



Sexual Harassment In The Workplace In The #metoo Era



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Scenario

- **You just got back from a week of vacation when your phone rings. You answer to find a woman on the phone who identifies herself as June. June says she used to work for the District in 1984 and she was "taken advantage of" by a male manager. She asks to speak to the Board Chair.**



Scenario



- **What to do with June?**
 - Tell her wrong number and hang up
 - Attempt to investigate
 - Give her the Board Chair's phone number
 - Listen attentively and empathize, but tell her there is nothing you can do



#MeToo Movement: The Employment Law Implications

- Sexual harassment has become a national media story
- Harvey Weinstein, Roy Moore, Kevin Spacey, Al Franken, Bill O'Reilly, Charlie Rose, Garrison Keillor, Donald Trump, Matt Lauer, Les Moonves, ...
- After Anita Hill, EEOC saw a 71% increase in sexual harassment filings
 - Filings doubled in some areas



#MeToo Movement: The Employment Law Implications

- We are seeing a surge in sexual harassment complaints and claims in 2018
 - Are you ready?
- Be prepared – policy, training, and investigation



Discriminatory Harassment

- Discrimination – protected characteristic motivates adverse treatment with respect to "terms and conditions of employment"
 - Harassment – form of discrimination
 - Sexual harassment – just one type of unlawful harassment
- These laws also prohibit retaliation against any individual who has opposed/reported discriminatory harassment



Protected Traits

- Traits protected by law that can form the basis of discriminatory harassment
 - Sex – gender and pregnancy
 - Race
 - Religion/creed
 - National origin
 - Ancestry
 - Age – 40 and over



Protected Traits

- Traits protected by law that can form the basis of discriminatory harassment
 - Disability—physical and mental
 - Veteran status
 - Genetic information
 - Possession of a GED in lieu of a high school diploma
 - Sexual orientation/gender identity



Sexual Orientation as a Protected Trait

- Courts and EEOC – currently split on whether sexual orientation discrimination violates law
 - Law is in flux, creating uncertainty
- Do your EEO and Harassment policies address sexual orientation?
- Despite personal views – should harassment/discrimination be tolerated?
- 3d Circuit – harassment based on a failure to conform with gender stereotypes may constitute unlawful sex discrimination



Discriminatory Harassment

- Verbal or physical conduct based on a protected trait that has the purpose or effect of:
 - Creating an intimidating, hostile, or offensive working environment; or
 - Unreasonably interfering with an individual's work performance; or
 - Adversely affecting an individual's employment opportunities



Sexual Harassment

- Quid Pro Quo Harassment
 - Submission to or rejection of unwelcome sexual conduct is used as basis for employment decisions
 - Examples:
 - **Seeking sexual favors in exchange for promotion**
 - **Disciplining/firing subordinate who ends a relationship**
 - **Changing performance expectations after subordinate refuses requests for a date**



Sexual Harassment

- Hostile Work Environment Harassment
 - Unwelcome conduct that unreasonably interferes with job performance or creates an intimidating, hostile, or offensive work environment
 - Most common type of harassment claim

IF IT'S UNWANTED,
IT'S HARASSMENT.



Discrimination – Anyone Can Be A Victim

- No requirement that victim be a minority
 - Reverse discrimination is actionable
 - FACT: Over 16% of sexual harassment charges filed with the EEOC in 2016 were filed by men
- No requirement that harasser be of a different class than victim
 - Same-sex harassment is actionable



Legal Elements of a Hostile Work Environment Claim

- Unwelcome conduct
- On the basis of protected trait
- Severe or pervasive
- Basis for employer liability



**BUT remember, conduct may violate your policy even if it does not constitute unlawful harassment



Unwelcome Conduct

- Victim-focused analysis
 - Conduct/comments must be uninvited by and offensive to the victim
 - Intent of the harasser does not matter
- Practical Advice
 - Because it is difficult to know individual sensitivities, err on the side of caution



Based On A Protected Trait

- Offensive to members of a protected group
- Sexual advances are always considered based upon a protected trait: sex
- Harasser does not need to be a different class than the victim

Discrimination

The prejudicial treatment or consideration of a person, racial group, minority, etc. based on category rather than individual, excluding or restricting members of on the grounds of race, sex, or age



Severe or Pervasive



- The conduct must be sufficiently severe or pervasive to alter the individual's working conditions
- Subjective and Objective Standards:
 - Subjective = Is this person actually offended?
Recognizes different social norms
 - Objective = Would a reasonable person in the same situation feel the conduct was so offensive as to alter "terms and conditions" of employment?



Employer Liability



- Co-workers/customers/vendors
 - "Knew or should have known" standard
- Supervisor Harassment
 - Tangible employment action – strict liability
 - No tangible employment action – affirmative defense of reasonableness available



Affirmative Defense

- Affirmative defense – employer must prove that
 - It took all reasonable steps to prevent and promptly correct any harassment; and
 - Policy, training, reporting procedure, etc.
 - Employee unreasonably failed to take advantage of the internal procedures for reporting harassment



Conduct That Can Contribute To A Hostile Work Environment

- Sending offensive e-mails, texts, or other communications
- Derogatory, profane, or degrading language
- Intimidation, hostile acts, threats, pranks based on protected traits
- Leering, staring, and suggestive gestures
- Unwanted sexual advances and propositions, requests for sexual favors
- Physical touching or assault



Conduct That Can Contribute To A Hostile Work Environment

- Epithets, slurs, negative stereotyping, offensive jokes or comments based upon protected traits
- Display or circulation of derogatory or offensive materials, or images based upon protected traits, including offensive graphics or cartoons
- Offensive or disadvantageous treatment based upon protected traits
- **Remember:** This conduct should be prohibited by District policy, even if it is not so severe or pervasive to establish a legal claim for discriminatory harassment



Permissible Behavior

- ✓ Business-like and professional interactions
- ✓ Ordinary socializing
- ✓ Welcome compliments
- ✓ Key – good judgment and common sense



Retaliation

- Unlawful to take a tangible employment action against an individual because he/she has engaged in protected activity
 - E.g., internal complaint, participation in investigation, filing charge with EEOC, etc.
- Causal connection must exist between protected activity and adverse action
- Prohibit any retaliation against any employee who has made a complaint or report of harassment or participated in an investigation



What Can Prompt Discrimination/Retaliation Claims?

