

## SEXUAL HARASSMENT



CONSULTANTS TO MANAGEMENT

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### The Scope of the Problem

- Workplace misconduct, including but not limited to sexual harassment threatens organizations' ability to carry out their missions.
- The cost of harassment includes detrimental organizational effects such as decreased workplace performance and productivity, increased employee turnover, and reputational harm.

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### The Scope of the Problem

- Public employees who behave badly. Examples of the worst:
  - Romantic relationships in the workplace
  - Sexually predatory/harassing behavior
  - Sexual Assault
  - Internet/Cyber/Text sex

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## The Scope of the Problem

- Excuses of Harassers:
  - It's just stress relief
  - Everyone talks that way (goes to multiple protected classes)
  - I'm just a "touching" person
  - I'm just like that and everybody accepts it
  - What about so-and-so? You should hear them!
  - I didn't mean it; you're making too much of this

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## SPECIAL CONSIDERATIONS

- Accused public employees are likely to assert the defense that "everybody is doing it"
- Many cases of sexual impropriety result in multiple and separate litigation tracks
- Many public employers simply don't know what they need to prove or argue in order to win
- Many middle managers tend to "bury" these cases out of fear for their own jobs
- Many people forget that arbitrators are really entrepreneurs plying their trade for profit

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## What is Discriminatory Harassment?

- Harassment v. Discrimination: What is the difference?
  - People often use the terms interchangeably, but there is a difference

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## Harassment

- **Harassment** – term is often used loosely; means to trouble, worry, or torment someone *on a persistent basis*
- **Forms of Harassment:**
  - Verbal – includes things said, written, or inappropriate sounds
  - Physical – includes hitting, pushing, blocking someone’s way, inappropriate touching
  - Visual – includes calendars, pictures, any inappropriate object that can clearly be seen

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## Discrimination

- **Discrimination** – occurs when a person or group of people are treated differently from another person or group of people. Title VII of the Civil Rights Act of 1964 prohibits discrimination on the basis of race, sex, religion, national origin, and color. Other federal laws prohibit discrimination on the basis of age, disability, pregnancy, and genetic information. These different classifications of people are considered “protected classifications.”

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## Discriminatory Harassment

Discriminatory harassment therefore occurs only when a person is troubled, worried, or tormented on a persistent basis because of his or her status in a protected classification in violation of the law.

There is a difference between inappropriate conduct for the workplace and unlawful discriminatory harassment.

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## SOURCES OF LAW

- Federal
  - §703 of Title VII of Civil Rights Act of 1964
  - EEOC guidelines in Chapter 29, section 1604.11 of the Code of Federal Regulations
  - Affirmative Action Plan (29 Code Fed. Reg. sec. 1608.)
- State
  - Ohio passed its first Civil Rights law in 1959
    - ORC §4112.02
  - Ohio Civil Rights Commission
  - Revised Code §2921.45 – criminal misdemeanor

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## Ohio discrimination law - differences

- Ohio courts generally mirror federal courts on discrimination laws
- **Two Key Areas** where Ohio Courts differ:
  - Punitive Damages: Employers may be held vicariously liable (i.e., liable for actions of managerial agents)
  - Joint and/or Several Liability of Supervisors: Individual supervisors and managers may be held jointly and/or severally liable with their employer for their own workplace discriminatory conduct

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## What is Sexual Harassment?

- Two general types
  - **Quid pro quo**
    - Occurs when someone in a supervisory position “relies upon his apparent or actual authority to extort sexual consideration from an employee”
  - **Hostile environment**
    - “[w]hen the workplace is permeated with discriminatory intimidation, ridicule, and insult that is sufficiently severe or pervasive to alter the conditions of the victim’s employment and create an abusive working environment.”

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## Quid Pro Quo

- In order for a complainant to prove a case of quid pro quo harassment, he/she must show the following elements:
  - Complainant is a member of a protected class
  - Subjected to unwelcome sexual conduct in the form of sexual advances or requests for sexual favors
  - Harassment complained of was because of the complainant's sex
  - Complainant's submission to unwelcome advances was an express or implied condition for receiving job benefits or refusal to submit would result in tangible job detriment
  - Harassment was committed by a supervisor
    - Someone with control over or authority to hire, fire, promote, and discipline employees

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## Quid Pro Quo

- Example
  - Supervisor is involved in a romantic relationship with a Subordinate
    - The supervisor had dated several other subordinates in organization
  - The Subordinate chooses to end the romantic relationship
  - Shortly after, the Supervisor disciplines the Subordinate for poor work performance
    - There was no prior mention of poor work performance in the Subordinate's record
  - Subordinate refused attempts by Supervisor to rekindle the relationship
  - Supervisor terminates employment of Subordinate
    - Termination occurs three (3) months after break up
  - Claims?
  - Outcome?

