of the invitation will permit
  - A provision that individuals found to have engaged in inappropriate conduct will be subject to discipline, up to and including dismissal
  - A prohibition against retaliation by anyone against any employee who reports harassment or who cooperates with the investigation of that report

# Avoiding Offense: Seven Risk Areas

# Seven Risk Areas

## 1. Vulgar language

- Many cases involve the use of vulgar language
  - Racial slurs
- The speaking of vulgar language does not violate the law, but it does contribute toward a hostile work environment

## 2. Work-related off-premises conduct

- Example
  - Office holiday parties off premises
    - Some employees have assumed workplace rules no longer apply in what might seem to be a purely social setting
- Often described as extensions of the workplace

## 3. Touching

- Is touching a fellow employee, beyond a handshake, necessary?

# Seven Risk Areas

## 4. Dating subordinates

- A supervisor dating a subordinate is particularly risky
  - Romantic gestures can be offensive to others
  - Relationships end with bad feelings
  - Relationships can create the perception of favoritism

## 5. Visual displays

- Posters, graffiti, other displays can be offensive on the basis of a protected status even when they are not directed at a particular individual
  - Sexually suggestive pictures posted around worksite
  - Restroom graffiti
  - Cartoons
  - Nooses

## 6. Talking dirty and telling jokes

- Sexual gossip and joking can often be seen as offensive

# Seven Risk Areas

## 7. Email

- 7. In many cases the most power evidence of harassing behavior has come in the form of email communication
  - 7. Emails can be accessible for long periods of time to the organization that owns the equipment in which they are sent and received



# Nine Excuses

There are certain standard responses to allegations of harassment

# Nine Excuses

1. “She/he is hypersensitive; how could anyone be offended?”
  - Conduct is viewed through the perspective of the offended party
    - Your reaction or your friends reaction may not align with an offended individual’s reaction to what you think is a joke or funny comment
2. “I treat everybody this way”
  - This excuse sets you up to be labeled “an equal opportunity offender”
3. “No one ever complained before, so how can the conduct be offensive?”
  - Some may have reasons to refrain from complaining, particularly when the offender is a position of authority/power
  - Unless the other party is initiating similar conduct, or otherwise welcomes the conduct, there is no reason to assume potentially offensive conduct is welcome

# Nine Excuses

## 4. “Boys will be boys”

- Conduct is not necessarily appropriate just because most employees view it as traditional or natural

## 5. “I didn’t mean any harm”

- The analysis of wrongdoing focuses on the impact felt by the party being offended, not the impact intended by the offender

## 6. “No harm, no foul”

- The law protects the psychological benefits of employment
  - Respect for co-workers and maintaining good morale are important even if they involve only feelings

## 7. “I read the policy again and I still don’t understand where you draw the line”

### 7. Things like pornography is not subject to a precise definition

- 7. Stay well away from anything that a “reasonable person” would deem inappropriate

# Nine Excuses

8. “I was only mentoring, trying to help with a personal crisis”
  - Perceptions of power in the workplace can convert a voluntary relationship into an implied condition of employment
  - Even the best intentions can be misunderstood
9. “You cannot take that charge seriously; he/she is trying to hold us up”
  - Maybe yes, maybe no
    - Understand that all complaints of harassment must be investigated
  - Retaliation is wrong even if the allegation of harassment was mistaken

# Respond Appropriately

When You Encounter Workplace Harassment

# Respond Appropriately

- If you experience harassment or witness harassment you should report it to an appropriate official
  - You do not have to report the incident to your supervisor first, especially if that is the person doing the harassing
- Harassment is an organizational problem
  - The employer wants to know about it so it can take prompt action

# Participating in an Investigation

# Participating in an Investigation

## Keep It Confidential

- Whether you are the accused, complainant, or a witness:
  - CONFIDENTIALITY IS CRITICAL
  - Typically, an employer will keep the information it gathers as confidential as possible, and both the accused and the complainant will have a chance to present their cases

## Don't Be Afraid to Cooperate

- There can be no retaliation against anyone or complaining about harassment
  - For helping someone else complain
  - For providing information regarding a complaint
  - The law protects employees who participate in any way in administrative complaints and those who participate in in-house investigations



# Participating in an Investigation

## As the Complainant

- The investigator will need to know ALL the details
  - The names of everyone who saw or heard the offensive conduct
  - The names of everyone who may have had a similar experience with the alleged harasser
  - A timeline of events concerning the incident
  - The reason why you did not report the incident earlier (if you delayed at all)
  - Your thoughts on what the employer should do to correct the problem

# Participating in an Investigation

## As the Accused

- You must cooperate in the investigation
  - No matter if the accusation is true or false
    - You may be asked not to communicate with certain individuals during the investigation
      - You are not allowed to retaliate against the people who made the complaint or against those who participate in the investigation
  - Failure to abide by these rules may result in discipline against you
  - You should expect to be asked to confirm or deny each specific allegation against you
  - You may be asked to provide any facts that might explain why the complainant would exaggerate or fabricate charges

# Participating in an Investigation

## As a Potential Witness

- You have a duty to respond truthfully concerning allegations

## Keep the Lines of Communication Open

- The object of the employer's investigation is to find out what happened
- As the complainant or as the accused you have the right to know what the organization's conclusion is
- If you are the complaining party it is important to promptly report any new incidents of harassment that occur after your first talk with the investigator
- If you are the accused do not be discouraged if the investigation fails to completely clear your name

# Participating in an Investigation

## Expect Adequate Remedial Action

- A variety of disciplinary measures may be used including:
  - Oral or written warning
  - Deferral of a raise or promotion
  - Demotion
  - Suspension
  - Discharge
  - The action taken in any particular case is within the organization's discretion