- Impression of lack of fairness or respect
- Direct discriminatory statements or conduct
- Inconsistencies
 - Better treatment of similarly situated employees outside of the protected class under similar circumstances
 - Conflicting reasons for adverse employment action, etc.



Four Essential Steps to Avoiding Liability for Harassment

1. Policy
2. Training
3. Investigation
4. Prompt correction of potentially harassing behaviors



The Discriminatory Harassment Policy

- Commitment to provide a work environment free from discriminatory harassment
- Inappropriate comments cannot be tolerated, even if no harm intended
- Reporting procedure
- Investigation
- Communicate results if appropriate
- No retaliation



Discriminatory Harassment Training

- Training should be conducted for all employees
 - Absolutely vital that all managers and supervisors receive training
 - Cover key points of policy
 - Definitions, reporting procedure, etc.
- Redistribute your policy to all employees at least annually



Conducting Thorough Investigations

- Importance of investigations
 - Investigations are the "real time" defense to complaints, so it is important to know what events trigger obligation to investigate
 - Liability may be based largely on how you respond, so knowing proper procedures is essential



When Should You Begin Investigating?

- Upon receipt of notice of potential issue or concern
 - Formal complaints
 - Informal complaints
 - "Just thought you should know..."
 - Observed behaviors
 - **Note**: No requirement employee put complaint in writing before employer has duty to act



Investigations Cause More Good Than Harm

- Some supervisors and managers follow the "ostrich approach" to complaints – train them to know better
 - Supervisors and managers are your eyes and ears
- Many benefits come from investigation
 - May provide an affirmative defense
 - May justify your actions
 - Can identify previously unknown concerns



How Prompt Is Prompt?

- Don't underestimate the importance of acting promptly
 - Supreme Court mandates prompt investigations and swift remedial action
 - Preserves evidence and fading memories
 - Demonstrates to employees you have a sense of diligence and commitment to policies
 - Investigations conducted within days and completed within weeks are viewed positively by courts



The Investigation



- Before getting started ...
 - Has alleged discriminator/harasser been the subject of prior complaints?
 - Minimize contact between alleged victim and alleged harasser during investigation
 - Be careful not to defame the alleged harasser
 - Decide who will conduct the investigation
 - Review relevant documents
 - Policies and procedures
 - Personnel files
 - Email/electronic files (assuming right to monitor has been communicated)



Investigation Preparation

- Decide location (quiet, private, maybe off-site)
- Prepare preliminary statement and introduction
- Outline areas of inquiry
- Draft specific questions in advance, but maintain flexibility
- Maintain a list of documents and evidence and update it throughout



Tips For The Investigator

- Stay neutral!
 - Do not make promises!
 - Do not "agree" with alleged victim or alleged harasser (or signal that you agree)
 - Do not downplay the seriousness of the situation
- Do not make legal conclusions or use legal terms
 - "Sexual harassment"
 - "Age discrimination"
 - "Hostile work environment"
 - "Racial bias"
- Focus
 - Were the District's policies violated?



Tips For The Investigator

- Confidentiality:
 - Can you guarantee it?
 - Can you require it?
 - *Best practice: ask every interviewee to maintain confidentiality*
- Stress the prohibition against retaliation



Document The Investigation

- Take careful, appropriate notes
 - Questions and answers
 - No opinions!
 - Dates, location, who was present, etc.
- Mark everything "CONFIDENTIAL"
- Compile an Investigation Report



Closing The Investigation

- Has a violation of the District's policies occurred?
- If yes, take appropriate remedial action as necessary
 - Decision maker should be someone other than investigator
 - Consider what action is necessary to ensure this does not happen again
 - Counseling, discipline, termination, reassignment
 - More training
 - Close the loop with complaining party
 - Follow-up and ensure no retaliation



Communicate Investigation Results

- If no policy violation is found, close the loop with the alleged victim and alleged harasser, and ensure that no retaliation occurs
- Regardless of finding:
 - Alleged victim and alleged harasser should receive an explanation of the action taken, why it was taken, etc.
 - Discipline should be included in personnel file
 - Investigation report should remain confidential and kept separate from personnel file
 - Ensure no retaliation



Takeaways



- Make sure the basics are covered
 - Know what is expected of you
 - Have a legally up-to-date policy
 - Make sure your employees are trained on the policy
- Make your discriminatory harassment policy part of your workplace culture
 - Talk about it, redistribute it



Takeaways



- Make employment decisions based on merit
 - Do not base on discriminatory reasons
 - Avoid comments/conduct that would create perception of discriminatory animus
 - Document to support decisions
- Supervisors and managers must understand their roles and responsibilities



Takeaways



- Need for good judgment
 - Intent is irrelevant
 - Bad judgment can greatly complicate your life and cost the District significant lost time and resources
 - If it is not appropriate for the workplace, then don't do it





Questions?

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