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## Hostile Environment

- Hostile environment harassment is what most people today would consider the most common type of sexual harassment.
- This particular type of harassment can cover a spectrum of behavior ranging from sex-based hate crimes to sexually crude terminology or displays to the actions of honest suitors who can't take a hint.
- Like quid pro quo harassment, does not necessarily have to be confined to the workplace.
- Harassing conduct by supervisors or coworkers that takes place outside the workplace but contributes to creating a hostile workplace environment may be actionable as well.

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## Hostile Environment

- Complainant must show
  - Member of a protected class
  - Complained of conduct was unwelcomed
  - Complained of conduct was based on gender
  - Conduct complained of is sufficiently severe or pervasive to alter the condition of the employee's employment and creates an abusive or hostile work environment
  - Employer knew or should have known, and failed to take immediate and appropriate corrective action

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## Hostile Environment

- Member of a protected class
  - Both men and women can bring an action for hostile environment/sexual harassment
  - Any complaint based on gender will be enough to satisfy this element

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## Hostile Environment

- Unwelcome conduct can take on many forms, including:
  - Sexual Advances - Unwelcome advances of the type found in quid pro quo cases are equally applicable to hostile environment cases, even where there is no tangible job action taken.
  - Gender Hazing - Often physical in nature and can be hate motivated or merely involve sex-based practical jokes that often result in damage to work equipment or personal property.
  - Gender Baiting - Generally non-physical, involving gender-based barbed comments, or generalizations about an entire gender.

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## Hostile Environment

- Sexually-Charged Atmosphere: An atmosphere in which sex-based discussion and conduct are prevalent
  - Employees discussing details of romantic relationships
  - Employees bragging about sex lives and "conquests," real or imagined
  - Pornographic or suggestive material kept or posted in the workplace
  - Off-color jokes and double-entendres
  - Overly persistent date seekers in the workplace
  - Graffiti, t-shirt art, off-color birthday cards, "girlie" calendars, etc.

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## Hostile Environment

t Severe or Pervasive Enough?

- Whether the conduct was verbal or physical (one instance of physical contact alone may be actionable harassment)
- The frequency of the conduct (unless the harassment is outrageous, a single incident is insufficient to demonstrate a hostile environment)
- Whether the conduct was hostile or patently offensive (well-intentioned pursuits of a romantic nature are less serious than inherently offensive or hate motivated conduct)
- Whether the harasser is a supervisor or coworker (a supervisor's actions tend to be viewed with more suspicion)

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## Hostile Environment

- Is it Severe or Pervasive Enough?
  - Whether others participated in the conduct (more harassers = more pervasive)
  - Whether the conduct was directed at more than one person or gender (if more than one employee of the same gender is targeted for harassment, the more likely the workplace environment is contaminated with hostility; conversely, if multiple employees of both sexes are subjected to the same conduct, the less likely the conduct is gender-based)

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## Hostile Environment

- Examples
  - Morningstar v. Circleville Fire & EMS Department
    - Facts:**
      - Amie Morningstar was the first female firefighter to ever work at the CFD
      - Began as volunteer in 2003-2004
      - She was a professionally certified firefighter and paramedic
      - Her volunteer class was first group required to pass a physical test in order to volunteer
      - Ms. Morningstar didn't receive her required gear for four (4) years (average length of time to receive gear was 2-6 months)
      - Ms. Morningstar applied for a FT position in 2005 and wasn't selected. CFD selected a male with no fire or EMS certifications
      - Became a full-time firefighter in 2007. In connection with her 2007 hiring, she had to take an agility test. This year was the first year that the test became more difficult
      - After passing her test she was placed on 90 day on-the-job-training probationary period (only new firefighter in CFD history to be required to do so)
      - Ms. Morningstar had her equipment and gear tampered with, go missing, etc.

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## Hostile Environment

- **Morningstar v. Circleville Fire & EMS Department continued:**
  - Ms. Morningstar was the victim of pranks
  - LT position opened up – Fire Chief told her on multiple occasions to not even bother testing because she wouldn't pass. The Fire Chief told her that a specific employee would be the one who was selected.
  - Ms. Morningstar took the test. She did not pass. The Chief called her a "bitch" in front of the agency administering the test.
  - The individual that the Chief said would be selected was the one who passed/selected.
  - Ms. Morningstar experienced unwanted sexual advances from another City employee
    - Forced embrace and attempts to kiss her in the front office of the CFD
  - Ms. Morningstar reported the incident to her LT. The LT wrote a report stating that he knew that this wasn't the first time this had happened between Ms. Morningstar and other employees, but this was the first time she expressed concerns. Ms. Morningstar stated that she did not want to file a formal complaint.
  - Other City officials were made aware of this incident (the Mayor and a Councilmember). They spoke with the Chief and he stated he would take care of it.
  - No action was taken.
  - February of 2015, Ms. Morningstar experienced a second incident with the same harasser – forcibly putting his head into her chest.

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## Hostile Environment

- **Morningstar v. Circleville Fire & EMS Department continued:**
  - Ms. Morningstar reported the incident to the same LT and subsequently met with the Captain and the Chief to discuss the encounter
  - During that meeting the Chief called her a "bitch" and was placed on admin leave while the accused was permitted to continue to work
  - Ms. Morningstar drafted a letter to the Chief and cc'd the Mayor to file a formal complaint
  - The day after the letter was sent the accused admitted to the conduct and was terminated
  - When Ms. Morningstar returned to work a memo was issued stating that everyone's workload would increase because of his departure
  - Ms. Morningstar complained about the Chief's behavior
  - An outside law firm was retained to investigate; this time the Chief was placed on admin leave while Ms. Morningstar continued to work
  - At the end of the investigation – the findings were that the evidence did not establish that the Chief violated the City's discrimination, harassment, or retaliation policies and he was reinstated
  - Upon reinstatement, Ms. Morningstar alleged she was retaliated against in various ways; she filed a lawsuit and went out on paid admin leave; after her leave expired she did not return to work and was terminated for failing to show up

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## Hostile Environment

- **Morningstar v. Circleville Fire & EMS Department** *continued*:
  - What are the Claims?
  - Outcome?

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## Standards for Employer Liability

- Potential for liability is determined by the source of the harassment that can stem from:
  - Supervisory personnel
  - Coworkers
  - Third party non-employees

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## Standards for Employer Liability

- Potential for liability is determined by the source of the harassment that can stem from:
  - Supervisory personnel
    - Title VII defines “employer” to include “agents” of the employer
    - Employers can be liable for hostile work environments created by supervisors with authority over complainant
    - Where a supervisor takes a tangible employment action against the subordinate, the employer is strictly liable for its supervisors’ actions

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## Standards for Employer Liability

- Potential for liability is determined by the source of the harassment that can stem from:
  - Supervisory personnel
    - Only in instances where no tangible job action is taken can the employer raise an **affirmative defense** by showing **both**:
      - it took reasonable preventive steps and prompt remedial measures, and
      - the complainant did not take advantage of properly established complaint procedure.

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## Standards for Employer Liability

- Potential for liability is determined by the source of the harassment that can stem from:
  - Coworkers
    - Most prevalent type of hostile environment harassment claim encountered
    - Only available in a hostile work environment claim, as there is no authority over coworkers
    - Is a “known or should have known” standard
    - Discrimination can occur in the employer’s response to the conduct, rather than the conduct itself
      - The remedial action taken by the employer must be “reasonably calculated to end the harassment”

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## Standards for Employer Liability

- Potential for liability is determined by the source of the harassment that can stem from:
  - Third Parties
    - Vendors, independent contractors
    - Similar standard to coworkers

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## Employer's Defense

- Employer exercised reasonable care to prevent and correct promptly any discriminatory harassing behavior; and
- Complainant unreasonably failed to take advantage of any preventative or corrective opportunities provided by the employer or to avoid harm otherwise

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## Reasonable Care to Prevent and Correct

- Clearly written policy that provides
  - A clear explanation of prohibited conduct, including a definition of sexual harassment
  - Clearly described complaint process providing a prompt, thorough, and impartial investigation
  - Assurance that employees who make complaints of harassment or provide information related to such complaints will be protected against retaliation
  - Assurance that employer will protect confidentiality to **extent possible**
  - Immediate and appropriate corrective action

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## Reasonable Care to Prevent and Correct

- Complaint Procedure
  - Courts have mandated such a procedure to use the defense
  - May prevent conduct from becoming severe or pervasive
  - Have someone to talk to outside the chain of command
  - Once communicated an investigation needs to occur immediately
- Communicate the procedure and train employees annually. EEOC's research indicates live, in-person trainings are most effective.

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## Employee's Duty to Exercise Reasonable Care

- Second prong of the affirmative defense available to employers for harassment that does not result in tangible employment action, requires a showing that the employee “unreasonably failed to take advantage of any preventative or corrective opportunities provided by the employer to avoid harm otherwise”
  - Important to emphasize that an employee who failed to complain does not have to prove the reasonableness of that decision; rather **burden lies with the employer to prove that employee's failure to complain was unreasonable**

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## Employer's Best Defense Against Liability

- Establish, communicate, and enforce a complaint procedure that:
  - Provides that no employee will be retaliated against for complaining of harassment
  - Places no unnecessary obstacles to complaints (e.g., undue expense, inaccessible points of contact, unnecessarily intimidating or burdensome requirements)
  - Effectively stops harassment

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## Other Efforts to Avoid Harm

- Even proof that the employee unreasonably failed to utilize employer's complaint procedure will not be sufficient if the employee made other efforts to avoid harm; such other efforts could include:
  - **Discrimination complaint with an enforcing agency** – complaint filed with EEOC or OCR while the harassment is ongoing considered reasonable efforts to avoid harm
  - **Union grievance** – courts have ruled that there was an effort “to avoid harm otherwise” where a union grievance was filed rather than utilizing the employer's harassment complaint process
- These types of complaints still need to be fully investigated as if they were brought through the employer's complaint procedure

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Questions?



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